
PRECEDENT IN CONTRACT CASES AND THE IMPORTANCE(?) OF THE WHOLE STORY

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INTRODUCTION

I am honored to contribute to this Symposium in honor of Bill Whitford. I have been an admirer of Bill's work for the past thirty-nine years, which encompasses my entire teaching career. Bill's scholarship on contracts and consumer law in his law review articles and in his casebook, *Contracts: Law in Action*, now in its third edition with Macaulay, Braucher, and Kidwell,¹ confirms the importance of examining the nonlegal forces at work in exchange transactions, the sometimes tenuous relationship between contract rules and legal decisions, the limitations of legal opinions, and the value of focusing on the relationship of contracting parties.

In this Essay, I begin with a brief description of Bill and his coauthors' casebook in order to capture the contributions and importance of their perspective on teaching contract law. I then turn to Bill and Stewart Macaulay's recent debate with Bob Scott on the meaning of the record in *Hoffman v. Red Owl Stores, Inc.*,² a case that figures prominently in Bill and Stewart's and most other casebooks. I use the fascinating back and forth between these three prominent authors as a jumping-off point to ponder the appropriate role of telling the whole story in important cases.

I. CONTRACTS: LAW IN ACTION

The preface to the casebook summarizes the perspective of *Contracts: Law in Action*. Critical of the classical view of contract law, Bill and his coauthors "reject the idea that contract law is no more than a small collection of timeless principles."³ Instead, to understand contract law, the student must appreciate

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1. STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, *CONTRACTS: LAW IN ACTION* (3d ed. 2010). I will speak of Bill's work with the understanding that Bill's important collaborators deserve much credit too.

2. 133 N.W.2d 267 (Wis. 1965). The debate is set forth in Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L.J. 859 (2010) [hereinafter Scott, *Legal Method*]; Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007) [hereinafter Scott, *Myth*]; and William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010) [hereinafter Whitford & Macaulay, *The Rest of the Story*].

3. 1 MACAULAY ET AL., *supra* note 1, at v (3d ed. 2010). In Bill and Stewart's article, "The Development of *Contracts: Law in Action*," they elaborate on their view of the meaning of "law in action": The term involves

contract law's role in a dynamic society in which numerous extra-legal forces influence the exchange process, including the hope for future dealing and reputational concerns. A focus on "law in action," the authors point out, leads to many additional insights, such as "that law is not free; most disputes end in settlement; crafting nice-sounding legal standards is one thing but finding evidence to establish a cause of action is another; and that all institutions, including the market, are flawed."⁴ In short, contract law is "messy," and the sooner students understand this, the better. For that matter, this reality is also an important lesson for analysts who too often base their conclusions on unrealistic assumptions about what happens "on the ground."⁵

In an early section of the casebook, in an essay on the casebook's method, Bill and his coauthors elaborate on these ideas, focusing more fully on what they call the "gap between the law on the books and the law in action."⁶ To fill the gap, the casebook includes a multitude of enriching materials. For example, chapter 3, "Contract and Continuing Relations," includes almost forty pages of materials on employment at will,⁷ including an introduction that details the evolving nature of the labor market, the history of the at-will doctrine, and the rise of legal protection for employees.⁸ Included are insights about contingent-fee litigation,⁹ the politics behind the selection of judges and their impact on judicial decisions,¹⁰ California's treatment of exceptions to at-will employment,¹¹ the relationship between employment at will and the free market,¹² and the costs of limiting employment at will.¹³ Other parts of *Contracts: Law in Action* include, for example, Bill's interviews with Matt Zeidenberg's lawyer, (Zeidenberg was the defendant in the leading case of *ProCD, Inc. v. Zeidenberg*)¹⁴ and with Joseph Hoffmann,¹⁵ and a discussion of the record in

how in fact, as opposed to in theory, statutory law and case precedent come into being; how people and businesses use contracts to manage their lives; how disputes in the performance of contracts arise and are settled; and how the resolution of disputes affects the parties to the disputes and influences future parties to contracts.

Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 TEMP. L. REV. 793, 799 (2015) [hereinafter Macaulay & Whitford, *Development*].

4. 1 MACAULAY ET AL., *supra* note 1, at v.

5. Macaulay & Whitford, *Development*, *supra* note 3, at 795, 799.

6. 1 MACAULAY ET AL., *supra* note 1, at 25; *see also id.* at 15–29.

7. *See id.* at 436–71.

8. *Id.* at 436–47.

9. *Id.* at 443.

10. *Id.* at 442, 444.

11. *Id.* at 444–47.

12. *Id.* at 467–68.

13. *Id.* at 470–71.

14. *Id.* at 605–07 (discussing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)); *see ProCD v. Zeidenberg in Context*, 2004 WIS. L. REV. 821 (providing an edited transcript of a videotaped interview by Bill Whitford of Zeidenberg and his attorney).

15. *See* 1 MACAULAY ET AL., *supra* note 1, at 386–87, (discussing the underlying facts of the case based on interviews with Joseph Hoffmann (citing Scott, *Myth*, *supra* note 2; and Whitford & Macaulay, *The Rest of the Story*, *supra* note 2)).

Hoffman v. Red Owl Stores.¹⁶ Only the least inquisitive students would want to ignore these rich materials.

More doctrinally focused casebooks invite insights into the law in action too (and Bill and his coauthors do not disagree). For example, realities that Bill and his coauthors identify, such as the role of lawyers in planning transactions and lawyers' efforts at settlement, are not hidden in the study of case decisions, at least not if the instructor pitches in with good questions. Cases involving quarrels over the parol evidence rule or the interpretation of contracts, for example, invite questions about how litigation could have been avoided or about the appropriate settlement strategy. Further, the need for balancing the "security of transactions" and regulation to prevent unfairness in contract exchanges¹⁷ is the inevitable conclusion of the juxtaposition of successful and unsuccessful cases on unconscionability and other policing doctrines. Such cases also reveal that most contracts involve standard forms and adhesive formation strategies. Moreover, Bill and his coauthors urge students to understand the "contradictions within contract law."¹⁸ Today, few, if any, contracts casebooks hide this ball in order to devote more room for "details of doctrinal refinements."¹⁹

In the end, the goal for casebook compilers should be to find the appropriate mix of rules and principles on the one hand, and supplementary materials on the other. Bill and his coauthors find that the mix should lean rather heavily toward the law in action.²⁰ Inevitably, then, users of *Contracts: Law in Action* certainly can be confident that the casebook artfully brings the realities of lawyering to light. Other may feel that the casebook is a bit too light on doctrine.

I now want to address Bill and Stewart Macaulay's debate with Bob Scott about the *Red Owl* case. This debate richly contributes to understanding the importance of the law in action.

II. THE DEBATE BETWEEN WHITFORD-MACAULAY AND SCOTT ON THE *RED OWL* CASE

Contracts: Law in Action quotes Wittgenstein to identify perhaps the paramount question challenging legal authors who supplement their treatment of judicial opinions with surrounding facts: "Is it even always an advantage to

16. *Id.* at 386–89; see also Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 809–37. There is, of course, much more.

In part inspired by the law-in-action approach, the first chapter of my casebook with Robert S. Summers, *Contract and Related Obligation*, traces an agreement from formation, to performance, to breakdown, and to the various stages of litigation. ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 2–47 (6th ed. 2010). The book also contains pleadings, lawyer correspondences, secondary sources elaborating on law-in-action issues, etc., so hopefully Bill would approve of our approach.

17. 1 MACAULAY ET AL., *supra* note 1, at 16–17.

18. *Id.* at 18.

19. *Id.*

20. Macaulay & Whitford, *Development*, *supra* note 3, at 800; see also 1 MACAULAY ET AL., *supra* note 1, at 18–19 (elaborating on the importance of teaching skills that will benefit future lawyers as opposed to focusing primarily on doctrinal rules).

replace an indistinct picture by a sharp one?"²¹ Bill's scholarly work on cases such as *ProCD* and *Red Owl* sharply reveals his answer to this question. Bill digs into the background of cases, including interviews of litigants and their lawyers, and studies case records because he believes that such work is crucial for understanding contract law as it functions in the real world. The "indistinct picture" presented by judicial opinions is thus far too shallow and incomplete. This perspective motivated Bill and Stewart to respond to Bob Scott's informative analysis of the facts of *Red Owl*.²²

Notwithstanding that negotiations for the grant of a Red Owl franchise to Hoffmann broke down,²³ the Wisconsin Supreme Court in *Red Owl* concluded that Hoffmann's precontractual reliance on Red Owl's promises and assurances of a franchise justified a jury award of damages under the doctrine of promissory estoppel.²⁴ The court stated that

[t]he record here discloses a number of promises and assurances . . . which plaintiffs relied and acted upon to their detriment. Foremost were the promises that for the sum of \$18,000 Red Owl would establish Hoffman in a store. . . . Hoffman was induced to sell his grocery store fixtures and inventory . . . on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Owl go through.²⁵

Bob Scott's conclusion after studying the trial transcript in *Red Owl*, however, was that the court wrongly affirmed the jury's finding that Red Owl promised to grant Hoffmann a franchise. Instead, the parties were simply negotiating, with Red Owl reticent because of its concern that Hoffmann would have insufficient capital to invest in the venture.²⁶ Moreover, Scott asserted that Hoffmann knew that Red Owl's agent, Lukowitz, the divisional manager, did not have the authority to commit Red Owl to grant a franchise.²⁷ Scott's thesis, therefore, was that the court should not have granted Hoffmann promissory estoppel relief.

Bill and Stewart also studied the trial record, along with interviewing Hoffmann and reading the appellate briefs in the case. After an extensive analysis of these materials, they concluded that Red Owl did in fact make a promise, albeit not the one that they thought was the court's focus.²⁸ Bill and

21. 1 MACAULAY ET AL., *supra* note 1, at 49 (quoting LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., Macmillan 3d ed. 1972) (1953)).

22. See Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 806.

23. The debaters reverted to the actual spelling of Hoffman, which has an additional *n* at the end. Apparently the court simply was mistaken as to the spelling.

24. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 273-77 (Wis. 1965).

25. *Red Owl Stores, Inc.*, 133 N.W.2d at 274.

26. Scott, *Myth*, *supra* note 2, at 91 n.88.

27. *Id.* at 95.

28. Bill and Stewart focus on the court's statement that "[f]oremost were the promises that for the sum of \$18,000 Red Owl would establish Hoffman in a store." *Red Owl Stores*, 133 N.W.2d at 274; see Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 851-57. But in the same paragraph

Stewart reasoned that the agent's statement that an investment by Hoffmann of \$18,000 would be enough was insufficient for many reasons. For example, the parties had not ironed out most details, such as the financial plans for the deal and a site for the franchise.²⁹ Instead, Bill and Stewart concluded that, at a later time in the negotiations, after Hoffmann and Red Owl officials met, Hoffmann had disclosed the state of his finances, and Red Owl gave him its financial plan, "a jury could have found that Hoffman[] was told that the 'only hitch' holding up award of a franchise was selling the bakery, and that Hoffman[] relied on this statement."³⁰ Moreover, Hoffmann reasonably relied on the Red Owl agent, Lukowitz, who made this statement.³¹ Bill and Stewart therefore concluded that the case was decided correctly and that "justice was done."³²

III. THE CONTRIBUTION OF THE *RED OWL* DEBATE

There are many things to admire about this scholarly debate, not the least of which is the degree of care and the amount of effort that the debaters invested in examining the facts of the *Red Owl* case. But of course, the debaters deserve kudos for much more than expending lots of time and energy unearthing more facts about the case.

Especially interesting for academics and their students, the debate yields a more accurate description and assessment of the facts of a leading contracts case, even if the debaters ultimately disagreed about precisely what had happened and what the result should have been. This enriched understanding allows readers to form their own conclusions over whether justice was done. It also helps readers identify the values and policies at stake in reaching that conclusion.³³ These alone are significant accomplishments.

The debate also underscores the value of the "law in action" approach. For example, readers can better appreciate the possible motives of the *Red Owl* parties, their reasons for litigating, and their litigation strategies.³⁴ The debate also sharpens the tools lawyers employ for, among other things, searching for and determining necessary facts and for choosing litigation strategies.³⁵ Further,

the court identifies additional assurances, including one that induced the Hoffmanns to sell their bakery building. *Red Owl Stores*, 133 N.W.2d at 274.

29. Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 846–47.

30. *Id.* at 850.

31. *Id.* at 849.

32. *Id.* at 801; *see id.* at 806.

33. See *infra* Section IV for a discussion of the debaters' conclusions and an evaluation of the policies and values at stake in examining the "whole story" of a case such as *Red Owl*.

34. Scott, *Legal Method*, *supra* note 2, at 871 ("The law-and-society scholar might support the 'found promise' story by once again providing a richer and deeper context to explain Hoffmann's behavior."); Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 837–46 (discussing the motives of the parties in *Red Owl*, their reasons for litigating, and their litigation strategies.)

35. See Judith L. Maute, *Response: The Values of Legal Archaeology*, 2000 UTAH L. REV. 223, 225 (stating that studying a case in depth can "trigger creative ideas for factual inquiry").

readers better appreciate the nature of legal doctrine and its interaction with facts and policy.³⁶

Perhaps more important for students and lawyers, the debate helps isolate and define the crucial issues and elements of applying promissory estoppel in the negotiating setting. The debaters' search for a promise by Red Owl and reliance by Hoffmann helps define precisely promissory estoppel's elements and their nature in this setting, and raises a red flag about the importance of finding a distinct and actionable promise and reasonable reliance on it. The need for caution and a focus on the facts is brought home by Bill and Stewart's distinction between the court's conclusion as to the actionable promise (that Hoffmann would receive a franchise if he invested \$18,000), which occurred early in the negotiations, and the assertion by Lukowitz that "the only hitch" was that Hoffmann had to sell his bakery, which occurred after Hoffmann's finances and Red Owl's plans were on the table.³⁷

The debate also underscores the policy issues at stake in applying promissory estoppel at the bargaining stage. Most fundamentally, it raises the issue of the limits of freedom of contract. Should Red Owl have any precontractual obligation to Hoffmann? Further, following other commentators, Bill and Stewart worry on efficiency grounds that without promissory estoppel people like Hoffmann would be deterred from making precontractual investments that ultimately benefit both parties.³⁸ Further, they are concerned that reliance without a remedy will enable promisors to "hold up" the relying party to extract greater gains than otherwise would be available.³⁹ In addition, Bill and Stewart argue that parties such as Hoffmann and Red Owl have tacitly agreed that Hoffmann can recover for his reliance and that courts should enforce this implied agreement.⁴⁰ Scott, on the other hand, points out that promissory estoppel in this context harmfully places handcuffs on prospective bargainers by stifling their ability and willingness to bargain.⁴¹ Ultimately, of course, the appropriate decision depends on balancing these policies in light of the facts of a case.⁴²

36. See *id.* at 229.

37. Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 850. I therefore doubt that Bill and Stewart's approach "eschew[s] abstraction, prediction, and generalization" or that it merely is an "occasion for identifying and vindicating the preexisting rights of the litigants." Scott, *Legal Method*, *supra* note 2, at 869, 873.

38. Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 855.

39. *Id.* at 855-56.

40. *Id.* at 856.

41. Scott, *Legal Method*, *supra* note 2, at 872 ("Freedom from liability for honest expressions of future intention that are later withdrawn encourages parties to negotiate freely without fear that their initial expressions of interest will be binding.")

42. See *infra* notes 48-63 and accompanying text for an argument that *Red Owl* was correctly decided.

IV. THE LIMITS OF THE WHOLE STORY

In this Section, I want to raise some questions about historical exploration of cases to reveal what I think are some limitations of such work. To be clear, for the reasons I only touched upon in my discussion in Section III, I believe the debaters performed a great service for students, lawyers, and scholars by their work on the *Red Owl* case. But the debate does raise some interesting quandaries too, especially about *Red Owl*'s precedential value, which is my focus here. I address the following questions: Based on the facts as the court found them, is the decision in *Red Owl* an unfortunate precedent? Should courts rely on the unearthed facts in *Red Owl*? What does the use of such facts portend for the future of promissory estoppel in the bargaining setting?

A. *Based on the Facts as the Court Found Them, Is the Decision in Red Owl an Unfortunate Precedent?*

With the benefit of hindsight, specifically knowledge of the development of promissory estoppel for over almost fifty years beyond the *Red Owl* case, it is fair to say that promissory estoppel in any setting has not had a huge impact in any manner that should cause alarm. In fact, the theory has not been very successful in the courts. My study of two years of cases in the 1990s showed that promissory estoppel was successful on the merits in only about eight percent of the cases brought.⁴³ But what about applying promissory estoppel specifically in the *Red Owl* precontractual setting? It appears that promissory estoppel has been no more successful in this context.⁴⁴ So it does not appear that *Red Owl* has done much harm even if wrongly decided, other than perhaps encouraging some unsuccessful litigation.⁴⁵

Nevertheless, at first blush it appears that both Bill and Stewart on the one hand and Bob Scott on the other believe that the *Red Owl* opinion is unhelpful in explaining the boundaries of liability for precontractual reliance, with the implication being that it is indeed a worrisome precedent. Bill and Stewart write:

Scott has referred to [*Red Owl*] as an unfortunate case that, because of the attention that it has received, has retarded thinking about the precise limits of a rule allowing recovery for precontractual reliance. We

43. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 589 (1998). My quick and informal sample of promissory estoppel cases decided across the states in the fall of 2014 tentatively suggests that the success rate has not changed over the years. Promissory estoppel does appear to be a bit more successful in Wisconsin than nationally, at least since 2000, perhaps thanks to the holding in *Red Owl*, which is still cited by Wisconsin courts. See Post-2000 *Hoffman v. Red Owl* Cases, Memorandum from Andrew Brehm, Research Assistant, Wisconsin Law Sch., to Bill Whitford, Professor of Law, Wisconsin Law Sch. (Oct. 2, 2014) (on file with author).

44. Bob Scott reports that in his survey of 108 cases decided between 1999 and 2003 involving precontractual reliance, thirty involved promissory estoppel claims, eighty-seven percent of which decided against the promissory estoppel claim. Scott, *Legal Method*, *supra* note 2, at 862; Scott, *Myth*, *supra* note 2, at 98.

45. See *infra* notes 60–62 and accompanying text for a theory that litigants often include a promissory estoppel claim in breach of contract cases.

agree that because the court does not explain why Lukowitz's statement about the \$18,000 should be considered a promise rather than a mere opinion or enthusiastic encouragement, the opinion does not help explain the limits on precontractual reliance.⁴⁶

Bill and Stewart ultimately conclude, however, that under their view of the facts *Red Owl* was decided correctly and that promissory estoppel belongs as a potential cause of action at the negotiation stage.⁴⁷

So, is *Red Owl* a worrisome precedent? Even accepting the facts as the court related them, I do not believe so. The facts recited by the court portray an unequal bargaining relationship in which the stronger party, Red Owl, a large established business, through its agents, repeatedly made assurances that Hoffmann, the operator with his wife of a local bakery for about five years, would get a franchise.⁴⁸ In fact, the court referred to Red Owl's communications as "assurances" at least five times in the course of the opinion. Red Owl's communications certainly contained conditions—buying and then selling a grocery business, selling their bakery business and building, purchasing an option on a lot—but Hoffmann met all of them, even as Red Owl continuously upped the monetary ante.⁴⁹ Moreover, the jury found and the court affirmed that Hoffmann was reasonable in relying on Red Owl's agent, Lukowitz, for relaying messages from the home office.⁵⁰ Certainly on grounds of justice there is room for legal doctrine to protect the weaker relying party under these circumstances—whether we call it promissory or, even better, equitable estoppel.⁵¹

In addition, I believe that each of the reasons for finding for Hoffmann identified by Bill and Stewart and referred to above—the efficiency, coercion,

46. Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 854–55 (footnote omitted).

47. See *supra* Section II for an overview of the *Red Owl* debate.

48. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 269–70 (Wis. 1965).

49. "The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment." *Id.* at 274.

50. Bill and Stewart point out that "the Hoffmanns were reasonable in viewing Lukowitz as an agent authorized to communicate messages from those headquarters officials." Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 851. They focus on Lukowitz's statements after Hoffmann had met with Red Owl officials, who reviewed Hoffmann's financial statement and drafted a financial plan. *Id.* at 852.

51. "Perhaps a franchise negotiation between a sophisticated franchisor and a relatively unsophisticated franchisee presents . . . a case" for preventing "exploitation." Scott, *Legal Method*, *supra* note 2, at 873.

Equitable estoppel may be a better fit because the sum total of all of the assurances, representations, and conduct of Red Owl proves the fairness of protecting Hoffmann's reliance, as opposed to just one or more isolated promises or assurances. Scott concedes that Lukowitz may have been "careless in his initial representation that \$18,000 'would not be a problem.'" *Id.* at 867. Careless conduct or language that induces reasonable reliance is tort-like in nature and hence a natural fit for equitable estoppel. However, Scott reports that equitable estoppel is a defense that cannot create a right of recovery under Wisconsin law. Scott, *Myth*, *supra* note, at 88. He suggests that other legal doctrines might better apply to the case. *Id.* at 88–89. For example, Scott suggests applying rules that govern preliminary agreements. Scott, *Legal Method*, *supra* note 2, at 877–80.

tacit agreement rationales—apply under the facts as related by the court.⁵² This is so because each of these rationales ultimately depends on whether Hoffmann reasonably relied on Red Owl, a supposition that I would argue was satisfied whether we call Red Owl's statements representations, assurances, or promises.⁵³ In addition, even if liability for precontractual reliance had spiraled as a result of the case, the decision would not have seriously disrupted the bargaining strategies of businesses. After all, Red Owl's agents were not compelled to assure Hoffmann continuously that the deal was going through. For that matter, it would not have taken much for Lukowitz or other agents to mention that Red Owl had no legal obligation until the deal was consummated. Perhaps Red Owl's agents allowed their hope for a commission or other advancement to cloud their communications with Hoffmann.⁵⁴

But now let's assume, for the sake of argument, that under the court's recitation of the facts, *Red Owl* is wrongly decided because the facts do not establish a distinct promise, representation, or assurance on which Hoffmann could reasonably rely. I'll go out on a limb here and assert that the decision is nonetheless a valuable precedent in the development of promissory estoppel. This is so because the description of the law in the case carefully established the requisites for a successful promissory estoppel claim. The court invoked section 90 of the *Restatement (First) of Contracts*, which clearly set forth the elements of promissory estoppel, and noted that the record "discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment."⁵⁵ So courts should have understood that a recovery requires a clear promise and reasonable reliance regardless of whether they believed that the *Red Owl* court was on a firm factual footing.

The *Red Owl* court's repeated emphasis on Red Owl's multitude of assurances alone should have alerted courts that only reasonable reliance establishes a promissory estoppel claim. Clearly, the accumulation of such assurances influenced both the jury and the Wisconsin Supreme Court. The decision, even if wrongly decided, also accentuated the need to distinguish assurances that are too uncertain to rely on and those that qualify as promises.⁵⁶ Although Bob Scott suggests that precontractual assurances are almost invariably too indefinite to induce reasonable reliance, there are important exceptions.⁵⁷ For example, reliance on an assurance may be reasonable, even if

52. See *supra* notes 28–32 and accompanying text for a discussion of Bill and Stewart's analysis of *Red Owl*.

53. Scott points out that the court applied a subjective/objective test to Hoffmann's reliance, meaning that the court took into account what a reasonable person in Hoffmann's shoes would have done. Scott, *Myth*, *supra* note 2, at 87.

54. See *id.* at 93.

55. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 273–74 (Wis. 1965).

56. "[A] representation does not qualify as a promise if the undertaking is uncertain or unclear . . ." Scott, *Myth*, *supra* note 2, at 90.

57. See generally *id.*

many terms are undecided, if the custom in the particular industry is to rely on such assurances in those circumstances.⁵⁸

Perhaps, though, I do not have to speculate about the influence of *Red Owl* even if wrongly decided. As already noted, future courts applying promissory estoppel have been relatively parsimonious in finding its elements, so the holding in *Red Owl* does not appear to have thrown courts off track.⁵⁹ Ironically, assuming the court decided the case incorrectly, the court's error may have had the effect of alerting future courts to the tenuous nature of promissory estoppel in the precontractual setting.⁶⁰ Perhaps Hoffmann's success may have falsely encouraged some promisees to bring promissory estoppel actions, but I doubt it. My study of promissory estoppel cases strongly suggests that litigants "tack on" a promissory estoppel cause of action in breach of contract cases without any strong hope of success.⁶¹ Ultimately, the *Red Owl* decision, whether right or wrong, helped establish, I think correctly, that courts should recognize the *possibility* of promissory estoppel at the negotiation stage.

An illustration from another leading case may help substantiate my argument that a decision may be incorrect, but still helpful doctrinally. In *Jacob & Youngs, Inc. v. Kent*,⁶² Cardozo decided that Jacob and Youngs, a contractor, had substantially performed construction of a house even though the contract called for Reading pipe and the contractor mostly had installed other pipe of the same quality and value. Cardozo found that the contract term calling for Reading pipe was a promise and not a condition precedent that would excuse Kent's final payment. However, the record in the case, which Cardozo failed to mention, revealed that other terms in the contract likely established that Reading pipe was a condition precedent.⁶³ Nonetheless, the case has real precedential value in establishing the methods and implications of distinguishing promises and conditions and has successfully guided precedent in numerous cases that followed it.

58. For example, in the movie industry the parties rely on unsigned "deal memos." A jury found Kim Basinger liable for \$8.9 million after refusing to perform in the worst movie ever made, *Boxing Helena*. See Michael S. Bogner, Comment, *The Problem with Handshakes: An Evaluation of Oral Agreements in the United States Film Industry*, 28 COLUM. J.L. & ARTS 359, 363, 371–72 (2005) (discussing *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994)).

59. See *supra* notes 43–45 and accompanying text for a discussion of the success rates of promissory estoppel claims.

60. See *infra* Part IV.C for a discussion of the future of promissory estoppel in the bargaining setting. Scott believes, on the other hand, that *Red Owl* is "quite inconsistent with the now-dominant view of when courts should use the doctrine of promissory estoppel to protect precontractual reliance." Scott, *Legal Method*, *supra* note 2, at 860.

61. Hillman, *supra* note 43, at 595–96.

62. 129 N.E. 889 (N.Y. 1921).

63. J. DAWSON, W. HARVEY & S. HENDERSON, CASES AND COMMENT ON CONTRACTS 816–17 (4th ed. 1982); see also Kenneth K. Ching, *Justice and Harsh Results: Beyond Individualism and Collectivism in Contracts*, 45 U. MEM. L. REV. 59, 71 (2014).

B. *Should Courts Rely on Bill and Stewart's (or Bob Scott's) Unearthed Facts?*

I have already identified several ways in which the *Red Owl* debate advances students', lawyers', and academics' understanding of the issues that arise upon applying promissory estoppel in the negotiation stage, including their understanding of the nature of promise and reliance in this setting. But several additional issues arise if a *court* contemplates using the facts derived from the record but missing from the official report of a previous decision either to support its conclusion in the current case or to distinguish the earlier case.⁶⁴

Combing a record to find additional facts may be unreliable. Researchers may reach different conclusions on the facts and on their meaning.⁶⁵ Our debaters, of course, substantiate this concern. In addition, such expeditions into the record and conclusions drawn have the potential for undermining the certainty of precedent:

Because virtually any decision would be potentially vulnerable to impeachment, and because it is rarely possible to establish conclusively why a court decided the way it did, people would have little sense of how courts would interpret the case law and therefore little idea of what the law is on a given legal issue.⁶⁶

Especially destabilizing, courts (and scholars) likely would not rely on precedent until the record was thoroughly explored to determine the validity of the holding. And without uniform rules and processes for analyzing the record, courts would have difficulty evaluating the relevance of uncovered facts.⁶⁷ Even if such an exercise were feasible, courts would be challenged developing the boundaries of acceptable supplementary materials. For example, mining the record may seem more reasonable than outside research, but might depend on who is doing the mining or outside research, the methods they are employing, and what they uncover.⁶⁸

Bill and Stewart are not unaware of the limitations of their method. They concede that their analysis unconsciously might favor Hoffmann, either because they interviewed him and formed a connection or because of their own biases on the appropriateness of promissory estoppel in the case.⁶⁹ Further, although they tried, they were unable to interview Red Owl officials to get their side of the story. And they were not present to hear the actual testimony, which may

64. Charles Barzun helpfully illuminates these concerns in a recent paper (although he seeks to debunk them primarily in the context of Supreme Court adjudication). See Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1672–77 (2013).

65. See *id.* at 1672–73 (“The problem is further aggravated by the fact that such historical inquiry is conducted by lawyers, who are not known for being very good historians.”).

66. *Id.* at 1672–74. In response to this argument, Professor Barzun reasons that “it is difficult to see why adding one more means of analyzing a precedent would effect a sea change in the relative determinacy of the law.” *Id.* at 1675.

67. *Id.* at 1677.

68. Although Bill and Stewart interviewed Hoffmann, they verified his remarks by examining the trial record. Whitford & Macaulay, *The Rest of the Story*, *supra* note 2, at 805.

69. *Id.* at 849.

translate very differently than the written page or Hoffmann's remembrances many years later.⁷⁰

In short, there is a good argument that the *Red Owl* debate is a valuable contribution for students, lawyers, and academics. Attempting to get closer to the truth outside the courtroom may be beneficial for those audiences. On the other hand, courts in later cases should entertain the facts that surface from exploring the record with caution. More important in assessing precedential value, especially taking into account rule-of-law concerns, is a court's own treatment and recitation of the facts, which most reliably establishes the meaning and significance of a case.⁷¹ Perhaps there are some exceptions where judicial reliance on supplemental facts from the record of a previous case makes sense. For example, combing a record to reveal information that explains an opaque or ambiguous precedent (which I do not believe includes *Red Owl*, even if factually incorrect) may outweigh the potential problems of unreliability and uncertainty.⁷² But courts should be reluctant to go much further. Certainly a court should not rely on the record of a previous case to contradict that court's own findings.⁷³

C. *What Does the Use of the Record Portend for the Future of Promissory Estoppel in the Bargaining Setting?*

Ironically, the debaters' efforts on understanding *Red Owl* ultimately may undermine still further judicial use of promissory estoppel in the precontractual setting. The felt need to substantiate the decision or to refute it by combing the record and interviewing parties legitimizes complaints about the court's holding and reinforces the view that the chance of error is sufficiently large that promissory estoppel does not belong in the precontractual setting at all. Further, examining the record in *Red Owl* does nothing to reduce the inevitable tension between the principle that legal obligation in the contract setting arises only after the parties form a contract and the contrary idea that a party can be liable for inducing reasonable reliance during negotiations. Instead, perhaps, the debate

70. Not infrequently, I, and I'm sure others, completely misinterpret an email because of the absence of tone and facial expression.

71. See Kevin M. Clermont, *Civil Procedure Archaeology*, in *CIVIL PROCEDURE STORIES* 1, 1 (Kevin M. Clermont ed., 2d ed. 2008).

A practical reason is *not* to uncover the cases' "true meaning" in the sense of discovering new facts or circumstances that revolutionize how we read the cases. Sometimes advocates do that to distinguish and so undermine a troublesome precedent. But that is in large part a lawyer's trick to mislead the court. Given our system of stare decisis, courts have to take precedents pretty much at face value. How the deciding court stated and understood the facts and circumstances fixes the context for deciphering the holding.

Id.

72. E-mail from Kevin M. Clermont, Robert D. Ziff Professor of Law, Cornell University Law Sch., to Author (Mar. 2014) (on file with author).

73. *Id.* These observations also suggest caution before embracing historical facts outside of the record to refute a decision. An exception to such reticence might be to impeach decisions that rest on illegitimate grounds. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

only draws attention to this dilemma and will motivate courts to shy away from promissory estoppel in the precontractual setting. Of course, once Bob Scott published his article, Bill and Stewart can justifiably argue that the benefits of their rise to the challenge outweigh any of these concerns. And, notwithstanding these concerns, to the extent Bill and Stewart persuade readers, perhaps their efforts actually portend a greater role for promissory estoppel in the precontractual stage in appropriate future cases.

CONCLUSION

Bill Whitford has been a giant in the law and society movement. His contributions far surpass those mentioned here. But I hope that this Essay suffices to reveal Bill's important contributions to contract law and, particularly, the value of trying to learn the whole story. For me, historical inquiry helps clarify the appropriate place for promissory estoppel in the legal lexicon, but courts, in a system of stare decisis, should ordinarily be reluctant to rely on it.

