

# Unlikely Resurrection: Richard Posner, Promissory Estoppel, and *The Death of Contract*

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## INTRODUCTION

Many of Richard Posner's opinions boldly confront great questions.<sup>1</sup> But equally important are those that, in the aggregate, illuminate discrete areas of the law and make them easier to understand. Among the best examples are Posner's some two dozen opinions on promissory estoppel.<sup>2</sup> They illustrate his ability to reshape the terms of even the most familiar debates.

By the middle of the twentieth century, the idea took hold that, in addition to promises supported by consideration, promises seriously made and reasonably relied on were also legally enforceable.<sup>3</sup> It was not easy, however, to reconcile this idea with traditional notions of contract law. It was not just that traditional contract law enforced only promises that were part of a bargained-for exchange. It was hard to hold both that all promises seriously made and reasonably relied on should be enforceable and still accept the statute of frauds, the parol evidence rule, and other doctrines governing contract creation and enforcement. All of these have the effect of limiting the enforceability of promises on which people reasonably relied.

It seemed possible that promissory estoppel would displace traditional contract law entirely. Liability would lie for careless speech as it does for any other careless act. Broken promises would become folded into a more general category of civil wrongs.

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<sup>1</sup> See generally, for example, *Baskin v Bogan*, 766 F3d 648 (7th Cir 2014) (striking down state bans on same-sex marriages).

<sup>2</sup> See generally, for example, *Cosgrove v Bartolotta*, 150 F3d 729 (7th Cir 1998); *Miller v Taylor Insulation Co*, 39 F3d 755 (7th Cir 1994).

<sup>3</sup> See Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U Rich L Rev 425, 433–37 (2007).

This was the theme of Professor Grant Gilmore's *The Death of Contract*.<sup>4</sup> At the end of this short monograph, however, Gilmore holds out hope that someone might appear and restore order:

We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony—an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that . . . [someone new] is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?<sup>5</sup>

Gilmore had little inkling that one of his own colleagues at The University of Chicago, working just a few doors away, was indeed waiting in the wings.

When interpreting the common law, Posner often sat in diversity. Far from wrestling with first principles, his task was to guess what another court would do if confronted with the same issue. He was not in a position to introduce striking new ideas or boldly reshape existing law. Nevertheless, Posner was in a position to harmonize various strands of existing doctrine. The cumulative effect of Posner's many opinions on promissory estoppel was to domesticate the doctrine within the realm of traditional contract law.

### I. THE EVOLUTION OF PROMISSORY ESTOPPEL

At common law, a promise, without more, was not legally enforceable—and for good reason.<sup>6</sup> When a judge issues a judgment and awards money damages, it is not just so much talk. The judgment entitles the prevailing party to a writ of execution, an order that compels the sheriff to seize property of the defendant.<sup>7</sup> Allowing a private actor to call on the coercive hand of the king was serious business.

People, of course, should keep their promises. But that was not the question. The question rather was whether a breach of a particular promise was important enough that the king needed to

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<sup>4</sup> Grant Gilmore, *The Death of Contract* (Ohio State 1974).

<sup>5</sup> *Id.* at 103.

<sup>6</sup> See John P. Dawson, et al, *Contracts: Cases and Comment* 203 (Foundation 10th ed 2013).

<sup>7</sup> Douglas G. Baird, *Reconstructing Contracts* 55–56 (Harvard 2013).

intervene. As between commercial actors, the rationale is straightforward enough. The king has an interest in ensuring that markets work. But what other kinds of promises rose to a level that justified the use of force? Common law lawyers took this question seriously.

Early on, common law lawyers distinguished promises that were enforceable from those that were not by asserting that the former were supported by “consideration,” while the latter were not.<sup>8</sup> Sometimes consideration was made synonymous with the *causa* that continental lawyers believed would make promises enforceable. There were other times when consideration was used interchangeably with the familiar *quid pro quo* of debt. Other times it was little more than a different way of saying that the promise in question was one of those that courts had previously found to be enforceable.<sup>9</sup>

When Professor Christopher Columbus Langdell and Oliver Wendell Holmes attempted to formalize the law of contracts beginning in the early 1870s, they offered an account of contract law that had hard edges.<sup>10</sup> They insisted that consideration existed only if there were a bargained-for exchange. For consideration to exist, each party had to incur a detriment or bestow a benefit in exchange for the promise received from the other.<sup>11</sup>

This account of positive law was something of an oversimplification.<sup>12</sup> Nevertheless, during this era, the pronouncements of Cambridge-based legal academics were to a large extent self-fulfilling.<sup>13</sup> The most prominent lawyers had been students at Harvard or had learned the law from its alumni. So too the judges. They believed the law to be what these professors said it was. They argued their cases and issued their opinions accordingly. Consideration required a bargained-for exchange because their professors said it did.

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<sup>8</sup> For a somewhat more detailed account of this history, see John P. Dawson, et al, *Contracts* at 203–06 (cited in note 6).

<sup>9</sup> See id at 204–05.

<sup>10</sup> C.C. Langdell, *A Selection of Cases on the Law of Contracts* (Little, Brown 1871); Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown 1881).

<sup>11</sup> Holmes, *Common Law* at 293–94 (cited in note 10).

<sup>12</sup> Courts in New York, for example, had long held that promises that were part of a charitable subscription were supported by consideration even though there was no bargained-for exchange. See generally, for example, *Barnes v Perine*, 12 NY 18 (1854).

<sup>13</sup> With his edition of *Kent's Commentaries* and his lectures on the common law, Justice Holmes was at the intellectual center of this legal circle even though he served on Harvard's faculty for only a short time. See James Kent, *Commentaries on American Law* 1826–30 (Little, Brown 12th ed 1896) (Oliver Wendell Holmes Jr, ed).

Hence, one could set a change in the law in motion by persuading Professor Samuel Williston, Langdell's successor as the teacher of contracts at Harvard, to temper the assertion that the only legally enforceable promises were those that were part of a bargained-for exchange. Those who set about this task—in the first instance Yale's Professor Arthur Corbin—pointed to cases in which courts had found promises to be legally enforceable yet not part of a bargained-for exchange.<sup>14</sup>

There was no general doctrine that promises seriously made and reasonably relied on were enforceable, but one could find cases that pointed in this direction. A grandfather gave his granddaughter a promissory note so that she did not have to work.<sup>15</sup> This led her to quit her job. But the grandfather died, and his executor refused to honor the promissory note on the ground that the promise was gratuitous and not supported by consideration. The granddaughter sued the executor and won. The court found that, by virtue of the reliance of the granddaughter, the executor was estopped from raising the defense of absence of consideration.<sup>16</sup>

To reach this result, the court applied equitable estoppel in a familiar way. The doctrine limits the ability of a party to enter an otherwise meritorious pleading if the pleading was at odds with that party's past conduct. I reassure a co-owner of a business that she can leave it for other ventures and not worry about the guarantee she has given me. Even if I do not formally waive the guarantee, my behavior keeps me from later suing her on the guarantee. Invoking the guarantee in court is inconsistent with telling the promisor that she should pursue new ventures. The grandfather's executor is similarly disabled from raising the absence of consideration in the face of the grandfather telling his granddaughter that she could quit her job.

But equitable estoppel does not ineluctably lead to the enforcement of serious promises reasonably relied on as a general matter. The holder of a promissory note, such as the granddaughter, is presumptively entitled to payment. To enforce a note, she does not need to plead that the underlying promise was supported by consideration. Absence of consideration is a defense that must be pled by the person being sued on the note.<sup>17</sup> Estoppel works in

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<sup>14</sup> See Gilmore, *Death of Contract* at 57–58 (cited in note 4).

<sup>15</sup> See generally, for example, *Ricketts v Scotchorn*, 77 NW 365 (Neb 1898).

<sup>16</sup> *Id.* at 367.

<sup>17</sup> See, for example, UCC § 3-305(a)(2) (“[T]he right to enforce the obligation of a party to pay an instrument is subject to . . . a defense of the obligor.”).

the case of a negotiable instrument because the person who made the promise and broke it rather than the person who relied on it is the one who must plead absence of consideration. In the case of an ordinary promise, the promisee must affirmatively plead the presence of consideration. Estoppel does not enter the picture. The beneficiary of the promise has to take the first step. Like every plaintiff, she must be able to state a claim on which relief can be granted. She cannot do this if the promise she seeks to enforce is not part of a bargained-for exchange.

Nevertheless, armed with this case and others invoking other doctrines, Corbin was able to persuade Williston and other members of the American Law Institute that there was a general principle at work. Reliance, in addition to consideration, sufficed to make promises legally enforceable. And the evolution of the doctrine did not stop here. In the decades that followed the adoption of the First Restatement of Contracts, promissory estoppel did not simply make reliance an alternative to bargained-for consideration. It morphed into its own cause of action.

Accepting promissory estoppel as a stand-alone cause of action introduced difficulties. In the first instance, it lacks hard edges. How exactly does one go about distinguishing what reliance is “reasonable”? Quite apart from the fuzziness of the doctrine, there was the question of what remained of traditional contract law if reliance alone triggered legal liability. What is the need for the many ways in which the common law limits the enforceability of promises (such as the parol evidence rule or the statute of frauds)?

This was the basic theme of *The Death of Contract*.<sup>18</sup> Without its formal rules, contract law loses its coherence as a distinct branch of law and simply merges into tort law. Given the uncertain boundaries of “reasonable reliance,” judges and juries are largely unconstrained. They are empowered to impose civil liability according to their own sense of what is fair when people fail to keep their promises.

From the perspective of many mid-century contracts scholars, the death of contract was not such a bad thing.<sup>19</sup> Courts ought

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<sup>18</sup> Gilmore, *Death of Contract* at 87 (cited in note 4) (“Speaking descriptively, we might say that what is happening is that ‘contract’ is being reabsorbed into the mainstream of ‘tort.’”).

<sup>19</sup> See, for example, Michael B. Metzger and Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L Rev 472, 557 (1983):

to have the discretion to do the right thing to the extent justice required it. The statute of frauds, the parol evidence rule, and other hoary contract doctrines were technical rules that allowed people who behaved badly to avoid responsibility for their actions.

Many cases in which parties invoke promissory estoppel are ordinary disputes between business people that may not provide a compelling case for legal reform.<sup>20</sup> It was easy enough, however, to find cases that made it easy to justify giving courts a general power to enforce promises seriously made and reasonably relied on. The facts of one notable case from the era illustrates. An insurance agent persuaded a young soldier to switch life insurance companies, assuring him that the new company, like his existing one, would cover him in the event he died in combat.<sup>21</sup> The written policy the company issued, however, excluded war risk.

The written policy was a completely integrated contract that, on its face, set out all the obligations of both parties. Hence, under traditional contract doctrine, the agent's oral promise was not enforceable, and thus the beneficiaries of the policy were not entitled to recover. The court found the promise enforceable nevertheless:

[T]his verdict recognized a duty of Prudential . . . to act in an honorable and upright way in accordance with its agent's promise. Thus, application of promissory estoppel in no way trammels upon the parol evidence rule. Involved here is a separate enforceable promise and not a variance or modification of the terms of the policy.<sup>22</sup>

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The judicial concern with pre-classical ideas of justice of which promissory estoppel is one expression has been on the rise throughout the twentieth century. Moreover, it has roots in the social experience of this century. Barring a thoroughgoing return to laissez-faire ideas, that trend is likely to continue, and the expansion of promissory estoppel should proceed apace.

<sup>20</sup> Although promissory estoppel is frequently invoked when negotiations never ripen into a final agreement, courts typically resist applying it in this context. See Alan Schwartz and Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv L Rev 661, 674–75 (2007). Promissory estoppel cases are most likely to be successful when business people interact and there are discrete undertakings on the part of one or the other without there being a formal agreement or the agreement itself being too indefinite to be enforceable as a traditional contract. See, for example, *Cosgrove v Bartolotta*, 150 F3d 729, 733 (7th Cir 1998) (holding that an investor could recover on a promissory estoppel theory after reasonably relying on defendant restaurateur's promise).

<sup>21</sup> *Prudential Insurance Co v Clark*, 456 F2d 932, 934 (5th Cir 1972).

<sup>22</sup> *Id* at 937. As it happens, *Prudential* could have been decided without reaching the question of the relationship between promissory estoppel and the formal rules of contract. It was a case in which the court might have relied entirely on traditional notions of equitable estoppel. Prudential had paid out on the policy and was suing to get its money back.

The pull of such compelling cases obscures the potential cost of an uncabined doctrine of promissory estoppel. It was all well and good to dismiss Langdell's belief that there was some inner ineluctable magic to the rules of contract, but it is another thing altogether to dismiss contract law's formalities as useless.

The statute of frauds ensures that, in deals of any consequence, courts and juries will have the benefit of some writing that evidences the transaction.<sup>23</sup> Similarly, the parol evidence rule forces the factfinder to focus on the written document.<sup>24</sup> With such rules in place, legal decisionmaking becomes cheaper and less prone to error. Moreover, the existence of such legal rules changes the dynamics of negotiations between the parties. I can negotiate with you and explore possible deals without fearing that what I say will trigger liability. Only when I sign a writing showing that we have reached a deal am I at risk of being bound. And I am bound only to what the document says. I do not have to worry that you misunderstood what I said during negotiations.

Such rules can make parties to contracts better off. I am willing to negotiate in a way that is more free-flowing and beneficial for both parties.<sup>25</sup> Once one accepts the possibility that contracts' formal rules have virtues and should remain in place at least to some extent, one needs some ability to cabin promissory estoppel. But how exactly does one go about doing this?

Richard Posner confronted promissory estoppel in *Economic Analysis of Law* even while Gilmore was writing *The Death of Contract*. Posner noted that promissory estoppel was best conceived as a species of tort. As with other torts, the relevant question is "whether the imposition of liability will create incentives for value-maximizing conduct in the future."<sup>26</sup>

When my wealthy uncle carelessly promises to pay for my college education and then refuses to keep it, it makes sense to hold him liable if I gave up my part-time job as a result of the

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It is easy to argue that, once having made the promise and kept it, Prudential was equitably estopped from using the court system to recover the money.

<sup>23</sup> See Richard A. Lord, 9 *Williston on Contracts* § 21:1 (West 4th ed 2012).

<sup>24</sup> See Richard A. Lord, 11 *Williston on Contracts* § 33:1 (West 4th ed 2012).

<sup>25</sup> Legal scholars have long identified such benefits of formal rules. See, for example, Lon L. Fuller, *Consideration and Form*, 41 *Colum L Rev* 799, 813 (1941) ("Business deals can often emerge only from a converging series of negotiations. . . . To surround with rigid legal sanctions even the first exploratory expressions of intention would not only introduce an unpleasant atmosphere into business negotiations, but would actually hamper commerce.").

<sup>26</sup> Richard A. Posner, *Economic Analysis of Law* § 3.1 at 43 (Little, Brown 1973).

promise. Given his promise, it was reasonable for me to rely on the promise. The world is a better place if people make only promises they intend to keep. It allows the beneficiaries of these promises to rely on them. The law is a useful lever to use to induce individuals to be careful when they make promises, just as it is a useful way to give them an incentive to drive carefully. Individuals should act and speak in a way that takes account of the costs that their actions have on others.

The rationale that Posner put forward in *Economic Analysis of Law* was, however, made at a high level of abstraction. It is one thing to assert that legal rules can induce parties to speak more carefully, but such rules can also chill speech, especially when the risk of error is taken into account. Gratuitous transfers often come with backstories that are hard to understand. The potential for legal liability may prevent some promises from being made in the first instance. Even with commercial actors, it is not easy to determine exactly what sorts of assurances should give rise to legal liability. Reliance alone is not sufficient. Weather forecasters know and want people to use their forecasts in making their plans, but they are not liable if they are wrong.

Posner as an academic gave no hint about how a court should go about demarcating the realm of promissory estoppel. Moreover, in making a general observation about the coherence of promissory estoppel as a cause of action, Posner did not confront the question of how to reconcile it with the technical rules of contract.

On the bench, however, Posner had to face these questions repeatedly. To be sure, as a judge he was painting on a much smaller canvas. Nearly all contracts cases that came to him as a federal judge arose in diversity.<sup>27</sup> He had to take the promissory estoppel doctrine of Wisconsin, Illinois, and Indiana as he found it. All of them embraced promissory estoppel, albeit in different flavors. But what Posner could do (and did), even after taking the peculiarities of each jurisdiction into account, was make sense of these rules and impart order to them.

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<sup>27</sup> One exception is *Miller v Taylor Insulation Co*, 39 F3d 755 (7th Cir 1994), an ERISA case in which federal common law is used to fill in gaps and promissory estoppel is the relevant gap filler.

## II. PROMISSORY ESTOPPEL AND RISK ALLOCATION

In his various promissory estoppel opinions, Posner put hard edges on the doctrine. Someone who pursues a promissory estoppel action must have relied on the promise. Some judges did not take this element seriously. Indeed, reliance is hard to see in *Allegheny College v National Chautauqua County Bank of Jamestown*,<sup>28</sup> one of the most prominent landmarks in promissory estoppel jurisprudence.<sup>29</sup> Posner, by contrast, insisted on reliance.

In one case, a company dismissed an employee and at the same time promised to pay him through the end of the year.<sup>30</sup> The promise was not part of a bargained-for exchange. The employee was properly terminated, and the company had no further obligation to him. And given the absence of any assertion that the discharged employees changed by virtue of the promise, promissory estoppel did not lie either.<sup>31</sup> Indeed, Posner found that asserting on appeal that such a promise is legally enforceable was frivolous, and he subjected those who made that argument to sanctions.<sup>32</sup>

Considerably harder than insisting on reliance is distinguishing between promises that are relied on that generate legal liability from statements of future intention that are relied on that do not. A judge applying promissory estoppel must be careful in identifying what sorts of utterances qualify as a “promise” for purposes of promissory estoppel. In Posner’s view, it is not sufficient that someone makes statements that are reasonably relied on. The person being spoken to must reasonably understand that the person doing the speaking is making a commitment to which she can be held.<sup>33</sup>

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<sup>28</sup> 246 NY 369 (1927).

<sup>29</sup> *Id.* at 373–75. Properly speaking, the case was not decided on the basis of promissory estoppel. Judge Benjamin Cardozo was able to find consideration on the part of a college that received a pledge. But there is much dicta about promissory estoppel, and no attention is paid in the course of this dicta to the fact that finding reliance under the facts was no easier than finding consideration. No one has ever rivaled Judge Cardozo in his ability to obfuscate and confuse in order to curry favor with the elites of the legal profession. And in *Allegheny College*, Judge Cardozo was at the height of his powers.

<sup>30</sup> *Colosi v Electric-Flex Co*, 965 F2d 500 (7th Cir 1992).

<sup>31</sup> *Id.* at 504. Similarly, if a retired employee wanted to use promissory estoppel to enforce the company’s promise to provide medical insurance, he had to show that, in the absence of such a promise, he would have acquired insurance from some other source or otherwise changed his conduct. *Miller v Taylor Insulation Co*, 39 F3d 755, 759 (7th Cir 1994).

<sup>32</sup> *Colosi*, 965 F2d at 505.

<sup>33</sup> In this respect, Judge Posner’s promissory estoppel opinions stand in distinct contrast to Justice Roger Traynor’s, which show no awareness of this question. See, for example, *Drennan v Star Paving Co*, 333 P2d 757, 760 (Cal 1958) (asserting that, because a subcontractor both expected and wanted the general contractor to rely on the promise, it

Consider the facts of *Garwood Packaging, Inc v Allen & Co.*<sup>34</sup> Garwood made a food-packaging system that had, in Posner's typically direct and forceful language, "flopped" in the marketplace.<sup>35</sup> Garwood engaged Allen & Co to help it find new investors. Martin, Allen's point person, looked for such investors and found some promising prospects. No one argued that a final deal was ever consummated, and there were no undertakings definite enough to create a traditional legally enforceable contract. But this did not end the inquiry. Promissory estoppel does not require the same degree of definiteness as a set of promises that are part of a legally enforceable bargained-for exchange.

Martin had assured Garwood that Allen would put up half of the needed capital if investors could be found for the other half. On multiple occasions, he said that he would find the financing Garwood needed. He told the principals at Garwood that he would see that the deal went through "come hell or high water."<sup>36</sup> The principals relied on these assurances. They forgave their personal loans to Garwood. They moved from Indiana to Ohio to be closer to a prospective partner that Martin had found. Posner accepted the possibility that this reliance was reasonable.<sup>37</sup> Taking actions such as moving to Ohio improved prospects of closing a deal by enough to justify the costs, even after discounting for the possibility that the deal might never close.

But Posner found that reliance alone was not enough.<sup>38</sup> Someone can make assurances about her plans and intentions and reasonably foresee (and perhaps affirmatively desire) that these assurances lead to costly reliance. But this is not enough for legal liability. Statements of future intention can be sufficiently qualified that they do not rise to the level of promises.

In another opinion, Posner used a series of hypotheticals to unpack this idea.<sup>39</sup> A father tells his son that he is thinking of promising him on his next birthday that if he gives up smoking, the father will restore him as a beneficiary under his will. The son enrolls in an expensive cigarette addiction plan as a result. A contractor tells a subcontractor that he would consider him only if he

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was "only fair" that the subcontractor should be bound in the event the general contractor won the contract).

<sup>34</sup> 378 F3d 698 (7th Cir 2004).

<sup>35</sup> *Id.* at 701.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 704–05.

<sup>38</sup> *Garwood*, 378 F3d at 704.

<sup>39</sup> See *Cosgrove v Bartolotta*, 150 F3d 729, 733 (7th Cir 1998).

had more minority workers in his employ, and the subcontractor goes out and hires some more. In both cases, reliance may be reasonable, but in neither case is there a cause of action for promissory estoppel. What is said is too qualified to count as a promise even if it induces reasonable reliance.

Martin told the principals that he would see that the deal would happen “come hell or high water.”<sup>40</sup> But these words cannot mean, as Posner put it, that Martin was promising that the deal would go through even if Satan appeared or a tsunami obliterated Ohio.<sup>41</sup> Words have to be understood in context. Garwood’s principals were not unsophisticated rubes. One of them had been an investment banker.<sup>42</sup> Among such actors, Martin’s words fall short of being a promise at all. Martin is merely announcing his intention to do what he can to make the deal happen. He is not promising any outcome. The principals might sensibly rely on this statement, but they cannot hold Martin liable if the deal does not happen.

But there are variations on *Garwood* that Posner does not consider. What if, for example, Martin said he would make the deal happen come hell or high water and then sat on his hands? Is it a fair construction of his words to include an implicit promise to use his best efforts to make the deal happen? Could the principals sue for a breach of that promise if Martin did nothing? Perhaps the better interpretation of Posner’s opinion in *Garwood* is not that there was no promise but rather that none was broken.

Figuring out what counts as a “promise” and what counts as “reasonable reliance” is far from straightforward. With respect to both, it is an effort to provide one party with the incentive to engage in the optimal amount of communication and the other with the incentive to engage in the optimal amount of reliance on the communication. A judge who is too willing to find that something rises to the level of being a full-fledged promise chills communication and induces overreliance.

Where other judges found implicit promises in order to invoke promissory estoppel, Posner found implicit qualifications to promises that rendered them unenforceable.<sup>43</sup> Posner justified doing this with a rationale he employed elsewhere. The obligations that the law implies have to reflect a sensible understanding of what

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<sup>40</sup> *Garwood*, 378 F3d at 701.

<sup>41</sup> *Id.* at 704.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

rational parties would undertake if there were explicit bargaining. Cases can arise in which there is a promise in a literal sense and reasonable reliance on the part of the promisee, but it does not make sense to find legal liability. Parties would qualify their promises appropriately if they had the time to do so. Hence, it makes sense to treat these promises as if these qualifications were there.

*ATA Airlines, Inc v Federal Express Corp*<sup>44</sup> is a case in which a promise was made and may have been reasonably relied on, and yet promissory estoppel did not lie.<sup>45</sup> Federal Express, in exchange for promising to provide aircraft to the Department of Defense in the event of an emergency, acquired rights to provide nonemergency transportation for the government at favorable rates. These rights were transferable, and ATA sought to acquire a portion of Federal Express's rights. Negotiations progressed sufficiently far that Federal Express wrote a letter in which it agreed to transfer some of its rights to ATA.

Given the letter, Posner recognized, "there is no question that there was a promise."<sup>46</sup> The letter left so many details open that it was not sufficiently definite to be enforceable under traditional contract law. Hence, he had to confront the question of whether the promise was enforceable under a theory of promissory estoppel. The question for Posner was therefore whether "the promise was (or could reasonably have been understood to be) intended to induce, and could reasonably induce, reliance to the tune of \$28 million."<sup>47</sup>

Posner read into Federal Express's promise implicit qualifications. As he explained:

If someone tells you "I promise you X, but don't hold me to it," the promisor is making clear that he is not inviting reliance and the promisee cannot, by ignoring the warning and relying on the promise to his detriment, make the promise enforceable.<sup>48</sup>

Federal Express might not have explicitly said ATA could not hold it liable for the promise, but it makes sense to treat its promise as if it had. "ATA could not reasonably have believed that

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<sup>44</sup> 665 F3d 882 (7th Cir 2011).

<sup>45</sup> *Id* at 888–89.

<sup>46</sup> *Id* at 888.

<sup>47</sup> *Id*.

<sup>48</sup> *Garwood*, 665 F3d at 885.

FedEx intended to *commit* itself to split the passenger business.”<sup>49</sup> For this reason, “[s]uch a ‘promise’ may create an expectation but does not create a commitment, and so the promisee relies at his risk.”<sup>50</sup>

In importing such qualifications, Posner confronted the same sort of challenges inherent in enforcing a traditional contract. The judge must discover the “tacit agreement” between the parties. As Justice Holmes explained, the extent of liability “should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.”<sup>51</sup>

*Principal Mutual Life Insurance Co v Charter Barclay Hospital, Inc*<sup>52</sup> is another case Posner approached in this fashion.<sup>53</sup> An insurance company agreed to provide insurance to a company’s full-time employees. The son of the company’s owners enrolled in the plan, representing himself as a full-time employee. When the son was admitted to a psychiatric hospital, the hospital called the insurance company to verify that the son had enrolled under the plan, and the insurance company affirmed that he had. As Posner recounted, with characteristic vividness, it turned out that the son did not work for the company. The son was instead “a male stripper and pimp facing criminal charges for these activities.”<sup>54</sup> The insurance company was therefore not obliged to cover the costs of his hospitalization even though it told the hospital that it would.

The question was whether the hospital could rely on the insurance company’s representation that the son was enrolled in the plan and hold it liable. Posner found that the hospital could not:

As an experienced hospital operator, it is charged with knowing that insurers of employee benefit plans do not, upon receiving an application for coverage by a person claiming to be an employee, conduct an in-depth investigation of the applicant’s entitlement to coverage and certify that entitlement in answer to inquiries by medical providers. That would be rather an absurd burden to place on the insurer, when we

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<sup>49</sup> Id (emphasis in original).

<sup>50</sup> Id.

<sup>51</sup> *Globe Refining Co v Landa Cotton Oil Co*, 190 US 540, 543 (1903).

<sup>52</sup> 81 F3d 53 (7th Cir 1996).

<sup>53</sup> See id at 57.

<sup>54</sup> Id at 55.

reflect that the plan might cover hundreds or even thousands of employees.<sup>55</sup>

But Posner may have made the case seem easier than it was. To be sure, it is hard for the insurance company to know whether those enrolled are in fact entitled to coverage. But it may be even harder for the hospital. Someone has to bear the risk, and it is not self-evident it should be the hospital rather than the insurance company.

Three parties are involved: the employer, the insurance company, and the hospital. The policy is more valuable to the employer if the insurance company is obliged to reimburse hospitals for a claim submitted by those who enroll, even if they later prove ineligible. When the insurer is bound, the hospital will be able to admit everyone enrolled under the plan. An employer should be willing to pay more for such a policy. It wants its workers to be able to receive medical care when they need it without having to establish that they are entitled to receive the benefits.

If the employer, the hospital, and the insurance company could bargain explicitly, would the insurance company assume the risk that some of those who enrolled might not in fact be eligible? How does one assess whether the benefits of such a promise are greater than the costs and that it is therefore sensible to read into the insurance company's assurances to the hospital its acceptance of the risk that someone enrolled under the plan is not in fact eligible? Such gap filling is what judges must do with respect to ordinary contracts.

There are no magic formulas here, but Posner did identify what matters. The problem of promissory estoppel requires fleshing out the allocation of risks that the parties would have made for themselves had they confronted the subject explicitly. There is not a traditional contract, but the fundamental problem is the same as if there were.<sup>56</sup> Legally enforceable promises are those in which the addition of legal enforceability makes the parties jointly better off. Far from signaling the death of contract, applying promissory estoppel requires engaging in the same enterprise.

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<sup>55</sup> *Id.* at 57.

<sup>56</sup> For Posner's account of this task of gap filling in the context of an ordinary contract, see Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 *Tex L Rev* 1581, 1605 (2004) ("[T]he best, the most cost-efficient, way to resolve [a] dispute . . . is to use commercial or economic common sense to figure out how, in all likelihood, the parties would have provided for the contingency that has arisen had they foreseen it.").

## III. RECONCILING PROMISSORY ESTOPPEL WITH FORMAL RULES

To this point, I have not examined how Posner tried to reconcile promissory estoppel with the traditional rules of contract formation. The discrete legal question that arises most often is whether promissory estoppel is still available when there is an ordinary bargained-for exchange but the statute of frauds is not satisfied. For example, this question is raised in *Consolidation Services, Inc v KeyBank National Association*.<sup>57</sup> Were Posner free to answer this question as a matter of first impression, his opinions suggest that the traditional rules of contract law would trump promissory estoppel:

Since the doctrine merely provides an alternative to consideration as a basis for enforcing a promise as a contract, it would be anomalous to use it to take an oral promise out of the domain of the statute of frauds.<sup>58</sup>

When confronting concrete questions such as whether promissory estoppel lies even when the statute of frauds would make the promise unenforceable, a federal judge sitting in diversity does not have a free hand. She must guess how the state's highest court would treat the case. But the judicial decisionmaking is not entirely fettered. The highest court may not have faced the question, and even if it has, a federal judge sitting in diversity must still decide how the rule of decision handed down by the state court applies to the facts before her. Posner showed how a resort to first principles was useful with respect to both tasks.

A good example came when Posner confronted Indiana's promissory estoppel regime. In Indiana, as elsewhere, a promisee must do more than show simple reliance to avoid the statute of frauds. In the language of the Second Restatement, the statute of frauds prevents enforcement of the promise unless "injustice can be avoided only by enforcement of the promise."<sup>59</sup> The task for the

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<sup>57</sup> 185 F3d 817 (7th Cir 1999).

<sup>58</sup> *Id* at 822. See also *All-Tech Telecom, Inc v Amway Corp*, 174 F3d 862, 869 (7th Cir 1999) ("When there is an express contract governing the relationship out of which the promise emerged, and no issue of consideration, there is no gap in the remedial system for promissory estoppel to fill.")

<sup>59</sup> See Restatement (Second) of Contracts § 139(1) (1981):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

judge, including federal judges sitting in diversity, is to apply this higher bar to the facts at hand.

Indiana's formulation was somewhat different than that of the Second Restatement, but it is cut from the same cloth:

[I]n order to establish an estoppel to remove the case from the operation of the Statute of Frauds, the party must show [ ] that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss.<sup>60</sup>

What is needed is some understanding of "unjust and unconscionable" that goes beyond, as Posner put it, "judicial indignation at dishonorable behavior by promisors."<sup>61</sup> It is not an easy task. As Posner explains, "To answer the question requires us to explore the provenance of a phrase at once vague (what does 'unjust and unconscionable' mean?) and redundant (how does 'injury' differ from 'loss?')."<sup>62</sup>

One cannot simply assess the moral worthiness of the promisor's behavior. As an ethical matter, people should keep their promises, and from this, it is only a small step to say that justice requires enforcing the promise in virtually every case. To make sense of this doctrine, Posner grounded the doctrine in its rationale.

This is again a familiar theme of Posner's contract jurisprudence. With respect to any particular doctrine, one must first understand the purpose that the doctrine is serving and interpret it accordingly. For example, when one party threatens to breach unless the other party, who has already sunk costs in performance, renegotiates, the party who succumbs to the threat can call on the doctrine of duress. To establish whether "duress" exists under any particular set of facts, one must first understand why the doctrine exists in the first place.

The formal grounds for refusing to recognize the renegotiated deal is the absence of consideration to support the modifications,

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For an example of a state court applying this test, see *Kolkman v Roth*, 656 NW2d 148, 156 (Iowa 2003).

<sup>60</sup> *Coca-Cola Co v Babyback's International, Inc.*, 841 NE2d 557, 569 (Ind 2006), quoting *Brown v Branch*, 758 NE2d 48, 52 (Ind 2001). This formulation originates in Justice Traynor's opinion in *Monarco v Lo Greco*, 220 P2d 737, 741 (Cal 1950).

<sup>61</sup> *Classic Cheesecake Co v JPMorgan Chase Bank, NA*, 546 F3d 839, 845 (7th Cir 2008).

<sup>62</sup> *Id.* at 842.

but such a rule does a poor job of distinguishing between the coercive renegotiation and the one that arises because of changed circumstances. Hence, in his opinions applying the doctrine of duress, Posner insisted that the judge should not engage in a mechanical search for consideration (not a straightforward process in any event) but rather focus instead on the question of whether the party forcing the renegotiating is taking advantage of a situational monopoly.<sup>63</sup> The economic concept of “situational monopoly” fleshes out what “duress” means.<sup>64</sup>

In one of his best-known contracts opinions, Posner similarly looked to underlying principles to understand the duty of good faith each party to a contract owes the other.<sup>65</sup> In Posner’s view, the duty of good faith serves to “forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule.”<sup>66</sup> The duty is best understood as embodying the set of “implied conditions necessitated by the unpredictability of the future at the time the contract was made.”<sup>67</sup> It forbids opportunistic behavior and requires the cooperation that is essential to mutually beneficial trade.

One can contest how much good faith conceived in this fashion requires in any particular case.<sup>68</sup> Nevertheless, at the very least, the requirement that parties act in good faith prevents one party from taking deliberate advantage of an oversight by the other. If they had the time and the money, parties would write contracts that prohibited every game of gotcha. Hence, it makes sense to imply a general duty that has the same effect.

The “unjust and unconscionable” test for determining whether promissory estoppel escapes from the statute of frauds can be grounded in a similar fashion.<sup>69</sup> To be sure, the task is not the same. In the other cases, the task is implying terms to flesh out a bargain that the parties have already reached. In assessing the applicability of the statute of frauds to a promise seriously

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<sup>63</sup> See *id.* at 846.

<sup>64</sup> See *Oxford Clothes XX, Inc v Expeditors International of Washington, Inc*, 127 F3d 574, 579 (7th Cir 1997). For a discussion of Judge Posner’s approach to the doctrine of duress, see generally Douglas G. Baird, *The Young Astronomers*, 74 U Chi L Rev 1641 (2007).

<sup>65</sup> See *Market Street Associates Ltd Partnership v Frey*, 941 F2d 588, 593 (7th Cir 1991).

<sup>66</sup> *Id.* at 595.

<sup>67</sup> *Id.* at 596.

<sup>68</sup> Some have criticized Posner’s *Market Street* opinion on this ground, arguing that the duties it puts in place are too narrow. See Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120 Harv L Rev 1187, 1195–96 (2007).

<sup>69</sup> *Babyback’s*, 841 NE2d at 569.

made and reasonably relied on, the question is the enforceability of the promise in the first instance. Nevertheless, the interest served, one of optimizing the value of promises that people make to one another, is the same.

The statute of frauds applies when the stakes are large enough that a court needs to be confident that a deal was in fact struck and it will not mistakenly enforce a promise that was never made.<sup>70</sup> The heightened reliance requirement serves the same purpose. Instead of asking about injustice in the abstract, the court should ask whether there was “a kind or amount of reliance unlikely to have been incurred had the plaintiff not had a good-faith belief that he had been promised remuneration.”<sup>71</sup> Given that factfinding is inherently prone to error, it makes sense to give parties an incentive to make the factfinder’s task easier. One can, however, carve out exceptions when the costs of failing to enforce the agreement are high and the likelihood of error is sufficiently small.

*Monarco v Lo Greco*,<sup>72</sup> the state law case that first allowed for promissory estoppel in the context of a traditional contract rendered unenforceable by the statute of frauds, was particularly compelling by this account. It involved a stepson who had worked on a farm for two decades. He received only room and board and spending money. The stepson asserted that he did this work in reliance on his stepfather’s unwritten promise to pass it on to him when the stepfather died.

Posner likened the stepson in *Monarco* to the travails of Jacob at the hands of his uncle Laban.<sup>73</sup> By contrast, the facts in the case before him were altogether different. He faced a case in which entrepreneurs sought a bank loan for their business. They asserted that a bank officer promised them that their loan application would be approved, and they took a number of steps, such as repaying defaulted student loans that the bank officer said were necessary to have the loan approved by the higher-ups at the bank.<sup>74</sup>

With respect to both the stepson and the entrepreneurs, there were allegedly promises that were relied on. What distinguished them was not that the stepfather behaved in a way that was more

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<sup>70</sup> See Lord, 9 *Williston on Contracts* § 21:1 (cited in note 23).

<sup>71</sup> *Classic Cheesecake*, 546 F3d at 845.

<sup>72</sup> 220 P2d 737 (Cal 1950).

<sup>73</sup> *Classic Cheesecake*, 546 F3d at 843–44.

<sup>74</sup> *Id.* at 840–41.

reprehensible than the loan officer but rather that the stepson's reliance was utterly inconsistent with the stepfather never having made a promise, while the behavior of the entrepreneurs (taking steps such as paying off a defaulted loan and waiting a few weeks for a decision) was not.<sup>75</sup> Entrepreneurs take such steps all the time in pursuit of bank loans even without promises being made to them. The idea here, as elsewhere in Posner's contracts jurisprudence, is to start by identifying the inner logic of the common law rules themselves.

#### CONCLUSION

Each of Richard Posner's promissory estoppel opinions made only small, incremental steps. This is necessarily the case for a judge who was interpreting the law of other sovereigns. But the aggregate effect of these opinions put promissory estoppel in an altogether different light than what Professor Gilmore presented in *The Death of Contract* or what many other academics have offered since. As Judge Posner conceived it, the boundaries of promissory estoppel can be drawn. It does not consume all of traditional contract law. There are some cases in which promissory estoppel claims prevail, but relatively few. Seen together, Posner's promissory estoppel opinions show the reach of the doctrine to be far less than Gilmore feared or mid-twentieth-century contract scholars hoped. More importantly, they show how complicated, messy problems can be put in perspective by casting a cold eye on them and figuring out what connects them to the cases that have come before. Doing this, like the use of metaphor, offers "intelligibility with the objective world."<sup>76</sup>

It is a commonplace to point to the way in which microeconomics informed Posner's judicial thought. Less often noted is the other great influence on his intellectual development. Posner's academic training before law school was not in economics but in literary criticism. Indeed, he devoted all of his last year of college to a study of the late poems of W.B. Yeats. Posner found himself under the spell of a particular form of literary analysis known as New Criticism.<sup>77</sup> One of the giants of this school was Professor

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<sup>75</sup> See *id.* at 844.

<sup>76</sup> See Richard A. Posner, *Yeats' Late Poetry: A Critical Study* (unpublished thesis, Yale University, 1959), quoted in William Domnarski, *Richard Posner 27* (Oxford 2016).

<sup>77</sup> See Domnarski, *Richard Posner* at 26–29 (cited in note 76) (describing the influence of New Criticism on Judge Posner's career).

Cleanth Brooks, and it was under Brooks's supervision that Posner wrote his study of Yeats.

Before the New Critics, literary criticism focused heavily on the cultural background in which works had been written. The lives of the great poets and the literary environment in which they wrote were the focal point. The New Critics believed that trying to understand poetry by looking at the biographies of those who created them was a mistake. It was, in the words of Professor William K. Wimsatt, another dominant figure in Yale's English department, the "intentional fallacy."<sup>78</sup> Instead, the New Critics claimed, literary criticism should begin and end with a hard look at the poem itself and the way it is put together.

A successful poem was, in Brooks's words, like a well-wrought urn.<sup>79</sup> It had to be assessed on its own terms. Approaching the judicial enterprise with unflinching clarity and incisive thought, the hallmark of Richard Posner's work over the last four decades, is very much in this spirit and explains to a great extent why, in the clarity and insight that he brought to promissory estoppel and everything else he touched as a judge, Richard Posner had no peers.

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<sup>78</sup> See W.K. Wimsatt Jr and M.C. Beardsley, *The Intentional Fallacy*, 54 *Sewanee Rev* 468, 469 (1946) ("Judging a poem is like judging a pudding or a machine. One demands that it work. It is only because an artifact works that we infer the intention of an artificer.").

<sup>79</sup> Cleanth Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* 19–20 (Harcourt Brace Jovanovich 1947).