

SOME PROBLEMS WITH CONTRACT AS PROMISE

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INTRODUCTION CONTRACT AS PROMISE

Despite the fond hopes of generations of legal scholars and activists, freely negotiated and enforceable contracts still govern the bulk of commercial relations in this country—particularly large complex commercial relations as opposed to consumer transactions. Law professors have to search pretty hard to find appellate cases that can be touted as harbingers of a contract-free future.

I want to begin this presentation by acknowledging the important role that Allan Farnsworth has played in keeping contract alive. Professor Farnsworth is without doubt the preeminent living American contracts authority. His principal contributions include the *Restatement (Second) of Contracts* (“*Second Restatement*”),¹ for which he was the reporter, and his masterful treatise on contracts.² These two projects testify to the fact that one person can make a difference in the development of law; they have been the doctrinal glue holding the rules and principles of modern contract law together against a siege of anti-contract ideology coming from academia. Additionally, I would be unfair to Allan were I to neglect his theoretically insightful law review articles, particularly those concerning contractual interpretation.³

If the goal of this symposium was to hear from two contract law professors with diametrically opposing views, then I am afraid that the organizers erred in inviting Professor Farnsworth and myself. This is not to say, however, that I have no disagreements with Professor Farnsworth. I do. In this essay, I shall try to explain why, although contract thankfully still lives in practice, the prevailing theory of contract that has been promoted by Professor Farnsworth and others is deficient in that it leaves contract law vulnerable to

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¹ RESTATEMENT (SECOND) OF CONTRACTS (1981).

² See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS (1990).

³ See, e.g., E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); E. Allan Farnsworth, “*Meaning*” in the Law of Contracts, 76 YALE L.J. 939 (1967).

being undermined in the ways that, for example, Walter Olson describes in his contribution to this symposium.⁴

In particular, mainstream contract theory is dominated by the conception of “contract as promise,” or what I shall call the promise theory of contracts. From the *Second Restatement to Contract as Promise*⁵ by Charles Fried, it is widely assumed that the basis of enforcing contracts is related to the obligation one has to keep one’s promises.⁶ According to this theory, one looks to the institution of promising to see why, and therefore when, commitments should be legally enforceable. This is hardly a new development. The promise theory of contract achieved preeminence through the efforts of Harvard Law School Professor Samuel Williston in his famous treatise⁷ and in the first *Restatement of Contracts* (“*First Restatement*”).⁸ (You might say that Professor Williston was the Allan Farnsworth of his day.)

Now I realize that to many the promise theory may seem not only to be obviously correct, but one cannot immediately imagine an acceptable alternative to it. Certainly, it seems preferable to the detrimental reliance theory of contract promoted by those heralding the “Death of Contract.”⁹ And I freely admit that the promise theory has its attractions—particularly if one assesses, as I do, the vitality of contract by the extent to which a legal system implements the classical liberal conception of justice,¹⁰ a central principle of which is *freedom of contract*. Freedom of contract has two distinct dimensions: The first—freedom *from* contract—stipulates that persons should not have contractual obligations imposed on them without their consent. The second—freedom *to* contract—stipulates that

⁴ See Walter Olson, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 CORNELL L. REV. 1043 (1992).

⁵ See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

⁶ This does not mean that a promise theory is necessarily a “will theory” which bases contractual obligation on the promisor’s subjective will to be bound. Promises may also be thought to create obligation because other persons have or are likely to rely upon them to their detriment. For a discussion of the various theories that have been advanced to justify contractual obligation, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986) (critically evaluating will, reliance, efficiency, fairness, and bargain theories of contractual obligation).

⁷ SAMUEL W. WILLISTON, *THE LAW OF CONTRACTS* (1st ed. 1920).

⁸ 8 RESTATEMENT OF CONTRACTS (1928). Williston was the Reporter for the *First Restatement*.

⁹ See GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). For a discussion of some of the difficulties with this theory, see Barnett, *supra* note 6, at 274-77; Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

¹⁰ I discuss the social function of the liberal conception of justice in Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL’Y 62 (1992).

persons should have the power to alter by consent their legal relations.¹¹ The promise theory has been salutary to both aspects of freedom of contract to some degree.

The promise theory views the origin of contract in the making of a promise.¹² This means that it views the creation of contracts as arising, in an important part, from the voluntary acts of promisors rather than from third parties like the State. In this regard, the theory facilitates the classical liberal value of freedom to contract. The promise theory also supports the notion that contracts should be interpreted according to the terms of the promise rather than by imposing terms on the parties. In this regard, the theory facilitates the classical liberal value of freedom from contract. These strengths of the promise theory are why I credit Professor Farnsworth—one of the leading proponents of this theory of contract—with helping to keep contract alive. By promoting the promise theory so effectively, he has helped bolster both freedom from and freedom to contract.

Yet the promise theory is not without its difficulties, though these difficulties are complex and hard to explain concisely. With this caveat in mind, however, and at the risk of substantial oversimplification, I shall attempt to summarize some of the problems that arise from adhering to a promise theory of contract.

I

SOME PROBLEMS WITH THE PROMISE THEORY OF CONTRACT

Serious problems with the promise theory begin the moment we seek a rationale for enforcing promises. The problem for which the promise theory is supposed to be the solution is to figure out exactly why it is that contracts are legally enforceable (and, therefore, which commitments should be enforced). That is, we are concerned, not with why persons ought to keep their word, but with why and therefore when coercion may be used by third parties, including the State, to compel promisors either to perform or pay damages when they fail to keep their word. The best-known answers to the question of legal enforceability provided by the promise theory are often either highly moralistic or tort-like in nature.

¹¹ For a discussion of these principles and the important social functions they perform, see Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

¹² See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."); FARNSWORTH, *supra* note 2, § 11, at 4 ("[T]he law of contracts is confined to promises.") (emphasis added).

Professor Fried, for example, has argued that the obligation to keep one's promises is a moral one:

An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.¹³

But a moral theory of promising, standing alone, would have courts enforcing purely moral commitments, which is tantamount to legislating virtue. Such an open-ended rationale leads to serious problems for the value of freedom of contract. First, it commits courts to enforcing promissory commitments that the parties themselves may never have contemplated as “contractual” or legally enforceable, thereby undermining the value of freedom from contract. Second, once the moral behavior of the promisor is deemed relevant to the issue of enforceability, the promise theory also appears to make relevant to the issue of enforcement other moral aspects of the promisor's behavior that may argue against enforcement, thereby undermining the value of freedom to contract. In this manner, the common-law *rights* of contract can come to resemble the judicial discretion of a court of equity.

Another popular justification of the promise theory looks at the promise from the direction of the promisee. That is, persons may be compelled to perform or pay damages because others have relied or are likely to rely upon a promise to their detriment.¹⁴ This was the rationale for contract law apparently favored by Fuller and Perdue in their famous article *The Reliance Interest in Contract Damages*¹⁵—although, as evidenced by his later article, *Consideration and Form*,¹⁶ Lon Fuller himself never took an injurious reliance theory as far as the many subsequent law professors who so admire his earlier path-breaking work. When the enforceability of promises is justified in this way the promise theory is but a short step away from a detrimental reliance theory. That is, once the injury suffered by the promisee is made the principal rationale for enforcing promises, we

¹³ FRIED, *supra* note 5, at 16 (footnote omitted).

¹⁴ See, e.g., Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373.

¹⁵ Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373 (1936-1937).

¹⁶ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). In this article, Fuller makes clear that he considers private autonomy to be a vital part of any complete account of contractual obligation.

end up with the following very tort-like theory of contract: Just as tort actions compensate persons injured by *physical* conduct, contract actions compensate persons injured by *verbal* promissory conduct. In such an approach, either dimension of freedom of contract plays little, if any, role. In sum, this way of justifying the promise theory ultimately transforms it into the detrimental reliance theory, which undermines rather than supports contract as a distinct type of consensual obligation within the liberal conception of justice.

Even the efficiency rationale for the promise theory provided by law-and-economics scholars creates problems. According to this view, an exchange of promises (bargains) is enforceable because both parties are made better off *ex ante*.¹⁷ Sole reliance on this rationale creates two problems. First, it apparently permits promises to go unenforced whenever it can be shown that factors such as unequal bargaining power or disparities of information undermine the normal assumption of mutual *ex ante* gain.¹⁸ Second, it enables some to ask why the efficacy of contracts should be assessed according to the *ex ante* benefits rather than some assessment of *ex post* fairness of the exchange. Why is the perspective of the parties before the exchange occurs the most appropriate point in a transaction to assess whether someone is made better or worse off by an exchange?

Yet another serious problem for freedom of contract is created by the promise theory's exclusive focus on promises once it is conceded, as it must be, that many real-world contract law problems arise precisely because parties have unavoidably left "gaps" in their promises. Some theorists argue that other nonpromissory principles must be used to determine the "gap-filling" rules of contract law.¹⁹ According to Charles Fried, who takes exactly this position, where gaps exist in a contract, "the court is forced to sort out the difficulties that result when parties think they have agreed but actually have not. The one basis on which these cases cannot be resolved is on the basis of the agreement—that is, of contract as promise."²⁰ While Fried, perhaps reluctantly, concedes this point, other theorists who are quite hostile to viewing consent as central to

¹⁷ Of course, the law-and-economics analysis of contract is considerably richer and more complex than this simple proposition. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 79-123 (3d ed. 1986).

¹⁸ See, e.g., Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 750 (1982) ("The argument based on the efficiency of contract price is fully effective only to the extent that the relevant market does not materially differ from a perfectly competitive market. In fact, however, many contracts are made in markets that are highly imperfect.").

¹⁹ See Barnett, *supra* note 11.

²⁰ FRIED, *supra* note 5, at 60.

contract law—such as relational theorists Ian Macneil²¹ and Peter Linzer²²—exalt in this view.

Perhaps more surprisingly, some law-and-economics scholars have adopted the same argument.²³ Because the problem of promissory gaps is pervasive, the promise theory implicitly legitimizes a variety of gap-filling rules based not on the parties' explicit or implicit consent, but on any policy or principle a court or legislature may happen to prefer. As Richard Craswell has argued, “[d]ebates over the question of why promises are binding . . . do much less than is commonly supposed to settle the role to be played by efficiency, non-economic values, or ethical theories generally in selecting contract law’s background rules.”²⁴

II

SOME ADVANTAGES OF A CONSENT THEORY OF CONTRACT

What alternative is there to the promise theory that can capture its advantages while avoiding its drawbacks? I favor an updated version of the older view of contract that seeks to distinguish between enforceable and unenforceable promises by looking to see if the parties to an agreement manifested their intention to create or alter their legal relations. According to this approach, the factor that must accompany a promise and that justifies substantial reliance upon a promise is the existence of a *manifested intention to create legal relations* or, to use another common formulation, a *manifested intention to be legally bound*.²⁵

I have called this the consent theory of contract.²⁶ According to a consent theory (and here I simplify the theory considerably),

²¹ See, e.g., Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 593 (1974) (“When the guise of . . . consensually formed law was not possible, . . . the system filled the gaps by supplying presentation in the form of predictable and theoretically precise rules.”). For a more extensive presentation of Macneil’s views of consent and my critique, see Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 VA. L. REV. (forthcoming August 1992).

²² See Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139; Peter Linzer, *Is Consent the Essence of Contract?—Replying to Four Critics*, 1988 ANN. SURV. AM. L. 213.

²³ See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

²⁴ *Id.* at 528. For my reply to Craswell, see Barnett, *supra* note 11 at 874-97.

²⁵ Although these two formulations are adequate for most purposes, for reasons that are beyond the scope of this essay, they are not completely accurate. A more complete expression of the principle would be that contractual obligation arises when a person “voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.” Barnett, *supra* note 6, at 300.

²⁶ In addition to the articles already cited, see Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL’Y (forthcoming 1992) Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990); Randy E. Barnett, *Squaring Undis-*

promises and other types of commitments ought to be legally enforceable if they are made in such a way as to convey to a promisee the message that the promisor intends to be held legally accountable for nonperformance. This message can be conveyed formally—for example, by a signed waiver of tort liability that is written in a manner that is intelligible to the person signing it.²⁷ Or it can be conveyed informally, as done on every commodities exchange in the world.²⁸ Regardless of how this message is conveyed, without it a promise does not create an enforceable *contractual* obligation.²⁹ With this message, a promise is presumptively enforceable as a contract.³⁰

For example, when I promised Janice Calabresi that I would take part in this symposium, I certainly did not intend to subject myself to legal sanctions should I for some reason fail to participate. Nor do I think that, while she certainly relied on my promise, Janice could reasonably have believed that I had consented to assume any contractual obligation to appear. Although she may have judged me harshly for withdrawing as a participant, both she and I would consider it to be the height of injustice if I were to be sued for breach of contract. Something more formal or more explicit than our phone conversation would have had to occur to rebut the normal presumption that a promise to speak is not legally binding on the speaker, although I have no doubt that there is a court somewhere that would disagree.

If the promise theory—whether based on the moral rationale of promise-keeping, on the rationale of injurious reliance, or on some other rationale—is the predominant view of the twentieth century, the consent theory, whose roots go back centuries, was probably the predominant contract theory of the nineteenth century (although it is a bit difficult to be sure about this since so much of legal theory in that period was implicit rather than explicit). The view that Williston needed to argue against and which he and others eventually defeated when they succeeded in making promise-keeping the focal

closed Agency With Contract Theory, CAL. L. REV. 1969 (1988); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986); Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984). A condensed and revised account of this approach appears in Randy E. Barnett, *Rights and Remedies in a Consent Theory of Contract*, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 135 (R.G. Frey & Christopher Morris eds., 1991).

²⁷ See Barnett, *supra* note 6, at 310-12.

²⁸ See *id.* at 312-17. See also Barnett & Becker, *supra* note 9.

²⁹ However, such conduct could still give rise to legal liability sounding in tort or restitution, provided the requirements of these types of liability are present.

³⁰ Because consent is only presumptively binding, other circumstances such as duress, fraud, and incapacitation, if established, could rebut the presumption and defeat a claim for contractual enforcement. See Barnett, *supra* note 6, at 309-10, 318-19.

point of contract theory, was stated by Professor Ernest Lorenzen in 1919: "Agreements which are physically possible and legally permissible should, on principle, be enforceable . . . if it was the intention of the parties to assume *legal* relations."³¹ Williston's triumph over this view was reflected in section 20 of the *First Restatement* which stated that: "neither . . . the mental assent to the promises in the contract *nor real or apparent intention that the promises shall be legally binding* is essential [to contract formation]."³² This position was adopted in section 21 of the *Second Restatement*, which states that "neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract. . . ."³³

By arguing, as I have in my writings on contract, that consent—a manifested intention to be legally bound—is the key to distinguishing enforceable from unenforceable promises, I do not mean to suggest that courts should simply look for this intention unguided by general rules and principles. I suspect that a direct pursuit of these intentions on a case-by-case basis would likely lead to more injustice from the standpoint of consent than it would avoid. To the contrary, the bargain requirement of consideration that plays a pivotal role in both the *First* and *Second Restatements*, and which states that mutually inducing promises are presumptively enforceable, is an excellent, though far from perfect,³⁴ criterion of consensual obligation precisely because the existence of a bargain so frequently corresponds to the existence of a manifested intention to be legally bound. This means that, in practice, there is often very little difference between a promise theory as embodied in the *Restatement* and a consent theory.

Still, an exclusive focus on either bargained-for consideration or detrimental reliance, or both, as criteria of contractual obligation creates serious problems of underenforcement and overenforcement. By this I mean a failure to enforce consensual commitments that should be enforced and the enforcement of commitments to which the parties did not consent and therefore should not be enforced. The problem of underenforcement is the concern of those contributors to this symposium, such as Walter Olson,³⁵ who complain that consensual commitments to waive tort liability and to as-

³¹ Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 646 (1919).

³² RESTATEMENT OF CONTRACTS § 20 (1928) (emphasis added).

³³ RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981). This proposition is qualified somewhat, however, by the further stipulation that "a manifestation of intention that a promise shall *not* affect legal relations may prevent the formation of a contract." *Id.* (emphasis added). This may represent a subtle shift in the direction of consent theory.

³⁴ See Barnett, *supra* note 6, at 287-91; Barnett & Becker, *supra* note 9.

³⁵ See Olson, *supra* note 4.

sume greater than normal risks of harm are held to be unenforceable no matter how demonstrable or knowledgeable may be the exercise of consent by a person assuming such a risk. In this manner, the ability of persons to exercise freedom to contract and avoid the hazards of the tort-law system of negligence is undermined, as Peter Huber and Walter Olson have so graphically described in their writings.³⁶

Consider for a moment the more neglected problem of the overenforcement of promises. One famous example of overenforcement engendered, at least in part, by the promise theory of contract, is the case of *Texaco v. Pennzoil*.³⁷ Texaco was accused of having tortiously interfered with a contract that allegedly existed between the Getty Foundation and Pennzoil. Texaco argued, in part, that there was no contract between Getty and Pennzoil for it to interfere with. So, an important issue in the case was whether or not a contract existed between Getty and Pennzoil.

The Texas Court of Appeals took the view that whether a contract existed or not depended on whether the parties "intended to be bound"³⁸ to the agreement they had apparently reached. Although this formulation sounds like a consent theory standard of "manifested intention to be *legally* bound," it could simply be another way of saying that one has made a promise. According to the *Second Restatement*, "[a] promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."³⁹

While I have no quarrel with this definition of a promise, it implies that *everyone* who makes a promise is "binding" themselves in some significant sense. Surely, I "bound" myself to come to Washington to give this presentation insofar as I gave Janice Calabresi reason to believe that I had made a "commitment" to attend, even though (in my opinion at least) I did not manifest an intention to be *legally* bound. Although they never squarely address the matter in *Texaco v. Pennzoil*, the Texas trial and appellate courts appear to have viewed the crucial issue to be whether or not a promise had been made. They concluded that sufficient evidence of a promise existed to justify the jury's verdict. If, however, any promise that was made by Getty to Pennzoil was not apparently intended to be legally bind-

³⁶ See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

³⁷ *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 769 (Tex. App. 1987).

³⁸ *Id.* at 789 ("The issue of when the parties intended to be bound is a fact question to be decided from the parties' acts and communications.").

³⁹ RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

ing, then from the perspective of the liberal principle of freedom from contract, this case is an instance of overenforcement.

Another recent case provides an intriguing example of a court attempting to use something like a consent theory of contract, rather than a promise theory, to decide whether a promise should be enforced and to prevent overenforcement. This is the *Cohen v. Cowles Media Co.*⁴⁰ case, which has become well-known (and was reversed by the Supreme Court of the United States)⁴¹ because the Minnesota Supreme Court held that enforcing a promise of confidentiality of a reporter to her source violated the First Amendment. For present purposes, the more interesting issue in the case is the contract law issue entirely avoided by the United States Supreme Court but considered by the Minnesota Supreme Court. This is the question of whether the promise of confidentiality made by a newspaper reporter to a source was properly enforceable according to contract law rather than according to the First Amendment. The majority of the Minnesota Supreme Court began its analysis by observing:

A contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach. We think, however, the matter is not this simple.

Unquestionably, the promises given in this case were intended by the promisors to be kept. . . .

The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive.⁴²

After noting that "in this case . . . we have a clear-cut promise,"⁴³ the Minnesota Supreme Court went on to offer a consent theory rationale for nonenforcement:

The law . . . does not create a contract where the parties intended none. . . . Nor does the law consider binding every exchange of promises. . . . We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe that they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the

⁴⁰ *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990).

⁴¹ 111 S. Ct. 2513 (1991).

⁴² 457 N.W.2d at 202-03.

⁴³ *Id.* at 203.

reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. . . .⁴⁴

The court then concluded:

In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances.⁴⁵

Of course, one can disagree about whether, on the facts of the case, the parties had or had not actually manifested an intention to be legally bound. But, the dissenters focused their fire not on the evidence of intent to be bound, but instead on the majority's implicit rejection of the promise theory, which maintains that the issue of intent to create contractual relations is irrelevant to contract formation. Justice Yetka argued:

The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job. Under established rules of contract law, the appellants should be responsible for the consequences of that broken promise.⁴⁶

Justice Kelly, in dissent, explicitly advocated the promise theory:

I remain unpersuaded by the majority's analysis that, notwithstanding that all the elements of a legal contract and its breach are here present, the contract is unenforceable because "the parties intended none." It reaches this conclusion even as it concedes that the promises given by the agents and employees of these defendants was [sic] intended by them to be kept.⁴⁷

In sum, both dissenting opinions accepted the conventional approach that a promise is actionable whether or not it is accompanied by a manifested intention to be legally bound. Their passionate dissents on this issue support my interpretation that the majority had in its opinion implicitly rejected the promise theory and, perhaps unwittingly, embraced a consent theory.

⁴⁴ *Id.* Notice how this language rejects the moral theory of "contract as promise" offered by Charles Fried.

⁴⁵ *Id.*

⁴⁶ *Id.* at 205. Notice that Justice Yetka's language implicitly relies on the injurious reliance rationale for enforcing promises.

⁴⁷ *Id.* at 206. Of course, had the promisors *not* intended to keep the promise at the time they made it, the legal theory would have been fraud, not breach of contract. See Barnett & Becker, *supra* note 9, at 485-95.

Ultimately, however, the majority made the telling theoretical mistake of considering the plaintiff's promissory estoppel argument as wholly unrelated to the issue of intent to contract.⁴⁸ By holding that the First Amendment, rather than the lack of contractual consent, barred a promissory estoppel cause of action, the stage was set for the Supreme Court reversal that eventually occurred.

CONCLUSION

Those who are interested in maintaining the life of contract should take an interest in the theories of contract that are discussed in the law schools. It is not enough to lambast the courts for reaching results that one intuitively finds absurd. One must also burrow beneath the results to find the flaw in the theory or doctrine that produced the outcome. For, until we discover the theoretical or doctrinal error, we can never be completely sure that it is the result rather than our intuitions that are mistaken.

The promise theory has been accepted for decades because it comports with some of our most basic intuitions about contractual obligations. Unfortunately, where it deviates from these intuitions, the promise theory has led to results and doctrines that have undermined the centrality of consent in contract law and theory. A consent theory of contract preserves much of what is intuitively appealing about the promise theory while incorporating many of the results and doctrines upon which opponents of consent have based their theories. In this way, a consent theory of contract transcends the limitations of the promise theory, and thereby helps to preserve the twin liberal values of freedom from and freedom to contract.

⁴⁸ For an analysis of promissory estoppel from the perspective of contractual consent, see Barnett, *supra* note 6; Barnett & Becker, *supra* note 9.