BOOK REVIEW

THE PRINCIPLES OF SOCIAL ORDER. Selected Essays of Lon L. Fuller, edited with an Introduction by Kenneth I. Winston. Duke University Press, Durham, N.C., 1981. pp. 313. $19.75.

*Reviewed by P.S. Atiyah**

The late Lon Fuller was undoubtedly one of the most original, interesting, and profound legal thinkers of the present century. Generations of contract students have been taught through his casebook, one of the finest examples of the art, and his famous article (co-authored with his student, William R. Perdue, Jr.) *The Reliance Interest in Contract Damages*,[1] has probably been the most influential single article in the whole history of modern contract scholarship. But the bulk of Fuller's writings are of a more jurisprudential character, and it is perhaps unfortunate that he is probably best known to students of jurisprudence today through his article responding to H.L.A. Hart's classic Holmes lecture, "Positivism and the Separation of Law and Morals."[2] I say this is unfortunate because, even though some may feel that Fuller had the better of this debate, that article does not reveal Fuller at his best, nor does it provide an overall framework or theory within which the Hart-Fuller debate can be seen in context.

This was partly Fuller's own fault. Although he wrote widely on legal theory, he was not a systematic thinker, or at least he failed to put together his scattered thoughts into any systematic framework. Some sympathetic interpretation and even reconstruction of his work is needed to view it in the round, and this posthumously published selection of his writings will surely serve as a major catalyst to that end.[3]

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1. Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936).

2. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Fuller's response is in the same volume. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

3. Professor Robert S. Summers' forthcoming book on Fuller in the new series on jurists entitled PROFILES IN LEGAL THEORY offers just this needed reconstruction of Fuller's legal theory.

Although the essays taken individually still fail to reveal the systematic theory that Fuller spent much of his life attempting to develop, they do enable the reader who sees them as a whole to have a far better understanding of the general nature of Fuller's approach to law. The editor's introduction is particularly helpful in this regard,[4] especially the pages on *The Ideal of Legal Processes*[5] and the table on page thirty-four that sets out some of the distinctive characteristics of different methods of social order as Fuller perceived them.

I

The essays are collected into three parts. The first part contains only one piece—a previously unpublished essay entitled *Means and Ends* that Fuller apparently intended to use as an introductory chapter to a book on the principles of social order. The book was never written, though his article on *The Forms and Limits of Adjudication*, later published—also posthumously—in the *Harvard Law Review*,[6] seems to have been an outgrowth of it and may well have been envisioned by Fuller as a possible chapter of this never-to-be-completed work.

The other two parts contain a variety of pieces, some previously unpublished, that the editor skillfully brings together to justify the title, *The Principles of Social Order*, which Fuller had in mind for his own book. Part II, *The Principles and Forms of Social Order*, comprises seven essays—all previously published—which contain the fullest account of Fuller's ideas on different methods or principles of social ordering. At various times and in various places he lists these methods or principles; the lists and even the numbers are not always the same, but he deals with several central concerns at length in these essays. Adjudication is clearly one method of social ordering; this is the topic of the *Harvard Law Review* article, already referred to, republished here in somewhat abbreviated form.[7] Other core methods are contract, discussed here in some pages taken from the third edition of his casebook;[8] legislation, addressed here in an excerpt from *The Anatomy of Law*;[9] mediation, which has received little attention from jurists but benefits from Fuller's experiences as a labor arbitrator;[10] managerial

4. L. FULLER, PRINCIPLES OF SOCIAL ORDER, *Introduction* (K. Winston, ed. 1981).

5. *Id.* at 26-29.

6. 92 HARV. L. REV. 353 (1978). Although the article was published in full only after Fuller's death, parts of it had appeared in Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC. INT'L L. PROC. (1960) and in Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

7. L. FULLER, *supra* note 4, at 86; *see supra* note 6.

8. *Id.* at 169.

9. *Id.* at 158.

10. *Id.* at 125.

direction, somewhat curiously treated in a paper on *Irrigation and Tyranny*;[11] and custom, presented here in one of Fuller's finest papers entitled *Human Interaction and the Law*, which is also concerned with contract and enacted law.[12]

Part III contains four pieces of less general interest, only some parts of which have been previously published. They concern the roles of legal education,[13] the lawyer,[14] the scholar,[15] and the legal philosopher.[16] Although these papers are less relevant to his overall theme, they nevertheless reveal the depth of some of Fuller's chief concerns. In particular, they show that the emphasis on means as opposed to ends—in any event, never wholly separable in Fuller's view—is closely related to Fuller's vision of the role of the lawyer in society, and also, therefore, to his vision of the role of legal education. One of the main tasks of the lawyer is to study the different means of social ordering so that he can advise on the selection of the most appropriate means to achieve a predetermined end. But, if he is to do this task properly he will sometimes have to understand and convince others why the inherent limits on the use of one or another of the principles of sound order may themselves shape the ends to be sought. So the lawyer must understand the principles of social order and the relationship of means and ends; legal education must, therefore, see that lawyers are properly instructed in these matters.

An appendix to the book contains a fascinating letter, apparently written in the early 1940's, from Fuller to his Harvard colleague Thomas Reed Powell. In the letter Fuller responds to criticisms made by Powell and by reviewers of his book, *The Law in Quest of Itself*, and bares much of his basic political ideology. He reveals his sympathy with Burke's philosophy, "which conceives society to be founded on institutions and conventions which are not wholly rational and which conceives of progress as a gradual improvement of those institutions and conventions in the direction of greater rationality,"[17] his prefer-

11. *Id.* at 188. This was a review of a book by Karl A. Wittfogel entitled ORIENTAL DESPOTISM—A COMPARATIVE STUDY OF TOTAL POWER (1957), which dealt with the apparently unpromising subject of the relationships of political power in societies heavily dependent on artificial irrigation. Fuller further developed the "managerial" form of legal ordering in some powerful pages in his "Reply to Critics" in the Appendix to the revised edition of THE MORALITY OF LAW 207-16 (1969).

12. L. FULLER, *supra* note 4, at 211.

13. *Id.* at 249.

14. *Id.* at 264.

15. *Id.* at 271.

16. *Id.* at 282.

17. *Id.* at 297-98.

ence—within limits—for judge-made law over enacted legislation,[18] his belief in using the "autonomous ordering of private individuals" to accomplish as much reform as possible,[19] and his advocacy of the comparative law/natural law methodology in common law development.[20]

Fuller's jurisprudential writing has already received much comment and criticism, and doubtless more will follow the publication of these essays and the publication of Professor Robert S. Summers' forthcoming reevaluation. Fuller's writings on contract have also been enormously influential on modern contract scholarship, but the relationship between Fuller's work on legal theory as a whole and his work on contract (theoretical though much of that was) has been largely neglected. I shall therefore devote the remainder of this review to a study of the relationship between Fuller's ideas across these two fields.

II

Just as he never expounded a systematic legal theory, Fuller never articulated a comprehensive theory of contractual obligation. His two principal contributions to contract scholarship are the reliance article,[21] which provided the framework for his casebook, and *Consideration and Form*, published in the *Columbia Law Review* in 1941.[22] In the third (1972) edition of the casebook, however, he included a section on *The Role of Contract*, reprinted in the present work,[23] in which he touches briefly on his "principles of social ordering" and explains the relationship between one of these principles—contract—and the others. This discussion suggests that Fuller may well have regarded contract as the predominant principle because it seems to be involved one way or another with all the others.

In *The Role of Contract* Fuller expands his list of the "principles of social ordering"; it is the last and longest of these lists that he produced. The principles are, in his own words:

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18. *Id.* at 302-03.

19. *Id.* at 299.

20. It is fascinating to note that Fuller here says that he sees his two great articles on contract law as closer in their methodology to Pothier than to Llewellyn, Cook, Williston, or Langdell. *Id.* at 296-97.

21. *See supra* note 1 and accompanying text.

22. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). *Human Interaction and the Law* in L. FULLER, *supra* note 4, at 211, also has claims to be regarded as a major contribution to contract scholarship.

23. L. FULLER AND M. EISENBERG, BASIC CONTRACT LAW (3d ed. 1972). The section appears in L. FULLER, *supra* note 4, at 170-87.

1. The coordination of expectations and actions that arise tacitly out of interaction, illustrated in "customary law" and "standard practice."
2. Contract.
3. Property.
4. Officially declared law.
5. Adjudication.
6. Managerial direction.
7. Voting.
8. Mediation.
9. Deliberate resort to chance; "tossing for it."[24]

Disclaiming any pretense of exhaustiveness, Fuller proceeds to show how the various principles may be interrelated and combined. He suggests that the principles fall into two broad categories, those which operate "vertically"—*e.g.*, legislation and managerial direction—and those which operate "horizontally"—custom, contract, etc. He then criticizes what he takes to be the modern tendency to see all social ordering as "imposed from above"[25] and proceeds to explain how contract relates to his other principles.

Starting with custom, Fuller suggests that the real difficulty is not discerning the relationship between custom and contract but, indeed, in drawing any clear distinction between the two.[26] Custom consists of "reciprocal expectations that arise out of human interaction," but that is true of contract as well. In addition, he lists other, more obvious affinities between custom and contract; for example, that standard behavior of the parties, a sort of personalized custom, may be used to interpret contract, and that contracts can be implied from conduct.[27]

Affinities between property and contract are even more obvious.[28] Indeed, in an unpublished manuscript cited by the editor, Fuller declares that "the institution of private property is, in fact, only the static and relatively less important side of the institution of private contract."[29]

Adjudication, too, has its affinities with or even its origin in contract because, at least in some societies, it grew out of a voluntary system of settling "blood feuds" by arbitration. Furthermore, modern arbitration is a simple adjudicative process founded on contract.[30]

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24. L. FULLER, *supra* note 4, at 170-71.
25. *Id.* at 174-75.
26. *Id.* at 175-76.
27. *Id.* at 176.
28. *Id.* at 177-78.
29. *Id.* at 27. In fact this suggestion bristles with difficulties if only because private property in the broadest sense—and hence some distribution of entitlements—is a necessary prerequisite to all contract.
30. *Id.* at 178.

It may appear more difficult to see any affinity between managerial direction and contract, but most managerial power comes from voluntary employment relationships.[31] Even enacted law and governmental managerial ordering are not devoid of contractual underpinnings. Here and in many other places[32] Fuller argues that enacted law involves a tacit promise by the lawgiver that citizens will be treated in accordance with the laws thus enacted. Fuller might well have added two illustrations—one from the managerial field and one from the legislative field—to strengthen his argument. He might have referred to the relationship between lord and serf in feudal society, which was highly "managerial" in Fuller's sense, yet frequently required the swearing of an oath of fealty to inaugurate the relationship, a clear use of "contractual" ordering. Fuller might also have pointed to any of a number of instances in which the public demands that vague enactments be replaced by more precise ones. Such a demand clearly presupposes some sort of obligation on the legislator's part to abide by the wording of the legislation. Whether Fuller correctly viewed this kind of obligation as contractual is a question I shall address later.[33]

Fuller has some difficulty seeing how contract can be related to voting. He attempts to analogize voting to a consensual, multilateral contract that lacks the element of a "trade-off,"[34] but this illustration is somewhat forced and unconvincing. Curiously, he fails to notice a much better argument sometimes made by political philosophers,[35] an argument one might think would have appealed to him, despite its many rivals: namely, that participation in voting involves a tacit agreement by the losers to abide the result of the vote. The same argument can be used, and indeed historically was used by Chief Justice Holt,[36] to justify the rule that a person who voluntarily submits a dispute to arbitration is bound by the result and impliedly undertakes to carry out the arbitrator's award.

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31. *Id.*

32. *See id.* at 167, 172, 234-35; L. FULLER, *supra* note 11, at 39, 209-19. The arguments set forth at pages 209-19 are especially powerful.

33. *See infra* text between notes 67 & 68.

34. L. FULLER, *supra* note 4, at 179. Fuller writes:

> Suppose that at the outset of a law suit the judge proposes to counsel an expedient that will speed the trial . . . . [I]f either objects, he will follow the book, if both consent the short cut will be adopted. . . . This phenomenon is worthy of mention because we tend to identify contract with the notion of a trade or exchange, and it is well to remember that there are consensual arrangements from which the element of "trade-off" is absent.

35. *See, e.g.*, P. SINGER, DEMOCRACY AND DISOBEDIENCE (1973). Interestingly, Singer actually invokes the analogy of the legal concept of estoppel on which to base this implicit promise. *See id.* at 51-52.

36. Squire v. Grevell, 87 Eng. Rep. 797, 6 Mod. 34 (1703); Purslow v. Bailey, 92 Eng. Rep. 190, 2 Ld. Raym. 1039 (1705).

Finally, mediation and lotteries can be and often are underpinned by contract; indeed, the former can hardly work without contract or at least some significant element of consent.

After this analysis the reader can hardly remain in doubt about Fuller's view of the relative importance of contract as a method of social ordering. Although he never specifically asserts that it is the "most important" method—and indeed, he would probably have resisted the question as oversimplistic, absent clear criteria of importance—it certainly must rank among the more dominant.

Any doubts as to the primacy of contract are stilled by Fuller's repeated emphasis, in other contexts, on the essential purposiveness of all law. This point is closely linked to his views on the value-laden nature of law, for purposiveness presupposes an idea or vision of what law *ought to be*. Throughout his writings Fuller reiterates the purposive nature of law and the rationality of the whole enterprise and, therefore, of all methods of ordering.[37] Much of his writing on the "inner morality" of law, for example, assumes that law is purposive. It is only this—he says—which justifies finding a "tacit promise" by the legislator or government to judge the citizen's conduct in accordance with enacted law; otherwise, he rightly finds no conceptual necessity to bind the legislator or the government's hands.[38] A legislator whose purpose is to reduce his subjects to a state of neurotic despair could enact a law one day and order his subjects to be punished for complying with it the next; there is nothing contrary to logic in such an exercise in tyranny unless one first makes some basic assumptions about the purposes of legislation, and perhaps of law in general.

Fuller's suggestion that the primary purpose even of adjudication is to assist in the future ordering of affairs by parties, or at least by the particular litigants,[39] also illustrates his stress on purposiveness. Doubts must surely begin to creep in here as to whether Fuller's ideological liberalism distorted his evaluation of the nature of adjudication. For even those who would wholeheartedly agree that adjudication is a rational, and, in that sense, a purposive exercise, might pause before agreeing that "adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated."[40] This goes too far. Adjudication may take place even where precedent cannot control or be established; indeed, some adjudications, such as arbitration, may be private in nature. Adjudication

37. L. FULLER, *supra* note 4, at 17-18 (editor's introduction).
38. *Id.* at 216-19.
39. *Id.* at 90.
40. *Id.*

may arise largely or entirely from the need to sort out a prior dispute without future implications, and the adjudication may even be settled on the grounds of "rightness" rather than for "goal" oriented reasons; that is, the adjudication may have no consequentialist aims or results.[41]

Similar criticisms could be made of Fuller's views of the proper role and limits of legislation. There is no doubt that he saw the role of legislation and its administration as essentially a mode of facilitating "human interaction." Indeed, Fuller took some pains to explain why even the criminal law should be seen in this way despite the obvious difficulties with "victimless crimes."[42] Curiously, Fuller actually addresses the relatively rare case of justifiable retroactive legislation—validating bona fide marriages when necessary forms have been destroyed by a fire[43]—apparently without worrying that in such a case the legislator is trying to sort out an existing or past problem and not to regulate human behavior in the future. Perhaps he took for granted that this was a supplemental or parasitic use of legislation, but it is odd that he did not make this explicit.[44]

Turning to Fuller's treatment of contract itself, it becomes perfectly clear that here too he sees contract as a principle of social ordering in the sense that it is a way of regulating *future* human interaction. There is no hint here of any possible secondary function such as that of "clearing up a mess," sorting out the results of accidental and unintended interaction. Furthermore, it is an essential part of Fuller's perception that contract is an *autonomous* way of regulating future conduct. Parties regulate their own future conduct through contract; the regulation is not imposed on them. Fuller articulates this most clearly in *Consideration and Form*,[45] in which he seeks to extricate the principle of private autonomy from some of the excesses of will theory. Thus he rejects the notion that private autonomy is somehow inconsistent with the "objective" interpretation of contracts,[46] although he does not fully develop this argument either here or elsewhere.

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41. For the difference between "rightness" reasons and "goal" reasons, see Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

42. L. FULLER, *supra* note 4, at 231-33.

43. *Id.* at 162-63.

44. The same point was made by Marshall Cohen in a symposium on Fuller's book, THE MORALITY OF LAW: Cohen, *Law, Morality and Purpose*, 10 VILL. L. REV. 640, 652 (1965). Fuller attempted an answer in the revised edition of THE MORALITY OF LAW, *see* L. FULLER, *supra* note 11, at 239-40, but the answer seems lame; he relies simply on "the special social context."

45. Fuller, *supra* note 22, at 806-10.

46. *Id.* at 807-08.

So firmly did Fuller base contract on the role of private autonomy that he seems to have been quite shocked by Llewellyn's suggestion that if aggrieved contracting parties did not sufficiently pursue civil remedies for breach, "the state might find itself compelled to intervene to strengthen the regime of contract."[47] To Fuller this was "startling." "To enforce a contract for a party who is willing to leave it unenforced is just as absurd as making the contract for him in the first place."[48] Fuller hastened to add that he realized that there were some contracts required by law but insisted that this was "a derivative phenomenon." I am not so sure we can sweep away compulsory exchanges imposed by the state in this way,[49] but more important, it is increasingly apparent that consumers often lack the capacity, money, or adequate incentives to enforce contractual duties against those who systematically abuse the law. Is there anything absurd about the state lending its aid to assist or even taking the initiative in enforcing such contracts with a view to suppressing or deterring this sort of conduct? After all, fraud has long been a criminal offense.

Fuller recognizes elsewhere[50] that the measure of damages for breach of contract is not a purely logical corollary of the duty breached, and that expectation damages may be awarded partly as a "prophylaxis" to deter contract breakers. This powerful and original insight seems somewhat at odds with his rejection of state aid to the enforcement of contracts; measuring damages by their deterrent effect demands that we recognize the award of expectation damages as a policy decision made by the courts as organs of the state. Of course, it might be said that in such cases the courts only assist in the enforcement of private rights at the behest of the parties and that Fuller's real objection was to a more active state role in the general maintenance of the contract regime. But, if this is the point of his objection, it reflects a somewhat outdated liberal belief that those who need assistance are able to identify their own problems and know where to go for help. Few people with experience of the problems of the poor and disadvantaged today believe this to be true.

III

The above criticisms of Fuller's overall theory of contractual obligation may seem matters of detail. But perhaps because he never sys-

47. L. FULLER, supra note 4, at 105 (quoting K. LLEWELLYN AND E. HOEBEL, THE CHEYENNE WAY 48 (1941)).

48. *Id.*

49. *See* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 742-54 (1979).

50. Fuller and Perdue, *supra* note 1, at 61.

tematically combined many of the different insights that underlie his thoughts, his position also contains deeper weaknesses and ambivalences. These difficulties with Fuller's theory can be classified into three groups.

A. *Contract and Exchange.*

When Fuller writes in general terms about the role of contract, and about the relationship of contract to other forms of social ordering, he is, I think, insufficiently clear about the distinction between contract and exchange; he also fails to disentangle adequately the separate elements in contract. Contract differs from mere exchange because it contains an element of futurity—what Ian Macneil calls "presentiation."[51] Contracts *bind* people to future performances. Exchange can be a purely present transaction. The fact that contracts are often defined as consisting of an "exchange of promises" must not obscure the fact that such an exchange necessarily looks to future performance, while many cash transactions involve nothing beyond a present simultaneous exchange—for example, a cash purchase in a supermarket. Of course, in modern law the extensive use of devices such as "implied warranties" means that even a simultaneous exchange of goods for cash has an element of futurity in it; but this is not inherent in the exchange itself. Exchange without warranties is perfectly possible, and indeed such an exchange was regarded as the norm in early nineteenth century law.

The difference between exchange and contract is quite an elementary distinction, but it is surprising how often it is overlooked. When Fuller rejects Bentham's insistence that contract derives its form and validity from society and law,[52] and asserts that the institution of contract "functioned in some measure" before state laws "existed or were even conceived of,"[53] he seems to overlook this simple point. It is almost certain that exchange in some form antedates state and law, and certainly vows and oaths were known in primitive societies. But almost all historians concede the emergence of executory contracts to be a relatively modern phenomenon.[54]

Again, when Fuller argues that contract underpins nearly all the

51. Macneil, *Restatement (Second) of Contracts and Presentiations*, 60 VA. L. REV. 589 (1974); Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974).

52. J. BENTHAM, WORKS 309, 333 (J. Bowring ed. 1859).

53. L. FULLER, *supra* note 4, at 174.

54. *See, e.g.*, H. MAINE, ANCIENT LAW (1861); A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975). For anthropological evidence, see M. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 181 (1965); M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE 28, 30, 200, 440-42 (2d ed. 1967).

other methods of social ordering that he identifies,[55] he does not disentangle the various underlying bases of contractual obligation which he recognizes and discusses elsewhere, especially in *Consideration and Form*.[56] Thus it is not always clear in *Principles of Social Order* whether he is discussing autonomy and consent, or expectations, or reliance, or unjust enrichment, or some unspecified mix of these factors when he finds contractual elements in various other forms of social ordering. For instance, the "tacit promise" which he regards the legislator as making to his subjects may indeed be some kind of moral or political obligation, but calling it a promise does not adequately explain how it can be identified with express promises where the obligation has, at least traditionally, been seen as deriving from some element of autonomy or even from the will of the promisor.

B. *The Facilitative and the Remedial Functions of Contract Law.*

Like many, indeed nearly all, liberal legal theorists, Fuller saw contract exclusively in terms of its facilitative function. He saw contract as an institution which enables people to plan their future relationships. Despite the importance Fuller attached to "remedies" in the traditional narrow contractual sense, his writing demonstrates little recognition that contract might have a secondary or "remedial" role to play in a broader and perhaps more significant sense of the concept of "remedy." In this broader sense "remedial" refers to the function a court exercises when it imposes on the parties a solution to a problem that goes beyond the natural or logical implications of the parties' own ordering. In the traditional and narrower sense, "remedies" for breach of contract were thought to involve no interventionist action by the courts; a remedy by way of damages was merely the logical corollary of wrongful breach. In this broader sense of "remedial," a court does not merely assist the parties to give effect to the inherent implications of their own arrangement when it provides a "remedy." It intervenes to deal with a situation in the nature of an accident, much in the way that tort law deals with accidents.

Although Fuller's own work on "remedies" in the narrower sense demonstrates that damage awards depend on judicial policy choices rather than on the parties' own intentions, he never seems to have appreciated the full implications of this for the role of contract law more generally. Some modern scholars, by contrast, see one of the main functions of contract law as being to help to sort out the unintended

55. L. FULLER, *supra* note 4, at 175-80.
56. Fuller, *supra* note 22, at 806-13.

and perhaps unforeseen results of past voluntary human interaction.[57] Of course, what is "foreseeable" and the specificity with which it is foreseen are matters of degree, and contracting parties can and often do try to take account of the unexpected and unintended in their private orderings. But contracts simply do not contain provisions designed to deal with everything that occurs. In these circumstances, the private ordering would break down if it were not supplemented by the remedial role of the law in this broad sense: for example, where performance of a contract becomes impossible, where unforeseen difficulties arise, where fundamental changes occur in the background to some long-term contractual relationship, and so on. But it may also happen that the law can be used to sort out difficulties in a relationship never originally thought of as one of a legal-contractual character. Cohabitants who buy a house and then part, for instance, often leave the law with the problem of deciding how the property is to be dealt with; other "family arrangements" which the courts would never enforce while executory may simply cry out for some solution when property has been transferred without formal contractual arrangements and family disputes then occur.

These are just a few samples of the many cases that courts today decide under a variety of doctrinal headings—"implied contract," "constructive trust," "estoppel," and so on. Most of these cases can be dealt with as cases of contract if courts are sufficiently enterprising or counsel sufficiently ingenious in their pleadings; but they are plainly *not* examples of the sort of contracts that Fuller discusses in these essays as methods of social ordering. In these cases, the courts come in to clear up a mess after things have gone badly wrong in a relationship, not simply to enforce compliance with privately made arrangements.

No doubt what the courts do in these cases may help others to order their affairs better in the future, but it is typical of many of these cases—the cohabitant and many family cases, for example—that initially the parties have such trust in each other that they would never feel the need to spell out the legal implications of their relationships. Indeed, as Fuller recognized elsewhere,[58] to try to invoke formal contract in such cases often destroys the very trust on which the relationship is based.

Fuller does not seem to have been greatly interested in, if he recognized at all, this broader remedial role of contract law. He demonstrates basic hostility to an active judicial role when courts attempt "to

57. L. FULLER, *supra* note 4, at 181.

58. *Id.* at 121.

write contracts" as opposed to "lay[ing] down rules about contracting." Furthermore, his view of the proper limits of legislation tends to be of the traditionally narrow liberal variety: legislation should lay down a framework within which individuals can exercise their private autonomy.[59]

All this seems to be extraordinarily narrow and restrictive. Why shouldn't the law provide assistance to parties to help them sort out their problems, especially when they have an ongoing relationship the continuance of which is important to the public? Many countries, for instance, provide labor mediators or arbitrators to help employers and unions resolve their differences when industrial disruption threatens. There are passages in *The Forms and Limits of Adjudication*[60] from which it might be inferred that Fuller would not have been happy with even so modest an element of state initiative. It is even more necessary for the law to step in to help clear up a mess when normal relationships finally break down. Of course this is often done under a different legal heading—bankruptcy, for instance, or corporate liquidation. One can hardly suppose Fuller would have objected to state legal activity of this kind. Perhaps, therefore, Fuller would merely have found the use of the term "contract" objectionable in this context.

It may appear ironic, in light of his emphasis on "remedies" in the narrow sense in the reliance article, as well as in the opening chapter of his casebook, but it almost seems that Fuller would have preferred to define "remedial contract law" as not part of the law of contract. Although this could be seen as a merely verbal issue, there are real dangers in imposing artificial definitional limits to a subject as important and central as contract law. I have suggested elsewhere[61] that this kind of definitional jugglery had serious consequences in the late nineteenth century when judges persuaded themselves that "pure" freedom of contract remained the fundamental ideal of the law by defining out of contract law any laws which interfered with freedom of contract. This led to an impoverished understanding of what was really happening to the law in the early part of this century, and in some quarters, that danger still seems to be apparent.

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59. *Id.* at 161-63. It is put even more strongly by the editor on page 158: "In Fuller's view, the only permissible form of legislation is the sort that lets individuals plan their own lives." However, Professor Summers tells me that he has seen a letter in the Fuller archives in the Harvard Law School library, dated May 10, 1965, addressed to Professor Bedau of Tufts University, in which Fuller expressed support for legislation establishing public transportation systems.

60. L. FULLER, *supra* note 4, at 104-05.

61. P. ATIYAH, *supra* note 49, at 405.

C. *The Relationship of Reliance to the Principle of Autonomy.*

One of the deepest and strangest ambivalences in Fuller's theory of contract arises from the relationship between reliance and the principle of autonomy. Fuller's great article on reliance was, of course, the starting point for much modern reliance theory.[62] It opened up for discussion the whole relationship between the doctrine of consideration and the different types of damages awardable in contract. It was, I think, the first systematic demonstration of the relationship between promise, benefit, and detrimental reliance on the one side and expectation damages, restitution "damages," and reliance damages on the other. But it also challenged the centuries-old orthodoxy which asserted that contracts are enforced on the basis of principles of autonomy alone—or out of respect for the human will. For the first time since the seventeenth century natural lawyers it was now seriously contended that contractual obligation could be seen as based primarily on actual or probable reliance by the promisee.

What is so very curious is that Fuller never seems to have seen in his recognition of the importance of reliance any challenge to his respect for the priority of the principle of autonomy. In *Consideration and Form* he actually refers to a number of cases in which "a promisee has seriously, and according to ordinary standards of conduct, justifiably relied on a promise which the promisor expressly stipulated should impose no legal liability on him."[63] In a footnote Fuller adds that in these cases "the principle of reimbursing reliance is regarded as overriding the principle of private autonomy."[64] It is astonishing that Fuller should have left this point without further comment; the implications cry out for exploration. How can the reliance be *justifiable* when the "promisor" disclaims responsibility for the consequences—unless, that is, one accepts that it is the court rather than the parties which has the responsibility for deciding when reliance is justifiable, and, therefore, worthy of legal protection. Certainly, as Fuller does recognize, the result involves a reversal of the normal order of priority between reliance and autonomy as the controlling principle. But once this order is reversed in these cases we surely need a principle to tell us when and why it will be reversed in other cases. Indeed, perhaps we

62. It was preceded by some of Corbin's work and especially section 90 of the first Restatement of Contracts for which Corbin was largely responsible; but at this date reliance theory was almost exclusively directed to recognition of unbargained-for reliance as an alternative to conventional consideration.

63. Fuller, *supra* note 22, at 811.

64. *Id.* at n.16.

need a principle to explain why autonomy normally takes priority over reliance rather than the other way around.

Perhaps more fundamental still is the question whether reliance doctrine is tied to contract law—rather than illustrating a much broader principle of social policy—in the way Fuller apparently assumed. Once again it is odd that Fuller never addressed this question, though he came tantalizingly close to it on several occasions. In the reliance article Fuller assumes almost throughout that the discussion concerns *promises*: the article chiefly addresses the question when and to what extent will promises be enforced because they have been or are likely to be relied on. It is true that he devotes a few pages[65] to liability for misrepresentation in order to demonstrate that here, too, a distinction can be drawn between the reliance interest and the expectation interest; and he also discusses other contractual problems from the same point of view, such as the effect of revocation of an offer. But Fuller does not seem to appreciate the potential implications of the reliance idea in these extensions of promissory liability. Nowhere does he fully explore the question whether reliance on non-promissory language or conduct may not, of itself, be a ground for the imposition of liability, in which case the protection of reliance may be a principle of far wider importance than contract.

This omission is all the more curious in light of Fuller's reference to the cases in which reliance has been allowed to override the autonomy principle, that is, where there is "a promise which the promisor expressly stipulate[s] should impose no legal liability on him."[66] But what kind of a promise is this? A strict positivist might insist that a person could morally bind himself by a non-legally binding promise; but it is an uphill task to argue that a person who disclaims all legal responsibility for reliance on his language is nevertheless making a morally binding commitment. And for Fuller, of all people, to say or imply that this could be the case is doubly puzzling. For Fuller would surely have said that a person who disclaims responsibility for reliance on his words quite clearly negatives the very moral responsibility which normally justifies the imposition of legal liability. Of course, so long as Fuller thought of reliance almost exclusively in conjunction with *promises*, it was more understandable that he continued to assume the primacy of the principle of private autonomy. A promise, after all, can be seen as, and indeed often is expressly couched in the form of, an *invitation to rely*. Hence the question whether the promisee was justi-

65. Fuller and Perdue, *supra* note 1, at 406-10.

66. *See supra* note 63 and accompanying text.

fied in relying as he did is often not even perceived—and does not seem to have been perceived by Fuller—as raising serious problems so long as reliance is tied to explicit promises. But even this oversight raises some fundamental questions. In particular, by permitting *unbargained-for reliance* to justify enforcement of a promise, the law necessarily embarks on a substantial redistributive exercise. The promisee is granted an entitlement to rely which he has not bought.

I will return to this point later.[67] Here I must pass to what is perhaps an even more serious implication of reliance theory once reliance becomes detached from promissory obligation. Once liability is imposed—for example, in tort, or via estoppel—for loss caused by justifiable reliance on language or conduct which cannot in any sense be regarded as promissory, the whole issue of *justifiability* of the reliance is opened up to a collective judgment. It cannot be asserted with even a modicum of plausibility that this kind of reliance—that is, reliance on non-promissory language or conduct—can be treated as giving rise to enforceable legal rights in some "neutral" sort of way. There must be a community or court judgment not merely as to the "reasonableness" of the reliance, as it is often put, but as to *the justifiability of reliance so as to shift the risk of ill consequences away from the party relying*. Once reliance came to play the major role even in promissory cases which was ascribed to it by Fuller, it was almost inevitable that its role would expand into these areas of non-promissory language and conduct. Yet Fuller never seems to have shown awareness of what this might involve.

Fuller's failure to address the issues raised by reliance on non-promissory language or conduct is also surprising because he lays so much stress on tacit promises and on custom as a source of reciprocal expectations. Although it may remain possible to treat the protection of reliance on an express promise as a form of promissory liability, it becomes implausible if not impossible so to treat reliance on an implied or tacit promise. Of course we infer promises for a variety of different reasons, but Fuller never seems to have appreciated that one powerful motive that often impels the inference of a promise is simply the reliance of one party on the other. Rather than deciding that there has been justifiable reliance because of a tacit promise, we often infer a promise because we believe there has been justifiable reliance. Perhaps the reason why some of us may sympathize with Fuller's suggestion of an implicit promise by the legislator to judge citizens in accordance with his own laws is the fact that he has invited—indeed instructed—

67. *See infra* notes 83-84 and accompanying text.

citizens to act in accordance with the laws. Having thus relied on the laws, having thus changed their position in many ways, it would be a monstrous injustice if the citizenry were then condemned for this very process. So the legislator may indeed be under the obligation which Fuller asserted, but it is not obvious that much is gained by classifying this as a promissory obligation.

In other words, we often imply the promise because we think there ought to be an obligation, not the other way round. Calling the obligation promissory then seems to legitimate the imposition of the obligation by invoking "neutral" moral principles, but in reality "we" feel—or most of us do—that there *should be* an obligation in this situation because of many of our basic presuppositions about liberalism, freedom, and the individual's role in society—presuppositions shared, of course, by Fuller. Recognizing openly why we want to impose such obligations is surely better than pretending that these are self-assumed obligations like those usually thought to arise from explicit promises.

A similar analysis may be offered of the famous Wisconsin case, *Hoffman v. Red Owl Stores*,[68] in which the court imposed a reliance liability on the defendants for (in effect) bad faith negotiations as a result of which the plaintiff had committed himself in various ways and suffered loss when no contract was ever concluded. Many commentators, following a Fullerian approach, assume that this case involved enforcement of an implied promise to bargain in good faith. Yet it is far from evident where this implied promise came from: the defendants could well have argued that they intended no such promise because the normal understanding of negotiating parties is that each acts at his own risk until a deal is concluded. It clearly follows from the court's decision that Red Owl owed a duty not to cause loss by failure to bargain in good faith, but it is hardly plausible to say that this duty arose from defendant's intentions or from the parties' private ordering. It arose from the court's perception of the requirements of good faith, even if this in turn was derived from normal understanding of commercial behavior.

Fuller would, I think, have responded to this argument by saying that implied contracts or implied terms are based on normal understandings and that they are parasitic on normal transactions between people acting normally. Thus good faith in bargaining is the norm and the "implication" of a duty to bargain in good faith is genuine.

Many lawyers would find this a defensible position, but there are serious difficulties in reconciling it with other facets of Fuller's theories.

68. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

In particular, Fuller laid great stress on custom, practice, and reciprocal standards of behavior as the substantive sources of obligation both in the case of enacted law and in the case of contract. Indeed, in dealing with enacted law he stresses the rationality and purposiveness of customary behavior, and declares that "we cannot understand 'ordinary law'—that is, officially declared or enacted law—unless we first obtain an understanding of what is called customary law."[69]

At this point[70] there appears to be a close connection between Fuller's perception of law in general and his perception of contract—which, indeed, he often insisted was a sort of private law for the parties. In both cases Fuller sees the informal normative rules of customary law or personal interactions as the primary source of the eventual obligations, perhaps as paradigmatic of public and private law respectively. In both cases the formal source, "law" or "contract," is then superimposed on the informal norms. Legislation thus becomes "formal" law, a formal, official declaration of what is right; equally, contract itself then becomes a sort of "form," a formal, authoritative determination of how the parties admit they ought to behave. In this counection it is important to note that Fuller's perception of customary law was far wider than, say, Llewellyn's perception of mercantile usage. Indeed, to Fuller, customary law seems to have been almost equivalent to what might be called social morality. Although Fuller never quite spells out this perception of the relation of express contract to implied contract or of the similarity between express contract and enacted or "made" law, he gets within a whisker of doing so in *Consideration and Form* when he discusses the role of moral obligation in the doctrine of consideration.[71] Far from being aberrant departures from principle, the cases upholding moral obligation as a consideration are, Fuller says, capable of rational defense:

> When we say the defendant was morally obligated to do the thing promised, we in effect assert the existence of a substantive ground for enforcing the promise. In a broad sense, a similar line of reasoning justifies the special status accorded by law to contracts of exchange. Men *ought* to exchange goods and services; therefore when they enter contracts to that end, we enforce those contracts. . . . The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient.[72]

69. *See* L. FULLER, *supra* note 4, at 213.

70. *See id.*, especially at 236.

71. Fuller, *supra* note 22, at 821-22.

72. *Id.* at 821.

This comes very close to saying that all contractual obligations are ultimately referable to prior substantive grounds of duty, and that the contract itself is merely a formal acknowledgment or admission of that fact.[73] On this view, neither enacted law nor explicit contract is a paradigmatic source of law or legal obligation. They are only formal sources. The primary or substantive sources must be sought behind the formal sources. Of course, these substantive sources may lack qualities such as clarity and precision, which renders it inappropriate to give them legal validity without the addition of the subsequent formal process—in this case, express contract. But the whole thrust of Fuller's philosophy of law was to minimize the importance of the formal rules of legal validity; therefore, he probably would have played down the idea that the prior sources of obligation are in some sense less "important" than the subsequent formal ones.

Fuller's discussions of the source of obligation for custom itself provides further confirmation of this. Why is customary law binding, whence the legitimacy of requiring parties to behave in accordance with custom? Fuller rejects the idea that this legitimacy can be based on a sense of obligation, or on a belief that the custom is binding—the *opinio necessitatis*. In clear cases, this is merely a tautology; where new customs are emerging, this doctrine gives no answer.

Fuller turns for his solution to the promissory estoppel idea in section 90 of the first Restatement of Contracts.

> As formulated to fit the problem at hand this principle would run along these (unfortunately somewhat complex) lines: Where by his actions toward *B*, *A* has (whatever his actual intentions may have been) given *B* reasonably to understand that he (*A*) will in the future in similar situations act in a similar manner, and *B* has, in some substantial way, prudently adjusted his affairs to the expectation that *A* will in the future act in accordance with this expectation then *A* is bound to follow the pattern set by his past actions toward *B*. This creates an obligation by *A* to *B*. If the pattern of interaction followed by *A* and *B* then spreads through the relevant community, a rule of general customary law will have been created. This rule will normally become part of a larger system, which will involve a complex network of reciprocal expectations. Absorption of the new rule into the larger system will, of course, be facilitated by the fact that the interactions that gave rise to it took place within limits set by that system and derived a part of their meaning for the parties from the wider interactional context within which they occurred.[74]

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73. This is the theory developed in P. ATIYAH, PROMISES, MORALS AND LAW (1981) at chapters 5-7.

74. L. FULLER, *supra* note 4, at 227.

At this point Fuller is in danger of being caught up in a vicious circle: express contract, like "made law," depends on, even arises out of, what parties "ought to be doing anyhow"; what they "ought to be doing" is complying with customary and traditional patterns of behavior; these are binding on them because they involve giving informal understandings of how they will behave and inducing others to rely "prudently" on those understandings. But why do these "informal understandings" create obligations? To escape a *petitio principii* here Fuller must surely go in one of two directions: he must choose between the principle of private autonomy or a collective determination of what is a "prudent" or justifiable reliance on the language or behavior of another.

I cannot find in Fuller's work a clear indication of which road he would ultimately have chosen. In many places he apparently views collective judgments as to what is "reasonable" or justifiable as parasitic on normal, intentional behavior. For example, parties who mislead others as to their intentions are thus held liable on an "objective" interpretation of their behavior, but this presupposes a world in which people normally mean what they say.[75] On this view, one could argue that "implications" are parasitic on normal behavior, normal intentions. But elsewhere in his writings Fuller seems to argue that normal behavior and normal intentions often fail to answer the questions which face us in the law. For example, in the reliance article Fuller exposes the emptiness of the foreseeability rule in *Hadley v. Baxendale*:[76]

> [I]t is clear that the test of foreseeability is less a definite test itself than a cover for a developing set of tests. As in the case of all "reasonable man" standards, there is an element of circularity about the test of foreseeability. "For what items of damage should the court hold the defaulting promisor? Those which he should as a reasonable man have foreseen. But what should he have foreseen as a reasonable man? Those items of damage for which the court feels he ought to pay."[77]

This element of circularity seems to me to extend to the whole relationship between explicit contract and imposed legal obligations. The meaning and nature of express promises take much of their substance from ideas of reasonableness but ideas of reasonableness derive in part from normal patterns of purposive behavior. There is, inevitably, action and reaction here: but which is paramount? Which is the

75. A similar idea seems to underlie the argument offered in J. Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916 (1982) (book review).

76. 156 Eng. Rep. 145, 9 Exch. 341 (1854).

77. Fuller and Perdue, *supra* note 1, at 85.

paradigm and which is parasitic? The answer to this question will often not matter; however, it may matter when principles of autonomy and reasonable reliance conflict. It may also matter when the law draws on residuary principles or ideals for extensions and new developments.

It is comforting to rest on our familiar conceptions of freedom of contract to answer this question, but Fuller, again in the reliance article, shows how easy it is to reverse our notions of what is normal and what exceptional, just as it is to reverse our perception of what is paradigmatic and what parasitic. Thus in dealing with the distinction between business contracts, normally enforceable while still executory, and non-business contracts, which tend to be enforceable only after reliance, Fuller points out how easy it would be to "base the whole law of contracts on a fundamental premise that only those promises which have been relied on will be enforced."[78] All we need add is that "the chief exception" to this principle will be the bilateral business agreement.

I have elsewhere developed the argument that the past century or thereabouts has seen a shift in the paradigm of contractual obligation.[79] In "the age of freedom of contract"—wherever that is placed—the principle of private autonomy was supreme. "Reasonableness" took its color from that principle; therefore, "objective" interpretations and "justifiable" reliance were viewed as parasitic on the private autonomy principle. In particular, reliance was largely seen as justifiable if, and only if, it was based on a promise. Today, with the waning of the private autonomy principle, "reasonableness" appears to be a more basic community judgment, drawing its sustenance less from private autonomy and more from collective moral ideas and even customary practices and redistributive ideologies. Private autonomy must now accommodate itself to reasonableness, rather than the other way round.

The result is that the notion of justifiable reliance may be gradually acquiring dominance over the private autonomy principle. Not all reliance on a promise is today seen as justifiable: for example, a promise by a consumer inserted in a contract in small print. Conversely, reliance on language and conduct is more often seen as justifiable even in the absence of a promise. Reliance has greatly developed as a source of liability in warranty law, in misrepresentation law, in products liability cases, in ordinary negligence actions, and of course in estoppel and promissory estoppel. Some of these forms of liability could be de-

78. *Id.* at 70.

79. *See* P. ATIYAH, *supra* note 49, especially chapters 20-22.

fended as liability on an "implied promise," but many of them cannot be so explained without circularity or distortion. Many therefore illustrate the growing ascendancy of the reliance principle over the private autonomy principle.

A recent English decision, *Yianni v. Edwin Evans & Sons*,[80] illustrates this process. The plaintiffs wanted to buy a house and applied for a loan to a "building society," a widely used type of home loan mutual society. The building society, as customary, commissioned a valuation which was conducted by the defendant surveyors. The report being favorable, the building society loaned the plaintiffs eighty percent of the amount of the valuation. The plaintiffs did not see the defendants' valuation, which was shown only to the building society, but they paid the defendants' fee through the building society. The valuation turned out to be grossly excessive, the defendants having negligently failed to discover structural weakness in the house which had to be put right at a substantial cost. The plaintiffs recovered damages against the defendants for their negligence: the court held that the plaintiffs had reasonably and foreseeably relied on the valuation, even though they had not seen it, because they assumed that the house was worth at least the amount loaned to them.[81] There was, of course, no promise or warranty addressed by the defendants to the plaintiffs; indeed, the defendants clearly did not intend that their valuation should be made available to or be directly relied on by the plaintiffs because they advised the plaintiffs to commission their own survey. Nor in all probability did the defendants charge a fee commensurate with the assumption of liability to the plaintiffs.[82]

It seems clear enough that if the principle of private autonomy was paramount, the defendants should not have been liable: they did not intend to assume liability nor even to invite reliance by the plaintiffs. It is true, and was found as a fact, that the plaintiffs' reliance was in one sense foreseeable and reasonable because most buyers do not commission their own surveys but rely on the building society's willingness to lend as sufficient evidence of the value of the property. But although this reliance may thus be said to have been "reasonable" it is hard to see how the plaintiffs could have been entitled to throw on the defendants the result of their reliance if traditional principles of contract had prevailed. The plaintiffs had no "right" or "entitlement" to rely so as to hold the defendants liable for the consequences. They had not

80. [1982] Q.B. 438.

81. *Id.* at 457.

82. Before the decision in this case it had been widely assumed that surveyors were not liable in these circumstances, so it is fair to assume they charged accordingly.

"bought" such a right; although they had paid the defendants' fee, the fee clearly did not include any element of "premium" to protect the plaintiffs against the risk which occurred.

The decision in favor of the plaintiffs—and this is typical of many such cases today, both in England and America—stems from the shift from contractual and promissory doctrine to reliance or tort doctrine. Contract doctrine, at least when it was largely bargain-based, only protected paid-for reliance. The promisee had to buy the right to rely. Once the courts shift into reliance or tort doctrine however, they in effect "give" the right to rely to the plaintiff and are thus engaged in a redistributive exercise. Furthermore, they do so largely on the ground that the plaintiffs have relied *in fact*, and in a normal, customary—therefore foreseeable—manner. Factual, customary reliance becomes justifiable reliance and is thus converted into a legally protected reliance.

It is, of course, true that any decision awarding damages to an injured plaintiff in a tort case involves a distributive element; even the torts of battery or conversion of goods depend on recognition that the person injured had the "entitlement" not to be injured by the battery or the conversion, and in that sense involve recognition that, as between the two parties, the entitlement is allocated to the victim. But in *Yianni*, and in any case in which the plaintiff is claiming reliance losses, there are two special features which make the distributive implications particularly striking. First, in the typical tort case the plaintiff has suffered a loss which is a social as well as a private cost, and traditionally tort law has been seen as having at least some concern for the avoidance or minimization of such social costs. But in the instant case, and in most typical reliance cases, the plaintiff has incurred a private cost which is not a social cost at all. The plaintiffs' loss in the instant case was offset, from the social viewpoint, by the corresponding gain to the seller of the property. Hence, the argument is purely about the allocation of the loss between the plaintiffs and the defendants, and the court could only shift the loss to the defendants by allocating to the plaintiffs a "right to rely" to which they were not prima facie entitled.[83]

Of course, much the same may be said of plain theft where the gain to the thief counterbalances the loss to the owner, and the tort remedy can therefore only be granted by allocating the entitlement in question to the owner. However, in this situation, the allocation of the entitlement takes place in accordance with the preexisting set of prop-

83. On the distinction between private and social cost in cases of this kind, see Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEG. STUDIES 1 (1982); Rizzo, *The Economic Loss Problem: A Comment on Bishop, id.* at 197; Bishop, *Economic Loss: A Reply to Professor Rizzo, id.* at 207.

erty laws, whereas in the case under discussion, the allocation of the right—at any rate on the first occasion such a decision is made[84]—involves a change from the preexisting allocation of entitlements. Moreover, the change in allocation—the redistribution of rights—is particularly striking because it concerns an entitlement to a recognizable commodity which can be bought in the market, and could have been so bought by the present plaintiffs. They could have bought advice with "a right to rely" on that advice, but they did not do so.

A second striking feature of decisions of this character is that the plaintiffs' loss or injury stems not only from the defendants' conduct or language, but more immediately from the plaintiffs' own free choice decision to act in reliance on that conduct. Because the defendants intended that the plaintiffs should not be entitled to shift the risk of such reliance to them and the plaintiffs likewise could not intelligibly have intended that their action in reliance should be at the defendants' risk, the allocation of the entitlement to rely to the plaintiffs clearly violated the principle of private autonomy.[85] This result seems to me to illustrate very well the curious way in which the development of reliance doctrine—for which Fuller was substantially responsible—today clashes so violently with the principle of private autonomy which he so strongly favored.

Nevertheless, I would like to end by suggesting that there is a broad sense in which the protection of "reasonable" reliance—perhaps even in the extended way illustrated above—ought not to cause serious anxiety to the modern liberal. F. A. Hayek has repeatedly warned us that non-contractual expectations cannot be protected to the hilt without serious infringements of the rights of others.[86] My "expectations" in my job, my income, the retention of the present value of my property and so forth depend entirely on the assumption that other people will continue to behave in ways that I have no right to compel them to behave. The continuation of my job in a market society depends on a

84. Of course, once the decision is accepted and becomes known, it can be assumed that surveyors will begin charging an appropriate premium for the extra risk they are forced to bear. Thus, the long-term result of such decisions is the familiar one of introducing—in effect—a system of compulsory insurance; the allocative effect of giving the home buyer a "right to rely" will thus remain, but future buyers will have to pay for the right.

85. It must be admitted that all these remarks may seem just as applicable to the case of fraud as they are to negligence; but a general allocation of an entitlement to rely on the *honesty* of those with whom we deal is one thing, and a general allocation of the right to rely on the *carefulness* of others is something else—especially when the risk covered is primarily a risk of financial rather than physical loss.

86. In particular see F. HAYEK, *The Mirage of Social Justice*, in 2 LAW, LEGISLATION AND LIBERTY at 114-25, 137-38, 140-41 (1976); *see also* T. HONORE, QUEST FOR SECURITY: EMPLOYEES, TENANTS, WIVES (1982) (Hamlyn Lectures).

continuing demand for the services I can provide. If people's needs or tastes change, I may lose my job; my property may depreciate in value and so on. These results can only be avoided by freezing the existing economic arrangements in society in a way which would greatly benefit the haves at the expense of the have-nots. In any event, not all expectations can be fully protected because some people expect no relevant change, while others expect change beneficial to them.

On the other hand, it is surely one of the marks of a liberal society that revolutionary or even over-rapid change should be avoided where possible. Protecting reliance is, in a broad sense, a way of reconciling the need for change with the desire to avoid infliction of unnecessary suffering on those who lose by change. Protection of all non-contractual expectations would be not only inconsistent with all change, it would be impossible for the reasons given above. But protection of at least some kinds of non-contractual reliance is not inconsistent with change. All it does is to cushion those liable to be most severely affected by the change. The radical or revolutionary may protest that this is merely a way of enabling "the rich" to hang on to part of their wealth a little longer, but at the present day as much of the demand for this form of protection—job protection, income maintenance and so on—comes from "the poor" as from the rich. Perhaps Fuller, with his sympathy for Burkean gradualism, as well as his faith in the rationality and legitimacy of customary behavior, would ultimately have come to see that his reliance principle could be justifiably extended to the non-promissory arena, and that once entrenched there it might often take priority even over the principle of private autonomy.