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## Contract Theory and Some Realism about Employee Covenant Not to Compete Cases

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# CONTRACT THEORY AND SOME REALISM ABOUT EMPLOYEE COVENANT NOT TO COMPETE CASES

*Daniel P. O’Gorman\**

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## I. INTRODUCTION

FOR centuries scholars have debated why the legal system enforces contracts, with no consensus having been reached.<sup>1</sup> This failure of consensus suggests that judges likewise disagree as to why con-

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1. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 6–7 (6th ed. 2009) (“For centuries, philosophers of the law have attempted to explain why, in addition to the keeping of the public peace, the legal system recognizes and enforces private agreements. As is so frequently the case in philosophical discourse no consensus has been reached . . .”); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) [hereinafter Barnett, *Consent Theory*] (recognizing “the current lack of a consensus concerning the proper basis of contractual obligation . . .”); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 1 (2003) (noting that whether contracts are promises has occupied “generations of thinkers, all failing to come up with a conclusive answer . . .”); Melvin A. Eisenberg, *The Theory of Contracts*, in THE THEORY OF CONTRACT LAW 206, 242 (Peter Benson ed., 2001) (“There has been a basic tension in contract theory between those who argue that promise is almost everything and those who argue that promise is almost nothing.”).

tracts are (or should be) legally enforced.<sup>2</sup> If the American legal realists were correct—that legal doctrine is generally indeterminate and that judges use doctrine to simply justify a decision based on what the judge thinks is “right” or “fair”<sup>3</sup>—this disagreement would be manifested in differing outcomes in contract cases with similar facts. Interestingly, this legal realist notion seems to be supported by how trial courts treat a particular type of contract dispute: the alleged breach of an employee covenant not to compete.<sup>4</sup>

Practitioners report that it is very difficult to predict how a trial court will respond to an employee non-compete case.<sup>5</sup> One commentator has stated that “the courts have frequently vacillated on [non-compete] provisions—even when the employees’ agreements and positions were essentially the same, and even at the same company.”<sup>6</sup> Another has stated that “different judges can look at the same set of facts and reach completely different conclusions.”<sup>7</sup> Another has stated that “the outcome of an emergency motion to enforce a non-compete agreement can be all but

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2. See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 191–92 (1997) (suggesting, while discussing Critical Legal Studies, that individual judges will have different conceptions as to why contracts should be enforced).

3. Brian Leiter, *American Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 257 (Dennis Patterson ed., 2010). This legal realist theme was echoed by critical legal studies scholars. See HILLMAN, *supra* note 2, at 191–92 (“CLS has taken up and expanded the themes of the legal realists. Although some CLS theorists concede the potential of contract doctrine to confine some decisions, they assert that the legal system falls far short of ‘strict rule-bound legalism.’ Instead, formal contract rules are largely ‘indeterminate’ because they rarely dictate a particular result in an important case. It is not that the *results* of litigation are necessarily unpredictable, . . . but that contract doctrine offers the *potential* for deciding cases in multiple ways.”).

4. This Article does not take a position on whether the legal realists and critical legal studies scholars are correct in general about the indeterminacy of contract doctrine, or whether such indeterminacy results in judges using doctrine to simply support the decision they believe is fair. This Article’s thesis is limited to employee covenants not to compete. In this latter setting, the applicable law is, in fact, highly indeterminate and the opportunity to justify a result by the manipulation of legal doctrine is substantial.

5. See Stephen M. Kramarsky, *IBM’s Hard Lesson in Non-Competes*, N.Y. L.J., Mar. 22, 2011, at 5 (observing that “results can be very difficult to predict”); Jonathan Cooper, *Why It’s Often Hard to Predict if a NY Court Will Enforce a Non-Compete Agreement*, NY SMALL BUSINESS BLOG (Apr. 1, 2011), <http://nysmallbusinessattorney.com/why-its-so-hard-to-predict-if-a-ny-court-wil-enforce-a-non-compete-agreement/> (stating that “it is very difficult to predict accurately whether a New York court will enforce a non-compete agreement . . . .”); Robert Wood, *Non-compete Agreements Texas Attorney: What Constitutes Confidential Information in Texas?*, TEXAS NON-COMPETE LAW BLOG: TEXAS NON-COMPETE AND TRADE SECRETS LAW (Apr. 16, 2010, 6:18 PM), <http://www.texasnon-compete.com/2010/04/articles/non-compete-agreements/non-compete-agreements-texas-attorney-what-constitutes-confidential-information-in-texas/> (“[I]t is difficult to predict with certainty how a particular dispute involving a non-compete agreement will be decided in court.”); Phillip Kilgore & Jeff Dunlaevy, *Battle-Worthy Non-Competes: Lessons From the Wreckage of Recent Cases*, 19 S.C. LAW. 24, 26 (2008) (“Enforcement of non-compete agreements in South Carolina’s courts . . . continues to be a frustrating and unpredictable venture.”); N. James Turner, *Successfully Defending Employees in Non-compete and Trade Secret Litigation*, 78 FLA. B.J. 43, 43 (2004) (noting that non-compete cases are often unpredictable).

6. Cooper, *supra* note 5 (emphasis omitted).

7. Wood, *supra* note 5.

impossible to predict . . . [and] past performance is no guarantee of future results.”<sup>8</sup> Legal scholars agree,<sup>9</sup> one stating that “[d]espite the nettlesome policy issues that plague non-compete law, there is one thing everyone can agree on—the current law is in a state of near chaos. Years upon years of seemingly inconsistent enforcement decisions have provided little concrete guidance as to what constitutes an enforceable agreement.”<sup>10</sup> This unpredictability has not abated and was recently illustrated by *International Business Machines Corporation v. Visentin*,<sup>11</sup> in which a federal district court reached a different result from a previous decision—*International Business Machines Corporation v. Papermaster*<sup>12</sup>—by the same court just over two years earlier on arguably similar facts. This unpredictability might explain why the alleged breach of employee non-competition agreements is frequently litigated.<sup>13</sup>

Such unpredictability is likely caused by several factors. First, many judges are probably more hostile to such agreements than is current doctrine.<sup>14</sup> Second, such cases are very fact-specific. Third, non-compete law is complicated and vague (and often involves a choice of law provision selecting law different from that of the forum state).

8. Kramarsky, *supra* note 5, at 5.

9. Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1077 (2007) (“The judicial outcomes [in media employee non-compete cases] have been unpredictable, ad hoc, and heavily fact-dependent, leaving media employers and employees alike lacking clear guidance on what constitutes a legally acceptable non-compete contract.”); M. Scott McDonald, *Non-compete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 138 (2003) (noting the “unpredictability created by the current state of the law on non-compete contracts . . . .”); Steven E. Harbour, *Restrictions on Post-Employment Competition by an Executive Under Georgia Law*, 54 MERCER L. REV. 1133, 1177 (2003) (“The law in Georgia appears to be very unpredictable on the issue of how to treat a non-compete provision in an employment agreement with an executive who had some bargaining power.”); Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Non-competes*, 80 OR. L. REV. 1163, 1243 (2001) (noting “the mounting problem of unpredictable and inconsistent case results . . .”).

10. Rachel Arnow-Richman, *Symposium: The Role of Contract in the Modern Employment Relationship: Non-competes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 155 (2003).

11. *Int’l Bus. Machs. Corp. v. Visentin*, No. 11 Civ. 399 (LAP), 2011 WL 672025, at \*24 (S.D.N.Y. Feb. 16, 2011), *aff’d*, 437 F. App’x 53 (2d Cir. 2011).

12. *Int’l Bus. Machs. Corp. v. Papermaster*, No. 08-CV-9078 (KMK), 2008 WL 4974508, at \*14 (S.D.N.Y. Nov. 21, 2008).

13. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 381 (2006) (noting that non-compete agreements are frequently litigated). Estlund also notes that the law regarding non-compete agreements “may have a built-in tendency to generate complexity, indeterminacy, and, as a result, litigation.” *Id.* at 383.

14. For example, as Professor Joseph Perillo has observed, when an employee covenant not to compete is “reasonable” under applicable state law (and thus enforceable under established legal doctrine), even appellate courts (which usually feel constrained to justify their decisions in written opinions that are easily accessible in either reporters or electronic databases) often find alternative bases to deny enforcement, bases that are nothing more than (according to Professor Perillo) “flanking devices.” Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 88–89 (1995).

This Article proposes, however, that the unpredictable nature is also caused by individual trial judges having different theories of why contracts are (or should be) enforced. Without question, an employee covenant not to compete case is one of those “hard cases that [is] radically undetermined by legal rules.”<sup>15</sup> Thus, trial judges deciding such disputes have substantial discretion, and this Article proposes that judges use that discretion (consciously or subconsciously) to implement (as a factor) their particular theory of contract law in spite of applicable legal doctrine.<sup>16</sup>

Part I of this Article discusses why contracts scholars seek to develop a theory of contract law and discusses the varying theories proposed by such scholars as to why contracts are (or should be) enforced. Part II discusses employee covenants not to compete and when they are generally enforceable under established legal doctrine. Part III discusses how trial court judges are able to use, as a factor, their theory of contract law when deciding disputes involving an employee covenant not to compete. Part IV analyzes how judges who adopt each theory would likely respond to an employee covenant not to compete case.

## II. CONTRACT THEORIES

Contracts scholars have devoted considerable attention to creating a so-called “theory of contract law.”<sup>17</sup> This effort to create such a theory has focused on explaining why the legal system enforces contracts,<sup>18</sup> with scholars seeking to discover contract law’s “core,” or in other words, some single unifying theme to contract law<sup>19</sup> (such theories have been

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15. JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 34 (1990).

16. See generally HILLMAN, *supra* note 2, at 193–94 (discussing the possibility that different judges have different theories as to why contracts should be enforced).

17. Peter Benson, *Introduction*, in *THE THEORY OF CONTRACT LAW* 1, 1 (Peter Benson ed., 2001) [hereinafter Benson, *Introduction*]; see also HILLMAN, *supra* note 2, at 1 (“General conceptual accounts of the nature and role of contract law in modern society flourish.”).

18. See E. Allan Farnsworth, *A Fable and A Quiz on Contracts*, 37 J. LEGAL EDUC. 206, 208 (1987) (“The urge to have a ‘theory’ of contract law . . . has led to an excess emphasis by scholars on why promises are enforced.”). The efforts have focused on those reasons in addition to keeping the public peace. PERILLO, *supra* note 1, at 6. This effort is distinct from determining why promises ought to be kept from a moral standpoint. “A moral obligation is something we ought to do or refrain from doing.” Barnett, *Consent Theory*, *supra* note 1, at 296. In contrast, a legal obligation is a duty that “can be enforced by the use or threat of legal force.” *Id.*; see also Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 713–14 (2007) (“[T]here is no direct and reliable route from the content of interpersonal morality to the appropriate content of the corresponding area of law. Legal domains may pursue normative purposes and principles of their own that are not straightforwardly derived from interpersonal morality.”). It is, of course, generally accepted that there is a moral obligation to keep a promise. See Eisenberg, *supra* note 1, at 260 (“It is a premise of this discussion that there is a moral obligation to keep a promise. Certainly that is so as a matter of social morality, and contributions by various philosophers, including importantly Thomas Scanlon, go toward showing that it is so as a matter of critical morality. Given that premise, the issue is whether there should also be a legal obligation to keep a promise . . .”).

19. Inasmuch as a “theory” is the “abstract principles of a body of fact,” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1296 (11th ed. 2003), a theory of contract law must

described as “single-value” theories).<sup>20</sup> To be sure, this effort might be futile, with no single explanation existing as to why contracts are enforced.<sup>21</sup> Nevertheless, the effort (particularly over the past forty years) has been undertaken with considerable zeal. The first subpart below discusses some of the reasons why contracts scholars might have devoted so much attention to trying to identify a unifying basis for contract law. The second subpart discusses what might be an unintended benefit of contract theorists’ efforts to create a unified theory of contract law. The third subpart discusses the different theories proposed by scholars as to why courts enforce (or should enforce) contracts.

#### A. WHY CONTRACTS SCHOLARS SEEK TO IDENTIFY A UNIFYING BASIS FOR CONTRACT LAW

Although contract doctrine is largely settled,<sup>22</sup> contracts scholars have been unable to agree on why the legal system enforces contracts.<sup>23</sup> As discussed below, there are likely several reasons why contracts scholars have devoted so much attention to this issue.

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necessarily reduce the complex body of contract doctrines (which is the body of fact) to a few principles. This effort by contracts scholars is reminiscent of Christopher Columbus Langdell’s notion that law is a science and that any field of law can be reduced to a few fundamental principles. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871) (“Law, considered as a science, consists of certain principles or doctrines . . . . [T]he number of fundamental legal doctrines is much less than is commonly supposed . . . .”). Contract scholars who seek a unifying theme for contract law have, however, gone beyond Langdell’s idea, inasmuch as these scholars have sought to isolate a single fundamental principle to explain contract law (such as the morality of promising or efficiency), not simply a set of principles.

20. Eisenberg, *supra* note 1, at 223.

21. See Peter Benson, *The Unity of Contract Law, in THE THEORY OF CONTRACT LAW* 118, 118 (Peter Benson ed., 2001) [hereinafter Benson, *Unity*] (“The point has come when we appear to doubt the value and indeed the very possibility of a coherent and morally plausible general theory of contract, one that could gain wide acceptance.”); CHARLES FRIED, *CONTRACT AS PROMISE* 3 (1981) (“[I]t is a point of some of these critics [of the concept of “contract as promise”] (for example, Friedman, Gilmore, Macneil) that the search for a central or unifying principle of contract is a will-o’-the-wisp, an illusion typical of the ill-defined but much excoriated vice of conceptualism.”). Contract theory can, of course, have a normative goal instead of an explanatory role. See, e.g., Eisenberg, *supra* note 1, at 206 (“[T]he theory of contracts could be a theory of what the content of contract law is, or a theory of what the content of contract law should be.”). Many contract theories straddle the line between explanatory and normative. See Brian H. Bix, *Contract Law Theory* 8, available at <http://ssrn.com/abstract=892783> (“Most such theories sit uneasily between description and prescription/evaluation. On one hand, they purport to fit most of the existing rules and practices; on the other hand, they re-characterize the practices to make them as coherent and/or as morally attractive as possible.”). No unitary contract theory can explain every contract doctrine—for example, the objective theory of contract formation, the consideration requirement, and the expectation damages rule cause particular problems for contract theorists—and thus contract theorists are usually left to argue that some contract doctrines are “wrong.” Of course, the more doctrines that are “wrong” according to a particular contract theory, the more the theory appears to be a normative theory than an explanatory theory. But few if any contract theories seek to stray too far from the realm of the explanatory.

22. Benson, *Introduction*, *supra* note 17, at 1.

23. See *supra* note 1.

### 1. *Enhancing Our Understanding of Contract Law*

Most obviously, a unified theory would enhance our understanding of contract law<sup>24</sup> by showing how “the rules ‘hang together’ in a coherent framework.”<sup>25</sup> This understanding could then be put to several uses. First, such an understanding would promote the law’s legitimacy by demonstrating “the internal consistency and reasonableness which the law claims for its doctrines and principles.”<sup>26</sup> Second, such an understanding could identify current contract doctrines or court decisions that are anomalous and that should therefore be rejected or modified as part of an effort to promote consistency in the law.<sup>27</sup> Third, such an understanding could provide guidance to judges when deciding hard cases.<sup>28</sup> Fourth, such an understanding could have predictive implications, helping lawyers and their clients predict how a court will decide a particular case. Fifth, such an understanding would have explanatory implications, helping to explain past court decisions.

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24. See STEPHEN A. SMITH, *CONTRACT THEORY* 5 (2004) (“Interpretive theories aim to enhance understanding of the law . . . .”); HILLMAN, *supra* note 2, at xiii (noting that theories of contract law “have deepened the understanding of . . . the nature and functions of modern contract law.”); Benson, *Introduction*, *supra* note 17, at 118 (“Unless we are able to make explicit the conception of contract that underlies [contract] doctrines and principles, we do not fully understand them and whatever understanding we may have of them must of necessity be partial and deficient.”); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 553 (1933) (“[T]he meaning of a technical doctrine receives illumination when we see it in the light of those wider ideas of which it is the logical outcome.”).

25. RANDY A. BARNETT, *PERSPECTIVES ON CONTRACT LAW* xviii (4th ed. 2009) [hereinafter BARNETT, *PERSPECTIVES*].

26. Benson, *Unity*, *supra* note 21, at 118.

27. See Barnett, *Consent Theory*, *supra* note 1, at 321 (“A better understanding of contractual obligation should ultimately result in rules and principles of contract that better facilitate the important social need to make and rely upon enforceable commitments.”). *But see* F. H. BUCKLEY, *THE FALL AND RISE OF FREEDOM OF CONTRACT* 3 (1999) (“A good many things might contribute to a change in legal rules, and new legal theories do not top the list.”). Such a use of a contract theory is controversial. Usually, a theory is developed to explain a set of facts, not to announce certain facts to be wrong. But providing a body of law that appears consistent is presumably important to maintaining the legitimacy of the common law in the eyes of the public. Of course, the more anomalies that are identified, and the more central they are to contract law, the more likely it is these anomalies will be used to undermine the support for the general theory being proposed. As noted by Stephen A. Smith, “The most obvious criterion for assessing interpretive theories is whether they fit the data they are trying to explain.” SMITH, *supra* note 24, at 7; *see also* Barnett, *Consent Theory*, *supra* note 1, at 270 (noting that one of the criteria for assessing a proposed theory includes “the number of known problems the theory handles as well or better than its rivals” and “the centrality of the problems that the theory handles well.”). An important aspect of determining whether there are such anomalies is defining “contract law,” and whether it includes concepts such as quasi-contracts and promissory estoppel.

28. See Barnett, *Consent Theory*, *supra* note 1, at 270 (noting that a theory helps solve future problems and provide an answer “for those cases at the margin where our intuitions are [not very] secure.”); BARNETT, *PERSPECTIVES*, *supra* note 25, at xix (noting that contract theory permits one to make a legal claim when there is not applicable doctrine). *But see* Farnsworth, *supra* note 18, at 208 (“The fable teaches that contemporary contracts theories have profoundly transformed the legal profession. (They have not.)”).



## 2. *Maintaining a Division Between Contract Law and Tort Law (or, Conversely, Assimilating Contract Law with Tort Law)*

The common law of civil obligations is generally divided into three doctrinal categories:<sup>29</sup> (1) contract duties,<sup>30</sup> which are generally considered self-imposed obligations that are enforced to avoid defeating the expectations of the right-holder;<sup>31</sup> (2) tort duties, which are generally considered imposed by society and that are enforced to avoid harm to the right-holder;<sup>32</sup> and (3) restitution duties, which are designed to avoid unjust

29. See FRIED, *supra* note 21, at 69 (“We have already encountered the two competing residuary principles of civil obligation that take over when promise gives out: the tort principle to compensate for harm done, and the restitution principle for benefits conferred.”). Fried also referred to the principle of “sharing,” *id.* at 70, but there is no general common-law legal duty to share, though such a legal duty is imposed to an extent through welfare legislation, and might also be a moral duty. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). In this sense, Fried differs from those libertarians “who deny that the state is ever justified in forcibly redistributing wealth from one individual or group to another,” Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 473 (1980), such as Friedrich Hayek and Richard Nozick. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1961); RICHARD NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). Although Fried supports a general redistributive welfare scheme, he does not believe such redistribution should take place through contract law. FRIED, *supra* note 21, at 71–72, 106. He does, however, support increased sharing of losses under the doctrines of mistake, frustration, and impossibility. See *id.* at 70–71. See generally Kronman, *supra*, at 473–74 (footnotes omitted) (“The libertarian’s opposition to the use of contract law as a mechanism for redistribution derives from his general belief that the compulsory transfer of wealth is theft, regardless of how it is accomplished. By contrast, liberals who oppose the use of contract law as a redistributive device do so because they believe that distributional objectives (whose basic legitimacy they accept) are always better achieved through the tax system than through the detailed regulation of individual transactions.”).

30. Here and elsewhere in this Article, I use the term “duty” in the sense of indicating a correlative “right” held by the person to whom the duty is owed. See Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 *J. LEGAL EDUC.* 238, 239 (2002); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 31 (1913).

31. Richard Craswell, *Against Fuller and Perdue*, 67 *U. CHI. L. REV.* 99, 129 (2000) (“Another common belief holds that . . . contract law enforces only those duties that a party has voluntarily assumed.”); Patrick Atiyah, *Contracts, Promises and the Law of Obligations*, 94 *L.Q. REV.* 193 (1978), reprinted in *A CONTRACTS ANTHOLOGY* 78, 78 (Peter Linzer ed., 1995) [hereinafter *ANTHOLOGY*] (noting that the law of contracts is generally considered to be based on obligations that are voluntarily assumed). But see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 *WASH. & LEE L. REV.* 697, 700–01 (1990) (“Use of the concept of consent seems to be inevitable in explanations and justifications of the law of contract. Consent itself, however, is a conclusion based on a complex set of normative judgments; consent is not a simple description of fact. In the event of a dispute between contracting parties, some external power must first decide whether the parties have consented in a valid manner and, if so, determine the scope of the consent. Legal decision makers, serving collective societal norms, construct consent. This process is unavoidably a means of regulation, one which fosters one view or another of beneficial contractual relations. Consent will not work as a rationale to enforce contracts without also bringing in social control of the parties’ affairs in the event of dispute.”) (footnotes omitted).

32. See FRIED, *supra* note 21, at 57–58 (referring to tort principles as “collectively determined grounds of resolution”); Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 *IND. L.J.* 553, 578 (2010) (noting that tort law compensates for harm done); Atiyah, *supra* note 31, at 78, 80 (noting that tort law is generally considered to be based on obligations imposed by law, and that tort law’s “immediate object of interest” is “the causing of damage or injury”).

enrichment at the expense of the right-holder.<sup>33</sup> Some contracts scholars desire to maintain a clear division among these categories of civil obligation and in particular a division between contract duties and tort duties.<sup>34</sup> If there is, in fact, a distinctive law of “contracts” (creating “contract duties”), then there presumably is an organizing principle or “intelligible order” to contract law.<sup>35</sup> Otherwise, there would arguably not be a distinctive law of “contracts” but perhaps (if moving to a greater level of generality) just a law of “civil obligations.”<sup>36</sup> Thus, driven by the belief that there is such a thing as an enclave of “contract law” within the law of civil obligations, and in reaction to those who argue contract law and tort law are essentially the same, these scholars have devoted tremendous energy to identifying a theory of contract law that renders contract law distinct from the other categories of civil obligation, and, in particular, tort law. Conversely, some scholars might desire an assimilation of contract law with tort law and therefore assert a unifying theme of contract law that is the same as tort law’s unifying theme.<sup>37</sup>

Of course, desiring a clear division between contract law and tort law (or seeking to assimilate contract law with tort law) does not explain the motive for such a desire. Some scholars presumably fear that an assimilation of contract law and tort law will have damaging effects upon established contract doctrine.<sup>38</sup> For those who seek to assimilate contract law into tort law, the effects would be (in their minds) beneficial. To understand what effects such assimilation could perhaps have, it is necessary to recognize the fundamental differences between contract law and tort law. It is also necessary to recognize that the effects of assimilation are generally considered to be contract law assimilating into tort law, not vice versa.<sup>39</sup>

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33. See Atiyah, *supra* note 31, at 80 (noting that restitution law’s “immediate object of interest” is “the rendering of benefits on the other”).

34. See GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974) (stating that “[c]lassical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort.”); FRIED, *supra* note 21, at 25 (“Here it is sufficient to introduce the notion that contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles. A major concern of this book is the articulation of the boundaries and connection between the promissory and other principles of justice.”).

35. See SMITH, *supra* note 24, at 5 (noting that the goal of contract theory is to reveal an “intelligible order”).

36. Or, if moving to a greater level of specificity, a law of sales contracts, insurance contracts, employment contracts, family contracts, etc.

37. See, e.g., FRIED, *supra* note 21, at 4–5 (arguing that reliance theorists seek to assimilate contract into tort and to subordinate “a quintessentially individualistic ground for obligation and form of social control, one that refers to the will of the parties, to a set of standards that are ineluctably collective in origin and thus readily turned to collective ends.”).

38. See, e.g., FRIED, *supra* note 21, at 4 (“If we assimilate contractual obligation to the law of torts, our focus shifts to the injury suffered by the plaintiff and to the fairness of saddling the defendant with some or all of it.”).

39. Of course, the rise of strict liability in tort law would be an example of tort law assimilating into contract law.

First, contract liability is strict liability,<sup>40</sup> whereas tort liability is usually (but not always) based on fault.<sup>41</sup> Thus, an assimilation of contract law with tort law might result in a shift (for contract law) away from a strict liability standard and toward a fault-based standard. If this occurred, the non-performance of a contract duty could be more easily excused than under a strict liability standard. This would in turn decrease the ability of parties to rely on contracts and perhaps also undermine the moral obligation to keep one's commitments. Second, the remedial schemes of tort law and contract law are different. Tort liability compensates for harm done and thus seeks to put the plaintiff in her pre-injury position (in this sense tort law is backward looking),<sup>42</sup> whereas contract liability puts the promisee in the position she would have been in had the promise been kept (in this sense contract law is forward looking).<sup>43</sup> Tort liability can also include emotional distress damages<sup>44</sup> and punitive damages,<sup>45</sup> whereas contract liability generally does not include such recoveries, even for an intentional breach.<sup>46</sup> To the extent these different remedial schemes are designed to implement different goals, an assimilation of remedies might undermine contract law's and tort law's different purposes.<sup>47</sup> It would also have the effect of rendering wholly executory contracts (contracts where neither party has relied on the other party's promised performance) essentially unenforceable because there would be no damages.<sup>48</sup> Third, tort liability is based on what the community con-

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40. See RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (1981) ("Contract liability is strict liability.").

41. Alfred C. Yen, *Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 COLUM. J.L. & ARTS 513, 518 (2009); see also FRIED, *supra* note 21, at 55 (referring to "all the usual tort qualifications regarding reasonableness").

42. Swedloff & Huang, *supra* note 32, at 578.

43. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981). In fact, the expectation damages rule has been referred to as perhaps the "most basic" principle of contract law and "the distinctive hallmark of contract law." Benson, *Introduction, supra* note 17, at 2, 3.

44. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 362-63 (1984).

45. See *id.* at 9 ("Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action 'punitive' or 'exemplary' damages, or what is sometimes called 'smart money.'").

46. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."); *id.* § 355 ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."). In fact, under the so-called "efficient breach" theory, scholars maintain that certain breaches are efficient and should therefore be encouraged. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 33-36 (4th ed. 2003) (discussing the efficient breach theory).

47. For example, contract law's remedial scheme is considered so important that some casebooks start with remedies. See, e.g., JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 2 (9th ed. 2008).

48. The non-breaching party could still perhaps be awarded nominal damages. See RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (1981) ("If the breach caused no loss . . . a small sum fixed without regard to the amount of loss will be awarded as nominal damages.").

siders appropriate behavior,<sup>49</sup> whereas contract liability is generally based on voluntarily imposed duties.<sup>50</sup> Liability based on community notions of appropriate behavior provides greater justification for state interference with the free market.<sup>51</sup> If contract law is considered to involve nothing more than society imposing legal duties on a person for policy reasons, then there can be fewer objections to contract doctrines imposing restrictions on so-called “freedom of contract.” For example, tort notions would permit courts to review contracts for their fairness through expanded use of current contract doctrines such as unconscionability.<sup>52</sup> Thus, those who seek to maintain a separate enclave for contract law—distinct from tort law or a general law of civil obligations—presumably believe strongly in freedom of contract and fear that assimilating contract law with tort law would threaten that ideal.

### 3. *Maintaining a Separation Between Law and Politics*

Although it is indisputable that the judiciary makes law in a common law system,<sup>53</sup> this notion has proved sufficiently troubling that considerable efforts have been made to render the judicial lawmaking process distinct from lawmaking by the legislative branch.<sup>54</sup> A unified theory of contract law (if followed by the courts) would help minimize judicial discretion and thus render the decision-making process less like politics and

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49. See FRIED, *supra* note 21, at 57 (referring to tort principles as “collectively determined grounds of resolution”).

50. Craswell, *supra* note 31, at 129 (“Another common belief holds that tort law imposes duties without regard to a party’s consent, while contract law enforces only those duties that a party has voluntarily assumed.”).

51. See FRIED, *supra* note 21, at 4–5 (stating that the “assimilation of contract to tort is (and for writers like Gilmore, Horowitz, and Atiyah is intended to be) the subordination of a quintessentially individualist ground for obligation and form of social control, one that refers to the will of the parties, to a set of standards that are ineluctably collective in origin and thus readily turned to collective ends.”) (footnotes omitted).

52. See *id.* at 75 (“Once we admit that bargains may be overturned or revised because of an imbalance in advantages of this sort, the way lies open to review and revise agreements generally in terms of their fairness.”).

53. RICHARD POSNER, *HOW JUDGES THINK* 153 (2008). For an excellent discussion of the distinction between a common law system and a civil law system, see BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 4–23 (2d ed. 2005).

54. For example, Professor Eisenberg has argued that “given the removal of the courts from ordinary political processes, the legitimacy of judicial lawmaking depends in large part on the employment of a process of reasoning that begins with the society’s standards, rather than with those standards a judge personally thinks best as a matter of critical morality.” Eisenberg, *supra* note 1, at 245. Professor Morton Horowitz has argued that in the nineteenth century, legal thinkers desired to create an autonomous legal order that would provide a clear separation between law and politics. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* 10 (1992). They sought to do this “through a process of systemization, integration, and abstraction of legal doctrine [by] refin[ing] and tighten[ing] up what had previously been a loosely arranged, ad hoc system of legal classification.” *Id.* In other words, they devoted their efforts to creating reductionist theories of law. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 60 (1979). Similarly, in response to arguments in the 1970s that contract law and tort law were being assimilated, so-called neoformalists “who objected[ed] to the modernist’s politicization of private law . . . propose[d] a return to the traditional ideal of the law as an independent discipline.” BUCKLEY, *supra* note 27, at 2.

more like applying established law. As stated by Professor Melvin Eisenberg, “[t]he attractions of single-value [contract] theories are obvious. [T]hey appear capable of producing determinate results, and because they are single-value theories, they appear to avoid the dissonance caused by conflicting values and the difficulties produced if conflicting values need to be accommodated.”<sup>55</sup> Thus, some scholars presumably seek a unified theory of contract law as part of an effort to promote judicial restraint, fueled by the belief that, even with respect to the common law, the judicial branch’s decision-making process should be less political than the legislative process. These scholars likely believe that the judicial branch, without broad investigatory powers, is not as competent as the legislature to decide policy questions;<sup>56</sup> that the judiciary is not as accountable as the legislature;<sup>57</sup> and that the judiciary’s lawmaking should be constrained due to its retroactive effect on the parties.<sup>58</sup>

Of course, a weakness in the “law and politics separation” argument is that policy likely played a role in the original adoption of established contract doctrine<sup>59</sup> and thus identifying a contract theory that explains current doctrine simply preserves a status quo that was originally formulated for policy reasons. Also, identifying a unified theory of contract law, although appearing to be a neutral process, is itself likely influenced by the theorist’s political leanings (in other words, we often see what we want to see).

#### 4. *Promoting a Political Ideology*

Some scholars perhaps seek to identify a unified theory of contract law because the unified theory promotes their political ideology.<sup>60</sup> For example, a scholar might argue that the basis of contract law is the moral obligation to keep a promise as part of an effort to promote a libertarian political viewpoint.<sup>61</sup> This motive is the opposite of the “law and politics separation” argument discussed above, but these scholars presumably would support judicial restraint once the favorable unified theory has

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55. Eisenberg, *supra* note 1, at 240.

56. See BUCKLEY, *supra* note 27, at 3 (noting that courts may “be less able than legislatures to assess the consequences of a legal change, since appellate advocacy is not a particularly good method of weighing empirical evidence.”).

57. See *id.* (noting that “[c]ourts are less accountable than legislatures and less subject to sanction when they embark on a judicial frolic.”).

58. Eisenberg, *supra* note 1, at 245 (noting concern with the retroactivity of judicial lawmaking).

59. See, e.g., Richard Danzig, *Hadley v. Baxendale: A Story in the Industrialization of Law*, 4 J. LEGAL STUD. 249, 283–84 (1975) (arguing that the rule of *Hadley v. Baxendale* was a product of nineteenth century economic conditions); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 135 (1976) (asserting that the rise of the employment at will doctrine was the result of advanced capitalism).

60. For example, Professor Jay Feinman has argued that “[m]etatheory is the scholarship of the right, using claims of scientific or philosophical objectivity in support of conservative politics.” Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1318 (1990).

61. See FRIED, *supra* note 21, at 1.

been established so as to avoid a change in the theory.<sup>62</sup>

B. A (PERHAPS) UNINTENDED BENEFIT OF SCHOLARS' EFFORTS TO  
CREATE A UNIFIED THEORY OF CONTRACT LAW

Even if contract scholars' efforts to develop a theory of contract law based on a single principle is futile, the effort will likely have an important unintended benefit. If particular contract scholars believe that contract law can be explained by a single principle, it is likely that some judges also believe that contract law can be explained by a single principle (or at least that it is based primarily on a single principle). Accordingly, the contract theories that have been advanced by contract scholars are probably also followed by individual judges. This in turn will help explain why judges reach decisions in particular contract law cases. This Article now turns to the contract law theories that various contract scholars have proposed with the understanding that such theories are likely followed (even if not overtly or even consciously) by various judges and that these theories influence their decisions in hard cases, such as a case seeking to enforce an employee covenant not to compete.

C. CONTRACT THEORIES

The theories of contract law that have been proposed by contracts scholars generally fall into the following categories: (1) the reliance and restitution theory, (2) the will theory, (3) the consent theory, (4) the bargain theory, (5) the efficiency theory, (6) the fairness theory, and (7) synthesis theories.<sup>63</sup> Each is discussed below. As will be seen, the challenge facing such theories is to provide a single basis for contract law that adequately explains contract doctrines such as the objective theory of con-

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62. It is sometimes difficult to determine whether a legal scholar is seeking to promote a particular political viewpoint. For example, Professor Horwitz has argued that the late nineteenth-century desire to separate law and politics was fueled by political motives. He maintains that part of this effort involved creating a clear distinction between public law (which was coercive) and private law (which was not coercive and would be "resistant to the dangers of political interference"), and that the goal was to "avoid the threat of coerced economic equality." HORWITZ, *supra* note 54, at 9–11. Horwitz argues that "perhaps the most central tenet of late-nineteenth-century legal orthodoxy [was] its commitment to a neutral, non-redistributive state." *Id.* at 16; *see also* GILMORE, *supra* note 34, at 7 (asserting that classical contract law was "in close historical relationship with the free market of classical economic theory . . ."); LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20 (1965) (asserting that classical contract law was "roughly coextensive with the free market" and was a "deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy.").

63. *See* Barnett, *Consent Theory*, *supra* note 1, at 269–70 (identifying five theories: will theory, reliance theory, fairness theory, efficiency theory, and bargain theory, and proposing his own "consent theory"); PERILLO, *supra* note 1, at 9 (discussing synthesis theories). The so-called "Wisconsin school," which argues that legal doctrines have little effect on citizens' behavior, *see* SMITH, *supra* note 24, at 34, has not been included because it is not truly a theory of contract law.

tract formation,<sup>64</sup> the doctrine that not all promises are enforceable (and usually only those given as part of a bargained-for exchange),<sup>65</sup> and the general rule that expectation damages are awarded<sup>66</sup> (with the effect of rendering wholly executory contracts enforceable).<sup>67</sup> Also, as will be seen, the viability of a theory often depends on whether certain doctrines (such as quasi-contracts, promissory estoppel, and statutes regulating contracting behavior) and practices (such as parties not usually enforcing wholly executory contracts when there is no reliance or benefit provided by the promisee) should be considered a part of "contract law."

### 1. *Reliance and Restitution Theory*

Some scholars believe that contract law's "core" is (or perhaps should be) the protection of the promisee's reliance on the promisor's promise (which would also include protecting the restitution interest for any benefits provided to the promisor in reliance on the promise).<sup>68</sup> In fact, "the earliest cases in which the courts of common law gave relief to promisees were those in which damages had been incurred in reliance upon a promise."<sup>69</sup>

When considering the reliance and restitution theory, it is important to recognize the important relationship between this theory and the possible assimilation of contract law into tort law. Because tort law is premised on preventing harm,<sup>70</sup> this theory (with its emphasis on protecting the promisee's reliance) is generally associated (rightly or wrongly) with such an assimilation, and in particular, a move for contract law toward community-based notions of proper behavior.<sup>71</sup> Thus, reliance theories should perhaps be subdivided into (1) those who believe the reliance interest is contract law's unifying theme but who do not believe contract law should be assimilated with tort law and (2) those who believe the reliance inter-

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64. Under the so-called objective theory of contract formation, a person is bound to a contract if she manifested assent, even if she did not intend to assent. *RESTATEMENT (SECOND) OF CONTRACTS* § 17 (1981).

65. *Id.*

66. *Id.* § 347.

67. See Benson, *Introduction*, *supra* note 17, at 2 (recognizing that the effect of awarding expectation damages is to render the wholly executory contract enforceable).

68. See PERILLO, *supra* note 1, at 8 ("Proponents of the reliance theory of contracts profess to see the foundation of contract law not in the will of the promisor to be bound but in the expectations engendered by, and the promisee's consequent reliance upon, the promise."). It has been argued that enforcing promises per se, as opposed to enforcing them only when the non-breaching party has suffered harm from the breach, potentially conflicts with the so-called "harm principle." See Bix, *supra* note 21, at 9-10 n.23 ("Smith, following Raz and others, also argues that enforcing contracts on the basis of promises potentially violates 'the harm principle'—the view, associated with the work of John Stuart Mill—that government is justified in infringing the liberties of its citizens only for the purpose of preventing harm to others.").

69. See PERILLO, *supra* note 1, at 8.

70. See FRIED, *supra* note 21, at 4 ("[T]he law of torts is concerned with just the question of compensation for harm caused by another . . .").

71. See *id.* at 4-5 (asserting that reliance theories seek to assimilate contract with tort and to replace contract law's individualist grounds for obligation with obligation designed to promote collective ends).

est is contract law's unifying theme and who believe contract law should be assimilated with tort law. For example, the former theory might not support the enforcement of the wholly executory contract but would believe that if there has been reliance, non-performance should not easily be excused. The latter theory would focus on whether the non-performance was "reasonable" and would support greater interference with freedom of contract than the former theory.

The idea that contract law's principal purpose is to protect the promisee's so-called "reliance interest" can be traced to the 1930s.<sup>72</sup> In 1936, Professor Lon Fuller published perhaps the most famous contracts article ever written, *The Reliance Interest in Contract Damages*,<sup>73</sup> and it has been noted that the popularity of modern reliance theories can be traced to Fuller's piece.<sup>74</sup> Although the article focused on a limited issue—why the standard remedy for the breach of a contract is an award of damages designed to protect the promisee's so-called expectation interest—the article necessarily raised the general issue of why the legal system enforces contracts.<sup>75</sup> Fuller speculated that the law awards expectation damages not to protect the promisee's expectation of performance per se but to protect the promisee's reliance on the promise.<sup>76</sup> Although this seems paradoxical, Fuller speculated that expectation damages were awarded instead of reliance damages because the latter were often hard to prove and were often the same as the expectation interest.<sup>77</sup> According to Fuller, awarding expectation damages would also deter breaches of contract, and breaches cause reliance losses.<sup>78</sup> Furthermore, awarding expectation damages would encourage parties to rely on their contracts and would thus promote value-enhancing exchanges.<sup>79</sup> Fuller's argument was particularly impressive because his assertion that contract law primarily sought to protect the promisee's reliance interest was based on an explanation of a particular contract doctrine—the award of expectation damages as the usual remedy for a breach—that appeared inconsistent with

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72. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). Although William R. Perdue, Jr., Fuller's research assistant, was identified as a co-author, Perdue acknowledged that Fuller was responsible for the article's theoretical component. BARNETT, PERSPECTIVES, *supra* note 25, at 4; *see also* Benson, *Introduction*, *supra* note 17, at 1 n.1 (stating that Fuller is considered "to be the writer of the article and certainly of its theoretical parts").

73. *See* Fuller & Perdue, *supra* note 72. Barnett described the article as "the most famous and oft-cited article on contract law ever written." BARNETT, PERSPECTIVES, *supra* note 25, at 3.

74. SMITH, *supra* note 24, at 78; *see also* FRIED, *supra* note 21, at 4 ("Proceeding from a theme established in Lon Fuller and William Perdue's influential 1936 article, a number of writers have argued that often what is taken as enforcement of a promise is in reality the compensation of an injury sustained by the plaintiff because he relied on the defendant's promise.").

75. *See* Fuller & Perdue, *supra* note 72, at 53 ("[I]t is impossible to separate the law of contract damages from the larger body of motives and policies which constitute the general law of contracts.").

76. *Id.* at 60.

77. *Id.*

78. *Id.* at 61.

79. *Id.*



his theory.<sup>80</sup>

The idea that contract law was primarily designed to protect the promisee's reliance interest returned in the 1970s, and this time the arguments were, to many, alarming.<sup>81</sup> In the early part of that decade, Professor Grant Gilmore argued that the prominence given to promissory estoppel in the American Law Institute's Restatement (Second) of Contracts meant that promissory estoppel had "swallowed up" the bargained-for exchange theory as contract law's core.<sup>82</sup> According to Gilmore, after the general acceptance of the doctrine of promissory estoppel, the only use for the bargained-for exchange basis for enforcing a promise would be the wholly executory contract, and even then it was recognized by the American Law Institute that the "probability of reliance lends support to the enforcement of the executory exchange."<sup>83</sup> He also argued that during the same time period, recovery based on restitution had gained favor.<sup>84</sup>

Gilmore stopped short, however, of arguing that the bargained-for exchange theory as the basis for enforcing a promise had been completely banished by promissory estoppel and quasi-contract (restitution). Rather, he maintained, for example, that the Second Restatement of Contracts had a schizophrenic quality about it much like the First Restatement (recognizing bargained-for exchange, reliance, and restitution as bases for enforcement) but that the Second Restatement's recognition of the strength of the reliance and restitution interests was now overt (unlike the First Restatement).<sup>85</sup> Gilmore believed that the emphasis on the promisee's reliance and restitution interests meant that contract law was "being reabsorbed into the mainstream of 'tort.'"<sup>86</sup> He famously argued that:

[w]e are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort. . . . [T]he two fields, which had been artificially set apart, are gradually merging and becoming one.<sup>87</sup>

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80. *Id.*

81. GILMORE, *supra* note 34, at 72; *see also* Barnett, *Consent Theory*, *supra* note 1, at 274 n.17 (noting that a reliance theory of contract "clearly underlies Gilmore's seminal work, *The Death of Contract*").

82. GILMORE, *supra* note 34, at 72.

83. *Id.*

84. *Id.* at 72-74.

85. *Id.* at 75-76.

86. *Id.* at 87.

87. *Id.* at 88 (footnote omitted). The difficulty with Gilmore's argument, however, is that promissory estoppel has not subsumed contract law. For example, courts have been hesitant to impose liability as a result of pre-contract assurances. *See* Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71, 91 (2007) (noting that promissory estoppel claims have generally been unsuccessful when

Thus, what was significant about Gilmore's thesis (and how it differed from Fuller's) was that it did not simply suggest that protecting the reliance interest was contract law's primary aim; it suggested that contract law and tort law were merging. This is what made Gilmore's thesis alarming. If contract law and tort law were becoming one, then the effects described earlier with respect to such assimilation might occur.

In the late 1970s, Professor Patrick S. Atiyah developed more fully the ideas of Fuller and Gilmore,<sup>88</sup> arguing that "the nature of contractual and promissory liability have been largely misunderstood by lawyers, philosophers, and others."<sup>89</sup> He argued that the wholly executory contract (whose enforcement could only be explained on promissory principles) was the focus of too much attention by contract theorists and that contracts that had been partly performed or otherwise relied upon were far more common and thus should be the focus of any theory of contract law.<sup>90</sup> He believed that this preoccupation with the wholly executory contract had led classical contract law to become overly preoccupied with the promisor's intentions instead of the promisee's reliance or the providing of benefits.<sup>91</sup> Atiyah argued that wholly executory contracts were rare and that contract law's core was therefore not the promisor's promise or the promisee's expectation interest, but the protection of the promisee's reliance and restitution interests.<sup>92</sup>

Atiyah further argued that since the late nineteenth century lawyers have been too preoccupied with the distinction between contract, tort, and restitution (i.e., quasi-contract).<sup>93</sup> For example, he asserted that:

until the middle of the nineteenth century at least, the common lawyers distinguished between express and implied contracts not between contracts and quasi-contracts. To the early common lawyers, the important point in common between express and implied contracts was that both usually involved a claim for payment or reimbursement for a benefit which had been conferred by the plaintiff on the defendant.<sup>94</sup>

Atiyah argued that contract law's principal purpose—the protection of the reliance and restitution interests—made it not so different from tort

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the plaintiff seeks to impose liability based on assurances made during contract negotiations).

88. For example, Atiyah stated in the introduction to his book, *The Rise and Fall of Freedom of Contract*: "But I must express my greatest indebtedness to the article by Fuller and Perdue, 'The Reliance Interest in Contract Damages,' . . . . In many respects, this article has been the starting-point for the whole of this book." P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 1 n.1 (1979) [hereinafter ATIYAH, *RISE AND FALL*].

89. *Id.* Atiyah has been described as "perhaps the most forceful critic of [the contract as promise] approach . . ." KIMEL, *supra* note 1, at 2. In 1981, however, with Atiyah's publication of *Promises, Morals, and Law*, Atiyah "added his voice to those who view contract and promise as analogous institutions." *Id.*

90. Atiyah, *supra* note 31, at 82–83.

91. *Id.* at 82–84.

92. *Id.* at 82–85.

93. *Id.* at 78–79.

94. *Id.* at 90.

law and restitution law.<sup>95</sup>

Atiyah took aim at the idea that contract law was primarily based on the voluntary assumption of a duty, the traditionally-stated distinction between contract duties and tort duties.<sup>96</sup> He used history to support his claim, characterizing the “will theory” (which argued that contract law was based on the voluntary assumption of a duty)<sup>97</sup> as simply a detour in the history of contract law to serve the political and economic climate of the nineteenth century.<sup>98</sup> Atiyah argued that the late nineteenth century model was based on that of the free market.<sup>99</sup> It was based on “[f]ree choice in all things, rational planning, calculated risk assessment, and the severest limitation of the active role of State and judge . . . .”<sup>100</sup> Restitution, with its benefit-based theory, therefore had to be banished from contract law.<sup>101</sup>

Atiyah maintained, however, that “[t]raditionally, a contract was primarily conceived as a relationship involving mutual rights and obligations; there was not necessarily an implication that the relationship was created by a conscious and deliberate act of will, still less that the rights and duties thereby generated were the creatures of the will.”<sup>102</sup> He asserted that:

[t]he extreme individualism, the belief that all prices are a matter of subjective choice, the stress on will and intention, of the nineteenth century were not found in the law of the eighteenth century to any significant degree. . . . Throughout the greater part of the [eighteenth] century, ‘law was conceived of as protective, regulative, paternalistic, and above all, a paramount expression of the moral sense of the community.’”<sup>103</sup>

Atiyah also argued that “[t]he notion that a promisee was entitled to have his *expectations* protected, purely and simply as such, as a result of a promise and nothing else, was not generally accepted in eighteenth century law,”<sup>104</sup> and he suggested that expectation damages did not become the measure of damages until the nineteenth century.<sup>105</sup>

95. *Id.* at 91.

96. *Id.* at 79.

97. *See infra* notes 131–61 and accompanying text (discussing the will theory of contract).

98. Atiyah, *supra* note 31, at 79.

99. *Id.* at 81.

100. *Id.* at 90.

101. *Id.*; *see also* HORWITZ, *supra* note 54, at 15 (noting that part of the effort to generalize and systematize contract law around the will theory included “William Keener publish[ing] a book on *Quasi-Contract* in 1893 for the purpose of isolating a paternalistic, non-will-based set of doctrines from a pure and supposedly voluntaristic system of contract law.”).

102. ATIYAH, RISE AND FALL, *supra* note 88, at 37.

103. *Id.* at 167–68 (quoting Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 257 (1975)).

104. ATIYAH, RISE AND FALL, *supra* note 88, at 142. This assertion is disputed. *See* William M. McGovern, Jr., Book Note, 66 MINN. L. REV. 550, 552 (1982).

105. ATIYAH, RISE AND FALL, *supra* note 88, at 456. This assertion is also disputed. McGovern, *supra* note 104, at 552–53.

Atiyah, however, did not simply rely on history. He made the normative argument that a loss of expectations was not comparable to a pecuniary loss through reliance or providing a benefit.<sup>106</sup> He also argued that the will theory did not fit with current contract doctrine.<sup>107</sup> For example, he argued that there were times when providing a benefit, without a prior or subsequent promise, would permit a recovery under quasi-contract.<sup>108</sup> To Atiyah, this showed that it was not the promise that was doing most of the work in the law of contracts, particularly because wholly executory contracts were rare.<sup>109</sup> Further, he saw the law of misrepresentation, warranty, and estoppel as reliance-based.<sup>110</sup> He also believed a promise-based theory could not be reconciled with the objective theory of contracts.<sup>111</sup> Additionally, the arrival of form contracts rendered the objective theory far more important than it had been in the world of simple promises and contracts.<sup>112</sup>

But if contract law was not primarily based on the promisor's promise, Atiyah had to explain why a promise is a necessary element of contractual liability. He argued that the promise plays primarily an evidentiary role in resolving ambiguities about the nature of the transaction, such as whether a benefit was provided as a gift, who the parties were to the contract, whether there had been performance by the other side, and the amount provided in the case of money.<sup>113</sup> The promise also provides prima facie evidence of the fairness of the transaction and the appropriate price to be paid.<sup>114</sup> Atiyah believed this was an "indispensable tool of efficient administration in a free market society . . . [f]or any other rule would leave it open to a dissatisfied party to any and every transaction to appeal to a judge to upset an agreed price and fix a new one."<sup>115</sup>

In arguing that the promisor's promise was not the primary basis for enforcing a contract, Atiyah was also left to explain the enforcement of the wholly executory contract. He argued that traditionally (until the late eighteenth century), enforcement of wholly executory contracts was not promise-based, but reliance- or benefit-based, because the promisee remained liable to perform his or her end of the bargain.<sup>116</sup> In other words, the promisee's duty to perform was not discharged by the other party's breach.<sup>117</sup> Thus, liability was premised on the promisee having to provide a benefit to the other side.<sup>118</sup>

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106. Atiyah, *supra* note 31, at 83.

107. *Id.* at 83–84.

108. *Id.* at 83.

109. *Id.* at 84.

110. *Id.* at 83.

111. *Id.* at 83–84.

112. *Id.* at 84.

113. ATIYAH, *RISE AND FALL*, *supra* note 88, at 144.

114. Atiyah, *supra* note 31, at 85.

115. *Id.*

116. *Id.* at 86.

117. *Id.*

118. *Id.*

With respect to modern law, which enforces the other party's promise but discharges the promisee's duty to perform upon a breach (provided that the breach is material and total),<sup>119</sup> Atiyah acknowledged that this form of liability (with respect to an executory contract) had to be promise-based, but he maintained that it should not occupy "the central role in Contract and even in promissory theory that it occupies today."<sup>120</sup> Atiyah argued that (1) wholly executory contracts are rare; (2) most contracts are quickly relied upon or performed; (3) the primary purpose of contracts is to establish the terms if there is performance, not to bind the parties to perform a wholly executory contract; (4) wholly executory contracts are not generally considered by the parties to be binding;<sup>121</sup> and (5) as a result of the market price/contract price differential for breach of sale of goods contracts there was often no recovery (and thus such contracts could be breached with impunity), and that in practice this must be a high proportion of cases where a wholly executory contract is breached.<sup>122</sup> Atiyah also argued that people today have less respect for the sanctity of a promise than a century ago.<sup>123</sup>

Additionally, Atiyah responded to various arguments in favor of the enforceability of the wholly executory contract. First, although an argument could be made that a promisee's reasonable expectation of performance should be protected, he argued that many expectations are not protected by law.<sup>124</sup> If such a promisee's expectation of performance was not protected by law, it would be less reasonable to expect performance.<sup>125</sup> Also, in other areas of law—such as torts—reasonable expectations are not protected until relied upon.<sup>126</sup> Further, although a disappointed expectation of performance could be considered harmful, psychological injuries are generally not protected in law.<sup>127</sup> Additionally, at least with respect to business entities, it would not make sense to refer to a psychological injury.<sup>128</sup> Atiyah argued that even though protecting expectations might be justified with respect to contracts that are deliberate exercises in risk allocation, not all contracts are of such a nature, and it could be argued that even with respect to such contracts reliance should be necessary to enforceability.<sup>129</sup> With respect to the argument that a promise creates a moral obligation to perform, Atiyah suggested that it was odd to believe "that a bare promise creates a moral obligation and

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119. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981) (providing that a material breach suspends non-breaching party's remaining contract duties); *id.* § 242 (providing factors relevant to determining when non-breaching party's remaining contract duties are discharged).

120. Atiyah, *supra* note 31, at 86.

121. ATIYAH, RISE AND FALL, *supra* note 88, at 756.

122. Atiyah, *supra* note 31, at 86.

123. ATIYAH, RISE AND FALL, *supra* note 88, at 655.

124. Atiyah, *supra* note 31, at 87.

125. *Id.*

126. *Id.* at 88.

127. *Id.*

128. *Id.*

129. ATIYAH, RISE AND FALL, *supra* note 88, at 5.

should create a legal obligation, without any inquiry into the reason for which the promise was given, or the effect that the promise has had.”<sup>130</sup>

In conclusion, Atiyah believed that while “[o]ur very process of thought, our language in political, moral or philosophical debate, is still dominated by th[e] nineteenth-century heritage” that produced the will theory of contracts,<sup>131</sup> these conceptions “do not reflect the value of our own times.”<sup>132</sup> He wanted a recognition that the reliance-based and restitution-based concepts that pre-dated the will theory were “ideas, . . . at least intuitively or implicitly, gaining much ground today.”<sup>133</sup>

## 2. Will Theory

In the nineteenth century, contract theorists proposed the so-called “will theory.”<sup>134</sup> Under the will theory, contractual obligation was based on the parties freely assuming the obligation, and a so-called “meeting of the minds.”<sup>135</sup> Although the idea of contract being based on the parties’ consent was not novel, the will theory was different in that it maintained that the voluntary nature of contractual obligation was all that mattered.<sup>136</sup> Called “classical contract law” by some, it “embodied the dichotomy between individual and community by imagining a realm of private agreement in which individual freedom was protected from state coercion.”<sup>137</sup> Rules regarding formation and the requirement of consideration “assured that the individual actually had consented to a bargained-for exchange.”<sup>138</sup> Under this theory of contract law, “the judge simply carried out the will of the contracting parties.”<sup>139</sup>

The will theory of contract—and its logical corollary, a subjective approach to contract formation—never found much traction with the courts in the United States,<sup>140</sup> and it fizzled as a contract theory largely because it was inconsistent with the objective theory of contract formation, which was needed in “an increasingly national corporate economy . . . .”<sup>141</sup>

130. Atiyah, *supra* note 31, at 90.

131. *Id.* at 79.

132. *Id.*

133. ATIYAH, RISE AND FALL, *supra* note 88, at 6.

134. James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 16 (2002); HORWITZ, *supra* note 54, at 13.

135. Barnett, *Consent Theory*, *supra* note 1, at 300; HORWITZ, *supra* note 54, at 35.

136. Gordley, *supra* note 134, at 16–17.

137. Feinman, *supra* note 60, at 1286.

138. *Id.*

139. HORWITZ, *supra* note 54, at 35. Christopher Columbus Langdell has been identified as a “will theorist,” and his will theory arguments are said to have been used “to craft the classical bargain theory of consideration.” Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1263 n.15 (1980).

140. See Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) (“[O]bjective approaches have predominated in the common law of contracts since time immemorial.”).

141. HORWITZ, *supra* note 54, at 37; see also Barnett, *Consent Theory*, *supra* note 1, at 300 (“[A] theory that bases contractual obligation on the existence of a ‘will to be bound’ is hard pressed to justify contractual obligation in the absence of an actual exercise of the will. It is difficult to see why one is legally or morally committed to perform an agreement

Thus, the will theory, although perhaps consistent with the objective theory of contracts if one considers the manifestation of assent as the best evidence of actual intent,<sup>142</sup> was inconsistent with a principle of contract law that appeared to be based on policy.

The undermining of the will theory began with Oliver Wendell Holmes's emphasis on the objective theory of contracts in *The Common Law* in 1881<sup>143</sup> and again with *The Path of the Law* in 1897.<sup>144</sup> With the publication of *The Path of the Law*, "objectivism [was] finally recognized to be incompatible with a will theory of contracts."<sup>145</sup> In *The Path of the Law*, "Holmes simply declared that when courts interpret or construe a contract, they impose some social policy on the parties regardless of any supposed intention."<sup>146</sup> Samuel Williston and Learned Hand further ad-

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that one did not actually intend to commit oneself to and still hew to a theory that based the commitment on its willful quality. This subjective component creates a tension between a will theory and the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individual's behavior that apparently manifests their assent to a transfer of entitlements.") (footnote omitted). The inability of the will theory to explain quasi-contracts and implied-in-law conditions also undermined the will theory, HORWITZ, *supra* note 54, at 37–39, as did the contractual liability of a principal for an agent's actions, *id.* at 46–49, and the power of a third party intended beneficiary to sue for breach. *Id.* at 50.

142. See Barnett, *Consent Theory*, *supra* note 1, at 272 (noting that the "will theorist" view was that "[w]here we cannot discern the actual subjective intent or will of the parties, there is no practical problem, since we assume it corresponds to objectively manifested intentions.").

143. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1963) (1881).

144. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

145. HORWITZ, *supra* note 54, at 38. Holmes has been criticized for both arguing that there could be no consistency in law, and yet attempting to adopt universal principles. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 53 (1997). Holmes himself was a system builder. As Mark DeWolfe Howe has noted, "[w]hen Holmes was twenty-nine he made it clear that he was not satisfied with the old disorder of the law—that he would do what he could to persuade his generation that an arrangement of the law and its concepts, 'scientifically' conceived, would bring in its wake not simply intellectual clarity but increased professional competence." Mark DeWolfe Howe, *Introduction*, in HOLMES, *supra* note 143, at xiii–xiv. Gilmore argues that Holmes "provided an apparently convincing demonstration that it was possible, on a high level of intellectual discourse, to reduce all principles of liability to a single, philosophically continuous series and to construct a unitary theory which would explain all conceivable single instances and thus make it unnecessary to look with any particularity at what was actually going on in the real world." GILMORE, *supra*, at 56. Holmes, of course, did not see the will theory as the organizing principle of contract law. To the contrary, he was a strong advocate of the objective theory of contracts. Howe asserts that this was part of a desire to keep German metaphysics—including Kantianism—out of the law. Howe, *supra*, at xv. Holmes, however, could argue that there were no pre-political natural rights that created a separation between law and politics, while at the same time arguing that a legal system should be based on a few fundamental principles chosen for policy reasons. Holmes's system building was thus somewhat different from Langdell's. See Eric A. Posner, *The Decline of Formality in Contract Law*, in BUCKLEY, *supra* note 27, at 64–65 ("Holmes's commitment to an axiomatic system of contract law comes perilously close to Langdell's 'geometric' approach to contract law, but should not be confused with it. A formal theory like Holmes's must be internally consistent, or else it will produce indeterminate results. However, Holmes did not purport to derive his theory from self-evident premises. Instead, he tried to present it as a unification of existing cases, which themselves emerged from a long history of common law development in response to social needs.").

146. HORWITZ, *supra* note 54, at 38.

vanced the objective theory of contracts,<sup>147</sup> and Arthur Corbin's pragmatism continued the task,<sup>148</sup> Corbin arguing that "all law was a reflection of collective determination and thus inherently regulatory and coercive."<sup>149</sup>

But in 1981, Charles Fried, in his book *Contract as Promise*, sought to resurrect the will theory, largely in response to the writings of Gilmore and Atiyah.<sup>150</sup> Fried, seemingly a new natural law theorist,<sup>151</sup> sought to establish a unitary basis of contract law,<sup>152</sup> and the unifying structure was a moral basis he called the "promise principle."<sup>153</sup> Fried argued that in private law (property, tort, and contract) liberal, individualistic premises had taken root.<sup>154</sup> In this sense, Fried continued the public-private distinction championed by the earlier will theorists.<sup>155</sup> Fried argued that the Kantian notion of respect for persons, not utilitarianism,<sup>156</sup> made a promise morally binding:

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. A liar and a promise-breaker each *use* another person. In both speech and promising there is an invitation to the other to trust, to make himself vulnerable; the liar and the promise-breaker then abuse that trust.<sup>157</sup>

Fried argued that the fact that promises were morally binding also increased a person's autonomy because it permitted a person to choose to

147. GILMORE, *supra* note 34, at 43.

148. HORWITZ, *supra* note 54, at 49–50.

149. *Id.* at 50.

150. FRIED, *supra* note 21, Preface. Professor F.H. Buckley has noted that in the 1970s "the principle of freedom of contract was everywhere in retreat" as a result of the writings of Gilmore, Atiyah, and critical legal study scholars. BUCKLEY, *supra* note 27, at 1.

151. FRIED, *supra* note 21, at 100 (seemingly arguing in favor of natural law); see generally MURPHY & COLEMAN, *supra* note 15, at 36–51 (discussing the reemergence of natural law theorists).

152. Fried's tone was overtly Langdellian. For example, Fried's first sentence is that one of the book's purposes is "to show how a complex legal institution, contract, can be traced to and is determined by a small number of basic moral principles" and to display its "underlying structure." FRIED, *supra* note 21, Preface. He again stated that he hoped "to show that the law of contract does have an underlying, unifying structure . . ." *Id.*

153. *Id.* at 1.

154. *Id.*

155. For a brief but useful discussion of the "public-private distinction," see BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 173–74 (2004).

156. FRIED, *supra* note 21, at 16. Whether promises should be kept because they are morally binding or because it promotes utility is an issue that has been debated significantly between moralists and utilitarians. See WILL KYMLICKA: *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 22–25 (2002) (discussing competing views); Eisenberg, *supra* note 1, at 246 ("Indeed, even the most basic moral issue in this area—the reason why there is a moral obligation to keep a promise—is still under active philosophical debate.").

157. FRIED, *supra* note 21, at 16 (footnote omitted).



make her future conduct non-optional.<sup>158</sup>

Of course, merely because there might be a moral obligation to keep a promise does not mean Fried's promise principle is the basis of contract law. Fried supported his argument by relying primarily on the expectation damages formula (which appears more consistent with the promise principle than the reliance principle).<sup>159</sup>

Fried, however, was faced with many contract doctrines—such as mistake, frustration of purpose, and impossibility—that did not appear promissory-based. For these, he acknowledged they were based either on tort or restitution principles, but argued that “contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles.”<sup>160</sup> Fried argued that these were situations in which contract law did not provide an answer, and as such other legal and moral principles needed to be invoked,<sup>161</sup> acknowledging that “the law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments.”<sup>162</sup> But Fried ran into trouble with doctrines that were clearly contract-law doctrines and that did not fit within the promise principle—in particular, the rule that not all promises are legally enforced, and in general only promises given as part of a bargained-for exchange. Thus, Fried was left to simply argue that the consideration requirement is incorrect<sup>163</sup> or that it served evidentiary purposes.<sup>164</sup>

158. *Id.* at 14.

159. *Id.* at 17. *But see* Shiffrin, *supra* note 18, at 722–24 (arguing that the expectation damages rule is inconsistent with the morality of promising because morally, a promisor is required to perform as promised, not to pay an amount of money as a substitute).

160. FRIED, *supra* note 21, at 25; *see also id.* at 60 (“In all of these cases [dealing with mistake, frustration, and impossibility] 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. The court cannot enforce the will of the parties because there are no concordant wills. Judgment must therefore be based on principles external to the will of the parties.”); *id.* at 69 (“There is . . . no . . . necessity that a contract have a determinative answer to all disputes that might arise relating to the contract’s subject matter . . . . [W]hen relations between parties are not governed by the actual promises they have made, they are governed by residual general principles of law.”); *id.* at 81 (“In every mistake case, it is my thesis, not promise but the competing equities must be used to resolve the inevitable dilemma caused by a contractual accident.”).

161. *Id.* at 25.

162. *Id.* at 69.

163. *See id.* at 25 n.\* (referring to “the artificial and unfortunate doctrine of consideration.”); *id.* at 35 (“I conclude that the standard doctrine of consideration . . . does not pose a challenge to my conception of contract law as rooted in promise, for the simple reason that the doctrine is too internally inconsistent to offer an alternative at all.”); *id.* at 37 (“I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it.”); Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 6 n.18 (2007) (“Another place where morality points the way to the reform of actual legal institutions is in respect to gratuitous promises that—if made with sufficient seriousness and reflection—should be as enforceable as those supported by consideration.”).

164. *See* FRIED, *supra* note 21, at 42 (“[A]n exchange is necessary neither to promissory nor to (a correct view of) contractual obligation. What the exchange (consideration) ac-

### 3. Consent Theory

Professor Randy A. Barnett, an apparent natural-law<sup>165</sup> libertarian<sup>166</sup> like Fried, has set forth what he calls a “consent theory” of contract.<sup>167</sup> Barnett sought to improve upon Fried’s “contract as promise” theory (which, to some, failed to adequately explain the objective theory of contract formation), while at the same time maintaining an autonomy-based theory<sup>168</sup> that “eschews the sorts of substantive inquiries into and interference with ordinary contractual arrangements that substance-based theories demand.”<sup>169</sup> Barnett builds off of the idea that contract law addresses how rights are transferred or alienated between rights holders<sup>170</sup> and sees contract law’s purpose as protecting against the wrongful interference with such transfers and bringing resource distribution into conformity with parties’ entitlements derived from such transfers.<sup>171</sup>

Under Barnett’s theory, contractual obligation is based on a person’s consent to transfer an entitlement.<sup>172</sup> For Barnett, “consent” is different from “will,” in that “consent” (according to Barnett) refers not only to subjective intent, but to an “interrelational act.”<sup>173</sup> Barnett argues that “[t]he consent that is required is [thus] a *manifestation of an intention to alienate rights*.”<sup>174</sup> In this respect, Barnett’s theory expanded contractual obligation beyond what it would be under the will theory, and it also corrected the deficiency of the will theory by explaining the objective theory of formation.<sup>175</sup>

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completes is to supply some other truly necessary element. Perhaps this is why it has seemed so natural to insist on consideration. The fact that I pay for a promise establishes two things: that the promise was made *to* me, and that I desired the promise to be made.”). Professor Bix has asserted that Fried “presented his theory as much as an argument for reforming current doctrine as an explanation of or justification for existing law.” Bix, *supra* note 21, at 9 n.23.

165. Barnett considers a “*valid legal obligation*” to be “an obligation that it is morally appropriate to enforce,” in contrast to a legal obligation “which a particular legal system will enforce (whether or not it should) . . . .” Barnett, *Consent Theory*, *supra* note 1, at 296 n.111; *see also id.* at 297 n.115 (“The fact that society does not recognize a right cannot alone mean that morally such a right does not exist.”).

166. *See* John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL’Y 513, 518 n.16 (2009) (identifying Barnett as a libertarian).

167. Barnett, *Consent Theory*, *supra* note 1, at 291–321.

168. *See* Eisenberg, *supra* note 1, at 233 (identifying Barnett as providing an autonomy-based theory). Barnett’s theory is also a better fit with the general enforceability of form contracts. *See generally* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002) (explaining consistency between the consent theory of contract and the general enforceability of form contracts).

169. Barnett, *Consent Theory*, *supra* note 1, at 320.

170. *Id.* at 292.

171. *Id.* at 296.

172. *Id.* at 299.

173. *Id.* at 299 n.121.

174. *Id.* at 304 (emphasis added).

175. Professor Melvin A. Eisenberg has asserted that Barnett is only able to do this by employing a definition of “consent” that varies from its normal meaning. Eisenberg, *supra* note 1, at 233. Eisenberg argues that “[c]onsent is a subjective, not an objective, concept. When we say that a person has consented to something, we do not mean that he gave the appearance of consenting; we mean he actually consented. Barnett’s theory therefore does

Barnett defended the objective approach based on the protection of the promisee's rights and the needs of the legal system. According to Barnett, "a vital function of a system of well-defined entitlements is the avoidance of disputes."<sup>176</sup> Therefore, "an entitlements theory demands that the boundaries of protected domains be ascertainable, not only by judges who must resolve disputes that have arisen, but, perhaps more importantly, by the affected persons themselves before any dispute occurs."<sup>177</sup> And to Barnett, "[a] coherent rights theory will . . . allocate rights largely on the basis of factors that minimize the likelihood of generating conflicting claims. In this regard, objectively manifested conduct, which usually reflects subjective intent, provides a far sounder basis for contractual obligation than do subjectively held intentions."<sup>178</sup> Barnett asserts that an objective standard is morally justified because such an approach "respect[s] and protect[s] the rights and liberty interests of others, whose plans and expectations would be severely limited if they were not entitled to rely on things as they appear to be and to take the assertive conduct of others at face value."<sup>179</sup> According to Barnett, the objective theory helps establish "the clear boundaries required by an entitlements approach."<sup>180</sup>

Although Barnett's consent theory expanded contractual liability beyond what it would be under the will theory, the contractual obligation under Barnett's consent theory was in one respect narrower than contractual obligation under the will theory. According to Barnett, a "manifestation of an intention to alienate rights" also "implies that one intends to be legally bound" and this is "what a court should seek to find before holding that a contractual obligation has been created."<sup>181</sup> Thus, for Barnett, a "promise" is not enough to create legal liability.<sup>182</sup> A promise might create a moral obligation to perform, but to create a contractual obligation something more is needed, and for Barnett, it is the manifestation of an intention to be legally bound.<sup>183</sup>

Barnett, however, like Fried, ran into trouble with respect to the general rule that a promise or consent to a transfer is not itself sufficient to be legally binding. Barnett, recognizing this problem, argued that the consideration requirement played an evidentiary role: "The fact that a person had received something of value in return for a 'promise' may indeed indicate that this promise was an expression of intention to transfer rights."<sup>184</sup> Also, "the receipt of a benefit in return for a promise

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not resolve the dilemma any more than does Fried's, because his 'consent' theory does not require actual consent, or more accurately, requires no consent at all." *Id.*

176. Barnett, *Consent Theory*, *supra* note 1, at 301.

177. *Id.* at 302.

178. *Id.* at 303-04.

179. *Id.* at 306.

180. *Id.* at 307.

181. *Id.* at 304.

182. *Id.* at 305.

183. *Id.*

184. *Id.* at 313.

should serve as objective notice to the promisor that the promise has been interpreted by the other party to be legally binding.”<sup>185</sup> Barnett conceded, however, that under a consent theory of contract, “the absence of either bargained-for consideration or reliance will not bar the enforcement of a transfer of entitlements that can be proved in some other way—for example, by a formal written document or by adequate proof of a sufficiently unambiguous verbal commitment.”<sup>186</sup> Thus, Barnett was ultimately left to state that “[a] consent theory . . . provides a focus for contemporary dissatisfaction with the doctrine of consideration.”<sup>187</sup> So Barnett’s autonomy-based theory had improved upon an important deficiency in Fried’s promise principle, but it failed to improve upon another.

#### 4. Bargain Theory

Grant Gilmore described a Holmes-Williston contract theory of the late nineteenth century and early twentieth century, which he referred to as “the classical or general theory of contract.”<sup>188</sup> According to Gilmore, the theory started with Langdell promoting the idea that there “really is such a thing as the one true rule of law, universal and unchanging, always and everywhere the same—a sort of mystical absolute.”<sup>189</sup> Then, Langdell selected contract law as the area of law for developing a general theory of law.<sup>190</sup> According to Gilmore, the general outlines of the theory of contract were then supplied by Holmes.<sup>191</sup> Although “Holmes kept his own theories open-ended by his reiterated insistence that law basically reflects social and economic conditions and must change as they change,” Samuel Williston (according to Gilmore) in turn implemented Holmes’s ideas in a “thoroughly Langdellian spirit.”<sup>192</sup>

Gilmore maintained that the theory was based on the notion that it should be difficult to establish the existence of a contract, but once one was established, liability for non-performance should be absolute.<sup>193</sup> Ac-

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185. *Id.*

186. *Id.* at 317.

187. *Id.* at 319.

188. GILMORE, *supra* note 34, at 94.

189. *Id.* at 97–98.

190. *Id.* at 98.

191. *Id.* at 14.

192. *Id.* at 98 n.256.

193. Whether Holmes and Williston in fact had a “theory of contract” is disputed. Professor Peter Benson, for example, has argued that their work was untheoretical. Rather, they (and others) simply sought to “bring order and internal consistency to the law of contract.” Benson, *Introduction*, *supra* note 17, at 2. He maintains that “these jurists did not so much develop a theory as systematically present the legal point of view by clarifying the definitions of contract principles and doctrines and by exploring, within limits, their implications and their conceptual interconnections.” *Id.* at 2 n.4; *see also* Farnsworth, *supra* note 18, at 208 (maintaining that Williston did not consider himself as having a theory of contract law). James Gordley has also identified significant differences between Holmes and Williston regarding their views on contract law. James R. Gordley, Book Note, *The Death of Contract*, 89 HARV. L. REV. 452, 456–57 (1975). For an argument that Williston’s work was more pragmatic than commonly thought, see Mark. L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 213–14 (2005).

According to Gilmore, some of the hallmarks of the theory were the requirements of a bargained-for exchange to render a promise enforceable<sup>194</sup> and the application of the objective theory of formation and interpretation.<sup>195</sup> The effect of a general theory of contract grounded on the need for a bargained-for exchange to make a promise enforceable meant that all sorts of promises—interfamily promises, promises to modify a contract or forgive a debt, promises to keep an offer open—would be denied enforcement unless made as part of a bargain.<sup>196</sup> The idea that consideration should be limited to a bargained-for exchange was designed to limit the number of promises that were enforceable.<sup>197</sup>

The “bargain theory” of contract has been described as a “process based” theory that “shift[s] the focus of the inquiry from the contracting parties and from the substance of the parties’ agreement to the manner in which the parties reached their agreement.”<sup>198</sup> But as has been noted about procedural theories, “[t]he mere fact that someone has observed a particular procedure in agreeing to do something does not explain why he should be required to abide by the terms of his agreement; to explain why he should, an appeal must be made to something other than the procedure itself.”<sup>199</sup>

Scholars have, therefore, sought to ferret out an underlying moral theory to the bargain theory of contract. For example, Gilmore argued that although the builders of the general theory of contract in the late nineteenth and early twentieth centuries were perhaps not motivated by laissez-faire economic theory, their theory—with limited liability—was consistent with nineteenth-century individualism and laissez-faire economic theory (which Gilmore described as everyone being able to do anything they wanted)—and “responded to the felt needs of the time.”<sup>200</sup> Gilmore argued that:

A system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they impliedly assumed. No man is his brother’s keeper; the race is to the swift; let the devil take

194. GILMORE, *supra* note 34, at 18.

195. *Id.* at 35.

196. *Id.* at 21–34; *see also* Barnett, *Consent Theory*, *supra* note 1, at 310 (noting that “the ascendancy of the bargain theory of consideration . . . had the unintended consequence of creating doctrinal problems for the enforcement of formal commitments where there was no bargained-for consideration.”).

197. GILMORE, *supra* note 34, at 21.

198. Barnett, *Consent Theory*, *supra* note 1, at 287.

199. Kronman, *supra* note 29, at 477.

200. GILMORE, *supra* note 34, at 95. Gilmore also argued that part of the basis for the theory was distrust of the jury, *id.* at 99, and that the consideration rule and objective theory would help transform fact issues for the jury into questions of law for the judge. *Id.* at 98.

the hindmost.<sup>201</sup>

### 5. Efficiency Theory

Law and economics scholars argue that “[e]conomic activity revolves around mutually beneficial trade, and the principal purpose of contract law is to facilitate such trade.”<sup>202</sup> “The initial aim of law and economics scholarship was to test the hypothesis that economic principles lend order and structure to the common law of contracts.”<sup>203</sup> To such scholars, “contract doctrines [might] reflect judicial efforts, whether deliberate or unconscious, to achieve efficiency.”<sup>204</sup>

For these scholars, efficiency means contract doctrines that help move resources toward their most valuable uses.<sup>205</sup> When parties voluntarily exchange goods or services for money and the exchange makes each of them better off, “the exchange will also increase the wealth of the society (of which they are members), assuming the exchange does not reduce the welfare of nonparties more than it increases *A*’s and *B*’s welfare.”<sup>206</sup> Law and economics and efficiency theories are, therefore, considered to be grounded in utilitarianism.<sup>207</sup>

Law and economics scholars generally prefer a system that freely permits voluntary exchange.<sup>208</sup> They also prefer a system under which losses are internalized by the party that can take precautions against the loss at the cheapest price;<sup>209</sup> transaction costs are reduced (which includes pre-contract negotiations, administering the contract, and enforcing the con-

201. *Id.* at 95.

202. DOUGLAS G. BAIRD, *ECONOMICS OF CONTRACT LAW* ix (2007).

203. *Id.* at xix.

204. ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1 (1979); *see also* BIX, *supra* note 155, at 115 (“Particularly at its earliest stages of development, there was . . . a ‘descriptive’ or ‘positive’ side to law and economics, in which some theorists tried to argue that most common-law rules were efficient (in different terms, that they maximized social wealth). Economic efficiency was proposed as the conscious or unconscious goal of the judges who developed the common law doctrines in various private law areas.”); MURPHY & COLEMAN, *supra* note 15, at 181–82 (“The work in law and economics has had both analytic and normative dimensions. The analytic work has aimed at demonstrating that large areas of law could be explained by seeing them as concerned not so much with matters of justice but with the efficient allocation of resources. The normative work in the field is concerned to give legislators and judges a framework for legislating and adjudicating cases so as to promote the goal of efficiency.”).

205. *See* KRONMAN & POSNER, *supra* note 204, at 1–2 (“The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable uses.”).

206. *Id.* at 2.

207. *See* SMITH, *supra* note 24, at 108 (identifying efficiency theories as based on utilitarianism); BIX, *supra* note 155, at 214 (“Economic analysis—and its legal analogue, law and economics—can be seen to be grounded on a variant of utilitarianism . . .”); LARRY A. DIMATTEO, ET AL., *VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION* 15, 15 n.7 (2007) (noting that a law and economics approach—the goal of which “is to advance economic efficiency by properly shaping legal doctrine”—“[a]s applied to contract law . . . is obviously a utilitarian approach.”).

208. KRONMAN & POSNER, *supra* note 204, at 2.

209. *Id.*

tract—including negotiations after breach);<sup>210</sup> and the parties have access to relevant information at a minimum cost.<sup>211</sup>

According to law and economics scholars, contract law promotes a system of voluntary exchange in several ways. First, by enforcing contracts (i.e., imposing formal sanctions against a party who breaches) contract law encourages parties to enter into contracts under which one party's performance will take a period of time.<sup>212</sup> If such sanctions were not available, a party whose performance was to occur second might not have an incentive to perform after receiving the first party's performance. Without the law providing a sanction for a party receiving the consideration and then not completing performance, "people would be reluctant to enter into contracts and the process of economic exchange would be retarded."<sup>213</sup> This also encourages a party to rely on a promise.<sup>214</sup> To obtain these benefits, contracts must be reliably enforced.<sup>215</sup> Second, contract law provides so-called "default rules"<sup>216</sup> that parties need not spend time and money negotiating about (thereby reducing the transaction costs associated with contracting).<sup>217</sup>

Law and economic scholars assert that efficiency concerns can account for the rules regarding formation (the objective theory of contract formation)<sup>218</sup> and remedies (the expectation damages rule).<sup>219</sup> Although an economist would only consider as value-maximizing a contract formed under the subjective theory of contract formation, the objective theory deters contracting parties from engaging in careless behavior during the contract process, and thus discourages "a costly form of carelessness that would tend to impede [the contracting process]."<sup>220</sup> An award of expectation damages "force[s] those who make promises to internalize the costs the breach imposes on the other party. Someone who makes a promise in an expectation damage regime has no incentive to break the promise unless he has better opportunities."<sup>221</sup> If damages were less than protecting the promisee's expectation interest, the breaching party would have an incentive to breach even when performance provided a net benefit.<sup>222</sup> Also, under the idea of "efficient breach," the law should not award more than expectation damages (i.e., no punitive damages) because this would create a disincentive for breaches that would result in a

210. *Id.*

211. *Id.*

212. *Id.* at 4.

213. KRONMAN & POSNER, *supra* note 204, at 4.

214. BAIRD, *supra* note 202, at ix.

215. *Id.*

216. "Default rules" are "provisions the law supplies to deal with conditions and circumstances about which the contract says nothing." *Id.* at x.

217. *Id.*

218. KRONMAN & POSNER, *supra* note 204, at 5.

219. See POLINSKY, *supra* note 45, at 35 ("[T]he expectation remedy is the only remedy that creates efficient incentives with respect to breaches of contracts.").

220. KRONMAN & POSNER, *supra* note 204, at 5.

221. BAIRD, *supra* note 202, at xii.

222. *Id.* at xiii.

net benefit.<sup>223</sup>

Because law and economics scholars desire a system that promotes free exchange, their goal is not very different from that of the “contract as promise” theorists, with each, for example, agreeing that expectation damages is the proper measure of damages.<sup>224</sup> But a law and economics approach, which is consequentialist, only values individual autonomy indirectly.<sup>225</sup>

## 6. Substantive Fairness Theory

Professor Randy Barnett has identified a theory of contractual obligation that he calls the “fairness theory.”<sup>226</sup> According to Barnett, this “school of thought attempts to evaluate the substance of a transaction to see if it is ‘fair.’”<sup>227</sup> For example, Professor Morton Horwitz has argued that in the eighteenth century, contractual obligation was limited based on the fairness of the exchange.<sup>228</sup> Thus, according to Horwitz, “[c]ourts and juries did not honor business agreements on their face, but scrutinized them for the substantive equality of the exchange.”<sup>229</sup> He argues that this limitation was implemented through (1) the doctrine that “equity courts would refuse specific . . . performance of any contract in which they determined that the consideration was inadequate”;<sup>230</sup> (2) “a substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages”;<sup>231</sup> (3) the courts’ failure to instruct juries on determining the amount of damages and the courts’ failure to reverse damage judgments, which resulted in “the community’s sense of fairness” dictating the result in contracts cases;<sup>232</sup> and (4) the enforce-

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223. *Id.* Such a notion is at odds with Fried’s notion of contract as promise. *Id.* at xix n.10.

224. FRIED, *supra* note 21, at 17; POLINSKY, *supra* note 45, at 35.

225. See Kronman, *supra* note 29, at 486 (“Any principle, such as utilitarianism, that purports to evaluate states of affairs solely on the basis of the total amount of some good they happen to contain is capable of taking the idea of autonomy into account only indirectly; utilitarianism can give weight to the independence of individuals only insofar as their independence contributes to something else which is taken to be good in itself.”).

226. Barnett, *Consent Theory*, *supra* note 1, at 269; see also Richard E. Speidel, Book Note, *Changing Your Mind: The Law of Regretted Decisions By E. Allen Farnsworth*, 31 LOY. U. CHI. L.J. 255, 258 (2000) (discussing the “Fairness themes” in contract).

227. Barnett, *Consent Theory*, *supra* note 1, at 283.

228. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 164 (1977) (“The most important aspect of the eighteenth century conception of exchange is an equitable limitation on contractual obligation. Under the modern will theory, the extent of contractual obligation depends on the convergence of individual desires. The equitable theory, by contrast, limited and sometimes denied contractual obligation by reference to the fairness of the underlying exchange.”). *But see* A.W. Brian Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (disputing Horwitz’s argument).

229. HORWITZ, *supra* note 228, at 167.

230. *Id.* at 164.

231. *Id.* at 165.

232. *Id.* at 166.



ment of a rule that "a sound price warrants a sound commodity."<sup>233</sup>

More recently, the use of the unconscionability doctrine to defeat enforcement is an example of using notions of fairness.<sup>234</sup> Additionally, Professor Anthony Kronman argues that "rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive."<sup>235</sup> Kronman argues "that considerations of distributive justice not only *ought* to be taken into account in designing rules for exchange, but *must* be taken into account if the law of contracts is to have even minimum moral acceptability."<sup>236</sup> But Kronman, to support his argument, is required to expand the generally accepted concept of "contract law" to include statutes with respect to usury, minimum wage, rent control, and racial discrimination in employment and the sale of real estate.<sup>237</sup>

### 7. *Synthesis or Multi-Value Theory (Neoclassical Contract Law)*

In response to so-called unitary theories of contract law, various scholars have argued that no single principle can explain contract law, and that contract law is based on a synthesis of principles. For example, Professor Joseph Perillo has asserted that "[i]t cannot be said that any of the competing philosophical premises . . . is officially enshrined in our law of contract. Each of them, together with the pervasive desire of the law to prevent unjust enrichment, coexists as part of our frequently utilized stock of legally acceptable arguments."<sup>238</sup> Professor Eisenberg, making a normative argument, has asserted that contract rules should take into account "all relevant moral, policy, and empirical propositions."<sup>239</sup>

Professor Jay Feinman has referred to modern contract law as "neoclassical contract law."<sup>240</sup> The description is based on the idea that modern contract law is based on classical contract law, but with subsequent critiques absorbed into it.<sup>241</sup> Feinman notes that "[n]eoclassical contract can be described as anti-theoretical and multi-dimensional."<sup>242</sup> Neoclassical contract law, incorporating the criticisms of classical contract law without completely abandoning it, "attempts to balance the individualist ideals of classical contract with communal standards of responsibility to

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233. *Id.* at 167.

234. *Id.*

235. Kronman, *supra* note 29, at 474.

236. *Id.*

237. *Id.* at 507.

238. PERILLO, *supra* note 1, at 9.

239. Eisenberg, *supra* note 1, at 241; *see also* JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991) (proposing a pluralist theory); Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 *TEX. L. REV.* 103 (1988) (similarly proposing a pluralist theory); Robert Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 616-48 (1983) (arguing that none of the proposed theories can account for the entirety of contract law).

240. Feinman, *supra* note 60, at 1285.

241. *Id.*

242. *Id.* at 1295.

others.”<sup>243</sup> Thus, “[t]he core remains the principle of freedom of contract . . . but this principle is ‘tempered both within and without [contract’s] formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties’ actual agreements.’”<sup>244</sup>

### III. EMPLOYEE COVENANTS NOT TO COMPETE

#### A. BACKGROUND

Employee covenants not to compete are commonplace.<sup>245</sup> These contracts involve a promise by an employee to his or her current or prospective employer to not compete against the employer after the employment relationship ends.<sup>246</sup> The purpose of such a covenant is usually to prevent unfair competition through the former employee’s use of relationships or information that the employee acquired during and as part of the former employment relationship.<sup>247</sup> Such agreements are necessary for employ-

243. *Id.* at 1287–88.

244. *Id.* at 1288 (quoting Hillman, *supra* note 239, at 104).

245. See Estlund, *supra* note 13, at 381 (recognizing that employee non-compete agreements are “increasingly common”); Thomas M. Hogan, Note, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?*, 80 ST. JOHN’S L. REV. 429, 429 (2006) (“Restrictive covenants have become a classic condition of employment, as employers feel the need to protect business interests.”); Turner, *supra* note 5, at 43 (“Fierce economic competition and a highly mobile workforce have caused many employers to require, with unprecedented frequency, that their new hires and existing employees execute non-compete agreements.”); Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (“Because of the increasing emphasis in the American economy on technically skilled employees and service oriented businesses, the covenant not to compete has become a standard addition to employment contracts.”); Margaret N. Kniffin, *Employee Noncompetition Covenants: The Perils of Performing Unique Services*, 10 RUTGERS L.J. 25, 25 (1978) (“In many employment contracts, the employee covenants that, after termination of employment, he will not compete with his former employer.”).

246. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 625 n.1 (1960); see also Closius & Schaffer, *supra* note 245, at 531 (“A covenant not to compete is a contractual restriction upon an individual’s ability to compete with another person or entity following the termination of some transaction or relationship between the two.”); James R. Krendl & Cathy S. Krendl, *Noncompetition Covenants in Colorado: A Statutory Solution?*, 52 DEN. L.J. 499, 499 (1975) (“Noncompetition covenants are agreements whereby one party, the covenantor, agrees not to compete with another party, the covenantee, in a particular line of business for a specified period of time and in a specified area.”); Chiara F. Orsini, Comment, *Protecting an Employer’s Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 176 (2000) (“These agreements often provide that ‘after the termination of employment for any reason, the employee will not compete with the employer in the employer’s existing or contemplated businesses for a designated period of time’ and within a designated geographic area.”) (quoting Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 N.Y.U. L. REV. 575, 602–03 (1999)).

247. Blake, *supra* note 246, at 647. Some courts, however, have enforced non-compete agreements based on the unique talents of the employee. See Kniffin, *supra* note 245. Professor Kniffin recognized that this rationale is different from the traditional rationale for enforcing a non-compete agreement. See *id.* at 55 (“Trade secrets and customer relationships are, in a sense, property of the employer, and it is reasonable to prevent the departing employee from absconding with them. But uniqueness is, by its very nature, a

ers because an employee's "fiduciary obligations become less stringent [after termination of employment] and the agent is free to compete with the former principal."<sup>248</sup>

An employee's non-compete pledge is usually found in a stand-alone non-compete contract or as a provision in an employment contract.<sup>249</sup> The extent of the non-compete pledge in a particular contract varies with respect to geographic scope, temporal scope, and line of business. Employees often sign such contracts because they lack the bargaining power to obtain the job without signing the agreement, and such contracts are often contracts of adhesion.<sup>250</sup>

Most cases involving employee non-compete agreements are between the former employer who is seeking to enforce the non-compete pledge and the employee who has allegedly breached the contract.<sup>251</sup> The enforceability of a non-compete pledge is not determined solely by traditional contract doctrine.<sup>252</sup> Rather, because such agreements are considered in restraint of trade,<sup>253</sup> they are enforced only if (in addition to satisfying the traditional requirements of contractual liability) the restraint is considered "reasonable."<sup>254</sup> Also, "[p]ost-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of

possession of the employee himself. He may have acquired his extraordinary skills under the guidance of the employer, or he may have been born with them, or at least have brought them to his job. But the nature of the services he renders is inherently dependent upon his own person. And since the employee's person cannot be considered the property of the employer, it is questionable whether an employer should be able to exercise dominion over the use of these unique abilities.").

248. Closius & Schaffer, *supra* note 245, at 534. A duty not to compete against one's employer during the term of employment "will be implied from general agency principles." Blake, *supra* note 246, at 647 n.74; *see also* Closius & Schaffer, *supra* note 245, at 533 ("During the agency relationship, the agent has 'a duty not to compete with the principal concerning the subject matter of his agency.'" (quoting RESTATEMENT (SECOND) OF AGENCY § 393 (1957))). An employer can bring a claim in either tort or contract for an employee's breach of the duty of loyalty. *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086 (9th Cir. 2003).

249. Blake, *supra* note 246, at 625 n.1.

250. Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 100 (1981).

251. *Id.* The other common scenario is a former employee filing a declaratory judgment action against the employer to determine if the non-compete pledge is enforceable. Filing such a suit might provide the employer with the advantage of selecting the forum for the lawsuit. *See Turner, supra* note 5, at 46 ("One strategy available to an employee faced with the potential of being sued for violating a non-compete is to take the offensive immediately. Tactically, the employee attempts to turn the tables on the employer in order to gain the advantage. Therefore, an employee who may be faced with the threat of imminent litigation through the filing of an injunction for alleged breach of a non-compete may wish to consider a preemptive strike — the filing of a declaratory judgment action — which should seek a determination of the enforceability of the non-compete agreement and a declaration of its invalidity.").

252. *See* ATIYAH, RISE AND FALL, *supra* note 88, at 451 (noting that such cases have "always been subject to special rules.").

253. *See* Closius & Schaffer, *supra* note 245, at 539 ("The legality of any covenant not to compete is initially suspect as a restraint of trade.").

254. Estlund, *supra* note 13, at 393.

his livelihood.”<sup>255</sup> In this respect, employee covenants not to compete are strictly scrutinized to protect the interest of both the public (with respect to the benefits of competition) and the employee.<sup>256</sup>

Usually, the primary issues involved in cases seeking to enforce such covenants are whether the covenant is supported by a so-called “protectable interest” or “legitimate business interest”<sup>257</sup> and whether the area, time, and line of business restrictions are reasonable. But many of these cases also involve different kinds of defenses, such as whether the employer breached the employment contract first, thereby discharging the employee’s duties under the covenant not to compete and whether equitable doctrines preclude an injunction against the continued breach of the agreement.

### B. EARLY ENGLISH COMMON LAW

Under early English common law, employee covenants not to compete were invalid irrespective of their reasonableness.<sup>258</sup> There were several reasons for this position. First, “[i]t was then believed that every member of society had his appropriate estate or degree which God had ordained for him, and that it was his duty to serve God in the estate or degree in which he found himself.”<sup>259</sup> And even if a restraint was limited to a particular geographic area, the guild system made it difficult for persons to find work in other areas.<sup>260</sup> Second, such agreements conflicted with the traditional rules of apprenticeship.<sup>261</sup> Generally, an apprentice was required to serve a long apprenticeship period during which the master paid the apprentice small or no wages, and the quid pro quo was that at the end of this period the apprentice, now a journeyman, would be able to

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255. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1981).

256. Estlund, *supra* note 13, at 396.

257. See Closius & Schaffer, *supra* note 245, at 541 (“Balancing these competing policies has led modern courts to scrutinize covenants not to compete by stating, first, that any such covenant, ancillary to an agency relationship, is unenforceable unless it protects some legitimate interest of the principal.”).

258. Blake, *supra* note 246, at 631–32; see also Hogan, *supra* note 245, at 433 (noting that “English courts were initially hostile towards enforcement because these restrictions tended to disadvantage powerless artisans.”). Some commentators have argued that under early English common law all contracts in restraint of trade were void. See Gary P. Kreider, *Trends in the Enforcement of Restrictive Employment Contracts*, 35 U. CIN. L. REV. 16, 16 (1966) (“Originally, at common law, all contracts in restraint of trade were held void.”); Kniffin, *supra* note 245, at 27 (“The earliest recorded cases concerning noncompetition covenants indicate that it was unnecessary for the courts to assess reasonableness; it was generally held that any contract prohibiting competition was void as a restraint of trade.”). The first reported case dealing with a covenant not to compete is apparently *John Dyer’s Case*, 2 Hen. V, f. 5, pl. 26 (1414), in which the judge stated: “In my opinion, [the defendant] could have demurred on it, that the obligation is void, because the condition is contrary to the common law, and by God if the plaintiff were here, he would go to prison until he had made an end [i.e., paid a fine] with the King.” *Id.* (quoted in A. W. BRIAN SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 519 (1975)).

259. SIMPSON, *supra* note 258, at 519.

260. *Id.* at 521.

261. Blake, *supra* note 246, at 632.

practice his trade.<sup>262</sup> In fact, an English statute in 1536 made non-competition agreements with respect to apprentices illegal.<sup>263</sup> As has been noted by Professor A.W. Brian Simpson, “[w]e are concerned with a period where the move from status to contract has not progressed far.”<sup>264</sup>

### C. THE NINETEENTH CENTURY AND THE RISE OF THE “REASONABLENESS” TEST

In the early seventeenth century, courts in England started to relax the rule that all contracts in restraint of trade were invalid.<sup>265</sup> And by the early nineteenth century the apprenticeship system was gone, and contracts designed to replace that system were becoming more common.<sup>266</sup> During the nineteenth century, courts hearing employee covenant not to compete cases followed the approach adopted in 1711 by the Queen’s Bench in *Mitchel v. Reynolds*.<sup>267</sup>

*Mitchel* arose out of a covenant not to compete ancillary to the sale of a business.<sup>268</sup> The case involved a defendant who assigned to the plaintiff a lease for a bake shop.<sup>269</sup> The defendant promised that he would not engage in the profession of baking in a specified area, but he then breached the contract.<sup>270</sup> The plaintiff sued, and the defendant argued that the promise was an illegal restraint of trade.<sup>271</sup> Lord Macclesfield stated that there is a presumption that any restraint of trade is invalid because such agreements might cause hardship on the covenantor resulting from an inability to earn a livelihood, cause harm to society from losing the covenantor’s services, and enable a business to develop a monopoly.<sup>272</sup> The court, however, found that the restraint in the case was enforceable.<sup>273</sup> The court held that it was reasonable for the parties to enter into the non-compete agreement because it was ancillary to the sale of a business, and if it were not enforced, it would result in hardship to a businessperson who wanted to retire but could not obtain an acceptable price because the buyer could not be assured the seller would not compete against the buyer.<sup>274</sup>

But the court warned that the situation might be different with respect to an *employee* covenant not to compete.<sup>275</sup> The court noted that such

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262. *Id.* at 633.

263. *Id.* at 634.

264. SIMPSON, *supra* note 258, at 521.

265. ATIYAH, RISE AND FALL, *supra* note 88, at 126.

266. Blake, *supra* note 246, at 638.

267. *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). The *Mitchel* decision was essentially a systemization of seventeenth century cases that had begun to enforce various non-compete agreements. SIMPSON, *supra* note 258, at 524.

268. *Mitchel*, 1 P. Wms. at 181.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 187.

273. *Id.* at 197.

274. *Id.* at 191.

275. *Id.* at 189.

agreements are subject to “great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves.”<sup>276</sup> The court also noted that there is a distinction between a “general” restraint and a “particular” or “partial” restraint.<sup>277</sup> A “general” restraint would be one that extends throughout the entire country and was perhaps unlimited in time.<sup>278</sup> A “particular” restraint was one limited in area and perhaps limited to doing business with particular persons.<sup>279</sup> The court noted that a “general” restraint would never be upheld because it would be unreasonable.<sup>280</sup>

Although *Mitchel* involved a restraint as part of the sale of a business, during the nineteenth century, its “reasonableness” approach to restraint of trade cases was considered the relevant authority for employee-restraint cases,<sup>281</sup> and the development of employee non-compete law in

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276. *Id.* at 190.

277. *Id.* at 182.

278. *Id.*

279. *Id.*

280. *Id.*

281. Blake, *supra* note 246, at 638–39; see also Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 455 (2001) (“*Mitchel* established a multifaceted analysis of reasonableness that has ever since dominated the law’s approach to contractual restraints on the practice of a trade and thus to the dissemination of workplace knowledge.”). Hogan, *supra* note 245, at 433 (“*Mitchel* provided the framework, which exists today in the American judicial system, for determining whether a restrictive covenant is reasonable under the circumstances to warrant enforcement.”). Interestingly, though, during the latter half of the nineteenth century, almost all employee covenants not to compete were upheld in England. Blake, *supra* note 246, at 640. This was due to several factors. First, in 1853 the Court of Queen’s Bench reversed the rule that restraints of trade are prima facie invalid and placed the burden on the covenantor to prove that the covenant was unreasonable. *Id.* Second, some English courts mistakenly believed that the reasonableness doctrine had been abandoned in an 1837 decision. *Id.* Third, it was a period of intense competition, and thus restraints of trade were not perceived as particularly harmful. ATIYAH, RISE AND FALL, *supra* note 88, at 410. Fourth, it was an era that emphasized freedom of contract, Blake, *supra* note 246, at 640–41, and “[t]he rule of reason during the period derived much of its content from the predominant importance accorded freedom-of-contract ideas.” *Id.* at 643; see also ATIYAH, RISE AND FALL, *supra* note 88, at 697 (“By the 1870s the judges were so accustomed to the idea that all contracts should in principle be enforceable, at least in the absence of plain illegality or sexual immorality, that even the old common law hostility to agreements in restraint of trade had been seriously weakened.”). In fact, courts began upholding what the court in *Mitchel* referred to as “general” restraints. Blake, *supra* note 246, at 641. “[A]s technology advanced, the general-partial distinction became meaningless, and thus unreasonable, and was narrowly applied and finally abandoned.” *Id.* at 639. Thus, “[t]he reasonableness test was always employed, but the values it embodied during the era were such that almost any restraint no larger than the market in which the covenantee did business was held suitable.” *Id.* at 642. It was not until decisions in 1913 and 1916 by the House of Lords that English courts took “a more active role in protecting the employee from undue burdens” of covenants not to compete. *Id.* at 643. The decisions did four things. First, they established that “the rule of reason required different measures to be applied in employee-restraint cases.” *Id.* Second, the burden was placed on the employer to prove that the restraint is reasonable. *Id.* Third, when determining whether the restraint was reasonable the employee’s interests must be considered. *Id.* Fourth, a restraint was unreasonable if its only purpose was to protect the employer from competition. *Id.*

the United States was similar to that in England.<sup>282</sup> By the late nineteenth century, the "reasonableness" standard for enforcing an employee covenant not to compete was accepted.<sup>283</sup>

#### D. MODERN LAW REGARDING EMPLOYEE COVENANTS NOT TO COMPETE

The modern law continues to enforce an employee covenant not to compete if it is considered a "reasonable" restraint of trade. Thus, while the First Restatement of Contracts in 1932 provided that "[a] bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation,"<sup>284</sup> it also adopted the "rule of reason," providing that "[a] bargain in restraint of trade is illegal if the restraint is unreasonable."<sup>285</sup>

The First Restatement provided that:

[a] restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or (b) imposes undue hardship upon the person restricted, or . . . (e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.<sup>286</sup>

The comments further provided that:

[n]either the period of time during which a restraint is to last, nor the extent of the territory that is to be included is conclusive but the length of time and even more the extent of space are important factors in the determination of the reasonableness of a restrictive agreement.<sup>287</sup>

The First Restatement also provided that the following would not impose an unreasonable restraint of trade unless it effected a monopoly:

A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.<sup>288</sup>

But the comments cautioned that:

[a] promise of a former employee will not ordinarily be enforced so as to preclude him from exercising skill and knowledge acquired in

282. *Id.*

283. *Id.* at 644.

284. RESTATEMENT (FIRST) OF CONTRACTS § 513 (1932).

285. *Id.* § 514; *see also* Kreider, *supra* note 258, at 17 ("American courts have upheld contracts restricting future employment so long as the limitations they imposed were reasonable and not injurious to the public.") (footnotes omitted).

286. RESTATEMENT (FIRST) OF CONTRACTS § 515 (1932).

287. *Id.* § 515 cmt. c.

288. *Id.* § 516(f).

his employer's business, even if the competition is injurious to the latter, except so far as to prevent the use of trade secrets or lists of customers, or unless the services of the employee are of a unique character.<sup>289</sup>

The First Restatement test has been summarized as providing that “[a] restraint is reasonable only if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.”<sup>290</sup> Although the First Restatement test was widely used,<sup>291</sup> courts often reformulated the first prong to require the protection of a “legitimate interest.”<sup>292</sup>

The Second Restatement of Contracts in 1981 provided that “[a] promise is unreasonable on grounds of public policy if it is unreasonably in restraint of trade.”<sup>293</sup> It further provided that “[a] promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.”<sup>294</sup> The comments, however, noted that an ancillary restraint is not necessarily invalid.<sup>295</sup> Under two circumstances such a restraint would be invalid because it does not comply with the “rule of reason.”<sup>296</sup> First, a restraint is unreasonable when it “is greater than necessary to protect the legitimate interests of the promisee.”<sup>297</sup> Second, even if no greater than necessary to protect the employer's legitimate interests, the agreement is unreasonable if the employer's “need for protection is outweighed by the hardship to the promisor and the likely injury to the public.”<sup>298</sup>

Simply avoiding competition is not a legitimate interest.<sup>299</sup> Courts have also declined to find a legitimate interest in protecting “general knowledge, skill, or facility acquired through training or experience while working for an employer . . . .”<sup>300</sup> Rather, “[i]n order to enforce a restraint, the employee must present a substantial risk either to the employer's relationships with his customers or with respect to confidential

289. *Id.* § 516 cmt. h.

290. Blake, *supra* note 246, at 648–49; *see also* Carroll R. Wetzel, *Employment Contracts and Noncompetition Agreements*, 1969 U. ILL. L.F. 61, 61–62 (“Whether such an incidental noncompetition agreement will be enforced depends upon its reasonableness as determined by the needs of the person for whose benefit the restraint is imposed, the extent of the hardship imposed upon the covenantor, and the degree to which the restraint interferes with the interests of the public.”).

291. Blake, *supra* note 246, at 648.

292. *Id.* at 649; *see also* John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49, 50 (2002) (noting that courts require employer to have a “protectable interest” in order to enforce non-compete agreement); Orsini, *supra* note 246, at 176 (noting that for a restrictive covenant to be valid it must “protect a legitimate employer interest.”).

293. RESTATEMENT (SECOND) OF CONTRACTS § 186(1) (1981).

294. *Id.* § 186(2).

295. *Id.* § 188 cmt. a.

296. *Id.*

297. *Id.*

298. *Id.*

299. Ingram, *supra* note 292, at 53.

300. Blake, *supra* note 246, at 652.



business information.”<sup>301</sup> With respect to customers,

the possibility is present that the customer will regard, or come to regard, the attributes of the employee as more important in his business dealings than any special qualities of the product or service of the employer, especially if the product is not greatly differentiated from others which are available. Thus, some customers may be persuaded, or even be very willing, to abandon the employer should the employee move to a competing organization or leave to set up a business of his own.<sup>302</sup>

#### E. CONCLUSION REGARDING EMPLOYEE COVENANTS NOT TO COMPETE

In conclusion, employee covenants not to compete were originally considered invalid because they were contrary to the medieval Christian notion that each person has a duty to serve God by working in the station to which he was born and contrary to the apprenticeship system. In the seventeenth and eighteenth centuries, the ban on such restraints started to be relaxed, and by the nineteenth century (when the apprenticeship system was gone), courts were enforcing such restraints if they were “reasonable.”<sup>303</sup> Having moved from status to contract, whether such a restraint was reasonable had nothing to do with one’s duty to God. But because such agreements were considered in restraint of trade and therefore had to be “reasonable” to be enforced, such agreements would never be welcomed fully into the realm of pure contract and its related idea of “freedom of contract.” Thus, on the journey from status to contract the employee covenant not to compete got left behind, and it now inhabits a borderland between contracts that are automatically void as against public policy and those that are enforceable as long as the traditional requirements for the formation of a contract are established.

Unfortunately, a doctrine that provides such agreements will be enforced if “reasonable” provides no guidance unless one knows what factors are considered in deciding whether the restraint is reasonable. As discussed above, in addition to establishing that the covenant is enforceable under traditional contract doctrine (e.g., the rules regarding formation), four factors must be established: (1) the covenant must be supported by a protectable business interest of the employer, which does not include a simple desire to avoid competition; (2) the restriction must be necessary to protect the business interest; (3) the restriction does not impose an undue hardship on the employee; and (4) the restriction does not harm the public.<sup>304</sup> Most jurisdictions place the burden on the employer to prove that the restraint is reasonable.<sup>305</sup>

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301. *Id.* at 653.

302. *Id.* at 654.

303. *See id.* at 638–39.

304. *See supra* Part III.D.

305. *See* Kniffin, *supra* note 245, at 28 n.15 (“[T]oday the reasonableness of a noncompetition covenant must usually be shown by the party who seeks to enforce it, the cove-

Perhaps the most interesting factor in the “reasonableness” test is the requirement that it not place an undue hardship on the employee. Typically, contracts in restraint of trade are considered suspect because of the harm to the public, but employee covenants not to compete are scrutinized with care because of a concern about unequal bargaining power between employer and employee and the fact that the employee may not fully appreciate the hardship to be suffered under the agreement.<sup>306</sup> Accordingly, the special rules regarding the enforceability of such agreements are based not only on concerns about harm to society from reduced competition, but ideas about unequal bargaining power and a paternalistic notion that employees will not fully appreciate the consequences of their promises.

Thus, non-compete law and its “reasonable restraint” approach is a synthesis of various theories of contract law. First, it is premised in part on a desire to increase economic efficiency in that it generally enforces agreements supported by a legitimate business interest and denies enforcement if the employer’s goal is to simply prevent competition. Second, it is based in part on the reliance theory of contracts in that it will only enforce a non-compete agreement if the breach in fact harms the employer. Third, it is based on substantive fairness in that a non-compete agreement will not be enforced if it results in an undue burden upon the employee. The will theory, the consent theory, and the bargained-for exchange theory play little role in current non-compete doctrine. But, as will be discussed, the indeterminacy of non-compete law enables a trial court judge to rely on the will theory, the consent theory, or the bargained-for exchange theory when deciding such cases.

#### IV. WHY A TRIAL COURT JUDGE IS ABLE TO USE HIS OR HER OWN THEORY OF CONTRACT LAW AS A FACTOR WHEN DECIDING EMPLOYEE COVENANT NOT TO COMPETE CASES

In addition to the factors discussed above that must be established to render an employee covenant not to compete “reasonable” (and thus enforceable), this Article proposes that trial judges also take into consideration their individual theories as to why contracts should be enforced. A trial court judge is able to use his or her own theory of contract law as a factor when deciding an employee covenant not to compete case because of the tremendous discretion available to such judges in these cases. This discretion stems from several bases. First, not only is a “reasonableness” test inherently indeterminate, each of the four factors that must be estab-

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nantee. A few cases, however, have placed the burden of proof on the covenantor.”) (citations omitted). Blake defends this position on the grounds that “[t]he employer, having a fuller ‘picture’ of the company’s interests and needs than any employee, should be in a much better position to show that a restraint is no more burdensome than needed to protect the employer’s legitimate interest. The employee, on the other hand, would find it difficult to show that the restraint is unreasonable.” Blake, *supra* note 246, at 648 n.75.

306. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1981).

lished to render a restraint "reasonable" is itself indeterminate, providing the trial court judge with substantial discretion. Second, there are a variety of standard contract doctrines relevant to such disputes that provide the trial court judge with further discretion. Third, such cases usually begin and end with a request for an injunction,<sup>307</sup> and a trial court judge has tremendous discretion when deciding whether to grant equitable relief. To illustrate the tremendous discretion provided to a trial court judge in these cases, each of these bases is discussed below in further detail.

#### A. THE INDETERMINACY OF EMPLOYEE COVENANT NOT TO COMPETE LAW

Each of the four factors that must be established to render an employee covenant not to compete a "reasonable" restraint of trade is indeterminate.<sup>308</sup> For example, determining whether there is a protectable business interest essentially involves determining whether the employee will have an "unfair advantage" when competing against the employer.<sup>309</sup> Although the categories of legitimate business interests are fairly well established,<sup>310</sup> the categories themselves are vague. For example, a protectable business interest includes confidential business information that the employee could use to his or her advantage against the employer.<sup>311</sup> But whether the information is confidential or is sufficiently known in the industry is often a disputed issue. Also, whether the use of the information would truly be harmful to the employer is generally disputed. Although a substantial relationship with the employer's customers is considered a legitimate business interest, determining whether a relationship is "substantial" is usually disputed. Whether training is truly "specialized" and "unique" is likewise usually disputed.

Whether the particular restraint is necessary to protect the business interest is also highly indeterminate. For example, whether a time frame during which the employee is prohibited from competing is reasonable cannot be determined with certainty, and it is likewise difficult at times to determine whether the scope of the prohibition (both in terms of types of work and geography) is reasonable.

Whether the restriction is too burdensome on the employee or the public is likewise difficult to determine with certainty. Because the employee will have taken a job competing against the employer, it is likely there will be no evidence of the employee's ability to obtain work that is not in violation of the covenant not to compete. Also, reasonable persons will disagree as to whether it would be unduly burdensome for an employee

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307. See Turner, *supra* note 5, at 43 ("Enforcement of a covenant not to compete usually begins with an application to the trial court for temporary injunctive relief . . .").

308. See Blake, *supra* note 246, at 648-49.

309. Estlund, *supra* note 13, at 393.

310. See McDonald, *supra* note 9, at 143 (identifying the six types of protectable interests, but recognizing that not all states recognize each identified interest, or to the same degree).

311. *Id.*

to take a job outside of her traditional area of work, and as to how far such an employee should be expected to travel for a job that does not violate the non-compete agreement.

With respect to whether the restriction is injurious to the public because the employee has been competing, there will likely be no such evidence, permitting the trial judge to simply speculate as to the harm that would occur if the employee is restrained. Reasonable persons will also likely disagree in general whether non-compete agreements are harmful to the public interest. Some will believe that the public benefits from “freedom of contract.” Others will believe that restricting employment opportunities hurts competition and therefore is harmful to the public.

B. ADDITIONAL DOCTRINES BEYOND THE “REASONABLENESS”  
REQUIREMENT THAT EXPAND THE TRIAL JUDGE’S  
DISCRETION WHEN DECIDING AN EMPLOYEE  
COVENANT NOT TO COMPETE CASE

In addition to the indeterminacy of employee covenant not to compete law, there are a variety of other doctrines upon which a court’s enforcement of an employee covenant not to compete depends that have nothing to do with whether the covenant is a “reasonable” restraint of trade. Some of these include (1) interpreting the contract language; (2) determining whether the employer committed a material breach prior to the employee’s non-performance; and (3) determining whether the employer has “clean hands.” These doctrines provide further discretion to the trial judge when deciding an employee covenant not to compete case, and each of these bases is discussed below.

1. *Interpretation*

The “[i]nterpretation of a promise or agreement is the ‘ascertainment of its meaning.’”<sup>312</sup> The process of interpreting a contract provides a trial court with substantial discretion regarding whether to enforce an employee covenant not to compete. This is because various rules help keep the interpretation of a contract within the province of the court, and away from the jury. For example, courts in general treat the interpretation of a contract as an issue of law to be decided by the court.<sup>313</sup> Also, under the so-called “plain meaning rule” that is followed by most jurisdictions,<sup>314</sup> “if a writing, or a term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind.”<sup>315</sup> Thus, the court has the power to determine a contract’s meaning without resort to the jury’s fact finding by concluding that the contract’s meaning is plain and unambiguous on its

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312. PERILLO, *supra* note 1, at 128 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981)).

313. *Id.* at 141.

314. *Id.* at 130.

315. *Id.* at 129.

face. Even when, however, extrinsic evidence is admitted to determine the meaning of an ambiguous term, if "after taking the extrinsic evidence into account, the meaning is so clear that reasonable jurors could reach only one conclusion, . . . the question is treated as one of law."<sup>316</sup>

## 2. *Material Breach*

The doctrine that a party's material breach relieves the other party of having to perform his or her contract duties provides a trial judge with further discretion when resolving employee non-compete cases. Although English common law was slow to recognize the mutual dependency of promises in a bilateral contract,<sup>317</sup> in 1773 Lord Mansfield announced that a constructive condition of a party's duty to perform was the performance by the other party of its contract duties that were to be performed first.<sup>318</sup> Since that time, it has been established law that "it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."<sup>319</sup> A material non-performance suspends the other party's remaining duties if the time for performance has not yet passed, and discharges the other party's remaining duties if performance can no longer occur.<sup>320</sup>

Accordingly, if an employee covenant not to compete is included in an employment contract that includes employer promises (such as particular wages and bonuses, or a promise of job security), the employee can assert that the employer materially breached one of these promises.<sup>321</sup> If it is found that there was such a material breach, the employee will be relieved of his or her non-compete pledge.<sup>322</sup> Although the existence of a breach is generally an issue for the jury, as discussed below, this will become an issue for the judge in most non-compete cases.

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316. *Id.* at 141-42.

317. See Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 907 (1942) (noting that there was a "delay in recognition of constructive conditions of exchange" under English common law).

318. *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773).

319. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

320. *Id.* § 237 cmt. a.

321. See Turner, *supra* note 5, at 44 ("the trial court must consider the employee's allegations that the employer committed a prior material breach of a dependent covenant in the contract . . . . If the employer materially breached the contract between it and the former employee prior to the employee's alleged breach of the non-compete agreement, the employee's obligation to comply with the non-compete may be relieved."). "The employer's failure to pay compensation under a contract of employment is the most common material breach available as a defense to employees who have previously signed non-compete agreements." *Id.* at 45. One court has even permitted an allegation of sexual harassment as an alleged breach by the employer of the employment contract. See *Harrison v. Palm Harbor MRI, Inc.*, 703 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 1997).

322. See Turner, *supra* note 5, at 44.

### 3. *Clean Hands Doctrine*

The “clean hands doctrine” provides additional discretion to the trial judge when deciding employee non-compete cases.<sup>323</sup> The doctrine generally provides “that a party cannot seek equitable relief . . . if that party has violated an equitable principle, such as good faith.”<sup>324</sup> The application of the “clean hands doctrine” has, however, also made its way into actions at law.<sup>325</sup> In fact, as recognized long ago by Zechariah Chafee, Jr., “the clean hands maxim is not peculiar to equity, but is simply a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suit for specific relief.”<sup>326</sup> The “clean hands doctrine” extends “to any inequitable, unconscionable, or bad faith conduct that is connected to the case.”<sup>327</sup> The theory is that courts “will not interfere on behalf of a plaintiff whose own conduct in this connection had been contrary to conscience.”<sup>328</sup>

The vague parameters of the clean hands doctrine will provide the trial judge with substantial discretion in an employee covenant not to compete case. The very nature of such cases involves a former employment relationship between the parties, a relationship that was terminated. This will often provide the employee with the opportunity to assert that the employer engaged in some sort of inequitable conduct that should preclude enforcement of the non-compete pledge. For example, the employer might have terminated the employee without good cause or the employee might have quit as a result of employer wrongdoing, and this could be asserted as a basis for denying relief.

### 4. *Trial Courts’ Discretion When Ruling on a Motion for an Injunction*

A trial judge’s discretion is further increased because the typical remedy in cases enforcing a covenant not to compete is an injunction.<sup>329</sup> An injunction is the typical remedy requested for a variety of reasons. First, it can be difficult for an employer to prove its damages to a reasonable

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323. See *id.* at 46 (“A well-known principle of law that cannot be overlooked by the attorney representing the employee in non-compete litigation is that ‘[o]ne who seeks the aid of equity must do so with clean hands.’”).

324. BLACK’S LAW DICTIONARY 286 (9th ed. 2009).

325. See T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63, 65 (2010) (“[A]djudications in state and federal courts evidence the expansion of unclean hands into matters of legal relief.”).

326. Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 1065, 1091–92 (1949). It has been noted that “[t]he work of former practitioner and Harvard law professor Zechariah Chafee, Jr., is the main source of the American experience with the equitable defense.” T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 519 (2010).

327. Anenson, *supra* note 325, at 64.

328. Chafee, Jr., *supra* note 326, at 877.

329. See John Sanchez, *A Survey of Physician Non-Compete Agreements in Employment Under Florida Law*, 35 NOVA L. REV. 63, 84 (2010) (noting that “an injunction is the usual remedy for the breach of non-compete agreements”).

certainty.<sup>330</sup> Second, most employers believe that the harm caused by the breach will be irreversible if permitted to continue during the litigation process. Thus, most employee non-compete cases begin with a motion for a preliminary injunction, and they often end with the court's ruling on the motion.<sup>331</sup>

The nature of an injunction provides the trial judge with substantial discretion for three reasons. First, because an injunction is an equitable remedy, the trial judge acts as the fact finder.<sup>332</sup> Second, the trial judge has substantial discretion in deciding whether to grant an injunction.<sup>333</sup> Third, the elements of an injunction provide the trial judge with substantial discretion. For example, a plaintiff seeking a temporary or preliminary injunction generally bears the burden of proving a substantial likelihood of success on the merits.<sup>334</sup> This burden includes establishing a substantial likelihood of success both on the elements of the plaintiff's

330. See RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981) (providing that “[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty”); *Env'tl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. Dist. Ct. App. 2009) (“The usual remedy in cases involving a valid covenant not to compete is injunctive relief since it is extremely difficult for a court to determine what damages are caused by breach of the covenant.”).

331. From my experience litigating these cases, the case typically ends with the trial court's ruling on the motion for preliminary injunction for several reasons. First, because such motions and the subsequent hearing are expensive, the parties are reluctant to expend more money continuing to litigate. In particular, for an employee who has been preliminarily enjoined, the employee has likely exhausted his or her resources defending against the motion for an injunction and has now been deprived of a source of income. Second, the trial court judge likely addressed the “substantial likelihood of success” element of a request for an injunction, and thus the parties will have a strong indication of which party will ultimately prevail. Third, an employer who loses a motion for an injunction is unlikely to be able to establish its damages to a reasonable certainty at trial and thus faces the prospect of incurring additional expenses with no recovery. Fourth, the deference given to a trial court's injunction decision generally renders an appeal to be not cost effective. Fifth, the losing party might not have the emotional strength to continue litigating. Some of these reasons have been recognized by a non-compete practitioner:

For the employee, defeating the employer's application for a temporary restraining order is of the greatest importance. If this pivotal battle is lost, the employee most likely will not have the emotional or financial resources to prosecute a successful appeal of the nonfinal order granting the temporary injunction. Months of being out of work in the employee's most economically productive occupation will take its toll. Lost contact with former clients eventually results in the permanent loss of those customers.

While the advantages of defeating the application for temporary injunctive relief are obvious in terms of the employee's short term financial status, a victory also enhances the employee's long-term litigation position, as it puts the employee in a much better bargaining position to work out a compromise with the litigious employer.

Turner, *supra* note 5, at 43–44.

332. See *Fed. Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 177 (2d Cir. 2000) (noting that the court acts as the “preliminary factfinder in connection with the preliminary injunction motion . . .”).

333. See *St. Charles Mfg. Co. v. St. Charles Furniture Corp.*, 482 F. Supp. 397, 405 (N.D. Ill. 1979) (“[T]he trial court has substantial discretion to grant a preliminary injunction . . .”).

334. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008).

claim as well as on each of the defendant's affirmative defenses.<sup>335</sup> Accordingly, the plaintiff bears the burden of proving a substantial likelihood of success on any defenses such as a material breach by the plaintiff or the "clean hands doctrine."<sup>336</sup> Thus, the trial judge has the power to find that a plaintiff has not carried its burden of proving a substantial likelihood of success on the merits with respect to the defendant's affirmative defenses.

#### V. TRIAL JUDGES, CONTRACT THEORY, AND EMPLOYEE COVENANT NOT TO COMPETE CASES

How a trial judge will rule in an employee covenant not to compete case is likely based, in part, on the judge's view as to why the legal system enforces (or should enforce) contracts. This conclusion is reached for several reasons. First, as discussed above, contracts scholars do not agree on why contracts are (or should be) enforced, and have proposed numerous conflicting theories. Second, if contracts scholars do not agree on why contracts are (or should be) enforced, trial judges likely also disagree on why contracts are (or should be) enforced. Third, as demonstrated above, the controlling doctrine in an employee covenant not to compete case (including non-compete law, contract defenses, and injunction law) is highly indeterminate. This indeterminacy provides trial court judges with the opportunity to reach decisions for reasons other than contract doctrine, while clothing the opinion in the language of controlling doctrine. Fourth, practitioners and scholars alike agree that the outcome of non-compete cases is very difficult to predict, and that courts reach conflicting decisions in cases with similar law and facts. Fifth, as noted by Professor Joseph Perillo, "very many [appellate] cases have employed flanking devices such as artful interpretation, the exercise of equitable discretion, and even by stretching the equitable doctrine of unclean hands[, in order to deny enforcement]. Other courts basically have sputtered that enforcement would be unjust."<sup>337</sup> If Professor Perillo is correct that there are a substantial number of reported appellate court decisions ignoring established doctrine, it is reasonable to conclude that there are even more trial court decisions that intentionally fail to properly apply established doctrine. This is particularly true because state trial court judges rarely write opinions,<sup>338</sup> removing an incentive to properly apply the law.

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335. *Erico Int'l Corp. v. Doc's Mktg., Inc.*, No. 1:05-CV-2924, 2007 WL 108450, at \*7 (N.D. Ohio Jan. 9, 2007), *vacated on other grounds*, 516 F.3d 1350 (Fed. Cir. 2008).

336. *Id.*

337. Perillo, *supra* note 14, at 88–89.

338. See MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 44 (1999) (noting that state trial court opinions are rarely written). If an injunction is granted, however, an opinion must generally be provided with findings of fact and conclusions of law. Joseph S. Berman, et al., *Preliminary Injunctions and Temporary Restraining Orders*, 1 *FEDERAL CIVIL LITIGATION IN THE FIRST CIRCUIT* n. 21 (2011).



All of these factors point to the conclusion that a factor in deciding employee covenant not to compete cases is the judge's belief as to why the legal system should enforce contracts.<sup>339</sup> This, in turn, suggests that practitioners should recognize that arguing contract doctrine might be necessary, but not sufficient, when handling an employee non-compete case, and that the work of contract theory scholars should be incorporated into any arguments (although not explicitly).<sup>340</sup> This section, therefore, addresses how judges who adopt each of the previously discussed theories of contract law would likely approach an employee covenant not to compete case.

#### A. JUDGE FOLLOWING THE RELIANCE AND RESTITUTION THEORY

For a judge who believes that contract law is principally based on protecting the promisee's reliance interest and restitution interest,<sup>341</sup> the judge's primary focus will be on whether (and to what extent) the employer relied on the employee's non-compete promise. If the trial judge believes that the employer would not have hired the employee had the employee not signed the non-compete agreement, this might work in favor of the employer. Importantly, though, such a judge will not likely view the simple hiring of the employee as significant employer reliance. The trial judge will view the non-competition agreement as collateral to

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339. Thus, even if Professor Farnsworth was correct when he suggested that "future scholars looking for potential topics might look elsewhere [than contract theory]," Farnsworth, *supra* note 18, at 209, contract theory likely plays an important role in explaining the unpredictable nature of non-compete cases.

340. The use by trial judges of different contract theories when deciding employee covenant not to compete cases is particularly harmful at both the contracting and the enforcement stage. For those employers who are in fact seeking to protect a legitimate business interest, it will create a disincentive to provide employees with valuable information. It will also cause such employers to pay employees less money than they otherwise would. The employer will discount the employee's wages based on the chance that the employee will be permitted to engage in unfair competition after the termination of employment. For those employers who are simply seeking to prevent competition, it will encourage such employers to use non-competition agreements because even if the contract is unenforceable under established legal doctrine, the contract might still be enforced by a particular trial judge. For employees, the unpredictable nature of such cases might lead to the idea that such agreements are generally not enforceable, thereby causing employees to undervalue their promises. At the enforcement stage, the unpredictability makes it very hard to settle such cases. As an initial matter, such cases are generally very difficult to settle because employers fear that a failure to enforce such an agreement will result in other employees breaching the terms of their non-compete agreements. Thus, even when a non-compete agreement does not appear reasonable, an employer has an incentive to proceed because the chance of success is greater than it would be based solely on an application of legal doctrine. For an employee facing the loss of a livelihood, the employee confronted with a reasonable non-compete agreement might as well defend to see if the result will be contrary to established doctrine. There is, unfortunately, no easy solution to this problem. Unless the doctrine governing employee non-compete agreements is made more determinate, trial judges will continue to have tremendous discretion in these cases. This, in turn, will permit such judges to use their theory of contract law as a factor when deciding these cases. But, to the extent this factor is recognized as a part of the trial judge's decision-making process, attorneys in such cases can at least fashion their arguments with such an understanding.

341. See *supra* Part II.C.1.

the employee's promise to work for the employee and the employer's return promise to pay compensation, even if the non-competition agreement provides that part of the consideration for the employee's non-compete promise is being hired and paid wages. Thus, inasmuch as the employer received the employee's labor, the trial judge will not likely view the employer's reliance as significant if the only argument is that the employer would not have hired the employee.

The insubstantial nature of the reliance interest in such a situation is demonstrated by determining the remedy if the employer sued an employee for breach of a non-competition agreement and sought damages to protect its reliance interest.<sup>342</sup> The so-called "reliance interest" is the promisee's "interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made."<sup>343</sup> When the only alleged employer reliance is hiring the employee, the employer would be faced with the difficult task of demonstrating that it would have been in a better position had it never hired the employee. And if the only harm asserted is the mere hiring of the employee, the employer will have to convince the trial judge that had it not hired this particular employee, it would have hired another employee who either would have worked for less compensation, or who would have been more productive. This will likely be too speculative to carry much weight with a trial judge who believes contracts should be enforced to protect the reliance and restitution interest.

Although such a judge also believes that contracts should be enforced to protect the promisee's restitution interest, such a judge likewise will not consider the restitution interest as particularly strong if the only alleged benefit conferred was the payment of wages. As previously discussed, because the non-compete agreement will likely be viewed as collateral to the employee's promise to work and the employer's promise to pay wages, it will be difficult for the employer to establish that the employee (who performed the work) has been unjustly enriched.

Accordingly, even though non-compete contracts rarely remain executory (like contracts in general, according to Atiyah), and would likely never be enforced if they were (because of the lack of a legitimate business interest supporting enforcement), the trial judge who believes contracts should be enforced to protect the promisee's reliance interest or restitution interest will require reliance that is more directly tied to the employee's non-compete promise. An exception, however, will likely be when the employer has paid the employee a substantial salary based in reliance on the employee's non-compete promise. In such a case, the salary (and thus the reliance) is tied directly to the employee's non-compete

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342. See RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) ("As an alternative to [damages based on the expectation interest], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.")

343. *Id.* § 344.

promise. There would likely be a substantial enough reliance interest and restitution interest to warrant enforcement in a case like this (according to such a judge).

Thus, rather than focusing on the employer's reliance in hiring and paying the employee, such a trial judge will focus on the strength of the employer's legitimate business interest justifying enforcement, and will also focus on the irreparable harm requirement in an injunction proceeding. The judge will look for the employer to have given something to the employee (tangible or intangible) in reliance on the employee's non-compete promise, such as specialized training, access to customers, or access to confidential business information. Note that each of these alleged legitimate business interests includes both reliance as well as restitution. In each case, the employer has provided something to the employee that the employee can now use in competition against the employer. Such a judge will carefully scrutinize the alleged legitimate business interest to ensure that it truly is something the employer would not have given the employee had the employee not made the non-compete promise (the reliance aspect), and whether the information truly can be used by the employee to her benefit (the restitution aspect). Such a judge will also carefully scrutinize whether the employee is, in fact, threatening to use that information to the direct harm of the former employer.

These judges will not be particularly concerned about failing to enforce a promise, inasmuch as they will view enforcement of a contract as primarily based on avoiding harm or preventing unjust enrichment, and not based primarily on the voluntary assumption of a duty by the promisor. Whether these judges will be more or less likely than other judges to excuse non-performance will depend on whether their reliance theory includes the belief that contract law and tort law have similar purposes (and perhaps should be assimilated). For those judges who follow this strain of reliance theory, they will be more willing than other judges to excuse the employee's nonperformance of the non-competition pledge on the grounds that the nonperformance was "reasonable." These judges, therefore, will likely give careful consideration to why the employment relationship ended. If the employer terminated the relationship without just cause (even if the employment relationship was on an "at will" basis), or the employee quit with good cause, the trial judge might consider this as a factor favoring non-enforcement (because the employee has not acted unreasonably). These judges will also likely consider whether the employee signed a lengthy form contract and thus might not have been sufficiently aware of the non-compete provision, or whether the employee lacked the bargaining power to object. In such situations the judge might view the employee's non-performance as reasonable. But for those judges who follow a reliance theory and believe there should still be a strict division between contract law and tort law, they will enforce the agreement as long as there has been reliance by the employer or a benefit provided.

In general, judges who follow the reliance and restitution theory will issue rulings beneficial to employees and detrimental to employers. These judges will require the employer to demonstrate substantial harm caused by the employee's alleged breach, or unjust enrichment of the employee. Also, if such a judge believes contract law and tort law serve the same purpose, such a judge might be more willing to excuse an employee's non-performance on the grounds that the employee has acted reasonably.

## B. JUDGE FOLLOWING THE WILL THEORY

For those judges who believe contractual liability is (or should be) based on the moral obligation to keep one's voluntarily assumed obligation,<sup>344</sup> the judge's primary focus will be on whether the employee understood that she was promising not to compete against the employer. Thus, although presumably paying homage to the objective theory of contracts, such a judge will, in fact, apply a subjective theory of contracts and seek out a "meeting of the minds" between the parties. For this judge, the factors commonly associated with procedural unconscionability (which focuses on whether a "voluntary meeting of the minds was possible"),<sup>345</sup> including "unfair surprise" and the "absence of meaningful choice,"<sup>346</sup> will be important. Thus, such a judge is likely to deny enforcement if the employee is unsophisticated or if the promise was buried in a lengthy and complicated form contract of employment.<sup>347</sup>

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344. See *supra* Part II.C.2. (discussing the will theory of contract).

345. *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993).

346. The doctrine of unconscionability is generally divided into so-called "procedural unconscionability" and "substantive unconscionability," both of which must usually exist for a contract to be unenforceable under the unconscionability doctrine. *Id.* at 1299. "Procedural unconscionability" refers to defects in the bargaining process, as opposed to unfairness in the contract's terms ("substantive unconscionability"). *Id.* Procedural unconscionability itself can be divided into two categories: (1) unfair surprise, see UCC § 2-302 cmt. 1 (1977) (noting that "[t]he principle is one of the prevention of . . . unfair surprise"); and (2) absence of meaningful choice. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (referring to "no meaningful choice" or "no real alternative."); see also Barnett, *supra* note 168, at 632 (noting that "[u]nconscionability is associated with the problems of unequal bargaining power, unfair surprise, and substantively unreasonable terms"). These two sub-categories of procedural unconscionability are distinct because a party might lack a meaningful choice while at the same time being fully aware of the contract's terms. Conversely, a party might be unfairly surprised to discover (after entering into the contract) a particular term in a contract, despite having had a meaningful choice as to whether to enter into the contract. It is important to recognize that the procedural unconscionability analysis is not (and could not be, under the objective theory of contract formation) the same as the will theory of contracts. Procedural unconscionability seeks to determine whether a so-called "meeting of the minds was possible," not whether a "meeting of the minds" in fact occurred. *Collins*, 621 N.E.2d at 1299.

347. The hostility the will theory should have for form contracts was explained by Professor Barnett as follows:

[I]f a subjective view of contractual assent is taken, then form contracts pose a very serious problem. If a person must consciously have had the particular terms in mind when signifying agreement to them, then most terms in most form contracts lack assent. Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form con-

But, if this judge concludes that the employee understood what she was promising, the strength of the legitimate business interest is not likely to be carefully scrutinized. This judge will view contract law and tort law as having strict doctrinal separation. Thus, upon concluding that the employee understood the non-compete pledge, this judge will not be particularly willing to excuse non-performance of the non-compete agreement based on an absence of harm to the employer or an argument that non-performance was "reasonable." The judge will also not be particularly receptive to arguments that the non-compete promise is unenforceable based on a lack of consideration (because will theorists believe that the consideration requirement is misguided and inconsistent with the moral obligation to keep a promise).

For this judge, as long as the employee understood what she was promising and had a meaningful choice to not enter into the agreement, the immoral party is not the employer but the employee who promised not to compete and then reneged. The employee invoked the convention of promising and invited the employer's trust, and then used the employer by breaking her promise and abusing the employer's trust.

In general, these judges' rulings will benefit employers and be detrimental to those with little bargaining power. Many non-competition agreements will be stand-alone agreements that the employee will read, or they will be included in employment agreements that are not as lengthy as many form contracts. Also, most employees will have a choice in that they can seek employment elsewhere. Accordingly, these judges will generally view the non-compete agreement to be enforceable based on the moral obligation to keep a promise.

### C. JUDGE FOLLOWING THE CONSENT THEORY

For a judge following the consent theory,<sup>348</sup> as long as the judge concludes that the employee *manifested* consent to the non-compete agreement, the judge will be inclined to enforce the agreement. Whether the employee read or understood the non-compete provision will not be particularly important to this judge (for example, consent theorists generally believe form contracts should be enforced because the party manifested consent).<sup>349</sup> Also, the judge will not be particularly receptive to arguments regarding a lack of consideration because, like will theorists, con-

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tracts all of the time. Every contracts professor and law student knows this from personal experience. Everyone reading these words, including yours truly, has at one time clicked the "I agree" box of a software license agreement without reading the terms in the scroll-down box. Hence the problem: How can someone be said to have "actually"—meaning subjectively—consented to terms of which one was completely unaware? To impute subjective assent to the person indicating consent to a form is obviously to engage in a fiction. Under a subjective theory of contractual assent, very few, if any, of the terms in a form contract would be assented to.

Barnett, *supra* note 168, at 628–29.

348. See *supra* Part II.C.3. (discussing the consent theory of contract).

349. See Barnett, *supra* note 168.

sent theorists maintain that the consideration doctrine is misguided. Such a judge will also not scrutinize the employer's alleged legitimate business interest as much as other judges because it is the employee's manifestation of consent to the agreement, not the harm caused by the employee's breach, that is the key issue.

Of course, the consent theory is based on the idea that a party has consented to transfer the promisor's entitlement. This requires that the judge conclude there was an entitlement that was capable of being transferred. Thus, it is possible that such a judge will believe that a promise to refrain from competing is not an entitlement that should be transferable. But in general, these judges will issue rulings favorable to employers because the employee will have manifested an intent to be legally bound to the agreement by signing it.

#### D. JUDGE FOLLOWING THE BARGAIN THEORY

For those judges who believe contractual liability is (or should be) based on the "bargain theory,"<sup>350</sup> the judge's primary focus will be the process of entering into the contract. If, as argued by Grant Gilmore, this theory makes it difficult to enter into a contract, these judges will carefully scrutinize the agreement to ensure there existed consideration for the employee's non-compete promise. These judges will likely look for consideration beyond mere employment at will. But once this judge determines that there was a bargained-for exchange with respect to the employee's non-compete promise, such a judge will not scrutinize the amount of consideration.<sup>351</sup> Also, upon determining that there was a bargain, the objective theory of contracts will apply and liability will be strict.<sup>352</sup> Thus, these judges will likely apply standard contract doctrine with respect to formation, but once a contract is found will likely not carefully scrutinize the alleged legitimate business interest. They will also be resistant to arguments that an employee's non-performance should be excused based upon the various defenses previously discussed (interpretation, employer material breach, or clean hands doctrine), or because non-performance was "reasonable." In general, these judges' decisions will generally favor the employer, once the employer is able to establish consideration.

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350. See *supra* Part II.C.4. (discussing the bargain theory of contract).

351. Under the bargained-for exchange theory for enforcing promises, the amount of consideration provided in return for the promise is irrelevant to determine whether there was, in fact, consideration provided. See *RESTATEMENT (SECOND) OF CONTRACTS* § 79(b) (1981) (providing that "[i]f the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged"); *id.* cmt. c ("Ordinarily . . . courts do not inquire into the adequacy of consideration. . . . [T]he requirement of consideration is not a safeguard against imprudent and improvident contracts except in cases where it appears that there is no bargain in fact.").

352. See *supra* Part II.C.4. (discussing the bargain theory of contract).

## E. JUDGE FOLLOWING THE EFFICIENCY THEORY

For those judges who believe that contractual liability is (or should be) based on promoting economic efficiency,<sup>353</sup> the issue will be whether non-compete agreements in general, or perhaps the particular non-compete agreement at issue, increase society's welfare. How such a judge will respond to a non-compete case is difficult to predict because law and economics scholars themselves have different approaches to when such agreements should be enforced.<sup>354</sup>

In general, a judge seeking to increase economic efficiency will be a strong believer in "freedom of contract,"<sup>355</sup> based on the notion that any contract entered into knowingly and voluntarily will move resources to their most valued uses, thereby increasing society's welfare.<sup>356</sup> But such a judge might also be interested in circumstances that might undermine the mutual or societal gain assumption, such as bargaining process defects or negative externalities.<sup>357</sup>

Usually, for these judges, whether there was a "market failure," or in other words, a defect in the bargaining process, might be important. For example, these judges might focus on whether there was an asymmetry of information between the parties or a lack of meaningful choice.<sup>358</sup> An asymmetry of information that might exist is the enforceability of non-compete agreements in general. For example, an employee might incorrectly believe that non-compete agreements are unenforceable, and therefore not give appropriate consideration to the provision. An employee might also lack a meaningful choice because it might be customary for all of the employers in the particular industry to require a non-compete agreement as a condition of employment.

These judges might also police the bargain to make sure that the employee did in fact receive fair value for her non-compete promise. Thus, if the employee is terminated shortly after starting work, the trial judge might not view the exchange as being mutually beneficial. Although such an analysis is contrary to the general view that the adequacy of the exchange is not assessed—and would also reduce the ability of parties to rely on contracts—if it was the employer who terminated the employee

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353. See *supra* Part II.C.5. (discussing efficiency theory as basis for enforcing contracts).

354. See Andrew J. Gallo, Comment, *A Uniform Rule for Enforcement of Non-Competition Contracts in Relation to "Termination Cases,"* 1 U. PA. J. LAB. & EMP. L. 719, 722-24 (1998) (discussing different views of law and economics scholars with respect to employee covenants not to compete).

355. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 308 (1999) ("[F]reedom of contract principles have been closely aligned with law and economics theorists.").

356. See *supra* Part II.C.5.

357. See Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2309 (1995) (stating that concerns of the law and economics tradition with respect to the mutual gain assumption and full contractual enforcement includes defects in the bargaining process and effects on third parties).

358. Mark A. Glick, et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 391 n.205 (2002).

(perhaps without good cause), the employer's own conduct would be the cause of the employee's promise being unenforceable. Such an *ex post facto* approach to efficiency, however, is generally rejected by law and economics scholars.

Because employee covenants not to compete have a negative externality in that they prevent a prospective employer from hiring the employee, as well as reduce competition, these judges might also focus on the strength of the employer's alleged legitimate business interest supporting the non-compete agreement.<sup>359</sup> For example, law and economics scholars often favor the enforceability of employee non-compete agreements on the grounds that such agreements encourage employers to provide employees with training and access to customers and confidential information, all of which helps the employee be more productive.<sup>360</sup> If, however, there is no such legitimate business interest, and the employer is simply attempting to prevent competition, such a judge is likely to consider the agreement as decreasing societal welfare.

Of course, such a judge might believe that it is too difficult and time-consuming to decide the efficiency of every non-compete agreement that is the subject of a lawsuit. Such a judge would enforce or not enforce such agreements based upon a decision whether such agreements increase economic efficiency in general. The judge might also believe that the indeterminacy of such an individualized approach would be harmful to employers and employees alike, who would be unable to predict whether their agreements are enforceable.

In general, because this type of judge will start with the premise that "freedom of contract" is beneficial to society, this judge will generally reach results that are favorable for employers and detrimental for employees. If, however, it can be shown that there was some bargaining process defect, or that the employer is simply trying to prevent competition (as opposed to having a legitimate business interest supporting the non-compete agreement), this judge is likely to refuse enforcement.

#### F. JUDGE FOLLOWING THE SUBSTANTIVE FAIRNESS THEORY

For judges who follow a substantive fairness theory,<sup>361</sup> the judge will carefully scrutinize the agreement to determine whether, in the judge's opinion, it is "fair." It is important, however, to keep in mind the distinction between fairness at the time the parties entered into the contract, and *ex post facto* fairness. The substantive fairness theory underlying the unconscionability doctrine is based on the fairness at the time of con-

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359. See, e.g., Alan Schwartz, *Interpreting Torts, Explaining Contracts*, 15 HARV. J.L. & PUB. POL'Y 747, 769 n.68 (1992) ("A contract term may advance the parties' interests but be inefficient because it imposes costs on third parties that exceed the contracting parties' gains.").

360. Rubin & Shedd, *supra* note 250, at 93.

361. See *supra* Part II.C.6. (discussing the substantive fairness theory).



tracting.<sup>362</sup> But the substantive fairness theory used by judges in employee covenant not to compete cases will likely also involve a post hoc assessment of the agreement.

With respect to the substantive fairness at the time of contracting, such a judge will likely look at whether the employer has provided additional consideration for the non-compete promise, beyond the wages expected for an employee who had not signed such a non-compete agreement. Not only will such a judge seek additional consideration for the non-compete pledge, the judge will place great weight on whether the amount of consideration is fair. These judges will also carefully scrutinize the geographic and temporal scope of the restraint, as well as the breadth of the types of work prohibited.

With respect to the substantive fairness after the breach, the judge will carefully consider the effect enforcement would have, as well as the effect non-enforcement would have. Such a judge will look closely at the employer's legitimate business interest allegedly supporting enforcement. The judge will also pay particular attention to the burden imposed upon the employee. If the employee is unlikely to find employment without breaching the agreement, the judge will be inclined to deny enforcement. These judges will also consider why the employment relationship ended. If the employer terminated the employment without just cause (even if the employee was employed on an at will basis), or the employee quit with good cause (particularly if the good cause is attributable to employer conduct), the judge is likely to consider enforcement to be unfair. Also, if the employment relationship was short, the court is likely to consider that the consideration provided for the non-compete promise was not sufficient.

In general, because of the harsh effect such agreements can have on employees, these judges will usually render rulings favorable to low-level employees. With respect to high-level executives, these judges will likely render rulings favorable to employers, based on the notion that these employees were well-compensated for their promises and received access to confidential information.

## VI. CONCLUSION

Although the value of contract theory to the legal profession has been questioned, one area in which it offers substantial benefits is identifying what factors (other than contract doctrine) an individual judge considers important in a contract dispute. When legal doctrine is indeterminate, and the judge has substantial discretion in deciding a contract dispute,

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362. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) ("If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.") (emphasis added).

such considerations might play an important part in the judge's decision. An employee non-compete case is likely such an area.

How a trial court will respond to such a case is notoriously unpredictable. Although this unpredictability is caused by several factors, one of its causes is the indeterminacy of legal doctrine in this area. This, in turn, permits trial judges to rely on their own theory as to why contracts are (or should be) enforced. Accordingly, when litigating such a case, relying upon legal doctrine, while necessary, is not sufficient. Rather, counsel should incorporate arguments designed to appeal to as many of the competing contract theories as possible.



# **Casenotes**

