MORE ON THE DEATH OF CONTRACT

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I. PROFESSOR GILMORE AND THE GRAVEYARD THEORISTS

There is today in the law school subject of contracts a growing stream of thought which I will call the "graveyard theory." In a recently published series of lectures entitled *The Death of Contract*, Professor Gilmore begins: "We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore."[1]

Gilmore's conclusion is based upon an argument which can be summarized as follows: Contract was "launched" by Langdell in 1871, given its broad philosophical base soon afterward by Holmes, elaborated into specific doctrine by Williston, and carried forward into modern times by the first *Restatement*. In its origin, the subject of contract marked a sharp break with the past; it was not produced by a continuous development in case law. The doctrine as it finally emerged from Williston was narrow, abstract and limited to the "bargain theory" of consideration. Even while Williston was creating his elaborate structure, however, courts were not following his formulations. Cardozo and the New York Court of Appeals decided cases which did not fit. Corbin, who confronted Williston and the other "Restaters" with an avalanche of opinions in which the plaintiff recovered without showing a bargain, forced them to include section 90.[2] This produced a schizophrenic effect, because section 90 could not be reconciled with the Holmesian requirement of a bargain contained in section 75.[3] As the law continued to develop, sec-

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1. G. GILMORE, THE DEATH OF CONTRACT 3 (1974) [hereinafter cited as GILMORE]. The author is Sterling Professor of Law at Yale Law School.

2. RESTATEMENT OF CONTRACTS § 90 (1932):

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

3. *Id.* § 75:

> (1) Consideration for a promise is
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> (a) an act other than a promise, or
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> (b) a forebearance, or
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> (c) the creation, modification or destruction of a legal relation, or
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> (d) a return promise
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> bargained for and given in exchange for the promise.

tion 90 swallowed up section 75. If we add together restitution, quasi-contract, promissory estoppel and the expanded consequential damages allowed by recent glosses[4] on *Hadley v. Baxendale*,[5] we conclude that contract, having sprung up suddenly out of tort's trespass on the case, is now sinking back down into tort and becoming indistinguishable from it.

This is a summary of the basic argument. It concludes in effect that contract went out with laissez-faire. The curious thing about the study is not its novelty, though considerable novelty is there. The curious thing is that the study does not, and could not ever because of its brevity, show whether contract is "dead," alive and well, or even flying headlong into places where nineteenth century scholars never dreamed it could go. The study analyzes only a few cases; it mainly treats the more familiar ones in the law of consideration. It argues, for example, that as promissory estoppel moves into commercial relations erosion appears in the "bargain theory," and the chance that promissory estoppel could become a theory of liability separate from contract throws a bridge, perhaps, between contract and tort. The same tendency toward merger is remarked in *The Heron II*,[6] which pushes the measure of damages awarded in contract cases closer to the measure awarded in tort. The study does not, and indeed cannot show, however, through its brief survey of changes in doctrine, that contract is "dead." It can only show that it is moving in the areas considered. Why the title, why the assumption, and why then such an effort? The answer is that the "death" of contract has been discovered in several empirical studies which Professor Gilmore apparently accepts as valid and upon which he seems to rely to provide the background for his own conclusions about developments in doctrine. This essay will comment upon whether those studies are reliable starting points in a discussion of contract doctrine and also upon Professor Gilmore's specific conclusions.

In 1956, James Willard Hurst set out the broad structure of his views on the function of contract law in nineteenth century America.[7] According to Hurst, the dominant public policy during that period was to facilitate and encourage "the release of individual creative energy."[8] More specifically, con-

4. *See, e.g.*, The Heron II, Kaufos v. C. Czarnikow, Ltd., [1967] 3 All E.R. 686 (H.L.).

5. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

6. Kaufos v. C. Czarnikow, Ltd., [1967] 3 All E.R. 686 (H.L.).

7. J. HURST, LAW AND THE CONDITIONS OF FREEDOM (1956).

8. Impatient confidence in productivity, and hence in any positive or restrictive uses of law which would free more units of production, was natural to our situation . . . . We continually experienced the tangible accomplishments of individuals, small groups, and local effort, with a heady sense of living in a

tract law in the nineteenth century reflected the dominance of the free market as the principal means for allocating labor and natural resources. As the market developed, the need to rely upon another's performance became imperative. The law of contract provided the framework for this development because it offered general freedom from restraint within the broad assumption that whatever arrangement was worked out privately by the parties would also be approved publicly by the law.[9]

Less than a decade later, Hurst consolidated and buttressed these ideas in a detailed account of the impact of contract law upon the lumber industry in Wisconsin.[10] It is in this second study that one first sees some of the conclusions of the "graveyard theory." Hurst analyzed seven hundred cases decided from 1836 to 1915. They presented issues ranging from damages for breach of covenant to build a sawmill to the enforcement of liquor bans in labor agreements. He concluded:

> Two general characteristics stand out boldly . . . (1) They [the seven hundred cases] are almost all contract-law cases first, and lumber-industry cases second. (2) They show the application of an already well-defined and stable body of legal doctrine, with little change over the period of the industry's lifetime.[11]

These are important conclusions, and so are the reasons for them. The reasons justify quotation:

> [B]y the second half of the nineteenth century contract was a firm body of doctrine, of such generality that it could embrace the problems of a new industry growing at headlong pace, without felt

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> fluid society in which all about him all the time one saw men moving to new positions of accomplishment and influence. Our background and experience in this country taught faith in the capacities of the productive talent residing in people. The obvious precept was to see that this energy was released for its maximum creative expression.

Id. at 7.

9. Hurst does remind us that even during headlong laissez-faire, courts refused to enforce illegal bargains, contracts against public policy and those without consideration. *Id.* at 11. Recently, it has been remarked that the nineteenth century saw the victory of the "will" theory of contract over an earlier "equitable" view of contract held in the eighteenth century. The view is that the older conception, which allowed juries to examine the substantive fairness of exchanges, could not survive a market for future delivery of goods which did not contemplate giving and receiving equivalents in value so much as a fluctuating expected value determined solely by the judgment of the parties. To protect this form of market, expectancy damages were necessary, and the law could not inquire into the adequacy of consideration. *See* Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974). For similar conclusions about the "will" theory, see Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

10. J. HURST, LAW AND ECONOMIC GROWTH (1964).

11. *Id.* at 289.

> need to mold itself much to the peculiarities of the industry. Taken together, these seven hundred cases show comparatively little significant variation in the shape of the contract law they declare for lumber, as compared to the law that applied to other dealings in the market. The generality in contract concepts which made this possible was the source of both strength and weakness. It was a source of strength, so far as it meant that the legal order could efficiently and smoothly adapt itself to varied circumstances. But there was weakness, so far as contract law achieved this generality by intense devotion to a quite limited range of policies, abstracted from the living context in which they arose. Thus there was strength in doctrine which readily treated timberland or standing timber as marketable goods in a community in which they were major assets. But there was a weakness in doctrine too abstract to acknowledge that there might be good reasons in public policy why trade in timberland or standing timber should not be treated as if it were trade in grain or dry goods. The weakness was a defect inherent in a quality. The prime quality or function of contract law was to serve the market's need of an assured framework of dealing; certainty might be disturbed by intrusion of a wide range of policy variables. The forms of contract served insistent demands of immediate dealings. But they did nothing to urge men's attention toward the broader or deeper context of transactions.[12]

It is important to notice here the conclusion that contract is "abstract," in the sense that it applies itself in the same way to lumber as it does to grain or dry goods. This is a "weakness," because the lumber industry may have particular demands not met by a wholly abstract set of rules. But it also is a "strength," because the lumber industry had to develop from nothing into what it became according to *some* legal arrangement, and no special set of arrangements peculiar to lumber existed, obviously, before the industry developed. General contract theory was there waiting in abstraction, ready-made, and it was used.

The "generality" or "abstractness" of contract law was also disclosed in another way:

> The second general characteristic of the law expressed in these seven hundred lumber-contract cases was the comparative absence of change in doctrine or administration, so far as contract law came into appellate litigation.[13]

The significance of this conclusion resides in the fact that the industry increased enormously in scale and complexity over the period covered by the

12. *Id.* at 289-90.
13. *Id.* at 292.

study. Significant new issues of public policy were posed. How did the law of contract respond to these newer issues?

> [E]ssentially the same contract law provided the legal setting for enlarged systems of dealing; indeed, the new policy problems arose largely because the generality of contract adapted itself with so little question to radically new directions of growth.[14]

Thus, the conception is that contract law is unchanging as well as abstract. Indeed, it is its abstraction which discourages it from being changed through adaptation to the needs of particular applications. If one changes the doctrine to facilitate lumber, for example, can it still be applied as readily to grain or dry goods? Some means must exist, of course, for subjecting an important industry to public policy. In the Wisconsin lumber industry, it was done by legislation. Laws were passed for the recording and measurement of logs, the creation of liens for labor and supplies, to increase damages for timber trespass and to allow lumbermen to incorporate.[15] These enactments did not modify basic contract doctrine. Instead, they "were in their nature auxiliary to contract."[16] Thus we have the finding that when real change is needed in the legal relationships of a particular business, the change does not come by altering the general theory of contracts; it comes by legislation which circumvents it. It would appear that contract law, by its very nature, was unable to effect the specific changes which were needed. It should be pointed out, however, that in Wisconsin lumber only minor legal encroachments of any kind were made upon the large domain left to private ordering; almost all agreements were in fact carried out.[17] Thus, the *instrument* of agreement dominated, despite legislation. Finally, it appears from the study that contract litigation was not significant at all in the real decisions which guided the industry.

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14. *Id.*
15. *See id.* at 291.
16. *Id.* at 293.
17. Hurst also reported that

> the day-to-day flow of activity saw a vast multitude of contract dealings which went through to consummation as the participants arranged that they should. And in Roujet Marshall's tales of the building of the Weyerhaeuser organization in the northwest, or Isaac Stephenson's recollections of the growth of the industry in northeastern Wisconsin, we are reminded again that nothing in this record is more striking than the absence of legislation or litigation challenging the basic contractual framework within which the big firms were created. On either of these counts, we are in a measure dealing with marginal phenomena when we focus on lawsuits in the Supreme Court. In this perspective, the Supreme Court record does not require that we make any major change in the picture of contract as a frame of doctrine within which sweeping power was conceded to private operators in the market to fix the allocation of timber resources and the directions of timber industry growth.

Id. at 297.

Hurst's empirical approach was followed in a succeeding study by Professor Lawrence Friedman,[18] who divided more than five hundred contract opinions by the Wisconsin Supreme Court into three different historical periods and then charted the changes which appeared over those periods. Period I covered the years from the organization of the Wisconsin Territory (1836) to the Civil War; Period II ran from 1905 to 1915; and Period III from 1955 to 1958. Friedman concluded that in Period I the court experienced its greatest period of creativity and initiative. These were the years when the "abstract" theory of general contract law was elaborated and applied in its purest form. The general business framework, as well as the particularized rules of adjustment, were furnished by the court in common law decisions.[19] By Period II, however, pioneer times had passed; strikes, boycotts, trusts and the "class struggle" formed the setting. "The economic struggle . . . now centered not over position in the race to develop the economy, but over the status quo—a struggle to exact a greater share in existing product, existing wealth."[20] In this period the contract cases brought to court showed "the increasing use of contract law, not for purposes of policing an abstract system, but for solving disputes of unique particularity." The court responded with a "retreat from abstraction," and a "growing interest in the precise and particular facts of the immediate case."[21] This was accompanied by a general

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18. L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965). For two interesting reviews, see Jones, Book Review, 13 U.C.L.A.L. REV. 882 (1966); Speidel, Book Review, 1967 WIS. L. REV. 301.

19. [I]n Period I, the age of abstraction, the Wisconsin Supreme Court . . . possessed a degree of creativity and initiative which in most senses it has not since enjoyed . . . . [T]he notion of abstraction vested in the court the primary function of framing the rules which were to govern the essentials of business transactions: the rules of initiation as well as adjustment . . . . [T]he legislature was concerned with particular derogations from abstraction—in a sense, with adjustment.

L. FRIEDMAN, *supra* note 18, at 194. This "abstraction," in the sense of ignoring the "particularities" of the specific subject matter dealt with, was in Friedman's view called for by the times:

> It was fact, not theory, that land was often bought and sold as a colorless commodity. It was fact, not theory, that the residents of Wisconsin were mobile men, not rooted to a particular community or to ancient customs which fixed persons from birth with a given social status. It was fact, not theory, that the economy was in a state of rapid growth. Opportunities were not limited by all the built-in and conservative values which inhere in a locality of age-old settlement, whose cultural shape has been decisively molded by existing social patterns.

Id. at 186.

20. *Id.* at 189.

21. *Id.* at 190. "The heavy use of such malleable concepts as waiver and estoppel shows how the court, faced with inherited rules, but with facts which looked the other way, was inclined to use these formulae of escape from the rigors of abstraction." *Id.*

decline in the court as a source of important public policy. For the most part, the court served "to work out details and iron out inconsistencies arising under expressions of policy originating elsewhere."[22]

By the time of Period III, the change from "abstraction" to "particularity" had become even greater. "[J]udges showed more and more willingness to examine common law doctrines in the light of 'justice' or 'common sense' or 'public policy.' Precedent and legal reasoning were not always enough."[23] This abandonment of abstract doctrine—the very framework of activity a century earlier—was possible because of the type of case the court was asked to hear. The court was "increasingly left with a group of very personal cases, . . . problems which arose out of and because of the marginality of the litigants."[24] The cases treated, for example, the problems of franchised dealers and commission salesmen—those whose business relationships were vague and needed definition, or were wholly new. As soon as practices in a trade became regularized, contract law was left behind. "Two generations was longer than most contract type-problems survived."[25] The court could afford to become "particular," and abandon general contract doctrine, precisely because that doctrine was no longer responsible for guiding important business decisions. The general legal framework of economic activity in Period III was prescribed by legislation, which laid down the broad rules of business fairness and created administrative agencies to implement and elaborate those rules. What did this mean for contract doctrine?

> In part, the activism of government in Period III was a judgment that the market was a failure; in another sense, it was a judgment that the economy consisted not of a market, but of many markets, each with its appropriate modality of control. In such a context, the law of contract remained alive, not, however, as the organic law of the state's economic system—a kind of constitution for business transaction—but as one among many. It was the system of rules applicable to marginal, novel, as yet unregulated, residual, and peripheral business, and quasi-business transactions . . . . "Contract" stepped in where no other body of law and no agency of law other than the court was appropriate or available.[26]

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22. *Id.* at 197.

23. *Id.* at 191. Friedman notes that many of the technical doctrines of contract law, such as the Statute of Frauds, consideration and the rules of offer and acceptance are usually afterthoughts when used as defenses to an action. If the court is prepared to look into "motivation" in order to achieve "particularized" justice, the technical doctrines must give way.

24. *Id.* at 201.

25. *Id.* at 202.

26. *Id.* at 193.

In sum, we have the general finding that contract law was coextensive with the free market, and shared its decline from a golden age in the nineteenth century to the "residual character" it shows today. The general market no longer exists; we have instead an aggregation of separate markets each regulated by non-contract law as soon as its development reaches an important size. Only the marginal areas, the bits and scraps of activity not coming within a larger market area, are left for classical contracts.[27] The implications are grim for the current law school course.

By now, it should be clear that Friedman's study—an important extension of the method and general ideas of Hurst—provides part of the coffin in which the general theory of contracts is thought to be interred. Before appraising Friedman's ideas or methods, it would be best to continue the tour of the literature by turning to yet another empirical study, dealing this time with more recent business behavior. The tomb of classical contracts was not sealed by Professor Friedman alone.

In 1963, Professor Stewart Macaulay presented the results of interviews with sixty-eight businessmen and lawyers representing forty-three companies and six law firms, together with a study of business forms from 850 firms—all in an effort to measure the extent to which contract law affects modern business decisions.[28]

First, Macaulay found that in a great number of cases exchange relationships are not created with contract law in mind. Detailed planning is often done for special, important transactions,[29] but more routine transactions are only planned to the extent that "boilerplate" forms set out the conditions

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27. Friedman's conclusions, which are similar to Hurst's, can be summarized as follows: contract is abstract: "it does not matter whether the subject of the contract is a goat, a horse, a carload of lumber, a stock certificate, or a shoe. As soon as it matters—e.g., if the sale is of heroin, or of votes for governor, or of an 'E' Bond, or labor for twenty-five cents an hour—we are in one sense no longer talking pure contract." *Id.* at 20. When it is necessary for the law to change in response to changes in business conditions, the changes "do not look in form like changes in the law of contract; they look like labor law, insurance law, social security or public utility regulation. *Id.* at 23. Contract is static: "By definition, no revolution could take place because contract law acted as a residual category, its content determined mainly by what law did in other respects affecting economic behavior. Instead, types of transactions marched in and out of the area of contract." *Id.* Finally: "The most dramatic changes touching the significance of contract law in modern life . . . came about . . . through developments in public policy which systematically robbed contract of its subject-matter." *Id.* at 24.

28. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

29. The sale of the Empire State Building is cited as an example. "More than 100 attorneys representing 34 parties, produced a 400 page contract." *Id.* at 57.

under which they are made.[30] Of seven lawyers with business practices, five "thought that businessmen often entered contracts with only a minimal degree of advance planning;" preferring instead to rely on "a man's word," a "handshake," or "common honesty and decency."[31] The findings are particularly interesting with regard to the "battle of the forms." Almost all of the purchasing agents interviewed said they assumed a deal was binding even though, as frequently happened, the conditions on the back of the seller's form were inconsistent with those on the back of the buyer's form.[32] Nine of sixteen sales managers said that "frequently no agreement was reached on which set of fine print was to govern."[33] In one instance, a manufacturer audited its records over a five-day period in four different years to see how often the "battle of the forms" had produced a contract in response to orders from its customers. In roughly seventy percent of the cases, no contract was technically formed.[34] Finally, even though requirements contracts are probably not enforceable in Wisconsin, interviews showed that Wisconsin firms regularly used them with knowledge of house counsel.[35]

Macaulay's second finding was that contract law is even less significant in the *adjustment* of business exchanges than in their creation.[36]

> [A]ll ten of the purchasing agents asked about cancellation of orders once placed indicated that they expected to be able to cancel orders freely subject to only an obligation to pay for the seller's major expenses such as scrapped steel. All 17 sales personnel asked reported that they often had to accept cancellation.[37]

When a dispute did arise, it was usually settled without reference to whatever contract existed between the parties.

> If something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently.[38]

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30. Of 1,200 companies replying to requests for forms, 850 companies "used some type of standardized planning." Only the very small businesses did not attempt to standardize. *Id.* at 58.

31. *Id.*

32. *Id.* at 59. Among the more famous cases dealing with this issue is Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

33. Macaulay, *supra* note 28, at 59.

34. *See id.* at 60.

35. *See id.*

36. *See id.* at 61.

37. *Id.*

38. *Id.* Macaulay reports that "[o]nly five of the 12 purchasing agents had ever been involved in even a negotiation concerning a contract dispute where both sides were represented by lawyers; only two of ten sales managers had ever gone this far." *Id.*

This relatively minor reliance on contract law is explained in several ways. First, a general set of behavioral norms is said to be accepted in most business dealings: "(1) Commitments are to be honored in almost all situations; one does not welsh on a deal. (2) One ought to produce a good product and stand behind it."[39] Other considerations which bear on the manner in which businessmen deal with each other may include the desire to continue a fruitful relationship which goes beyond the scope of the particular matter at hand; a concern for one's reputation in the trade; the continuing personal relations between salesmen and purchasing agents, as well as between engineering staffs which render mutual assistance; or even the fostering of purely social contacts between top executives. In this "friendly" atmosphere, contract law can even be a liability. To insist on having every remote contingency covered in advance "indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade."[40] Contract litigation is also found to have specific drawbacks. Not only may it end the business relationship, but it also demands unrecoverable outlays which cannot be justified in view of the possible judgment.[41] Thus, litigation is principally limited to the "one shot deal," the unforeseen disaster, or the contract growing out of speculation.[42] In the ongoing type of business arrangement, it is the non-legal sanction that causes an agreement to be carried out. In sum, Macaulay finds that contract law—in the sense of the classical rules for dealing laid down in its technical doctrines—is of little relevance either to the decision to form a business agreement, or to the adjustments needed to carry it out.

With the review of these three studies, one has toured the foundation of the "graveyard theory" of contracts.[43] The studies argue that the present law school course is obsolete—basically because it still limits itself to the problems set forth by Langdell in 1871. Because contract doctrine is abstract and incapable of change, it has not and cannot respond to any need for reform. Carried forward by Williston and the *Restatement*, these old problems

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39. *Id.* at 63.

40. *Id.* at 64.

41. To mount a trial, especially in another city, is expensive. "Top management does not travel by Greyhound and stay at the Y.M.C.A." *Id.*

42. An example given is the wrongful termination of a dealer's franchise by a manufacturer. The relation has ended, and no other sanction is likely to work. *Id.* at 65.

43. Other studies have also been made. *See* Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System—Part II*, 1965 WIS. L. REV. 740; Comment, *The Statute of Frauds and the Business Community: A Reappraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957). And of course there is the celebrated article by Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).

are no longer thought to reflect the significant issues facing modern business.[44] As soon as a problem gets big enough to require recurring treatment, it is moved out of contract into some new area of the law.[45] Even in the small domain which is left to contract, however, it is the non-legal sanction which really serves to encourage performance.[46] In view of the kinds of cases left for contract law to solve, one must ask whether the effort spent in law school to refine contract doctrine can still be justified. To continue with the present material "could be compared to a zoology course which confined its study to dodos and unicorns, to beasts rare or long dead and beasts that never lived."[47]

II. The Decline of Contract

It is against the background of these empirical studies that one must view Professor Gilmore's book. The main argument of the book is that contract, abruptly and perhaps adventitiously created as a separate subject, is merging back into tort whence it came.[48]

A. The Classical Theory

In a brief chapter entitled "Origins," the book begins with the familiar observation about Langdell—that he launched "the idea that there was—or should be—such a thing as a general theory of contract."[49] Gilmore makes the point, however, that it was really Holmes who laid the broad philosophical foundations for the classical theory.[50] It was Holmes who formulated the

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44. *See* Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 Wis. L. Rev. 805, 819.

45. *See id.* at 812. "Contracts casebooks . . . lovingly preserve many construction-contract cases that, whatever 'fundamental' issues they may raise, are obsolete as *construction contract cases* because the construction business is no longer conducted that way." *Id.* at 813.

46. *See id.* at 814.

47. L. Friedman, *supra* note 18, at 25.

48. *See* Gilmore 87.

49. *Id.* at 13.

50. *Id.* at 14. *See* Howe, *Introduction* to O.W. Holmes, The Common Law at xiv-xv (1963):

> Many of Holmes's contemporaries, both in England and in the United States, were as aware as he was of the great importance of discovering the truly basic concepts in the common law—concepts with a deeper philosophic significance than those which had sufficed to preserve a clumsy sort of order while the forms of action ruled the common law. Those forms, if not yet abolished everywhere, were slipping unregretted into the graves which Benthamite reformers had dug for them. While they governed the practice and the minds of lawyers it had not been necessary to conceive a theory of contract, a theory of tort, or a theory of possession. Assumpsit, covenant, and debt; trespass, case,

bargain theory of consideration, who was not prepared to reimburse the reliance later protected by section 90 of the *Restatement* and who affirmed that people had a right, by paying damages, to "break their contracts."[51] Gilmore quotes Holmes as follows:

> It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.[52]

Gilmore then remarks:

> Now the vulgar error that any benefit or any detriment would do has been exploded. It is clear that there are benefits and benefits, detriments and detriments. No matter how much detriment a promisee may have suffered, he has not, thereby, necessarily furnished a consideration. Nor does he have, so far as Holmes takes us, any right to redress or even any claim on our sympathies, no matter how reasonable his detrimental reliance may have been, not even if, in the course of incurring his detriment, he has conferred a benefit on the other party. Absent "consideration," the unhappy promisee has no right or claim. And nothing is "consideration" unless "the parties have dealt with it on that footing." There must be, in the final mysterious phrase, "the relation of reciprocal conventional inducement, each for the other, between consideration and promise." That indeed is "the root of the whole matter."[53]

These general principles established by Holmes were, according to Gilmore, transformed by Williston into the familiar rules of contract doctrine. This was done only after some bending and bruising of decisional precedents.

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and trover; ejectment, detinue, and replevin—these forms of action had been forms of analysis and substitutes, accordingly, for generalizing thought. The task of Holmes's generation and the generation which preceded his, was that of discovering a philosophically satisfactory and practically useful scheme or order for the common law.

See also Laski, *The Political Philosophy of Mr. Justice Holmes*, 40 YALE L.J. 683 (1931).

51. O.W. HOLMES, THE COMMON LAW 230 (1963).

52. GILMORE 20, *quoting* O.W. HOLMES, *supra* note 51, at 236.

53. GILMORE 20.

The old favorite of *Dickinson v. Dodds*[54] is given as one example. That case held that an offer had been effectively revoked because the offeree, before acceptance, learned from a third party that the offeror had already sold (or was intending to sell) the property to another. Although the offer was to be left open until 9 a.m. on Friday, and the offeree tried to accept it at 7 a.m. on Friday, the court said there was no meeting of the minds because the offeree had learned on Thursday of the offeror's change in plans. In the opinion, no one suggested that the doctrine of consideration was relevant, so Williston is criticized for citing *Dickinson* as the leading case for the proposition that "offers unless under seal or given for consideration may be revoked at any time prior to the creation of a contract by acceptance."[55] The familiar duo of *Harris v. Watson*[56] and *Stilk v. Myrick*[57] serve as another example. In *Harris*, a shipmaster during a voyage promised his seamen that he would pay a five guinea bonus if they would perform some extra work to save the endangered ship. In *Stilk*, the shipmaster agreed to divide among the crew the wages of two seamen who deserted at Cronstadt (it being impossible to replace them) if the crew would work the ship back to London shorthanded. The court denied recovery in both cases, saying in *Harris* that the "rule was founded on public policy,"[58] and in *Stilk* that the "agreement was void for want of consideration." Here, Williston is criticized for lumping the cases together as authority for a "rule" that a modification in the duty of a party to a contract is not binding unless supported by "additional" consideration.[59] Finally, we have *Foakes v. Beer*,[60] the approval of which has drawn Williston considerable criticism.

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54. [1876] 2 Ch. D. 463 (C.A.).

55. GILMORE 30.

56. Peake 102, 170 Eng. Rep. 94 (K.B. 1791).

57. 2 Camp. 317, 170 Eng. Rep. 1168 (K.B. 1809).

58. "[I]f sailors were . . . in time of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make." 170 Eng. Rep. at 94.

59. Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him . . . . On principal the second agreement [*i.e.*, the Cronstadt agreement in *Stilk*] is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion.

GILMORE 23, *quoting* 1 WILLISTON, CONTRACTS § 130 (1st ed. 1920).

60. 9 App. Cas. 605 (P.C. 1884). In *Foakes*, a creditor agreed to forgive the interest

It is generally agreed that *Foakes* was a bad decision, both in result and in method. People should be able to compromise debts. It is also true that the seamen's cases express strong tones of public policy which are not reflected in Williston's abstract formulation of doctrine. Finally, *Dickinson* did turn on assent. However, one may ask whether this is really a basis for making Williston a villain. In an article written in 1921, where Williston discussed (and condemned) the narrow view of the nineteenth century toward promises in restraint of trade, he said:

> Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare and that the only ultimate test of proper limitations is that provided by experience.[61]

The main argument for the decline and fall of contracts is presented in the last chapter of Gilmore's book, which he begins by arguing that the bargain theory of consideration was never as widely accepted as Holmes and Williston pretended. Many cases had held that consideration existed even though no bargain, in the technical sense, could be found. Cardozo's opinions in *De Cicco v. Schweizer*,[62] *Allegheny College v. National Chautauqua Bank*[63] and *Wood v. Lucy, Lady Duff-Gordon*,[64] are cited to show that the Holmesian formula was not the law in New York. However, the Holmes-Williston formula eventually became accepted as the definition of consideration, though not wholly supported by the cases. It was still necessary,

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on a debt if the debtor would agree to pay it off in installments. The debtor did so, but then the creditor sued to recover the interest. The court, relying on an earlier decision, held that the creditor's promise was not binding because the debtor had given no consideration; the duty to pay off the debt was already owing under the parties' original agreement, so the debtor incurred no additional detriment by paying it off and the creditor received no benefit by receiving what was already due. Of course, as the lawyer for the defendant Foakes had argued, "Mankind have never acted on the doctrine."

61. Williston, *supra* note 9, at 374.

62. 221 N.Y. 431, 117 N.E. 807 (1917). The court held, in an action to enforce a father's promise of an annuity to his engaged daughter, that each party to the engagement was under a duty to carry it out; and thus by doing so furnished no consideration for the father's promise. However, consideration was found in the forebearance by both parties, acting together, to exercise their mutual right to rescind.

63. 246 N.Y. 369, 159 N.E. 173 (1927). A gratuitous pledge to a college endowment fund was enforced by implying a promise on the part of the college to "perpetuate the name of the founder of the memorial."

64. 222 N.Y. 88, 118 N.E. 214 (1917). Lucy promised Wood the exclusive right "to place her indorsements on the designs of others" in exchange for half the profits. Wood was to have the right to do so for one year, but Lucy secretly placed her indorsements herself and kept the profits. Lucy said Wood had given no consideration to support her promise, since he had not bound himself to anything at all. Cardozo held that Wood's promise should be implied, the arrangements being "'instinct with an obligation,' imperfectly expressed." *Id.* at 91, 118 N.E. at 214 (citation omitted).

therefore, to explain the many decisions enforcing promises which were not bargains. If consideration meant bargain, a different phrase was required: thus, promissory estoppel emerged.[65] The *Restatement* did not use the word estoppel, but it incorporated in section 90 the distinctly nonbargain ground of detrimental reliance as a basis for enforcing promises. According to Gilmore, the eventual triumph of section 90 over its rival, section 75, shows the decline of the Holmesian formulation.

> Original § 90 . . . was exposed to the world naked of Comment and provided with four ambiguous illustrations as its sole capital. Text and illustration together took up less than a page. Revised § 90 with its Comment and Illustrations runs to over twelve pages and the original four Illustrations have grown to seventeen. . . .
>
> The principal change from *Restatement (First)* rests, however, in the elaborate Commentary which has been provided. The reliance principle, we are told, may have been, historically, the basis for "the enforcement of informal contracts in the action of assumpsit."
>
> "Certainly [the Comment continues] reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange. . . . This Section thus states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains."
>
> Thus the unwanted stepchild of *Restatement (First)* has become "a basic principle" of *Restatement (Second)* which, the comment seems to suggest, prevails, in case of need, over the competing "bargain theory" of § 75.[66]

The next symptom of decay is found in the liberalization of recovery in various cases where benefit has been conferred on the defendant.[67] By expanding the theory of unjust enrichment, and by liberalizing the rules of "substantial performance," the law is moving away from the bargain idea on the benefit side as well as the detriment side. Promissory estoppel, Gilmore notes, is merely the twin of unjust enrichment: the latter applies to the case where the plaintiff has conferred a benefit on the defendant; the former applies when the plaintiff has simply suffered a loss through reliance on the defendant's promise.[68] The old problem of the "illusory promise" has also been put to rest, so that people can now rely upon the enforceability of re-

65. This concept, of course, was not new. *See* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898).

66. GILMORE 71-72.

67. *See id.* at 73.

68. *Id.* at 88-89.

quirements contracts. The now exploded theory of mutuality of obligation has followed suit. And, insofar as remedies are concerned, Gilmore observes that even *Hadley v. Baxendale*[69] is showing strain. The recent decision in the *Heron II*,[70] as mentioned above, makes the measure of liability for breach of contract more similar to that for torts.

Finally, the emergence of promissory estoppel as a distinct form of liability may point the way to a new fusion between contracts and torts.

> The most recent, and quite possibly the most important, development in the promissory estoppel or § 90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision. This line, if it continues to be followed, may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation. . . . By passing through the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory. And if we choose to follow the alternative route of recovery under theories of quasi-contract or unjust enrichment—§ 89A in *Restatement (Second)*—the argument that the contract limitations no longer apply seems to be quite as strong as it is in the § 90 cases. If we manage to get that far, the absurdity of attempting to preserve the nineteenth century contract-tort dichotomy will have become apparent even to the law professors who write law review articles and books . . . .[71]

From this analysis of changing doctrine, Gilmore draws his final conclusion:

> Speaking descriptively, we might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort." Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. . . .
>
> We have had more than one occasion to notice the insistence of the classical theorists on the sharp differentiation between contract and tort—the refusal to admit any liability in "contract" until the formal requisites of offer, acceptance and consideration had been satisfied, the dogma that only "bargained-for" detriment or benefit could count as consideration, and notably, the limitations on damage recovery. Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of

69. 9 Ex. 341, 156 Eng. Rep. 145 (1854).
70. Kaufos v. C. Czarnikow, Ltd., [1967] 3 All E.R. 686 (H.L.).
71. GILMORE 90 (citations omitted).

> tort. The dykes which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. . . . We 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. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.[72]

This, then, is Gilmore's principal thesis. It is stimulating and very well put. The tour of familiar problems in doctrine makes fresh and telling points against Holmes and Williston. Does it, however, demonstrate the "death" of contract? Perhaps one should distinguish between the "death" of contract from a theoretical point of view—from the point of view of doctrinal separateness from "tort"—and from a practical point of view—from the point of view of the actual use of general contract law in exchange transactions. Professor Gilmore's analysis is directed only to the theoretical side. Has he demonstrated by his discussion of developments in promissory estoppel, quasi-contract and the measure of damages that contract and tort are being merged? It would seem the answer is no. How does one explain in tort, for example, the enforcement of a wholly executory contract upon which one has spent nothing in reliance? Here, one wants to "gain" from one's "bargain," not be restored to the pre-contract status quo. Whenever one's expectancy is greater than one's reliance or any benefit conferred by part performance, the recovery must depend upon a promise. It was the modern market place which demanded that contractual liability reach this extent.[73] If contract is to be merged into tort, is the theory of tort now to include a rationale for such recoveries? Or is contract no longer to protect a pure expectancy? Professor Gilmore furnishes no answers.

It is true, of course, that promissory estoppel and quasi-contract have ex-

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72. *Id.* at 87-88 (citations omitted). The idea that contract and tort are merging has been explored before. Morris Cohen, in discussing the various theoretical bases for contract liability, observed that under the now popular injurious reliance theory, "the whole question of contract is integrated in the larger realm of obligations, and this tends to put our issues in the right perspective and to correct the misleading artificial distinctions between breach of contract and other civil wrongs." Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 578 (1933).

73. *See* Horwitz, *supra* note 9, at 946-52.

panded at the expense of the narrower view of Holmes and Williston. It is quite valuable to have this so ably pointed out. But it is difficult to see how the expansion of those doctrines supports an argument that the other side of contract theory—the protection of the promisee's expectancy interest in his bargain—was therefore weakened in any way or made to depend upon some basis for recovery other than a promise.

B. Promissory Estoppel and Contract Theory

Promissory estoppel has indeed been one of the most interesting areas of development in contract theory. Professor Gilmore does not discuss *Hoffman v. Red Owl Stores, Inc.*,[74] the leading case for the proposition that promissory estoppel may provide a basis for liability separate from contract. In *Hoffman*, the promise was found to be insufficiently definite to form a contract even if it had been accepted, yet the court held that for liability under section 90 the promise need not be "so comprehensive as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee."[75] In effect, the court found promissory estoppel to be an independent basis for liability.[76] The cases decided since *Hoffman* appear to be divided on the issue of whether section 90 liability is separate from that of contract. In *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*[77] and *Turtle Creek Square, Ltd. v. New York State Teachers Retirement System*[78] the courts, in refusing to follow *Hoffman*, held that in a section 90 action the defense of the Statute of Frauds is only avoided where there has been a second promise to execute a writing. Of course, if section 90 were a new ground for liability separate from contract, the Statute of Frauds defense would be inapplicable. Likewise, in *Boddy v. Gray*,[79] the court refused to enforce the promise where the terms were not definite enough to form an "enforceable agreement." In support of the *Hoffman* result are *H.W. Stanfield Construction Co. v. Robert McCullan & Son, Inc.*[80] and *Associated Tabulating Service, Inc. v. Olympic Life Insurance Co.*[81] In the former, the court deemed immaterial the defendant's argument that the action must fail because of lack of mutual assent

74. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).
75. *Id.* at 698, 133 N.W.2d at 275.
76. *Id.*
77. 16 Ariz. App. 415, 493 P.2d 1220 (1972). *See also* Bevins v. Dickson Electronics Corp., 16 Ariz. App. 105, 491 P.2d 494 (1971).
78. 432 F.2d 64 (5th Cir. 1970).
79. 497 S.W.2d 600 (Tex. Civ. App. 1973). *See also* Ziese v. Ramada Inns, Inc., 463 F.2d 1058 (7th Cir. 1972).
80. 14 Cal. App. 3d 848, 92 Cal. Rptr. 669 (Ct. App. 1971). The court relied upon Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (Sup. Ct. 1958).
81. 414 F.2d 1306 (5th Cir. 1969).

since a promissory estoppel theory is not premised upon the existence of a contract. In the latter, the court found insufficient evidence to support a claim that a five-year contract had been formed binding the defendant to have its data processing needs met by a computer concern. However, the court did find that the preliminary negotiations were sufficient to establish a claim for promissory estoppel. In short, it is by no means clear, nor even likely, that promissory estoppel has supplanted contract theory.

It is undeniable that the promissory estoppel cases have changed the scope of liability in an area where the traditional rules of Williston either did not recognize it at all or awarded full expectancy damages by manipulating the rules of offer and acceptance. The real importance of this advance will be in the (non-gratuitous) negotiation of business deals. There is a great deal more honesty and flexibility in simply reimbursing the promisee's reliance in a case where no full bargain was reached but where the promisor's actions have nevertheless damaged the promisee. This additional flexibility takes nothing away from the general idea of contract, however. The decision to grant or withhold relief in these cases can be made only in light of the factors which have always guided the decision of contract (as opposed to tort) issues. For example, was there in fact a promise? Is it just to hold that one party was bound at a point in the negotiations where the other party was still free to withdraw? To what extent would such liability discourage the freedom which is desirable in negotiations? Indeed, the entire question may best be treated as one of breach of a "contract to bargain."[82] The cases decided since *Hoffman* make it clear that contract principles will continue to dominate judicial decisions in this area.

If one wished to inquire whether contract were being absorbed by tort, there are other areas of development more fruitful than promissory estoppel. In product liability cases, for example, there has been a preference for the tort action of strict liability because contract defenses (such as privity) can be avoided. Professor Gilmore points this out.[83] He does omit to add, however, that this tort characterization extends only to those tort principles rele-

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82. *See* Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673 (1969). Knapp has pointed out that in cases such as *Hoffman* the parties may have "agreed to agree," and yet have one of three possible intentions: each party may regard himself and the other as free to withdraw for any reason; as fully bound unless an excuse exists which would excuse performance of an ordinary executory contract; or as not completely bound, but nevertheless "committed to the deal" in the sense of being bound to try in good faith to reach some agreement. For further discussion, see Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969); Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559 (1970).

83. GILMORE 92-94.

vant in solving the particular problem presented. If the question is liability for personal injuries to consumers of bad food, then tort policies for distributing social risks should apply. However, if the question is the liability of a manufacturer of component parts to a manufacturer of assembled products for the failure of a component to perform as specified, then the commercial claim for money damages should be governed by contract principles of fairness between the parties based upon their promises.

Perhaps the clearest example of all on the question of merger between contract and tort is section 524A of the proposed *Restatement of Torts*.[84] This section would make a seller liable in tort to a buyer for innocent material misrepresentations which induce a sale. Damages would equal the difference between what the buyer gave and what he received. There is a lively argument today over the question of whether this tort action— in which the buyer would be allowed to keep the goods and sue for damages— should be permitted when there are defenses which would preclude recovery in contract for breach of warranty. What is the difference between an innocent misrepresentation of material fact which induces a sale (a tort action) and a breach of warranty (a contract action)? Perhaps we are dealing with what Professor Hill calls "breach of contract as a tort." As he very ably points out,[85] the effect of the tort characterization is to avoid the parol evidence rule and possibly other contract defenses as well. In contract, for example, the buyer may rescind for a material misrepresentation and void the exchange, but ordinarily he must return what he has received. The alternative to rescission is to enforce the exchange by keeping the goods and suing for damages. Where the buyer rescinds, resort to parol evidence is permissible notwithstanding an integrated writing; where the buyer enforces, he may not have the benefit of a bargain made orally where an integrated writing exists. Under section 524A, however, the buyer in a tort action would be allowed to keep the goods despite an integration, show the oral misrepresentation and recover as restitutionary damages the difference between what he received and what he gave. Obviously, if this view is adopted, tort will

84. RESTATEMENT (SECOND) OF TORTS § 524A (Tent. Draft No. 3, 1958). The section reads as follows:

> (1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from action in reliance upon it, is subject to liability to the other for the harm caused by his justifiable reliance upon the misrepresentation, even though it is made without knowledge of its falsity or negligence.
>
> (2) If such a misrepresentation is made without knowledge of its falsity or negligence, the damages recoverable for it are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.

85. Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974); Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973).

have supplanted contract in an area of potentially greater importance than that covered by developments in promissory estoppel and quasi-contract. Whenever the value of what the buyer gave is equal to the value of the goods as represented, the buyer gets his expectancy despite traditional contract defenses. Professor Hill has noted that the courts, despite being repeatedly urged to do so, have not adopted this view.[86]

The question of whether contract is alive and well is a hard one. Hurst, Friedman and Macaulay have made a strong case that it is not. Gilmore's short tour of doctrine obviously was inspired by their work[87] and is understandable only in light of it because, standing alone, Gilmore's observations do not show that contract is "dead"—either from a doctrinal perspective or from an empirical perspective. By assuming, however, the validity of the conclusions reached by the "graveyard theorists," one might find in the erosion of Williston's rules an additional side of the general point already established. If the conclusions of the "graveyard theory" become conventional wisdom, we might see more "studies in the decay of doctrine" following in Gilmore's wake.

Again, is contract alive and well? Or, what is its utility in the day of rent control, insurance, labor and utility regulation, retail price maintenance, food and housing subsidies, land-use control, form warranties and freezes on prices and wages?[88] It would require an empirical study far more vast in scope than those already done to answer that question. Until such a study is made, an example and some tentative observations will have to suffice.

III. Contract Law As a Social Ordering Device

A. Contract and Litigation

It is best to begin by pointing out a principal weakness in the "graveyard theory"—it equates the importance of litigation as a means of social control with the importance of contract law as a means of social control. There can be little doubt that litigation has decreased enormously in importance during the twentieth century. As the small, sharp trading Yankee entrepreneur has been replaced by the conglomerate corporation, decisions in the economy have moved from the "invisible hand" working through innumerable independent operators, to the more powerful and more visible hands which work

86. Hill, *Breach of Contract as a Tort*, 74 Colum. L. Rev. 40, 50 (1974). *But see* W. Prosser, The Law of Torts 710-14 (4th ed. 1971).

87. "The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond." Gilmore 95-96.

88. *See* F. Kessler & G. Gilmore, Contracts, Cases and Materials 12 (2d ed. 1970).

through centralized economic planning.[89] To influence decisions in the planned markets of today it is necessary to make laws which operate prospectively. Litigation operates essentially in retrospect, to declare rights and duties as they existed at some point anterior to the decision. The only prospective effect of litigation is in the importance of a case for stare decisis, or in its interpretation of a statute. In public law, where decisions are mostly directed to officials, or in tort, where most harm is not planned, the prospective effect of litigation is considerable and courts serve as principal sources of the law. In contracts, where the object is to plan, it is somewhat more difficult for courts to generate law because in any case which arises the party adversely affected by a change in doctrine can plead unfair surprise. More important than this, however, is the complete inability of litigation to formulate, through the slow process of stare decisis, the bodies of detailed regulation necessary to deal with the complex planning in industries such as insurance, housing and securities. It is simply not feasible to generate a securities law or a housing code through stare decisis. One must lay down the rules in advance and notify those affected by any change before putting it into effect. If abuses exist, one cannot wait for the trial and error process of deciding individual cases.

B. Contract and Social Ordering

If one measures the usefulness of contract law by the extent to which modern business is controlled through precedents established in contract litigation, one will find that contract law is not very useful. The truth is, however, that *litigation* is becoming less important as a source of law—irrespective of the subject matter—because of the way our economy functions. This is especially so in contract, which deals exclusively with planning. It should come as no surprise that business ethics have recognized the need in a planned economy for performance of agreements. This would indicate, if anything, that the regime of private ordering is stronger than ever. In Dean Pound's words: "Wealth, in a commercial age, is made up largely of promises."[90] If one wishes to measure the importance of contract law, one must look beyond litigation.

The importance of general contract law lies in its support for the regime of social ordering through private agreement which it is still the object of the specialized branches of law to facilitate. In insurance law, labor law, commercial law and the law of landlord-tenant, the rules exist to facilitate private ordering. Labor law, for example, encourages agreement because

89. *See* J. GALBRAITH, THE NEW INDUSTIAL STATE 22-45 (1967).
90. R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

agreement is the only way to arrive at a solution to many labor problems. Legislation has intervened to set a floor on wages, require extra payment for overtime and prohibit (among other things) acts which impede bargaining; but legislation has not and probably will never decide the basic issue of how much a given private employee should be paid—that is left to bargaining. Judicial intervention, in the form of injunction, has been of notoriously little effect. In insurance and landlord-tenant law, matters have been legislatively removed from private agreement because of the inequality of bargaining power, but the actual operation of the insurance industry and the rental housing market still depend upon competition among buyers and sellers to supply the motive force. Sales law under the Uniform Commercial Code, as under the old Uniform Sales Act, still operates basically as a facility; the parties may dispense with it by specifying that it will not apply, or avail themselves of it by allowing it to apply through implication.[91] It is there to use, or not use, as the parties wish. In many ways, Article Two acts as a convenient dictionary for defining terms left undefined by the parties.[92] The main point here is that the specialized branches of law created by legislation—where contract has been "robbed" of its subject matter—all contain large areas which are left to private ordering and which are governed by general contract law. Moreover, it is only through the making of private agreements in the unregulated part of these industries that the industries go forward. Without voluntary agreements the "law" of these industries would have no purpose and would make no sense unless the industries were operated as public utilities or direct governmental services.[93] Until they are, the basic problems created by the regime of private ordering will continue to dominate legislation. Contract issues, such as what conduct is necessary for the formation of an agreement, what evidence is reliable in showing an agreement, what meaning should be given to the terms, how much of a deficiency in one party's performance is necessary to excuse the other's and what remedies should be available, will all have to be taken into account. Professor Macaulay has noted, for example, that in drafting the recent legislation to regulate fran-

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91. *See, e.g.*, UNIFORM COMMERCIAL CODE §§ 1-102, 2-719; UNIFORM SALES ACT § 71.

92. For some interesting views on the UCC and the death of contract, see Speidel, *Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822.

93. *See* Macneil, *Whither Contracts*, 21 J. LEGAL ED. 403, 408 (1969), for the view that there are many common elements in all the types of contractual transactions treated as separate subjects in law school, and that unless the common elements are studied together we will "lose some of our understanding of the functions and techniques of contracting and of contract law in the various transaction-type areas themselves."

chises between automobile dealers and manufacturers, these basic contract issues were paramount.[94] Here, as in labor legislation, the drafters limited the freedom of the parties, but in a way designed to force them to have some kind of *contract*. It is difficult to see in this any decline in the usefulness of contract as a social institution.

C. Abstraction as Strength

A second weakness in the "graveyard theory" is its failure to recognize the strength in contract law's abstractness. As Hurst observed in his study of the Wisconsin lumber industry, general contract principles furnished the legal means for getting the industry underway. Before it developed, *some* ready-made rules were necessary to enable the industry to grow to a point where particularized treatment was possible. Because of its flexibility, general contract law was available from the start. Thus, we have an instance where contract's abstractness was precisely the quality which made it useful. Does the abstractness and hence the flexibility of general contract law still serve as a device for regulating new economic relationships? At least one example comes to mind—the recent decisions implying warranties in residential leases.

Until a few years ago, the relations of landlord and tenant were governed by the property concept of the lease as the conveyance of an interest in land. In rural society, the principal value of a lease had been in the land, so the landlord was under no obligation to repair any defects in the dwelling.[95] As conditions changed, and most tenants became city dwellers, it was necessary to adjust the common law to the needs of urban life. This was finally recognized in *Javins v. First National Realty Corp.*,[96] the leading case for the proposition that residential leases should be considered as contracts rather than conveyances. The *Javins* court stated the problem as follows:

> The city dweller who seeks to lease an apartment on the third floor

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94. "The questions of what is a failure to perform a contract duty, whether a failure is a material one, and whether there are any excuses bear a striking resemblance to the problems dealt with by traditional contract law." Macaulay, *supra* note 43, at 849. "In this sense, contract law itself may have lost much of its subject matter, but many of its ideas continue to be significant in what may be called the 'newly developing nations' of the law." *Id.* at 850.

95. Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647), is the classic case—the tenant must pay rent even though ousted from the premises by an invading army.

96. 428 F.2d 1071 (D.C. Cir. 1970). There has been a parallel development in the law governing the sale of newly constructed homes. Courts have held that the builder and seller impliedly warrant that the structure is designed and constructed in a workmanlike manner. *See, e.g.*, Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 115 Cal. Rptr. 648 (1974) (en banc); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969); Note, *Implied Warranties in the Sale of New Homes*, 23 FLA. L. REV. 626 (1971).

> of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[97]

Thus, in *Javins*, the law is confronted with a problem of finding a useful body of rules for regulating the relations between landlords and tenants under new conditions which make the older legal framework obsolete. The possible solutions include legislation, contract law, or some form of strict liability resembling tort. If contract is dead, one would expect the ultimate solution to be either in legislation through a housing code or in something akin to the tort liability for harmful products. At the time *Javins* was decided, however, the District of Columbia already had a housing code. It is well known, of course, that housing codes are frequently ignored. Inspectors do not always inspect, reported violations do not always frighten the violator, and means exist to discourage complaints. Although the codes have helped a great deal, the government still is unable to legislate good housing through housing codes, principally because codes do not supply money for construction or renovation,[98] and because governmental enforcement is not a sufficiently grave economic threat. If the rent still comes in, one simply balances the danger of fines against the cost of repair. Judging from the number of violations outstanding, the scale of private decision is not weighted heavily in favor of compliance.

The device of private enforcement through contract law appears to be more powerful. If the rent stops, operations must stop. This approach also accords with the modern attitude toward performance of agreements—one expects to be excused from one's own duty if the other party does not fulfill his. What moral obligation is there to pay rent for premises which are not as promised? Thus, it would seem both more effective and more in keeping with current notions of fairness to allow tenants to withhold rent if premises are not up to standards. Why is it necessary, though, to arrive at this result through contract law? Could not the housing code simply be amended to authorize non-payment of rent—or payment of rent into court—as an additional means of code enforcement? Why worry about whether the mutual promises are "dependent" or "independent" or whether there is an "implied warranty?"

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97. 428 F.2d at 1074.

98. *See generally* Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act—An Economic Analysis*, 17 VILL. L. REV. 886 (1972).

The answer is that the bundle of rights and duties which comprise a modern residential lease cannot be dealt with by so simple a means as amendments to a code. Too many subsidiary issues exist. May the tenant stop paying completely if there is *any* code violation, even the most minimal? How much may he deduct, if anything, for one burned out bulb in a hallway? Does he have any obligation to pay for the value he has admittedly received from the premises even though they are not as required by the code or as promised by the landlord? What are his obligations to mitigate damages? In order to answer these questions, one must resort to the rules of general contract law, rules designed to solve the typical problems which arise in consensual transactions. Doctrines such as materiality of breach, rescission and the contractual measure of damages are waiting ready-made to be applied, and they are being applied.

In *Javins* itself, the landlord sued for possession after the tenant had stopped the rent because of code violations. For property law this poses a difficult problem. We have the theory of constructive eviction, but it requires that the tenant vacate in order to make legal use of the landlord's breach. If the tenant stays he must pay full rent and absent an express covenant cannot recover damages since there is no implied duty to repair.[99] If the tenant has decided to leave, of course, this property remedy is adequate and has the virtue of insuring that the landlord will be paid for whatever value the premises actually have to the tenant. The glaring weakness is that in the current housing shortage, vacating is not a suitable remedy. Property law provides no theory by which the tenant can enforce the contract by staying put and demanding damages, rather than rescinding the contract by moving out and stopping rent. To enforce the lease, one must base the remedy upon a promise.

If property law is insufficient, is it still possible to solve the problem simply by amending the housing code? Could residential tenants be authorized to halt rent whenever a code violation occurs? Some states have enacted statutes which allow tenants to make repairs and deduct the cost from rent, after first giving the landlord an opportunity to make the repairs himself.[100]

Upon a moment's reflection, we see that these statutes really amount to an enactment of basic contract principles and not a blanket authorization to

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99. *Compare* East Haven Associates v. Gurian, 64 Misc. 2d 276, 313 N.Y.S.2d 927 (Civ. Ct. Rec. 1970) *with* Barash v. Pennsylvania Rental Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970). The problem here is "partial constructive eviction" but the same rules appear to apply. For another example where property concepts dominate remedies, see Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. Ct. App. 1969).

100. *See, e.g.*, CAL. CIV. CODE § 1942 (West 1954); OKLA. STAT. ANN. tit. 41, § 32 (1962).

withhold rent. Both the California and Oregon statutes require the tenant to make the repairs. This translates into a common contracts rule: in agreements to furnish services where the performance is faulty or incomplete, the measure of damages equals the cost of completion. The tenant is not authorized to stop the entire rent, because to do so would be unfair to the landlord whenever the rent exceeds the cost of repair. Or, in contract parlance, the value of the breaching party's partial performance would be forfeited—a result not thought to be enlightened. This statute could only have been drafted with contract "rules" in mind, and can only be evaluated in light of the general contract principle that in cases of breach the damages should be apportioned as nearly as possible to fault. When the tenant is also in breach, and the seriousness of the parties' breaches must be measured one against the other, it becomes even more obvious how necessary these general contract principles are in the interpretation and application of the legislation to specific cases.

Is there a tort solution? A study in point is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[101] The tenant in that case was assaulted and robbed in a common hallway of her apartment house by an intruder. She proved that the security measures in effect when she moved in—a doorman, an observation desk in the lobby, attendants stationed at the entrances to a parking garage connected to the building and locked doors after 9:00 p.m.—had in every respect been discontinued at the time of the assault. She also proved that the landlord knew of the change in conditions. The court held that "there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling,"[102] and that "there is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity."[103] Thus, a tort duty arose "from the logic of the situation itself,"[104] and a contract duty arose from an interpretation of the agreement. Could the problem be solved through a tort duty alone? To do so, it would be necessary, of course, to define a single standard of care applicable to all landlords. But what standard should it be? For example, are doormen to be required in all apartment buildings?[105] The *Kline* court held that the standard was "rea-

101. 439 F.2d 477 (D.C. Cir. 1970).
102. *Id.* at 483.
103. *Id.* at 485.
104. *Id.* at 483.
105. It has been estimated that to provide doormen around the clock in a twenty-five unit, low-income building in New York City would, if the cost were passed on to the tenant, increase the per-unit rental by more than 50%. *See* Comment, *The Landlord's Emerging Responsibility For Tenant Security*, 71 COLUM. L. REV. 275, 298 (1971).

sonable care in all the circumstances."[106] It added that "[i]t may be impossible to describe the standard in detail for all situations . . . and evidence of custom amongst landlords of the same class of building may play a significant role in determining if the standard has been met."[107] One may well ask what the "class" of the building has to do with tort liability. Does tort law give more protection to residents of luxury high-rises than it does to residents of low and middle-income walk-ups? In order to decide the case, the *Kline* court (its shoulders to the wall) proclaimed that "the applicable standard of care in providing protection for the tenant is that standard which this landlord himself was employing . . . when the appellant became a resident . . . . The tenant was led to expect that she could rely on this degree of protection."[108] If the landlord's duty depends upon the "class" of the building and the conditions promised as an exchange for rent at the time of contracting, it would seem that whatever tort duty there might be has been absorbed into the contract duty defined by the lease. Of course, this is not really so. It only appears to be so because of the absurd premise upon which such a statement is based. The premise is that the law of property, of torts and the device of social control through legislation (landlord-tenant law) are somehow antagonistically vying here with contract for predominance. Nothing could be more wrong.[109]

The simple fact is that general contract law contains principles which are essential for working out disputes in residential leases. First, how can it be decided whether the tenant has any duty at all to pay for premises which violate the housing code? Not by reading the code itself, for it typically contains no indication whether it is intended to become part of a lease. Indeed the fact that the code provides governmentally enforced sanctions is an argument that private remedies were not intended to be affected.[110] If, however, one resorts to the principles of general contract law, one finds that the landlord's minor or immaterial breach does not excuse the other party's performance; it merely gives a claim for damages. Courts confronted with this problem have typically made this interpretation.[111] In *Javins*, for example,

106. 439 F.2d at 485.

107. *Id.* at 486.

108. *Id.*

109. For example, in slum housing the tort standard of care might in theory be more stringent than the de minimis level that might fairly be implied from the lease itself. However, in luxury housing the contract standard of safety bargained for in the lease will frequently be higher than the minimal tort standard. In short, contract and tort do not compete with one another in supplying the standard of safety for urban apartment dwellers but, instead, are complementary; which standard is applied depends upon the context.

110. *See* Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

111. In Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), the court limited the

the court said that "the jury should be instructed that one or two minor violations standing alone which do not affect habitability are de minimis and would not entitle the tenant to a reduction in rent."[112] This result is inevitable under contract principles because to hold otherwise would forfeit the benefit of the landlord's bargain in circumstances where the defect in his own performance was very slight. On the other hand, where the landlord's breach is so material as to deprive the tenant of the substantial benefit of the premises (making them uninhabitable), then it is unjust to ask the tenant to continue his performance by paying rent because the tenant would then forfeit the value of his bargain. In contracts, one result is implied in the other. Thus, the meaning of a housing code for private leases can be evaluated in a reasonable way by using the pre-existing principles of general contract law. The newly declared right of the tenant to enforce the contract (by retaining possession and deducting damages from the rent) is no surprise if one remembers the clear parallel and precedent in the law of sales, another contractual subject. The buyer who receives non-conforming goods is not forced to choose between the alternatives of rejecting the goods completely or paying the contract price. He may accept them and deduct the damages for breach of warranty from the price still due.[113] Starting from here, it is not a giant step to the conclusion that the tenant should be able to accept a non-conforming apartment and deduct damages for breach of warranty of habitability from the rent still due.

Other problems remain, of course. What if the landlord alleges that the code violations are the fault of the tenant? The answer in contract is that the tenant is liable for them under the general principle that damages are apportioned to fault. Or, in the words of the *Javins* court, "the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action."[114] This same rationale may be expected to resolve questions about

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tenant's right to withhold rent for breach of implied warranty to "vital facilities necessary to maintain the premises in a liveable condition." *Id.* at 146, 265 A.2d at 535. In the case where the tenant has vacated the premises at the time of the suit, the problem should be somewhat different because there is no question of suspending the tenant's performance. The courts still speak in terms of "habitability," however. *See* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969). *See also* Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972), where the tenant sued to enjoin the landlord from filing an eviction action.

112. 428 F.2d at 1082 n.63.

113. *See* UNIFORM COMMERCIAL CODE §§ 2-714, 717.

114. 428 F.2d at 1082 n.62.

the tenant's duty to mitigate damages. Granting, however, that the tenant may deduct something, how much may he deduct? The *Javins* court said that nothing may be deducted for "one or two minor violations." That is to say, in contract terms, that the performance of the innocent party is not suspended by a minor breach. For the more serious defects which affect habitability, *Javins* said that the amount to be deducted is left to the jury. The exact measure has been defined in other cases to be the difference between the contract price and the actual value during the tenancy.[115] Under *Javins*, the jury will assign a dollar value to the landlord's breach and suspend the tenant's performance to that extent—an eminently contractual solution. If the jury finds that only part of the duty to pay is suspended, and the tenant does not pay the balance, "a judgment for possession may issue forthwith,"[116] or, in contract terms, the tenant will not be allowed to enforce the contract without paying for what he has received under it. One may object that the materiality of a given breach is difficult to measure, and so tenants may find it risky to withhold rent in doubtful cases. The first answer is that any solution which genuinely tries to apportion fault equitably here must evaluate the impact of each party's breach upon the other. The second answer is that the difficulty of deciding doubtful cases under a proposed rule should never prevent its use in cases where it clearly applies to produce a better result.

The last problem for contracts which *Javins* suggests (but does not discuss) is the effect of an express disclaimer upon the implied warranty of habitability. If this is a contractual matter, can it be bargained away? Here the law must decide whether it is socially useful to make this particular item the subject of private agreement. Given the present housing market and the importance of minimum standards of habitability, it is unrealistic to expect that free bargaining will produce acceptable results. Housing codes, in fact, express a clear legislative judgment to the contrary. Is contract then defeated as a force here? The answer is "no." One could say, of course, that contract includes the doctrine that agreements contrary to public policy are void, and also includes the doctrine of unconscionability. Obviously, these are adequate to solve the problem in terms of doctrine.[117] However, the real answer is that general contract law is not defeated or made smaller in signifi-

115. *See, e.g.*, Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

116. 428 F.2d at 1083.

117. The parallel with the UCC is clear—limitation of consequential damages is permitted where losses are simply commercial, but not where there is an injury to the person. UNIFORM COMMERCIAL CODE § 719. And an uninhabitable apartment is surely more analogous to personal injury than to commercial loss.

cance because it alone cannot solve all the legal problems posed by residential leases. To believe that it is would be to misunderstand the legal process.

D. A Melding of Social Control Devices

It is fundamentally wrong to see any antagonism, competition or conflict between the law of contracts and that of torts, property or the legislation found in housing codes. On the contrary, the ultimate success of the total legal regime applicable to rental housing will depend on how well these various legal tools can be made to work together. The legal process depends basically for its movement upon all of the various contributions for which each of its constituent parts is uniquely fitted—and best fitted—to make. A moment's reflection will show that this is so. Those who draft codes have the responsibility for defining as precisely as possible beforehand the particular minimum standards necessary to protect life and health in rental premises. Because they have the means for gathering information describing a wide range of activity, they can make broad decisions governing an entire industry with at least some confidence in the probable results of those decisions. They cannot, however, decide in advance how to treat each question of private remedy which may arise from a specific dispute. That is a job for general common law principles, including those in the law of contracts. Nor can the drafters of these codes hope to resolve beforehand all the questions arising in the more numerous lease transactions in which the "minimums" required by the code have been far exceeded—whether, for example, the landlord has provided the specific degree of comfort and security bargained for, or whether the tenant should be found to have acted in some way contrary to that expected for the "class" of building in which he finds himself. Such questions are left to private agreement. Insofar as tort duties are concerned, they are necessarily limited to a standard of general applicability which, again, is concerned with a certain minimum which everyone can be expected to meet. One cannot possibly take into account under a single standard all the different expectations generated by the variety of accommodations now available. If one tries, the standard becomes so broad as to be meaningless. This does not signify, however, that housing codes and tort laws are "dead" as instruments for legal control of leases. They, just as contract, have their proper function and are able to handle some questions better than contract. It should not be necessary, for example, to allege an implied warranty in order to recover for an obvious act of negligence by a landlord, especially since the measure of damages and numerous other factors would be different in tort than in contract. The realistic approach is to see that each legal tool is able to handle some aspect of this single complex problem better than the

others. The true objective of the law should be to use each of these tools so that it strengthens and complements the work of the others.

IV. Conclusion

It is principally the failure to see contract as only one among several available devices that leads Professor Gilmore and the "graveyard theorists" to believe that contract is somehow "dead." Does the fact that tort law and legislation are better suited than contract to accomplish some things prove anything at all when we remember that contract can accomplish still other things far better than tort or legislation? It is a naive view that cannot see in our legal system—as in our economy—a considerable division of labor. One does not compare aspirin to iodine, or ether to penicillin.

Our economic and legal system uses a mixed regime of public and private ordering to define and achieve its goals.[118] To benefit from the variety and ingenuity of private initiative there must be enough flexibility to allow new economic relationships to be invented and get underway and to modify the legal treatment of older relationships in light of shifts in the conditions under which they exist. General contract law often provides this flexibility better than legislation. It does not follow, however, that legislation is any less necessary or useful, since it must provide whatever public regulation there will be, together with the money and machinery to carry it out. The fact that legislation does and should exist means nothing more than that contract, like all other means of social control, is limited in scope. One of the greatest objects of public policy is to mark out the boundaries of private initiative—to encourage it where it is beneficial and discourage it where it is not. It follows that both contract law and the legislation which limits it are devoted to the same basic purposes—to channel agreements into useful directions and encourage people to carry them out. This is so because no sanction, whether legislative or judicial, can ever supply the benefits of performance.

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118. *See generally* H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958).