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Assurance, Reliance and Expectation

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INTRODUCTION

Reliance is a central concept in law and everyday affairs. Questions as diverse as the presence of trust,[1] the extent of responsibility for a promise,[2] or the retroactivity of an appellate decision[3] may depend on whether some person or persons did or did not rely. In the field of contract law, Fuller and Perdue's influential article, *The Reliance Interest in Contract Damages*,[4] called attention to reliance as a key to explaining contract liability and remedies. That article alone has provoked an extensive body of scholarship on reliance as a basis for liability and damages.[5] Hence, one would expect careful attention to have been paid to the concept. Yet the meaning of "reliance" has been entirely neglected in legal and philosophical literature.

For example, it is striking that nowhere do Fuller and Perdue clarify the concept so central to their analysis. They assume that the reader fully understands what "reliance" means and what phenomena

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1. *See, e.g.*, ANNETTE BAIER, MORAL PREJUDICES 95-202 (1995); Richard Holton, *Deciding to Trust, Coming to Believe*, 72 AUSTRALASIAN J. PHIL. 63 (1994).

2. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

3. *E.g.*, Stovall v. Denno, 388 U.S. 293 (1967).

4. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936).

5. *See, e.g.*, Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987); Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131 (1987); Robert Birmingham, *Notes on the Reliance Interest*, 60 WASH. L. REV. 217 (1985); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 52 U. CHI. L. REV. 903 (1985); Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247; Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991). For citations to other articles, see Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 45-50 (1996).

count as reliance. In effect, they treat reliance as a background part of nature: no more in need of jurisprudential analysis than the fact that heavy objects fall to the ground.[6] Those who have pursued the insights of Fuller and Perdue invariably make the same implicit assumption and fail to analyze the concept they write at length about.[7]

This Article seeks to fill a gap in legal scholarship by carefully examining the concept of reliance, as well as closely allied concepts such as assurance and expectation. Reliance is a characteristic of some, but not all, conduct, and the fact that given conduct amounts to reliance has important social and legal consequences. Our task is to analyze this characteristic and to account for its significant consequences. To do so, we will develop a comprehensive analysis of reliance; apply the analysis to some issues in domains, such as misrepresentation law, where reliance plays a central role; and pursue answers to several deeper questions, in particular, why detrimental reliance is a well-accepted basis for liability and blame. The analysis of reliance that we develop and apply will be framed in terms of: (a) the reasons for action that reliance involves, and (b) the types of criticism or blame with which reliance is closely connected.

Before we begin the inquiry, however, we will attempt to motivate the basic questions the Article asks and the approach it takes to answering them. To that end, we will sketch some key differences between acting in reliance[8] and acting on a belief. The sketch will help the reader appreciate what any successful analysis of reliance must show and will serve as a non-technical prelude to the more technical arguments that follow.

A. Reasons, Belief, and Reliance

Suppose that an individual, say Jones, were to look out his window, see a menacing sky, and leave home with an umbrella. We likely would say that:

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6. The authors' treatment of reliance should be contrasted with their profound recognition that the notion of "damage" does not denote a fact of nature, but a creation of a legal system. *See* Fuller & Perdue, *supra* note 4, at 52-53 (asserting that damage is "not a datum of nature but a reflection of a normative order).

7. Even an article captioned "The Meaning of Reliance" fails to explain the meaning of "reliance." *See* Jay Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 Wis. L. Rev. 1373.

8. The sketch, like the main analysis, is principally concerned with the phenomenon of reliance on an utterance as opposed to, e.g., reliance on a person. As we shall see, an analysis of reliance on an utterance points to the analysis of other types of reliance.

Indeed, (1.2) is little more than a restatement of (1.1). An ordinary reason for action, such as is involved in (1), normally is understood to be, or at least to centrally involve, a belief.

But if we try to unpack (2) in an analogous way, we get:

(2.2) Jones believed that Smith said rain was likely, and this belief was a substantial factor in Jones' taking an umbrella.

This proposition is plainly not a restatement of (2.1). Rather it is a statement that, while in some sense true, misses the point. For (2) does not explain Jones' action in terms of a belief in the physical phenomenon of Smith's uttering something.[10] Rather, it explains Jones' action in terms of his acceptance (in some sense) of the content of Smith's utterance. To treat (1) and (2) as having the same logical form, and as expressing the same connection between reason and action, flies in the face of this elementary fact.

This difference between (2) and (1) reflects a difference between reliance and acting on a belief. Sentence (2) ordinarily can be understood as an implicit statement about Jones' reliance. Specifically, it ordinarily can be understood to imply that:

(2.3) Jones relied on the fact that Smith told him rain was likely.

By contrast, (1) cannot normally be understood as a statement about Jones' reliance on some phenomenon or event.[11] Rather, it is a statement about Jones' acting on a belief.

Thus, comparing the respective logical structures of action-on-belief statement (1) and reliance statement (2) suggests that reliance, to the extent it is a form of acting on reasons, is materially different from simple action on a belief. Any analysis of reliance must account for and explain this difference.

B. Reliance and Blame

There is a second, probably more obvious, difference between acting in reliance and acting on a belief: the appropriateness of criticism or blame. If, in (2), Smith was wrong and rain was in fact not

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10. A proposition that does explain an action in this way might be:

(*) Jones acted disdainfully because Smith said "ain't."

11. It is true that there exists a weak sense of "rely" for which one can say, with respect to case (1), that Jones relied on the sky's being menacing. But to "rely" in this weak sense means simply to believe and act on that belief. Thus, to say that:

(1.3) Jones relied on the fact that the sky was menacing

is to say the same thing as (1.2).

Henceforth, we shall use "rely" and "reliance" only in the strong sense.

(1) Jones took his umbrella because the sky was menacing.

This is a commonplace type of observation about why someone acted as he did. In making the observation, we would be saying, among other things, that:

(1.1) The reason (or a reason) Jones took his umbrella is that the sky was menacing.

This is another commonplace type of observation. Theories abound to explain what it means for a person to act on a reason and how a reason can be said to be the cause of an action.[9] But with or without a theory, we grasp what (1) and (1.1) mean, at least so far as we know how to use these sentences in the proper way.

Suppose now that it is a different day. Jones, instead of looking out his window, asks Smith what the day's weather will be. Smith tells Jones that rain is likely, and Jones proceeds to leave home with his umbrella. We might then say:

(2) Jones took his umbrella because Smith said that rain was likely.

Again, we have an everyday sort of observation about why someone acted as he did. In making this observation we would be saying, among other things, that:

(2.1) The reason (or a reason) Jones took his umbrella is that Smith said rain was likely.

Sentences (1.1) and (2.1) appear to have the same logical form, namely: person A did ϕ for reason R. And the apparent sameness of form itself suggests that (1) and (2) tell the same kind of explanatory tale. Each sentence appears to explain Jones' carrying an umbrella as a straightforward case of acting on a reason—in the one case on the sky's condition and in the other case on Smith's forecast. Yet appearances can deceive; there are fundamental differences between (1) and (2). One difference is in what *acting on a reason* involves in (1.1) and in (2.1).

To see the difference, note that, in (1), the connection between reason and action is mediated by a simple belief in the content of the reason. (1) can ordinarily be understood to imply that:

(1.2) Jones believed the sky was menacing, and this belief was a substantial factor in his taking an umbrella.

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9. *See, e.g.*, G.E.M. ANSCOMBE, INTENTION (1957); ROBERT AUDI, ACTION, INTENTION, AND REASON (1993); JOSEPH RAZ, PRACTICAL REASON AND NORMS (1990); Donald Davidson, *Actions, Reasons, and Causes*, *in* ESSAYS ON ACTIONS AND EVENTS 3 (1980).

likely, Smith might be open to criticism, by Jones and others, on several grounds. First, Smith might be open to criticism simply for misleading Jones. This type of criticism would be appropriate whether or not Jones had been harmed, just as criticism would be appropriate, irrespective of harm, were Smith to have lied to Jones or broken a promise to him. Second, additional criticism might be appropriate if Smith's false utterance did cause Jones harm. In case (1), by contrast, there would be no one to criticize were the sky soon to clear.

This blame-related difference between (1) and (2) cannot simply be a matter of Jones, in one case, acting on an utterance and in the other on a fact of nature. Not all utterances that induce a person to act are predicates for blame. For example, suppose that in case (2) Smith had not flatly asserted that rain was likely, but had merely said:

(2a) "I think it's going to rain."

On the basis of Smith's hedged prediction, Jones might believe rain is impending and consequently take his umbrella: people act on the basis of such statements all the time. But as caselaw and everyday experience confirm, we normally would not blame Smith if her prognostication proved wrong.

To explain this second difference between (1) and (2) we must again invoke reliance and related notions. An easy way to see this is to note that Smith can give Jones a reason to carry an umbrella, yet by invoking reliance in a *negative* way, avoid the possibility of blame. For instead of flatly asserting that rain is likely, Smith could offer a more complex statement of the sort: "I'm sure it's going to rain—but please don't rely on my saying so." The second part of the statement suppresses the invitation to rely that is implicit in the first. By suppressing the invitation to rely, Smith negates the possibility of blame. This suggests that an invitation to rely is implicit in certain types of assertion, and that this invitation lays the foundation for blame when the assertion proves untrue.

C. The Analysis of Reliance

As the foregoing sketch suggests, the concept of reliance is centrally involved in explaining some types of action on reasons and in ascribing some types of blame. But how does one explain reliance? A simple gambit, taken, for example by an old treatise on torts, is to say

that there is "reliance on [a] representation" when acting on the representation is "the promoting and proximate cause" of action.[12] But this leads nowhere. A representation can be "the promoting and proximate cause" of an action even where there is no reliance: in cases like (2a), for example, where the representation is a prediction or opinion.[13] Perhaps instances of reliance form a subclass of the actions designated by this overly broad description. But which subclass? And why should reliance be singled out from other "promoting and proximate" causes of action as a predicate for liability or blame?

To be useful and complete, an analysis of reliance must explain the way in which reliance involves acting on reasons and must distinguish reliance from simple action on a belief. The analysis must also show how reliance is connected with forms of blame and must explain why detrimental reliance, but not other forms of detrimental action on an utterance, is a predicate for blame and liability. Finally, it must identify the types of utterance that give rise to reliance, and explore the connections between those utterances and the relevant reasons and criticisms.

This Article seeks to answer those questions. It proceeds as follows. In the first section, we examine some notions that are fundamental to any analysis of reliance: meaning, reasons for belief and action, and types of criticism and blame. The most important part of this section is the discussion of reasons for belief and action. There we introduce and explain the notion of an *exclusionary permission*: a kind of reason that permits, but does not require, one to act against the balance of ordinary reasons for action.

In the second section we turn to an examination of the speech act of *assuring* and its relationship with reliance. We will find that assuring characteristically gives rise to certain types of reasons, including exclusionary permissions. Reliance, we shall see, can be analyzed (in part) as a matter of acting on such an exclusionary permission. This

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12. FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 375 (St. Louis, F.H. Thomas Law Book Co. 1894). *See also* List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965) (stating that reliance on an utterance occurs where the utterance is "a substantial factor in determining the course of conduct"); Samuel Stoljar, *Promise, Expectation and Agreement*, 47 CAMB. L.J. 193, 207 (1988) ("[R]eliance normally means one's acting in response to another's statement . . . .").

13. A typical dictionary definition of "representation," in the sense relevant here, includes predictions and opinions. *See, e.g.*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2553 (Lesley Brown ed., 1993) ("representation," definitions 2a & b) [hereinafter SHORTER OED]. *See also infra* section III.A.

will enable us to explain some fundamental features of reliance and to account for the practical differences between reliance and acting on a belief. In this section of the article, we also explore the connections between reliance and several types of criticism or blame.

In the third section, we make use of the analytical tools previously developed, and the conclusions reached about assurance and reliance, to clarify some issues in the law of misrepresentation. We will see that misrepresentation law is principally concerned with the speech act of assuring, and we will diagnose some avoidable complications that result from confusing this speech act with other, seemingly similar, ones. We will also clarify an issue that has troubled courts and torts scholars, viz., the difference between the reasonableness of reliance and the reasonableness of the underlying action.

In the last section, we examine a notion usually thought to be connected with reliance: expectation. We will see that there are at least two distinct notions of expectation, which have not been appreciated to be distinct. Both are important to law, but in different ways and for different purposes. By contrasting certain characteristics of reliance with corresponding characteristics of one notion of expectation, we will be able to see why it is that law and other social institutions tend to impose liability or blame for inducing detrimental reliance. This, in turn, will lead us to see that social and legal concern with reliance is a reflection of a deeper concern with protection of decisionmaking autonomy.

I. BACKGROUND NOTIONS: MEANING, REASONS AND BLAME

To explain reliance, we must first clarify three notions on which its analysis depends. As we have already seen, reliance is bound up with the phenomenon of acting on reasons and with the institution of blame. Reliance is also bound up with language, since utterances are a common basis for reliance. Thus, we shall briefly examine the notions of meaning, reasons, and blame.

A. MEANING

1. *Meaning and Reliance in General*

Consider an ordinary utterance—for example:

(3) "There are wolves in Minnesota."

To understand the relationship between such an utterance and an act of relying on it, we start with two basic observations. First, unless an utterance has meaning (in some sense) to the hearer, she cannot be said to rely on it. Second, an act cannot amount to reliance on an utterance unless there is a logical connection between the meaning of the utterance and the act.[14]

A simple example will make this clear. Suppose that Smith, upon hearing the utterance of (3) by Jones, hands a cough drop to Wilson. Ordinarily, we would not consider Smith's action to be an instance of reliance on the utterance. This is because, without more, we cannot see the connection between Smith's act and the utterance's meaning. If Smith insists that, in giving the cough drop to Wilson, she was relying on the utterance, we would demand an explanation of that connection. Smith might satisfy our demand by explaining that "there are wolves in Minnesota" is really a secret code, meaning "the person next to you has a sore throat"; or that the cough drop was laced with a potent new wolf repellent; or that Smith and Wilson had made a trifling bet on whether there are wolves in Minnesota, and Jones had taken it upon himself to resolve the controversy. In each of these cases, we can at least begin to understand the connection between meaning and resulting act.

It follows, then, that to understand reliance, we must understand at least some aspects of meaning. Specifically, we must understand some aspects of what we shall call *pragmatic meaning*. First, however, we must distinguish meaning of a more basic type.

2. *Semantic Meaning*

Language is commonly used for representing, reasoning about, and acting on the world. This is a central function—on some accounts, *the* central function—of language. What we call semantic meaning is associated with this function: it is the sense of "meaning" people ordinarily have in mind when they ask what a term (such as "mountain") or a sentence (such as "don't count your chickens before they hatch") means.[15] Meaning in this sense is what dictionaries and

14. *Cf.* Geosearch v. Howell Petroleum Co., 819 F.2d 521, 526 (5th Cir. 1987) (finding that liability for fraud requires that there "be a reasonable relation between the contents of the defendant's misrepresentation and the action plaintiff took in reliance").

15. A classic exposition of meaning in this sense is Wilfrid Sellars, *Some Reflections on Language Games*, *in* SCIENCE, PERCEPTION AND REALITY 321 (1963). *See also* Gilbert Harman, *Language, Thought, and Communication*, *in* VII MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 270, 290 (Keith Gunderson ed., 1975).

phrasebooks seek to provide.[16] The semantic meaning of a word, phrase, or sentence is the role the word, phrase, or sentence has in the relevant language (such as English). If a person knows the meaning of "water," he can perform a great variety of language-related and water-related acts. He can ascertain the truth of empirical propositions; e.g., "that jar over there is filled with water." He can reason about water-related matters: e.g., "this liquid is water: therefore, salt will dissolve in it." And he can engage in reasoned actions involving water: e.g., he can quench his thirst by drinking a glass of water. Semantic meaning is a complex phenomenon.

Theories abound to explain semantic meaning and the ways in which one can convey the semantic meaning of a term or sentence. The approach we take here is allied with several that have been advanced by linguists and philosophers of language.[17] On this approach, the meaning of a term (or sentence) is explicated through a *paradigm* of the term (or the sentence) and a statement of its *point*.[18] A paradigm is a relatively simple answer to the question, "What is an X?" in terms of what ordinarily counts as an X. Such an answer may be in the form of an exemplar (e.g., "That thing over there is *mauve*"), a list of properties (e.g., "A *wombat* is a large, burrowing marsupial"), or a method of bringing about an X (e.g., "To form a *contract*, one person offers to make an exchange and the other person accepts"). A point, by contrast, is an answer to the question, "Why does it matter whether something is an X?" The answer is in terms of a fundamental regularity or norm governing X's.

To take a simple example, the paradigm of *cup* might be: a small bowl with a semi-circular handle, having a size, shape and weight that allows a person to hold it with one hand. The point might be: a cup is (or can be) used for comfortably drinking hot liquids. In general, the

16. Concepts and semantic meaning (of terms) are closely allied. The concept of fruit is much the same thing as the meaning of the term "fruit," and to ask for the meaning of a term is to ask about the corresponding concept. In light of this close correspondence, we will refer interchangeably to semantic meaning (of terms) and concepts.

17. *See, e.g.*, GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS (1987); Linda Coleman & Paul Kay, *Prototype Semantics: The English Word* Lie, 57 LANGUAGE 26 (1981); Gilbert Harman, *(Nonsolipsistic) Conceptual Role Semantics*, *in* NEW DIRECTIONS IN SEMANTICS 55 (Ernest Lepore ed., 1987); Hilary Putnam, *The Meaning of "Meaning,"* *in* VII MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE, *supra* note 15, at 131. *See also* JULIUS KOVESI, MORAL NOTIONS 1-65 (1967).

18. The rationale for this treatment of semantic meaning is discussed at length in Jay Conison, *The Pragmatics of Promise*, 10 CAN. J.L. & JURISP. 273 (1997) [hereinafter Conison, *The Pragmatics of Promise*]. *See also* Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 635-37 (1994).

paradigm of a term or concept identifies core or unproblematic cases; the point helps determine its applicability in novel, unorthodox, or uncertain cases—e.g., determine whether an object shaped like a cup, but made of ice, should be still considered a cup.

3. *Pragmatic Meaning*

When we deal with the meaning of a term or sentence on an occasion of use, we are concerned with pragmatic meaning. If Jones utters: "It is windy outside," the pragmatic meaning of the utterance is not simply a matter of the role in language of the sentence. Rather, it is a matter of what Jones intended the hearer to understand and what a hearer normally would understand by the utterance in the context.

Pragmatics is concerned with communication and with meaning in the sense of that which is communicated.[19] "Communication," however, should not be understood simply as the conveying of factual information from speaker to hearer. For present purposes, "communication" means intentional conduct by which the speaker attempts to induce some belief in, or some action by, the hearer.[20] When speaker S performs an act by which he communicates something to hearer H, S, by that act, gives H either a reason to believe some proposition p or a reason to perform some action a. For example, if S says to H, "It's noon," S ordinarily intends by that utterance to get S to believe that it is noon; and the fact that S said to H, "It's noon," is ordinarily a reason for H to believe that it is noon. Similarly, if S says to H, "Let's go to lunch," S ordinarily intends by that utterance to get S to go with him to lunch; and the fact that S said to H, "Let's go to lunch," is ordinarily a reason for H to go with S to lunch. What S means by his communicative utterances is connected with what S intends H to believe or do.

Pragmatically meaningful utterances can be used for an enormous variety of communicative ends. A meaningful utterance can be used to command, beg, question, suggest, warn, and perform a host of other language-related acts.[21] Utterances that have pragmatic meaning are often characterized as *speech acts*.[22] A speech act ordinarily

19. On pragmatics generally, see S.C. LEVINSON, PRAGMATICS (1983); PRAGMATICS: A READER (Steven Davis ed., 1991).

20. For a generalization and elaboration of this view of "communication," see DAN SPERBER & DEIRDRE WILSON, RELEVANCE (2d ed. 1995).

21. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975).

22. *See* JOHN R. SEARLE, SPEECH ACTS (1969).

has the logical form, "F(p)," where p is a proposition and F is an indicator of the type of speech act it is.[23] The speech acts, "Are you going?", "Go!", "I want you to go," and "I hope you will go," are all variations on a common propositional theme—"you go." They have a common propositional content—a common p—but differ in their *illocutionary force*—in their F. Illocutionary force is what the speaker, through the speech act, seeks to accomplish.

There are many ways to analyze and categorize speech acts.[24] The method we shall use focuses on the types of reasons for belief and action that the speech act ordinarily gives rise to.[25] For example, speech acts such as assertions and suggestions ordinarily give the hearer a reason to believe the fact asserted. Speech acts such as requests and orders ordinarily give the hearer a reason to perform the action requested. Still other speech acts, including vows and promises, ordinarily give the speaker a reason to perform the action that is the subject of the vow or promise. Further classes of speech acts can easily be identified. This reason-based approach to the analysis of speech acts is useful in analyzing legally and morally significant utterances.

B. REASONS

If a reason bears upon the question "What shall I believe?," we call it a reason for belief. If it bears upon the question "What shall I do?," we call it a reason for action. The distinction is at least partly contextual. The fact that the sky is menacing may be a reason both for belief (that it will rain) and action (carrying an umbrella).[26]

As we have seen, a speech act may provide a reason for belief. The assertion, "It is raining outside," gives the hearer a reason to believe it is raining outside; the promise, "I will return your umbrella tomorrow," gives her a reason to believe that the speaker will return her umbrella tomorrow. Similarly, a speech act may provide a reason for action. The order, "Shut the door," gives the hearer a reason to

23. *Id.* at 31. Some illocutionary acts, such as "Greetings!", "Congratulations!", do not have this form.

24. For a commonly used one, see John Searle, *A Taxonomy of Illocutionary Acts*, *in* EXPRESSION AND MEANING 1 (1979).

25. *See* Conison, *The Pragmatics of Promise*, *supra* note 18, at 288.

26. The distinction is further blurred by the fact that there can be non-epistemic reasons for belief—i.e., reasons that are independent of the truth of the proposition believed. After all, believing can be treated as an action. An example of belief based on a non-epistemic reason is believing that Smith will win an upcoming election because doing so provides motivation for working hard to elect him. *See, e.g.*, Gilbert Harman, *Pragmatism and Reasons for Belief*, *in* REALISM/ANTIREALISM AND EPISTEMOLOGY (Christopher B. Kulp ed., 1997).

shut the door. The vow, "I will be kind to Smith the next time I see her," gives the speaker a reason to be kind to Smith the next time he sees her.

Our interest is primarily, although not exclusively, in reasons for action generated by speech acts. Reasons for action play two roles. First, they can motivate and guide action. The fact that Jones' toaster is broken (in the context of his desire to eat toast) can motivate Jones to buy a new one. Second, they can explain action. The fact that Jones' toaster is broken (in the context of Jones' desire to eat toast) can explain why he bought a new one.

1. *First-Order Reasons*

Reasons for action such as Jones' need for a working toaster are often called *first-order reasons*. A first-order reason is the most basic type of reason that enters into practical deliberation and the explanation of action. Many theories and analyses of first-order reasons have been advanced. A broadly accepted view (stated simply) is that first-order reasons are facts or beliefs in the context of some want, preference, or other motivational feature of a person. Jones' fondness for sweets, coupled with the fact that he is handed a piece of cake, is a complete first-order reason for him to eat the piece of cake. In stating a person's reason for action, it is common to cite only the belief, or only the motivational factor. Such a statement of reason, however, is elliptical. A complete account requires both parts.

First-order reasons can be weighed (in a metaphorical sense) in a very familiar form of practical deliberation.[27] If Jones is trying to decide whether to play golf or study for the bar examination, he may invoke such considerations as that more study will increase his knowledge of the matters tested, that exercise and relaxation will improve his mental and physical state, that if he fails the test he can take it again, and so forth. These are all first-order reasons for and against golfing and studying, which Jones may weigh in deciding what to do.

After Jones acts or decides to act, these first-order reasons continue to have a role. Jones may then invoke them to justify or explain his action or decision. Persons other than Jones may also invoke them to explain why Jones spent the day as he did. After the fact, Jones or another person can say that Jones ϕ'ed (or decided to ϕ) because of

27. *See, e.g.*, RAZ, *supra* note 9, at 25-28. For an account of weighing reasons in the context of judicial decisionmaking, see STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992).

reason R, or that Jones acted on reason R. As this usage makes clear, there is a distinction between the ex ante and ex post use of first-order reasons. Once Jones acts or decides to act, reasons to the contrary cease to be relevant. If Jones ends up playing golf, he (and others) will justify or explain his action by reference to his reasons for playing golf, but not his reasons for studying.

2. *Reasons and Oughts*

Usages of the term "ought" are closely connected with usages of the term "reason." In its most basic sense, "ought to ϕ" is essentially synonymous with "has a (first-order) reason to ϕ."[28] If Jones has a reason to whistle, then he ought to whistle. This sense of "ought" is very weak. Because a person can simultaneously have reasons to both ϕ and not ϕ, he can be in a situation where, on the one hand he ought to ϕ and on the other hand he ought not to ϕ.

A second, different sense of "ought" is the balance-of-reasons sense. Return to the example of Jones and the bar exam. Once Jones has considered and weighed the reasons for and against the alternatives, he may reach a decision, say, that on the balance of reasons he ought to play golf. "Ought to ϕ" in this sense is not equivalent to "has a reason to ϕ." Rather, it is approximately equivalent to: given present circumstances C, consisting of first-order reasons $R_1, \ldots, R_n$, the best course of action is to ϕ. On this sense of "ought," it is doubtful that one can simultaneously assert and deny that a person ought to ϕ. However, people can disagree over whether, in a given case, a person ought (in this sense) to ϕ.

3. *Second-Order Reasons*

A different type of reason is a *second-order reason.* A second-order reason is not a reason for or against some ordinary action, such as mowing the lawn or taking a left turn. Rather, it is a reason governing the use of first-order reasons in practical deliberation and ordinary action. Two types of second-order reasons are central to the present analysis. Both justify and explain a person's not acting on certain first-order reasons.

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28. RAZ, *supra* note 9, at 29-31.

a. Simple Exclusionary Reasons

One type of second-order reason is a *simple exclusionary reason.*[29] It is a reason not to act on certain types of first-order reasons.[30] For example, a fiduciary with the responsibility to invest trust assets has a simple exclusionary reason to avoid acting for reasons of self-interest in matters of trust investment. The fact that the fiduciary has this second-order reason does not mean that the investments he makes for the trust cannot, under any circumstances, further his own interest. Rather, it means that, when investing trust funds, the fiduciary should not act for the reason of furthering his own interest.[31] Simple exclusionary reasons are reasons against acting on certain reasons; they are not reasons against the underlying action itself.

i. Simple Exclusionary Reasons and Speech Acts

Simple exclusionary reasons can result from speech acts. Consider, for example, the speech act of deciding.[32] Deciding, by its very nature, cuts off debate. If, after purportedly deciding to ϕ, a person still considered himself entirely free to weigh all the pros and cons of ϕ'ing, it is difficult to see how he could be said to have decided to ϕ.[33] When a person decides to take action ϕ, he necessarily gives himself a reason to disregard (from that point on) some or all reasons against ϕ'ing. Hence, deciding to ϕ gives the speaker a simple exclusionary reason to refrain from acting on some or all first-order reasons against ϕing.[34]

The example of deciding to ϕ also illustrates another important feature of simple exclusionary reasons, viz., that they are often accompanied by a special type of first-order reason. To understand this first-

29. Raz calls this type of reason an "exclusionary reason." RAZ, *supra* note 9, at 40-45. The rationale for preferring the name "simple exclusionary reason" will presently emerge.

30. A full exploration of this topic would require an unpacking of what it means to act for (or on) a first-order reason. For present purposes, it suffices to say that part of what it is for P to ϕ for reason R is that P ϕ's because he believes that R is a reason for him to ϕ. *See* Joseph Raz, *Reasons for Action, Decisions and Norms*, 84 MIND 481 (1975). The further issue of what it means to believe that R is a reason to ϕ is beyond the scope of this article.

31. Ordinarily, the act of investing will be preceded by deliberation. Having the simple exclusionary reason also means that the fiduciary, in deliberating about how to invest trust assets, should disregard his own interest.

32. The analysis applies equally well to acts of deciding that are not speech acts.

33. For further discussion of decisions as exclusionary reasons, see RAZ, *supra* note 9, at 65-73.

34. For a defense of the rationality of acting on exclusionary reasons, see David Gauthier, *Assure and Threaten*, 104 ETHICS 690 (1994).

order reason, consider Jones, who is at the grocery store. He puts a carton of blueberries in his basket. The action, let us say, is not immediately preceded by a decision: Jones simply noticed the display of blueberries and without thinking put the carton in the basket. Nonetheless, Jones' action is likely to be based on an ordinary first-order reason: e.g., the fact that Jones wants blueberries for his breakfast cereal and has none at home. There are two salient aspects of this ordinary first-order reason. First, as we have already noted, the reason is closely connected with Jones' wants or interests. Second, although Jones does not invoke the reason before acting, he (and others) can invoke it afterwards to explain his action.

If there had been a decision by Jones, it would add something new to the explanatory calculus. For Jones could then explain his action by reference to the fact that he had decided to put the carton of blueberries in his basket. The act of deciding would itself provide a new first-order reason for the action. But unlike as with ordinary first-order reasons, it does not constitute a reason for action on account of its promoting some contingent want or interest of Jones. Rather, it is a reason because of the principle of rational conduct that a person ought to do what he has decided to do. If Jones decides to ϕ, he ipso facto has a reason to ϕ irrespective of what ϕ is. The reason is contentless, like a presumption. Let us call it a *formal reason.*[35]

A formal reason is usually of little practical importance where there are strong, articulable reasons (such as Jones' desire for blueberries on his cereal) underlying the action in question. In such cases, there is little, if anything, to be gained by explaining the action in terms of the decision rather than the underlying reasons. But there are occasions where formal reasons have explanatory importance. Suppose that Jones pauses to choose between two very similar cartons of blueberries. After a brief period of indecision, he puts one in the cart. If Jones is asked to explain why he took *this* carton of blueberries, rather than *that* one, he may have nothing to say other than: "Well, I just decided to take this one."[36] And we accept this as a perfectly proper explanation.

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35. For discussions of this type of reason, see H.L.A. Hart, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM 243, 254-55 (1982). *See also* Margaret Gilbert, *Agreements, Coercion, and Obligation*, 103 ETHICS 670, 688 (1993).

36. A man may decide to do A even though he does not believe that all things considered he ought to do A. He may, for example, believe that he ought to decide and that it does not matter what he decides or he may believe that he ought to decide and not know what to decide. In such cases it is clear that the decision is regarded by the agent

Vows, promises, and similar speech acts have (at least in part) the same reason-generating features as decisions. Each of these speech acts gives the speaker a formal reason for doing what he said he would do and a simple exclusionary reason not to act on reasons to the contrary. If an individual promises to ϕ, and he then ϕ's, he can explain his ϕ'ing simply by reference to the fact that he promised to ϕ (the formal first-order reason); and he can explain his refusal to consider reasons for not ϕ'ing by reference to the fact that he promised to ϕ (the simple exclusionary reason).

ii. Simple Exclusionary Reasons and Oughts

In dealing with simple exclusionary reasons—indeed, in dealing with second-order reasons generally—one is concerned with what a person ought to do at two levels of practical discourse. On the one hand, a simple exclusionary reason is a reason to disregard, and not act on, certain first-order reasons. Hence, a person who has a simple exclusionary reason ought to disregard those first-order reasons, where "ought" is the weak "ought" discussed previously. There can be conflicting oughts in this sense because there can be conflicting second-order reasons.[37]

On the other hand, simple exclusionary reasons (and second-order reasons generally), bear upon the underlying action one ought to take. This yields a new sense of "ought." For what one ought to do, taking into account second-order reasons is not necessarily what one ought to do, solely on the balance of first-order reasons. It might be the case, for example, that on balance of reasons, Jones ought to relax on the day before the bar examination. But if he promised his mother that he would devote every available moment to studying, he may properly disregard the reasons to relax. He may thus conclude that he ought to study—where this "ought" takes into account not just first-order reasons, but also the second-order reason resulting from his promise.

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as a reason for action. Before he decided he saw no reason why he should do A rather than not - A. Having decided he has a reason to do A—namely his decision.

Raz, *supra* note 30, at 494.

37. For example, orders and promises generate second-order reasons. Jones is subject to conflicting second-order reasons if he promises his wife that he will be home early to watch the children so she can attend a meeting, but then is ordered by his boss to work late.

iii. Simple Exclusionary Reasons and Authority

As we have seen, for speech acts like decisions and promises, the simple exclusionary reason and the formal reason may justify the speaker in acting against the balance of first-order reasons. If Jones promises to ϕ, he may be justified in ϕ'ing even if there are strong reasons to the contrary; indeed, even if the original reasons underlying the promise have vanished and good reasons against ϕ'ing have emerged. In this respect, decisions and like speech acts may be said to be "binding."

There is another, perhaps more useful, way to explain this sense of bindingness. A speech act which gives rise to a simple exclusionary reason coupled with a formal reason has the practical effect of causing a judgment or decision made at one time to supplant judgment or decision at a later time. If Jones decides, vows, or promises to ϕ, he eliminates the need to decide later whether to ϕ. When subsequently faced with the question of whether or not to ϕ, Jones may invoke the prior speech act as a dispositive reason (within limits) to ϕ. More significantly, the earlier decision, vow or promise within limits makes not ϕ'ing an inappropriate course of conduct. Jones is thereby bound to ϕ.[38]

Speech acts like decisions and promises supplant later judgments of the speaker himself. Other types of speech act supplant judgments of the hearer. For example, when the speaker and hearer are in a relationship of superior to subordinate, a command to ϕ provides the hearer with a formal reason to ϕ and a simple exclusionary reason to disregard first-order reasons against ϕ'ing.[39] The practical result is to give the hearer a reason to act against the balance of first-order reasons, and to substitute the speaker's judgment for her own.

This analysis can be extended beyond speech acts to other sources of reasons. A similar account can be provided for mandatory and prohibitory rules; these are norms such as "no littering" or "yield to merging traffic." Mandatory and prohibitory rules are often analogized to commands. Although the analogy has well known limits and weaknesses, there is one respect in which it is sound. For mandatory and prohibitory rules provide any individual who accepts them with a

38. For another explanation of this sense of the bindingness, see G.E.M. Anscombe, *Rules, Rights, and Promises*, 3 MIDWEST STUD. PHIL. 318 (1978).

39. *See* Hart, *supra* note 35, at 253-54.

first-order reason to act coupled with an exclusionary reason.[40] In this sense they are binding. They substitute the judgment of the legislator (or other source of the norm) for the judgments of the rule's subjects.

In general, there is a close connection between the notion of authority and the phenomenon of one's having a simple exclusionary reason coupled with a formal reason. As many legal and political philosophers have observed, the notion of authority has at its heart the phenomenon of one person's judgments supplanting judgments of others. "The whole point and purpose of authorities," says Raz, "is to preempt individual judgment on the merits."[41] Similarly, writes Friedman, "[t]o cite authority as a reason for doing an act . . . is to put a stop to the demand for reasons at the level of the act itself, and to transfer one's reason to another person's . . . judgment."[42] Authoritative pronouncements are distinctive because of the way they are treated by a class of subjects, and this treatment is analyzable in terms of simple exclusionary reasons and accompanying formal reasons. To a person who accepts the authority of a court, legislature, or other source of norms, a rule or directive functions as an exclusionary reason coupled with a formal reason. The complex of reasons justifies the subject not only in following the rule or directive but also, in appropriate cases, acting against her own judgment of what ought to be done on the balance of first-order reasons.

4. *Exclusionary Permissions*

Another important type of second-order reason is what we may call an *optional exclusionary reason* or, following Raz, an exclusionary permission.[43] It can most easily be understood through a simple contrast. When a person has a simple exclusionary reason, he ought to disregard some or all of a class of first-order reasons. When he has an exclusionary permission, he *may* disregard some or all of a class of first-order reasons.

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40. *See* RAZ, *supra* note 9, at 71-76.

41. Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFFAIRS 3, 15 (1985).

42. R.B. Friedman, *On the Concept of Authority in Political Philosophy*, *in* AUTHORITY 56, 67 (Joseph Raz ed., 1990). *See also*, Hart, *supra* note 35, at 258 ("[T]o have . . . authority is to have one's expression of intention as to the actions of others accepted as peremptory content independent reasons for action.").

43. *See* RAZ, *supra* note 9, at 90-91.

a. The Role of Exclusionary Permissions

From the fact that a person may do something it does not follow that, on balance of reasons, he ought to do it.[44] This applies to the act of disregarding first-order reasons as much as it does to the act of rolling in the mud. If a person may roll in the mud, whether he should do so is governed by reasons. If a person may exercise an exclusionary permission and disregard first-order reasons, whether he should do so is also governed by reasons—indeed, by first-order reasons. Suppose, for example, that Smith has an exclusionary permission which entitles her to disregard the financial interests of Jones in connection with a proposed course of action. Whether Smith proceeds to disregard Jones' financial interests may be guided and explained by, e.g., Smith's desire to simplify a complex decision, her sense of honor, or her concern that Jones might reciprocate by disregarding her (Smith's) interests in a later transaction.

The analytical importance of exclusionary permissions lies in the following. An action may be permitted, in the sense that there are no conclusive reasons against it. This is a weak sense of "permitted"; so weak that most actions are permitted in this respect. It is a generalization to the realm of reasons of Hohfeld's notion (in the more limited realm of norms) of a privilege to ϕ as the absence of a duty not to ϕ.[45] Yet there are cases of a person's being permitted to ϕ that cannot be analyzed simply in terms of first-order reasons. These are cases where one is permitted to perform an act, even though, on balance of first-order reasons, he ought not to do it. A simple case is where a person has been given consent to perform an action that he otherwise ought not to perform.[46] An action permitted in this stronger sense can be explained in terms of a second-order reason that allows (but does not require) one to act against the balance of first-order reasons; in short, in terms of an exclusionary permission.

Exclusionary permissions have received little attention in philosophical and jurisprudential literature. But they surely warrant more, since a great many phenomena can be explained in terms of them. Consider mercy. A judge or other actor may face a situation where the balance of first-order reasons tells in favor of ϕ'ing, but where ϕ'ing would have harsh consequences for some person P. In such a

44. Indeed, it does not even follow that he ought to do it, in the weak sense of "ought."

45. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

46. *See* RAZ, *supra* note 9, at 96-97.

case, the judge or other actor may show mercy on P by not ϕ'ing. The appropriateness of not ϕ'ing under these circumstances cannot be explained by reference to some first-order reason that tips the balance in favor of the merciful course of conduct. Mercy exists only when the merciful action goes against the balance of first-order reasons. Accordingly, an analysis of mercy would seem to require invocation of a second-order reason. But the reason invoked cannot be a simple exclusionary reason, affirmatively calling for one to disregard reasons against the merciful course of conduct. Mercy is discretionary; by its nature it does not have to be exercised. What mercy thus seems to involve is a form of permission. In fact, it seems to involve the exercise of an exclusionary permission that enables one to disregard some or all reasons in favor of the harsh action.

b. Exclusionary Permission and Authority

Some of the most interesting and important examples of exclusionary permission can be found in situations where an individual may treat a prior decision (by himself or another) as authoritative, but does not have to do so. Consider one such case. Suppose that Jones throws a candy wrapper on the sidewalk. Smith, a complete stranger, orders him to pick it up. By virtue of Smith's order, Jones has a first-order reason to pick up the candy wrapper. If Jones and Smith were in a hierarchical command relationship (such as the Army), Jones would also have a simple exclusionary reason and Smith's order would be authoritative for him. Here, however, Jones and Smith are strangers and the order is not authoritative. Nonetheless, Jones has an exclusionary permission by which he may treat the situation *as if* Smith had authority over him. If Jones chooses to act on the permission and treat the situation this way, it becomes as if he had a simple exclusionary reason. He will then disregard first-order reasons for not picking up the wrapper and act on Smith's command.

Another example of an exclusionary permission connected with authority is a type of self-imposed norm. Suppose that Jones adopts the precept: show kindness to animals. Just what has he done? If Jones had merely decided to perform a single act of kindness, such as buying a toy for his cat Fluffy, he would have a first-order reason and an exclusionary reason, which together bind him to buy the toy. A similar conclusion could be drawn had Jones adopted for himself a rule not to engage in some well-defined type of conduct—for example, a rule to avoid cruelty to animals. By doing this, he would again

have given himself a formal reason and an exclusionary reason, and thus bound himself to avoid cruelty to animals.

But we cannot analyze Jones' resolution to show kindness to animals along these lines. To treat it as providing a formal reason and an exclusionary reason would be absurd. To do so would be to treat the precept as a categorical rule of the form: always perform acts of kindness to animals. To follow such a rule, Jones would have to spend every available moment working at a shelter for homeless animals or engaging in some comparable activity.[47] This is not what people intend when they adopt such a precept. Yet the obvious alterative—to treat Jones as having merely a first-order reason—fares no better. Presumably, Jones already has a general preference for kindness to animals—why otherwise would he have adopted the precept? But if so, Jones would already have a first-order reason to be kind to an animal wherever there arose an opportunity to do so: the precept would add nothing.

The proper analysis is to see the resolution as giving Jones a formal reason to engage in acts of kindness to animals (just as in the case of a decision) and an exclusionary permission to disregard reasons not to engage in such acts of kindness. Jones may exercise the permission in appropriate cases and thereby treat the precept as if it supplied a simple exclusionary reason. When he does treat the precept this way, it functions as an authoritative rule. But whether to treat it this way under given circumstances is a matter of Jones' rational choice.

A final example of the connection between exclusionary permission and authority is the type of norm called a "principle." As we have noted, a (mandatory of prohibitory) rule may be analyzed as a formal reason coupled with an exclusionary reason. The rule setting a speed limit of thirty-five miles per hour on Main Street gives a person driving on Main Street a reason to drive thirty-five miles per hour and a second-order reason to disregard first-order reasons to drive faster. At least in some cases a principle may be treated analogously, as a formal reason coupled with an exclusionary permission. For example, the principle that a person should not be allowed to profit from his wrong, taken as a norm for judges, supplies a first order reason to

47. ANSCOMBE, *supra* note 9, at 58-62; A.I. MELDEN, RIGHTS AND RIGHT CONDUCT 26-29 (1959). A slightly weaker interpretation of the categorical rule supposedly embodied in the precept might be: whenever you see an animal, perform an act of kindness toward it. But this rule is equally absurd.

prevent a wrongdoer from profiting from his wrong and an exclusionary permission entitling the judge to disregard reasons that would allow a wrongdoer to profit from a wrong.

The fact that a principle involves an exclusionary permission accounts for the phenomenon, so emphasized by Dworkin,[48] that principles do not necessarily determine the outcome of decisionmaking in cases where they apply. Unless the permission is exercised, a principle supplies only a first-order reason for action. Yet, as Raz points out, principles can be dispositive.[49] When the permission is exercised, it is as if there were an exclusionary reason and a first-order reason, just as in the case of a rule.

C. Criticism and Blame

A person who, through an utterance, induces another to rely can sometimes be criticized or blamed. This much is clear. But the observation does not tell us very much; there are many types of social criticism,[50] not all of which are relevant to the phenomenon of reliance.

One of our aims is to understand why certain forms of criticism are appropriate in connection with reliance. To lay the foundation for this inquiry, we must identify and preliminarily explore the forms of criticism that are connected with reliance. Two such types are quite familiar: criticism based on harm and criticism for breach of obligation.[51]

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48. *See* Ronald Dworkin, Taking Rights Seriously 24-26 (1977).

49. *See* Joseph Raz, *Legal Principles and the Limits of Law*, 81 Yale L.J. 823, 841-42 (1972).

50. We are interested in criticism that essentially involves reference to social practices or social norms. Some types of criticism, by contrast, are formal, challenging structural deficiencies in a person's acting on reasons. These types include criticism for irrationality or for having chosen a poor course of action, given the actor's motivation's and reasons. The distinction between formal and social criticism is not rigid, *see* Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 912 (1996), but we need not refine it for present purposes.

For an account of social constraint that is in many respects parallel to the account of social criticism presented here, see Russell Hardin, *Trustworthiness*, 107 Ethics 26 (1996).

51. The types of criticism described in the text are not the only ones that reflect social norms. Another familiar type of criticism is criticism for character deficiency. If Jones repeatedly breaks his promises, he may be criticized not only for breach of obligation and (perhaps) for inducing harm, but as well for having a bad character. Yet another type of criticism is criticism for unfairness. Both character criticism and criticism for unfairness play essential roles in morality, law, and everyday life, but have little, if any, bearing on the analysis of reliance.

1. *Harm-Based Criticism*

One of the most common grounds for criticizing conduct is that it has produced harm. A person who gratuitously strikes another may be criticized for causing bodily harm. A person who tells a stranger that his tie looks cheap and ugly may be criticized for causing emotional harm. Yet it is vital to recognize that not all actions which cause harm are criticizable. A person who takes a customer away from a rival by offering a lower price will not be criticized for causing economic harm. A man who woos and wins the affections of an unattached lady will not be criticized for causing anguish to her other suitors. Whether a person may be criticized for causing harm of a given type depends on prevailing social norms.[52]

One such norm is that a speaker is subject to strong criticism if his false assurance leads a hearer to rely, to her harm. It is not always appreciated that this norm is contingent. It certainly is not a law of logic. Inducing detrimental reliance through a false assurance could well be as weak a basis for criticizing the speaker as is inducing detrimental action through an erroneous statement of opinion—an apparently similar phenomenon. The norm enabling criticism for reliance-based harm is a social fact that demands explanation.

2. *Criticism For Breach of Obligation*

A second familiar type of criticism is criticism for breach of an obligation. This type of criticism is not dependent on harm or other consequences of the action (or inaction). A breach of obligation is criticizable by its nature. It is in the nature of promise that the failure to keep a promise may be criticized; it is in the nature of murder that action constituting murder may be criticized; it is in the nature of son that conduct amounting to a failure to give special attention to the interests of one's son may be criticized.[53] To explain this form of criticism more rigorously: criticism of conduct as a breach of obligation is based on the possibility of describing the conduct in terms of a special type of concept. That concept is one whose point is (at least in part)

52. These norms also govern what counts as harm. *See* Fuller & Perdue, *supra* note 4, at 52-53. Polluters were not subject to criticism and liability until it became widely accepted that polluting the air and water was a way of causing harm.

53. *See* MELDEN, *supra* note 47.

the norm that conduct describable this way may be criticized.[54] If conduct is characterizable as, say, murder, then it is ipso facto blameworthy. There is no need to state further that it is harmful, irrational, unfair, demonstrative of bad character, or foolish in order for it to warrant obligation-based criticism.

Obligations come in various types. The types differ, inter alia, in their source, scope, and connection with reliance.

a. Canonical, Institutional, and Voluntary Obligations

What we will denominate canonical obligations are obligations having the form: obligation not to ϕ; where ϕ is an action of the type referred to by the associated obligational concept. Examples are the obligations not to murder, lie or steal. Canonical obligations govern all members of the relevant society. They promote social stability in a wide array of contexts.

Other types of obligation are more limited in scope. *Institutional and voluntary obligations*[55] have the form: obligation to P; where P is a person or group referred to by, or closely connected, with the associated obligational concept. Examples are the obligations to one's children or one's country; to a friend; or to a party to an agreement.[56] Institutional and voluntary obligations attach because of, and are specific to, a status or social arrangement. They guide conduct so as to enhance and preserve such arrangements.

These three types of obligation can be bases for reliance. They enable people to rely on other members of society to act in ways that maintain social order and facilitate interchange. Canonical obligations enable members of society to rely on others not to engage in the criticizable activity. The obligations not to murder, steal, or lie make it possible for a member of society to deal with others under the reasonable assumption that they will not murder, rob, or lie to him. Institutional or voluntary obligations, on the other hand, relate specially to a status or relationship, marking it out for preferential treatment. They encourage forms of special treatment for those who stand in the

54. *See* Conison, *The Pragmatics of Promise*, *supra* note 18, at 297-98. See also Anscombe, *supra* note 38, for a similar explanation.

55. For an explanation of the distinction between these two types of obligation, see Conison, *The Pragmatics of Promise*, *supra* note 18, at 301.

56. *See, e.g.*, ALASDAIR MACINTYRE, *"Ought," in* AGAINST THE SELF-IMAGES OF THE AGE 143-48 (1971); MELDEN, *supra* note 47; Michael Hardimon, *Role Obligations*, 91 J. PHIL. 333 (1994).

relevant relationship to the actor and so enable these persons to rely on the fact that they will be given such special treatment.

b. Propositional Obligations

The obligations just described are important in law and everyday life. Important also is the phenomenon of reliance on them. But these obligations are of only limited present interest, since the forms of reliance to which they give rise are not the forms with which we are centrally concerned. The type of obligation with which we are most concerned is what we shall call *propositional obligation.*

Propositional obligations arise from an utterance, rather than from a status or relationship, and their scope is defined by the content of the utterance. The most familiar example is promissory obligation. A promissory obligation results from a promise, and the scope of that obligation is determined by the content of the promise. Similarly defined obligations result from swearing, guaranteeing, and related speech acts.

Now, one can rely on a propositional obligation in the same way one can rely on a canonical obligation. A person can rely on the obligation resulting from a promise by relying on the fact that the promisor is subject to criticism if the promise is not kept. Yet, our interest here is not primarily in this phenomenon of reliance on the obligation. Rather, it is in the phenomenon of reliance on the speech act itself, in particular, on the propositional content. This is surely the more common type of reliance connected with a speech act. If Jones promises Smith that he will be home before dark, Smith ordinarily will rely on Jones' being home before dark, and not on the attendant fact that Jones may be criticized if he does not keep his promise.

Reliance on a speech act differs from reliance on a propositional obligation. Yet the former does have a deep and analytically important connection with propositional obligation itself: namely, a common source. It is a striking fact that promises and other speech acts that give rise to propositional obligation are precisely the speech acts on which people can rely. As we shall see, understanding this connection is a key to understanding reliance.

II. ASSURANCE AND RELIANCE

Discussions of speech-act based reliance most commonly focus on the speech act of promising. Yet promising is a special case of the

speech act of assuring,[57] which is itself a basis for reliance. In analyzing the speech-act basis for reliance, it is preferable to focus on assuring. One reason is that assuring is the more general category. Another is that assuring is a phenomenon largely unexplored in the literature. As a result, we can begin on a fresh slate without the preconceptions that attach to promises and promising.

A. The Explanatory Character of Assurance

We seek to explain assurance. Yet we must first note a difference between the concept of assurance and everyday concepts such as cup or green. The latter are practical concepts, denoting perceptible and manipulable things. They serve utilitarian functions, and items that fall under them have mainly practical ends. Assurance, by contrast, has a non-utilitarian function and it refers to a non-ordinary (intangible) type of thing. The concept has an explanatory, rather than a pragmatic, role; it functions more like scientific concepts such as gene than like practical ones such as cup.

Explanatory concepts make sense of ordinary phenomena through theories in which the concepts play a role. The concept of gene, as used in biology, explains the phenomena of heredity through the laws of genetics; the concept of demand schedule, as used in economics, explains market phenomena through the laws of price theory. The laws that enter into the point of an explanatory concept, moreover, are laws which predict and explain; they are not descriptive or practical laws, as is the case with ordinary concepts. The laws that enter into the point of gene explain the basic facts of heredity. The laws that enter into the point of demand schedule explain the basic facts of market pricing.[58]

Although we have described certain concepts as explanatory, the explanatory character of any concept is actually a matter of degree. Brick has a substantial practical component and a small explanatory component: there are few phenomena that the concept explains in a lawlike way. Quark has a substantial explanatory component and a negligible practical component: the concept is used almost exclusively to predict and to explain. Gene is an intermediate case. Although the concept was once wholly explanatory, genes are today manipulated for profit. The concept has gained an increasingly practical role.

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57. *See* Judith J. Thomson, The Realm of Rights 294-321 (1990).

58. For a similar notion, see Audi, *supra* note 9, at 36 ("[T]heoretical concepts . . . derive their 'meaning' from the main lawlike propositions in which they figure.").

This mixed character of concepts is evident in normative or ethical domains, where concepts with a significant (but less than complete) explanatory aspect are common. For example, mother has both a descriptive component and a substantial explanatory component. The fact that X is Jones' mother explains why X is so concerned with Jones' well-being and why Jones shows respect and affection for her. Similarly with courage. The fact that Jones' conduct amounts to courage explains why Jones should be praised for it. "In general, the way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons or actions."[59] In normative or ethical domains, explanatory concepts are often called *thick concepts*.

Thick concepts often provide reasons for action; hence, they play a role in explaining conduct and in reasoning about what one should do.[60] The fact that X is Jones' mother, as we have noted, may explain why Jones treats her as he does. It may also serve as a reason for Jones to take a wide range of actions with respect to her. Assurance and assuring are thick concepts. We make use of assurance, not to describe but to explain conduct. In fact, we use assurance to explain conduct in at least two sorts of ways.

On the one hand, we use assurance in a conventional causal manner to explain past conduct and predict future conduct. We invoke an assurance to explain why Jones invested in a certain company—Smith assured him that the company had just been issued a patent on a new gold refining process. Used this way, assurance functions analogously to gravity. It locates phenomena—specifically, human conduct—within a framework of rules that can be used to explain and predict in terms of reasons.

On the other hand, we use the concept to explain what people have an obligation to do or why they may be criticized or blamed for doing or not doing something. We invoke the fact of assurance to explain why Jones should be criticized for not attending Smith's party—he had assured Smith he would be there and has no excuse for not coming. This use of assurance, too, locates phenomena—the behavior of persons—within a framework of rules. This time, the framework is one that can be used to explain and evaluate in terms of social norms.

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59. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 129-30 (1982).
60. *See id.*

Thus, there are two explanatory points for assurance. We may call the one involving reasons the *illocutionary point*, and the one involving blame the *obligational point.*

B. The Point of Assurance: Reasons

The illocutionary point of assurance itself has two parts, inasmuch an assurance that p gives the hearer two types of reasons. (We are disregarding in the present analysis any reasons it gives the speaker.) One is a first-order reason to believe that p. The other is an exclusionary permission that entitles the hearer to disregard reasons against actions based on not-p.

1. *The Reason for Belief*

An assurance gives the hearer a reason to believe the proposition asserted. This is an integral part of the concept. It would make no sense to say: "I assure you that p, but don't believe it."

Three comments about this reason for belief are in order. First, an assurance that p need not actually give rise to a belief that p. The reason for belief may be weak: the speaker might be a chronic liar or plainly have little basis for giving the assurance. All that is necessary is that the utterance provide a reason for believing the matter asserted.

Second, if the hearer does come to believe the proposition asserted, that belief can serve as a reason for the hearer's taking action based on it. An assurance by a speaker that Fido will not bite may induce a belief that Fido generally will not bite. This belief (in the context of, say, a desire to pet the dog) in turn may lead the hearer to pet Fido. Such acting on belief is an ordinary case of acting on a first-order reason. It is not materially different from acting on a belief formed by observing the dog's behavior.

Third, many types of utterance have precisely the belief- and action-generating features just discussed. An expression of opinion, a prediction, or a suggestion that Fido will not bite may generate a belief that Fido will not bite, which may in turn become the reason for petting the dog. The fact that an assurance provides a reason for a belief, which may eventuate in action, cannot by itself distinguish assuring from other illocutionary phenomena.

2. *The Exclusionary Permission*

What must be added, in order to differentiate assuring from other illocutionary acts, is the second part of the illocutionary point: the norm that an assurance provides the hearer with an exclusionary permission.

a. Assuring and Non-Assuring Utterances

To see why assuring gives rise to an exclusionary permission, and what the permission involves, contrast a non-assuring utterance with an assurance. Suppose that Jones, while hiking, comes to a stream. He wishes to cross it. He considers whether to try to do so by walking on a log of uncertain strength. Smith is fishing nearby. If Smith says:

(5) "I think you can make it across on that log";

Smith has expressed an opinion. She has given Jones a first-order reason for belief which Jones can use in his practical reasoning. If Jones does not have reasons against walking on the log that outweigh the reason to walk on it supplied by Smith, then on balance of reasons he ought to walk on the log. On the other hand, if the log appears weak, and his and Smith's observations are the only reasons for and against walking on the log, then on balance of reasons Jones ought to find some other way to cross the stream.

Now suppose Smith had instead urged:

(6) "Trust me, it's strong enough to support you."

Again, Smith's utterance gives Jones a first-order reason for belief. But this time the utterance is not merely an expression of opinion. There is significance to Smith's use of the words "trust me." It lies in the fact that Smith is inviting Jones to treat her as an authority on the sturdiness of the log. Smith does not simply want Jones to consider her view of the matter; she is inviting Jones to suspend his own judgment about the stability of the log and instead act on Smith's judgement about it. If Jones were to respond, "Well, I'll take your views into account," he would be rejecting Smith's invitation to accept Smith's judgment and would be treating (6) as if it were (5)—a simple expression of belief. These considerations imply that (6) provides Jones with an exclusionary permission by which he may disregard some or all first-order reasons not to walk on the log.

The use of phrases such as "trust me" is not essential to an assurance—to a speaker's inviting a hearer to treat him as an authority and

giving the hearer an exclusionary permission. Any unequivocal assertion will ordinarily have this effect.[61] In normal circumstances, when a person unequivocally asserts that p, he not only gives the hearer a reason to believe that p but invites the hearer to accept his judgment that p.[62] Phrases such as "trust me" or "I assure you" merely affect the intensity or quality of the invitation. This explains why, when a person utters "p" but does not wish to assure the hearer, he normally must add that the utterance is not intended as an assurance.

Part of the explanation for an unequivocal assertion's functioning as an assurance (and for the rationality of the hearer's acting on the exclusionary permission) lies in the pragmatics of conversation. It is a conversational implicature of an assertion that p that the speaker believes that p and has adequate evidence for it.[63] If Jones says to Smith, "Brahms wrote two piano concertos," then Jones is violating conversational norms unless he believes that Brahms wrote two piano concertos and has adequate evidence for the belief. An assertion is ordinarily more than a mere allegation and, because of conversational norms, provides the hearer with more than a simple reason for belief.

This, however, is not the full story. The deeper explanation lies in the function of communication as a labor-saving device. Ever since Putnam's revolutionary work on (semantic) meaning, philosophers have recognized that the ability of people to use much of the language of everyday discourse is dependent on a division of linguistic labor. The reason is that not everyone can know the meaning of every word. As Putnam explained: "[E]veryone to whom gold is important for any reason has to acquire the word 'gold'; but he does not have to acquire the method of recognizing if something is or is not gold. He can rely on a special subclass of speakers."[64] An ordinary person may be

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61. Tort scholars have recognized this:

> When a person makes an unqualified statement, he thereby implies certainty. When he states it with emphasis on the certainty of his knowledge.... the psychological effect is notoriously much more pronounced, and reliance upon the existence of the facts thus stated, or upon an adequate factual basis for the opinion so expressed is more likely to be induced.

Fowler V. Harper & Mary Coate McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN L. REV. 939, 955 (1938). *See also* 2 FOWLER V. HARPER ET AL., LAW OF TORTS § 7.7, at 421 (2d ed. 1986) (referring to "the strong psychological effect in inducing reliance on positive and unequivocal statements of fact made by a person in a position—or apparently in a position—to know the facts").

62. *See* SPERBER & WILSON, *supra* note 20, at 116 ("In verbal communication, the hearer is generally led to accept an assumption as true or probably true on the basis of a guarantee by the speaker.").

63. *See* LEVINSON, *supra* note 19, at 100-05.

64. Putnam, *supra* note 17, at 131.

familiar with the words "leopard" and "jaguar," but know only that they refer to large spotted cats and so not be able to distinguish them. He thus cannot be said to fully know the meaning of "jaguar." Yet he can still use the term because its meaning is a social phenomenon and because there are people whose business it is to know the meaning of the term of "jaguar."[65] Similarly, there are people whose business it is to know the meaning of "chiaroscuro," people whose business it is to know the meaning of "tort," and people whose business it is to know the meaning of "torte." The phenomenon is widespread.

There is an analogous, but more localized, principle applicable to conversation. Speakers and hearers ordinarily differ in their knowledge of the subject under discussion. An important feature of communication—arguably the basic organizing principle—is that speakers seek to convey new and useful information to the hearer while minimizing the burden of processing it.[66] If Jones tells Smith that a dissolute life caused Green's untimely death, then ordinarily Jones knows (or thinks he knows) more about the cause of Green's death than does Smith, and is trying to fill a gap in Smith's knowledge of the matter.

Assertions are efficient, labor-saving vehicles for conveying relevant information because they provide the hearer with authoritative syntheses of more basic reasons. In a case where the speaker asserts in conversation that the keys are on the table, as, for example:

(7) Smith: "Where are the keys?"

Jones: "On the table";

the speaker could instead have provided the hearer with a litany of more basic considerations, for example:

(8) Smith: "Where are the keys?"

> Jones: "I saw them on the table an hour ago. I haven't seen anyone enter or leave the house in that time, and the cat is at the vet";

and permitted the hearer draw her own conclusion. But communication would be inefficient if it consisted primarily of statements of opinion and of mere reasons for belief. The speaker does not respond as in (8) precisely because, as a normal speaker, he understands that part

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65. [T]here are two sorts of tools in the world: there are tools like a hammer or screwdriver which can be used by one person; and there are tools like a steamship which require the cooperative activity of a number of persons to use. Words have been thought of too much on the model of the first sort of tool.

Putnam, *supra* note 17, at 146.

66. *See* SPERBER & WILSON, *supra* note 20, at 155-71, 266-79.

of his role is to save the hearer from having to draw conclusions from facts that are better known to himself. Assertions are means of fulfilling this conversational role, and must entitle the hearer to accept the proposition communicated and dispense with her own weighing of underlying facts or reasons. This is why a response by the hearer of, "Well, that's just your opinion," is a rejection of what the speaker intends the assertion to function as, and what the assertion ordinarily does function as. The response is a refusal to recognize the existence of the exclusionary permission that ordinarily results from unequivocal assertions of fact.

b. Assurance and Reliance

As we can now see, acting on and reasoning from an assurance are quite complex practical activities. They are inherently multileveled, involving, at the least, first-order reasons for belief, an exclusionary permission, and reasons for and against the exercise of the exclusionary permission. This multileveled complexity is what explains the fact (which we observed at the outset of our inquiry) that one cannot treat a statement about acting on an assurance as if it had the simple logical form of a statement about acting on a first-order reason.

Recognizing this complexity, in particular the fact that an assurance gives the hearer an exclusionary permission, enables one to begin to understand the notion of reliance.

i. A Simple Argument

Consider a very simple argument elaborating on points made in the introduction. Reliance, as we observed, is a type of acting on a reason; specifically, on a reason of the kind involved in an assurance. Now, an assurance can generate two types of reason for action: a first-order reason for action (when the hearer believes the speaker) and an exclusionary permission. But the upshot of what we showed in the introduction is that reliance cannot be a matter simply of acting on the first-order reason (i.e., acting on a belief in the assurance's content). The connections with belief are different. Since reliance cannot be a matter simply of acting on a first-order reason, it must be (at least in part) a matter of acting on the other sort of reason to which an assurance gives rise, namely, an exclusionary permission.

ii. What the Analysis Explains

Of course, this is a rough argument. But further support lies in the fact that the analysis of reliance in terms of exclusionary permission explains some important features. First, it explains why one can rely on only a few types of speech acts: assurances, promises, guarantees and the like. These speech acts are distinctive in that they give the hearer an exclusionary permission.[67] Superficially similar speech acts on which one cannot rely, such as predictions, guesses, and vows, provide the hearer with a first-order reason for belief but not an exclusionary permission.

Second, it explains why an assurance cannot be the complete reason for action. Where there is reliance on an assurance, one can always sensibly ask: Why did he rely? Why did he act on the assurance?[68] Acting on an assurance is thus very different from acting on an authoritative order. With an authoritative order, one can respond to the question, "Why did he act on it?" with: "Because it was an order." By contrast, whether to act on an assurance is a matter to be settled by appeal to considerations other than the fact that the speech act in question was assurance. If reliance is a matter of exercising an exclusionary permission, this feature is easily explained.

iii. Reliance and Dispositions

The account also enables us to better understand the practical and empirical differences between acting in reliance and acting on a belief.

In many cases, one cannot tell just by examining the underlying act whether a person is acting in reliance or acting on a belief. The

67. While a speech act's providing an exclusionary permission is a necessary condition for reliance on it to be possible, it is not sufficient. For example, a categorical, non-authoritative order ("Do ϕ!") gives the hearer an exclusionary permission, but is not a basis for reliance in the ordinary sense. A clue as to what more might be required lies in the fact than an instruction (in the "how to" sense—i.e., an instruction on how to drive from Jones' house to Smith's), which is a type of conditional order, does give the hearer an exclusionary permission and can be relied on. An instruction has the form: do ϕ if you want to ψ. It differs from an unconditional order in that it also provides a reason for belief—specifically, a belief that ϕ'ing will lead to ψ'ing. This suggests that a further condition for the possibility of reliance on a speech act is that the speech act provides a reason for belief in its content.

68. "Reliance . . . connotes dependence. It bespeaks a voluntary choice of conduct by a person harmed. It infers [sic] that the person exercising it can decide between available alternatives." Barnum v. Rural Fire Protection Co., 537 P.2d 618, 622 (Ariz. Ct. App. 1975).

first hypotheticals we considered involved the very same action—leaving home with an umbrella—that amounted to reliance in one case and acting on a belief in the other. We have seen that one can account for the difference between reliance and acting on a belief by invoking exclusionary permissions. This account of the difference, however, is in terms of what look like theoretical entities. It is not a practical basis for distinction. Nonetheless, the account can help us identify a major behavioral difference between acting in reliance and acting on belief.

The behavioral difference is rooted in the fact that reliance has a (substantially) dispositional character while acting on belief has a (substantially) categorical character.[69] What this means is as follows. A *categorical* property of an item is one that applies because of the item's perceptible condition or activity.[70] Yellow is a categorical property of flowers, sneezing is a categorical property of people, and dissolving is a categorical property of sugar cubes. Such properties describe manifest states or occurrences. A *dispositional* property, by contrast, applies because one or more subjunctive conditionals are true of the item; that is to say, because the item is subject to norms that describe what would regularly happen under conditions that may not currently be obtaining.[71] Solubility is a relatively simple dispositional property. To say that a sugar cube is soluble is to say (in part) that it would normally dissolve if placed in water. Belief is a more complex dispositional property.[72] To say that Jones believes p is to say (in part) that Jones would act in certain ways under certain conditions.[73] The ways in which Jones would act are various, and depend on the content of the belief.[74]

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69. Dispositions play a significant role in scientific explanation, both physical and psychological, and have received a great deal of attention in the philosophical literature. For an introduction to the subject, see DISPOSITIONS (Raimo Tuomela ed., 1978).

70. This explanation can be developed more fully, but for present purposes it will suffice.

71. This explanation can be developed more fully, but for present purposes it will suffice. For an overview of the major approaches to explaining dispositions, see D. Hugh Mellor, *In Defense of Dispositions*, 83 PHIL. REV. 157 (1974), *reprinted in* DISPOSITIONS, *supra* note 69, at 55.

72. The view that belief is a disposition has been challenged. *See, e.g.*, DAVID M. ARMSTRONG, BELIEF, TRUTH & KNOWLEDGE (1973); ALASDAIR MACINTYRE, *Emotion, Behavior and Belief, in* AGAINST THE SELF-IMAGES OF THE AGE, *supra* note 56, at 230, 235.

73. *See* GILBERT RYLE, THE CONCEPT OF MIND (1949); LYNNE RUDDER BAKER, EXPLAINING ATTITUDES: A PRACTICAL APPROACH TO THE MIND 153-92 (1995).

74. As Ryle points out:

> Dispositional words like 'know' [and] 'believe' . . . are determinable dispositional words. They signify abilities, tendencies or pronenesses to do, not things of one unique kind, but things of different kinds. Theorists who recognize that 'know' and 'believe'

Dispositional and categorical properties are matters of degree: some properties have both categorical and dispositional features. To say that birds are migrating is to say, for example, that they are flying south (categorical) and that they would be flying south at the same time in any other year (dispositional).[75]

Acting in reliance on an utterance is a substantially (although not entirely) dispositional characterization. To characterize an action as a case of reliance is to describe it, at least in part, in terms of what would regularly happen if certain conditions were to obtain. To say that, in ϕ'ing, Jones relied on utterance U is (in part) to say what Jones would do in a class of cases in which circumstances were different. Specifically, it is to say that he would act the same way.[76] For example, in saying that Jones was relying in (2), we are saying such things as that, if he walked outside and found a cloudless sky, he likely would have continued to carry his umbrella. The range of relevant subjunctive statements depends on the utterance relied on and the reasons for reliance. But, in general, relying involves a disposition not to act on certain first-order reasons for action and thus to act the same way in an identifiable class of cases.

This explains how a person can be said to rely—to exercise an exclusionary permission—while still acting in accord with the balance of first-order reasons, and thus how relying can be indistinguishable on its face from acting only on belief. Reliance, as a dispositional characterization, does not require that the individual *now* be acting against the balance of first-order reasons, any more than solubility requires that a soluble object now be dissolving. A person may act or propose to act in a manner that, under the circumstances, is consistent with the balance of first-order reasons, yet still be relying. He is relying so long as he would tend to act in the same way were the balance of first-order reasons to change in such a way as to militate against the action.

This, then, is the import of the abstract description of reliance on an utterance in terms of exclusionary permission: to describe an action as "reliance" is to ascribe a disposition.

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are commonly used as dispositional verbs are apt not to notice this point, but to assume that there must be corresponding acts of knowing or apprehending and states of believing. . . .

RYLE, *supra* note 73, at 118.

75. *See* RYLE, *supra* note 73, at 140-42.

76. Since reliance involves a disposition to continue acting the same way, there is no problem in treating inaction as reliance in appropriate cases.

iv. Other Senses of "Reliance"

Further support for the analysis of reliance in terms of second-order reasons comes from examining other uses of "rely" and "reliance." Although we are focusing our attention on cases where reliance is induced by an assurance, there are a host of other types of reliance. In many of these other cases, "reliance" describes phenomena explicable in terms of exclusionary permissions.

For example, it is common to speak of "relying on a person." To rely on a person is to rely on him to do or not do something. The something in question may be an action or class of actions, such as holding the ladder steady, keeping out of trouble, or keeping the nation out of war. This sort of reliance is explicable in terms of the relying party's exercising a permission that entitles him to disregard, as reason for action, the possibility of the other person's not performing the relevant action or not acting in the appropriate way. Jones' relying on his brother may amount to, e.g., relying on his brother to bail him out of trouble. At a minimum, reliance here involves Jones' disposition to go forward (e.g., to amass large gambling debts) as if it were settled that his brother will bail him out of any trouble resulting from the action.

Many examples can be found in law where the term "reliance" is used in a way closely connected with exclusionary permission and with optionally treating some utterance or phenomenon as authoritative. For example, courts often speak of reliance on a legal status or on a legally significant state of affairs. Courts say, e.g., that a driver with the right of way is entitled to "rely on his preferred status." The type of driver reliance sanctioned by this rule is the driver's acting on the assumption "that others will obey the law by not entering into his travel path."[77] Reliance on having the right of way thus involves disregarding the possibility that others may drive their vehicles in certain hazardous ways. Of course, driver disregard of such reasons is optional—as one surely would expect on grounds of traffic safety. Hence, relying on one's having the right of way appears to be a matter of exercising an exclusionary permission.

Another example involves one of the most common phrases in judicial opinions: *plaintiff (or defendant) relies on X,* where X is a case

77. Somogyi v. National Eng'g & Contracting Co., No. 68694, 1996 WL 11318, at *2 (Ohio Ct. App. Jan. 11, 1996) (quoting and approving jury charge). *See* Schmidt v. Jansen, 20 N.W.2d 542, 543 (Wis. 1946).

or statute. When a party relies on a case, two exclusionary permissions seem to be involved. First, the party himself is exercising the option of treating the case or statute as authoritative. But he is also urging the court to act similarly and exercise its option of treating the case or statute as authoritative.[78] Hence, this usage of "rely" is like that involved in relying on an assertion, in that it includes optionally treating an utterance (or the equivalent) as authoritative. It differs only in that the action in reliance is a matter of urging another person to exercise an exclusionary permission as well.[79]

A final example, somewhat different from the prior ones, is that of a manufacturer's "right to rely" on warnings placed on its products. Where there is such a right to rely, the manufacturer is insulated from liability in cases of product misuse by the consumer.[80] This rule is probably based on the everyday norm that a person who warns another that p gives himself an exclusionary permission by which he may disregard reasons for taking additional steps to prevent the occurrence of p. For example, if Jones warns Smith that Wilson has been maligning Smith to the boss, Jones gives himself an exclusionary permission that entitles him to decline to act any further for the reason of preventing Wilson from maligning Smith.[81] Presumably Jones has some reason to prevent the maligning. The warning permits, but

78. An analogous usage can be found in regulations. For example, the Internal Revenue Service often advises that taxpayers "may rely on these proposed regulations for guidance pending the issuance of final regulations." *See, e.g.*, 63 Fed. Reg. 35, 37 (1998). The optional exclusionary significance of this phrasing is clear.

79. Analytically similar are cases of reliance on legal defenses. *See, e.g.*, State Farm Gen. Ins. Co. v. Best in the West Foods, Inc., No. 2, 1996 WL 360719, at *11 (Ill. App. Ct. 1996). In such cases, a party's reliance on the defense involves his exercising the option of asserting it to a court as an authoritative determinant of the outcome of the action. Note that one can waive a defense by declining to exercise the option to assert it, and one can also "waive one's right to rely" on a defense through conduct inconsistent with the defense or conduct that leads the other party to rely on one's not asserting it. Waiver of a defense is not the same as waiver of the right to rely on it.

Similar comments can be made about reliance on authoritative documents. *See, e.g.*, Aquatherm Indus., Inc. v. Florida Power & Light Co., 84 F.3d 1388, 1393 (11th Cir. 1996) (judgment); Hardesty v. Coastal Mart, Inc., 915 P.2d 41, 43 (Kan. 1996) (pretrial order); Rolnick v. Rolnick, 674 A.2d 1006, 1011 (N.J. Super. Ct. App. Div. 1996) (judgment).

80. *See* Ferguson v. F.R. Winkler GmbH., 79 F.3d 1221, 1226 (D.C. Cir. 1996); Higgins v. E.I. DuPont de Nemours & Co. 863 F.2d 1162, 1168 (4th Cir. 1988). *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1977) ("Where warning is given, the seller may reasonably assume it will be read and heeded . . . .").

81. Or for the reason of preventing the harm resulting from Wilson's maligning. The rationale for the norm is that of limiting first-order reasons for action to proper bounds. If Jones has a reason to compliment Smith on his new tie, then the act of complimenting Smith may exhaust the force of the reason. Jones need not compliment Smith for the tie over and over again.

does not require, Jones henceforth to disregard that reason for action. Thus, a manufacturer who issues a warning against product misuse gives himself an optional reason to exclude further consideration of safety measures—he has a right to rely on the warning. The legal system, through the rule cited, supports this norm.[82]

c. Reasons for Reliance

i. The Variety of Reasons

There are many reasons why a person might rely on an assurance, i.e., exercise the exclusionary permission. A person might do so because he wishes to avoid offending the speaker, because he is too lazy to investigate further, or because he makes it a rule to heed the advice of elders. Countless other reasons can be imagined.

This plethora of possible reasons tends to be obscured by the supposition, especially prevalent in the law of misrepresentation, that there can be no reliance without belief.[83] Now, belief is surely the most common reason for reliance; arguably, even the paradigmatic or normal reason for reliance. But it is unwarranted to suppose that belief can be the only reason for reliance. Perhaps it is true that one cannot rely on an assurance that p and at the same time believe that not-p.[84] But even if so, it still remains true that a person can rely on an assurance that p and simultaneously remain agnostic about p.[85] In the tale of the emperor's new clothes, the emperor relied on the scoundrels' statements by parading naked through town. Yet, until the child reported that he was naked, the emperor neither believed the statements (they contradicted what he saw) nor disbelieved them (the scoundrels were glib and he was impressionable). He simply did not know what to believe.

ii. Belief

Still, the most common reason for reliance on an assurance is belief in its content; thus, we must try to understand how this reason

82. *See infra* section c.iii.

83. *See, e.g.*, Stoljar, *supra* note 12, at 20; Wegefarth v. Wiessne, 107 A. 364, 369 (Md. 1919).

84. *See* Apex Oil Co. v. Belcher Co., 855 F.2d 997 (Cir. 1988) (holding that because party did not believe misrepresentations, a jury could not find that he had relied on them); HARPER ET AL., *supra* note 61, at 465; Holton, *supra* note 1, at 72.

85. Some caselaw recognizes this. *See, e.g.*, List v. Fashion Park, Inc. 340 F.2d 457, 462 n.3 (2d Cir. 1965).

functions. The key is to recognize that, when such a belief is the reason for reliance, it operates at two levels of practical reasoning. It is both a first-order reason for action and a reason for exercising the exclusionary permission. In the example above concerning Jones and the log, if Jones acts on the assurance because he believes Smith, the belief is both a reason for the action in question—walking on the log—and a reason for disregarding reasons not to walk on the log. It is easy to misjudge the proper analysis of the situation. Unless one knows what to look for and is sensitive to the role of second-order reasons, one likely will suppose that Jones' belief functions only as a first-order reason for action. Failure to recognize this additional, second-order role contributes to the confusion of reliance with simple action on a belief.

What may also facilitate this confusion is the existence of a strong notion of belief that is formally similar to reliance. In its weak sense—the sense we have thus far been using—"believe that ϕ" is more or less synonymous with "be of the view that ϕ." Believing that ϕ, in this weak sense, is the simplest state based on epistemic reasons that a person can be in. It is the epistemic counterpart of intending to ψ—the simplest state based on reasons for action that a person can be in.

The stronger sense of "belief" differs from the first in that it also includes the epistemic counterpart of an exclusionary reason. A belief that ϕ, in the weak sense, is provisional; it may be overturned simply by recognition of contrary reasons. By contrast, a belief that ϕ, in the strong sense, cuts off debate and excludes some or all conflicting reasons from further consideration. If one believes that ϕ, in the strong sense, one is disposed to hold onto the attitude of belief in the face of conflicting evidence—a sign that its analysis requires appeal to an exclusionary reason. In this respect, belief in the strong sense is the epistemic counterpart of a decision.

Acting on a strong belief and relying because of a belief look similar.[86] Both phenomena involve exclusionary reasons. Both are

86. "The words 'rely' and 'believe' are nearly synonymous. 'Rely' is to depend on some one or something as worthy of confidence; to repose confidence; to trust . . . . 'Believe' is to accept as true on the testimony or authority of others; to have faith and confidence in the truth of any one or anything." Spencer v. Hersam, 77 P. 418, 418 (Mont. 1904).

instances of acting (in some sense) on belief.[87] But there are important differences.

Consider Jones: by profession he is a dowser. To believers, he is a genius and prophet with an unerring ability to locate water underground. Smith is a believer. Jones has announced that water is located on Smith's land at spot Y. Smith believes Jones; on the basis of the belief he proceeds to dig. We would say that Smith has a strong (perhaps unshakable) belief which results from Jones' pronouncement and that Smith has acted on this belief. Yet Smith's conduct is not reliance. Reliance involves acting or potentially acting against the balance of first-order reasons for action. When Smith acts on the basis of Jones' utterance, he is acting on a belief (albeit a strong one) about the presence of water. He is not acting on the basis of a second-order reason for disregarding first-order reasons for action. Smith's acting on Jones' utterance is invariably acting in accord with his beliefs and with the balance of first-order reasons for action. It is much the same as Smith's acting on what he unmistakably sees or hears.

Now consider Brown, a hydrologist. His clients give credence to his pronouncements, but do not treat them as gospel. Brown assures Green that water is located at spot X on his land, and Green begins to dig. Let us suppose that Green relies because he (weakly) believes Brown. Because Green is relying, he may be disposed to dig even if, let us say, other knowledgeable people advise him that there is no water under his property. To this extent, the cases of Green and Smith look similar. But there are differences. One is that the belief leading Green to act is only a weak one and can be overturned by new information. For example, if Green learns that five other hydrologists have said there is no water at spot X, Green is likely to cease believing and, as consequence, cease relying on Brown's assurance. By contrast, if five hydrologists contradict Jones, Smith is disposed to persist in his belief and thus continue to act on it. A second difference is that, if another person, say Wilson, were to ask whether there was water on the premises, Smith, the strong believer, would be disposed to respond: "Yes, at spot Y." By contrast, Green would be more likely to respond along the lines of: "Well, Brown the hydrologist says there is water at spot X."

87. Moreover, strong belief can be brought about through trust, which is closely connected with reliance. *See* Judith Baker, *Trust and Rationality*, 68 PAC. PHIL. Q. 1 (1987); Karen Jones, *Trust as an Affective Attitude*, 107 ETHICS 4, 16-17 (1996).

iii. Law

Another important type of reason for exercising an exclusionary permission is the legal system's protection or promotion of the exercise. This is a complex topic but some basic points can easily be made.

Consider again the case of Jones and the log. Suppose it were a legal norm that a person in Jones' position could recover compensation for harm resulting from his reliance on Smith's false assurance about the log. The effect of the norm would be to diminish the force of, or even cancel, certain reasons against acting on the permission: reasons such as that relying might lead to harm. The legal system could then be said to *protect* the exercise of the permission, or to *protect reliance.*

The impact of legal norms can be stronger. Suppose it were a legal norm that a person in Jones' position could recover compensation for his reliance on Smith's false assurance about the log, irrespective of any harm from such reliance. If the amount recoverable were sufficiently large, then the effect would not just be to lessen the force of reasons not to rely. It would be to encourage Jones to rely—to provide him with an affirmative reason to exercise the permission. In such a case the legal system could be said to *promote* the exercise of the permission, or to *promote reliance.*

To understand the significance of these two species of norms and their connections with reliance, it helps to recognize that there is a third possibility: that a legal norm might enable a person in Jones' position to recover compensation for *any* false assurance about the log, irrespective of reliance (and, a fortiori, irrespective of harm through reliance). For the task at hand of analyzing reasons for reliance, this third possibility is less interesting than the other two, because the type of norm in question (unlike the other two) can be a reason either for or against reliance.[88] Hence, we will not examine it at this point.[89] We only wish to note that such a norm, which imposes liability for a false assurance, without more, is something quite familiar: it expresses criticism of a false assurance on grounds of breach of

88. The argument that it can discourage reliance is as follows. If one can recover damages for a false assurance alone, a person who has been given an assurance could rationally elect not to act on it, in the hope that the assurance will prove false and she will thereby be able to recover damages without having incurred any expenses through reliance (potentially diminishing net recovery). If the damages recoverable are sufficiently large, the hearer could have a substantial reason not to rely.

89. It is discussed in the next section.

obligation. And what this helps us to see is that: (a) the first type of norm also expresses something familiar, viz., criticism of a false assurance as a cause of harm; but (b) the second type of norm expresses a new type of social criticism, one that we have not yet identified and described. This latter type of criticism is, so to speak, intermediate between obligation-based and harm-based criticism. It also implements a very specific social policy, namely, that of encouraging reliance.

There are domains in which legal norms promote reliance.[90] Probably the most familiar example is in the routine award of so-called expectation damages—damages not dependent on proof of harm through reliance—for breach of a negotiated business contract. As Fuller in effect argued, this award is a means by which the legal system encourages a party to exercise the exclusionary permission to which an agreement gives rise. Fuller suggested that the underlying rationale is: "[t]o encourage reliance we must . . . dispense with its proof."[91] This overstates the case,[92] but it does seem true that, to

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90. There are also contexts in which law appears directed toward protecting reliance. For example, the provisions of RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), which broadly impose liability for detrimental reliance on a promise, impose it only on the basis of an after-the-fact examination of the facts and circumstances: where "justice can be avoided only by enforcement of the promise." Moreover, the provision states that the remedy "may be limited as justice requires." These qualifiers greatly reduce the effectiveness of section 90 in providing an encouragement to rely: i.e., reduce its force as an affirmative reason to exercise the exclusionary permission resulting from a promise. While section 90 is clearly designed to protect reliance on promises, it does not seem capable of promoting it.

Our legal system also at times affirmatively declines to protect reliance. For example, it is the invariable rule that "[n]obody has the right to rely on representations he or she knew to be untrue." Foss v. Madison Twentieth Century Theaters, Inc., 551 N.W.2d 862, 866 (Wis. Ct. App. 1996) (citing First Credit Corp. v. Behrend, 172 N.W.2d 668, 672 (Wis. 1969)).

91. When business agreements are not only made, but also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened by any rule which limited legal protection to the reliance interest.

Such a rule would in practice tend to discourage reliance. The difficulties in proving reliance and subjecting it to pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof.

Fuller & Perdue, *supra* note 4, at 61-62.

92. Fuller tends to run together three distinct notions—reliance, detrimental reliance, and damages measured by the harm from reliance—and to refer to them all by the invented, but undefined, term "reliance interest." *See, e.g.*, Fuller & Perdue, *supra* note 4, at 54. In his discussion of the relationship between the expectation interest (another invented term) and the reliance interest, equivocal handling of these reliance-related concepts leads Fuller to misstate the connection between damage awards and the encouragement of reliance.

Consider the quotation set out in the preceding footnote. The first sentence is obviously true. But the second sentence is ambiguous. Does Fuller mean by "reliance interest" reliance,

encourage reliance, we may dispense with proof that an act of reliance led to harm.

The policy of promoting contractual reliance appears to be strongest in the domain of negotiated commercial transactions. But it is not limited to that domain. For example, in the well-known case of *Devecmon v. Shaw*,[93] the plaintiff's uncle had allegedly encouraged him to take a trip to Europe, promising to repay the expenses of the trip. After the uncle's death, the plaintiff sued the estate for reimbursement. In reversing the lower court's exclusion of evidence as to the plaintiff's damages, the court explained that whether the plaintiff would or would not have taken the trip without the uncle's promise was not determinative of his right to recover. Nor did it matter, continued the court, whether the plaintiff had on the whole benefited from the trip. It was enough for recovery that he had acted on the uncle's statements. Although the court advanced the justification that "[g]reat injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise,"[94] it went beyond this protective rationale and established a rule of recovery, not dependent on proof of economic harm, that would promote reliance in similar circumstances.[95] As in the context of negotiated commercial transactions, to encourage reliance here, the court dispensed with proof that it led to loss.

Appreciating the difference between protecting and promoting reliance, and the difference between the underlying legal norms, helps

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detrimental reliance, or a certain measure of damages relating to detrimental reliance? The plausibility of the claim in the sentence depends on what Fuller means by the term. It also depends on what he means by "protection" of the reliance interest: it could mean here protection of reliance, promotion of reliance, or any of several other possibilities.

The remainder of the paragraph suggests that what Fuller has in mind by "protection [of] the reliance interest" is compensation for harm resulting from reliance on a promise. On this interpretation, Fuller may be right that to so limit legal protection would in practice "discourage reliance." But even if he is right, he is wrong to think (as he is led to by equivocation on "reliance interest") that, from this quasi-empirical claim about the effect of using a damage measure, a conclusion follows about the effect of requiring evidence of reliance: the conclusion that "[t]o encourage reliance we must . . . dispense with its proof." At most it follows that we *may* dispense with proof of *harm* from reliance. Indeed, as we have seen above, *see supra* note 88, dispensing with proof of reliance here could encourage non-reliance.

Fuller may be right that there are reasons to award damages for breach of promise or contract, even if there has been no reliance (detrimental or beneficial). But he has not explained what those reasons might be.

93. 14 A. 464 (Md. 1888).

94. 14 A. at 465.

95. However, the court did not identify the kind of fact pattern to which the holding would apply.

one better understand a controversy in contract jurisprudence. Recent scholarship has tried to explain why it is that, in several domains, the law appears to go beyond mere protection of reliance on promises[96] and allow recovery without proof that harm resulted from reliance on the promise. These domains include workplace assurances of continued employment, employer promises of pensions, and promises to contribute to a charity.[97] Some scholars have argued that, because the law here is not simply remediating detrimental reliance on a promise, it must be "enforcing the promise."[98]

Scholars who advocate such a position do so, at least in part, because of an unstated premise: that a breach of promise can be criticized *only* as a breach of obligation or else as a cause of harm, and that there is no third alternative. But this simply is not the case: a breach of promise can be criticized on many grounds, e.g., as demonstrating the promisor's bad character.[99] In the social and economic contexts that have generated the controversy, there is a very plausible third alternative. The law in the relevant domains may be based on criticism of the intermediate type, discussed above, which reflects a policy of encouraging reliance.[100] As one pair of scholars has urged, the law in these areas appears to reflect a "policy . . . to protect the ability of individuals to trust promises in circumstances in which that trust is socially beneficial."[101]

C. Assurance, Reliance and Blame

As we have just seen, a false assurance can be the predicate for harm-based and reliance-encouraging criticism, and these two types of criticism are intimately connected with reasons for reliance. We noted in passing that a third type, obligation-based criticism, can also be predicated on a false assurance. We did not discuss this third type in the prior section because it is less closely connected with reasons for reliance. It still should be examined, however, but for a different reason: because it is part of the meaning of "assurance" that assuring gives rise to a propositional obligation.

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96. Which is as far as Restatement (Second) of Contracts § 90 (1981) seems to go. *See supra* note 90.

97. *See* Becker, *supra* note 5, at 136-37; Farber & Matheson, *supra* note 5, at 907-10.

98. *E.g.*, Yorio & Thel, *supra* note 5, at 111.

99. *See* David Hume, A Treatise of Human Nature 522 (Selby-Bigge ed., 1975) (1739).

100. *Cf.* Randy E. Barnett, *The Death of Reliance*, 46 J. Legal Educ. 518, 522 (1996).

101. Farber & Matheson, *supra* note 5, at 905.

Yet it is quite striking that mere breach of this obligation is a weak basis for criticism and is generally of little practical importance. Serious criticism of a false assurance is most commonly predicated on some other ground. Rarely is it predicated on breach of obligation alone. In law, a misrepresentation ordinarily generates a right to relief only where there is harm (i.e., injurious reliance) or unfairness (e.g., unjust enrichment), or where some important policy, such as promoting reliance, is implicated.[102] The same is true in everyday affairs.[103] For this reason, the obligational point of assurance is of less practical importance than the illocutionary one.

The probable explanation for this weakness of obligation-based criticism is that false assuring can often be beneficial. On the one hand, communication and society would be impossible unless assurances ordinarily were true.[104] False assuring thus violates a basic social and linguistic norm, and its inherent blameworthiness reflects this. Yet providing true and reliable information, while a central function of communication, is far from the only one. There are many circumstances where it is appropriate to give assurance as to what is unlikely or even false: for example, where the hearer needs reassurance or mental uplift more than she needs a basis on which to act. Assuring little Virginia that there really is a Santa Claus, or assuring Aunt Wanda that you will never dispose of the Tupperware collection she just gave you, are obvious examples of false, but legitimate assuring. Other legitimate reasons for assuring what is false can easily be adduced.

Since assuring what is false has nontrivial beneficial uses, intrinsic criticism of it is weak. Indeed, the norm against false assuring may be little more than a presumption.[105] As consequence, any significant criticism of false assuring ordinarily requires some factor beyond mere falsity.

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102. *See, e.g.*, HARPER ET AL., *supra* note 61, § 7.15.

103. *See* SISSELA BOK, LYING (1989).

104. Were all statements randomly truthful or deceptive, action and choice would be undermined from the outset. There must be a minimal degree of trust in communication for language and action to be more than stabs in the dark. This is why some level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles. Even the devils themselves, as Samuel Johnson said, do not lie to one another, since the society of Hell could not subsist without truth any more than others.

Id. at 19-20.

105. Bok states the basic principle against lying as a presumption, placing the burden of justification on lying rather than on truth-telling. *See id.* at 30-31.

III. APPLICATION: MISREPRESENTATION LAW

The analytical tools developed so far can be applied to areas of law that make use of notions of assurance and reliance. In this part we examine, and show how to clarify, some basic parts of misrepresentation law.

A. THE NATURE OF A REPRESENTATION

The law of misrepresentation deals with situations where a person who has relied on an utterance suffers harm. The primary concern of the law is misrepresentations of present or past fact—misrepresentations such as "this house has never had a termite problem," or "I can pay for this with my line of credit from the bank." Misrepresentation law is also concerned with insincere expressions of opinion. However, these latter expressions have not been dealt with in an analytically satisfactory way. It is not difficult to see how tort rules governing misrepresentations of opinion can be reformulated and improved.

The utterances of interest to misrepresentation law are usually called "representations." The *Restatement (Second) of Torts*, for example, states that liability for misrepresentation is based on (among other things): (a) a representation; (b) made for the purpose of inducing another to act or refrain from acting in reliance on it; (c) reliance on which is justifiable.[106] In fact, the utterances of central concern to this body of law are what we have called assurances. The *Restatement* explains that a representation is "a positive assertion that the fact is true,"[107] and that it "implies that the maker has definite knowledge or information which justifies the positive assertion."[108] A representation thus gives the hearer a reason to believe what is asserted. Furthermore, a characteristic of a representation is that the hearer is "justified in relying on [its] truth" by virtue of the representation alone.[109] Stated otherwise, it gives the hearer an exclusionary permission. And, indeed, commentary to the *Restatement* shows that its

106. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

107. *Id.* § 538A cmt. b.

108. *Id.* Compare the conversational implicature that the speaker believes the assertion and has an adequate basis for it, *supra* note 63.

109. *Id.* § 540. *See also* Heffernan v. Freebairn, 214 P.2d 386, 389 (Cal. 1950); Citizens Sav. & Loan Ass'n v. Fischer, 214 N.E.2d 612, 616 (Ill. App. Ct. 1966); Crofford v. Bowden, 311 S.W.2d 954, 956 (Tex. Civ. App. 1958).

authors understood and intended that "representation" be equivalent with "assurance."[110]

Hence, it is assuring that is central to misrepresentation law. Yet this is obscured by the fact that, in both everyday discourse and the *Restatement*, "representing" is sometimes used to mean a very different speech act. "Representing that p" is sometimes used to mean the speech act which we might, for convenience, call *alleging that p*.[111] Alleging that p amounts to simply uttering "p" (or the equivalent of "p") in circumstances where the speaker expresses his belief that p.

The act of alleging can function as an element of more complex speech acts. For example, alleging that p is a constituent of assuring that p, inasmuch as assuring necessarily involves a report of the speaker's belief in the propositional content.[112] But alleging can also function as a freestanding speech act: viz., the illocution of *merely* alleging and performing no further speech act under the circumstances. Merely alleging differs from assuring in that it lacks the feature of ipso facto giving rise to an exclusionary permission. One can describe the speech act of merely alleging that p in a variety of ways, the choice depending on what one wishes to emphasize. If one prefers to emphasize what is said, one would describe the speech act of merely alleging that p as: expressing a belief that p, or offering an opinion that p. On the other hand, if one prefers to emphasize what is not said, one would characterize the speech act as: withholding assurance that p.[113]

In ordinary circumstances, to utter "It is cloudy outside" is to allege—i.e., to represent in the weaker sense—that it is cloudy outside. To utter "p" ordinarily is (at least in part) to express one's belief that p. However, in ordinary circumstances, to utter "It is cloudy outside" is also to assure—i.e., to represent in the stronger sense—that it is cloudy outside. As we have seen, when one makes a statement of fact, one invites the hearer to rely. To say: "It is cloudy outside, but don't rely on it" is unusual and jarring; one might say that it is pragmatically self-contradictory.

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110. RESTATEMENT (SECOND) OF TORTS § 525, illus. 2 & 3 (1977).

111. *See, e.g.*, SHORTER OED, *supra* note 13, at 2552 ("represent," definition 8b).

112. One cannot say, "I assure you that p, but I don't believe that p." On this sense of "report," see Wilfred Sellars, *Empiricism and the Philosophy of Mind*, *in* I MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 253, 271-73 (1956).

113. *Cf. id.* at 272 ("[T]he statement 'X looks green to Jones' differs from 'Jones sees that X is green' in that whereas the latter ascribes a propositional claim to Jones' experience and *endorses* it, the former ascribes the claim but does not endorse it.").

Accordingly, in normal circumstances an utterance of "p" constitutes a representation that p, in both senses of "represent." This explains why the *Restatement* can use the equivocal term "represent" with so little difficulty. In the bulk of the cases, the utterance of concern is an act of representing in both weak and strong senses.

There is one context, however, in which only the weaker sense of "represent" is normally appropriate: so-called "representations of opinion." Offering an opinion is very commonly the withholding of an assurance. In such cases, a "representation of opinion that p" could have only the sense of mere expression of belief that p. It could not mean "assurance that p." Regrettably, the *Restatement* and caselaw insist on using the term "represent" in connection with opinions, oblivious to the fact that (unlike as with ordinary statements of fact) the term cannot be used in this context in both senses.

This insistence on basing misrepresentation law on the term "represent" affects the way rules are framed. The basic rule of misrepresentation law is that a false representation (in the strong sense) ordinarily gives rise to liability. There is a supposed exception, however, for false representations (in the weaker sense) of opinion. But as should be clear, this is not a genuine exception: it is simply equivocation on the term "representation." Opinions do not constitute an exception to the rule of liability for misrepresentations (i.e., assurances), any more than water (a vehicle for paint pigment) constitutes an exception to a rule prohibiting vehicles in the park.

The equivocation involved in this supposed exception is subsequently neutralized, but only through further equivocation. For there is a supposed exception to the supposed exception, in the rule that a "representation of opinion" may, after all, be a proper basis for liability when, under the circumstances, the representation (in the weak sense) effectively functions as an assurance of fact (for example, of facts underlying the opinion)—i.e., as a representation in the strong sense.[114] But it surely would be less confusing were the basic rule of liability to be framed in terms of liability for false assurances, and then applied straightforwardly to statements of opinion which are, and statements of opinion which are not, false assurances under the circumstances.[115]

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114. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 539 (1977). *Cf.* Harper & McNeely, *supra* note 61, at 952.

115. *See, e.g.*, W. Page Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 658 (1937), where the author recognizes (without fully developing the idea) that there may be

B. Reasonable Reliance

The analysis of reliance in terms of the exercise of an exclusionary permission allows one to understand "reasonable reliance," a notion courts have had difficulty clarifying in a principled way. Reasonableness of reliance is often confused with reasonableness of the ordinary action performed in reliance. Our account enables us to see that reliance on an assurance is reasonable if it is reasonable for the actor to exercise the exclusionary permission. The crucial idea is that what is judged to be reasonable is, in whole or in part, the act of excluding first-order reasons.

1. *Reasonableness of Action and Reasonableness of Reliance*

Purely as a conceptual matter, reasonableness of reliance and reasonableness of the underlying action must be different. To appreciate why, suppose that Jones performs some ordinary action, say ϕ'ing. In assessing the reasonableness of this action, one determines whether it is substantially justified by first-order reasons. Whether an action is reasonable is closely connected with the assessment of whether the actor ought to perform the action, in the balance-of-reasons sense.[116]

Suppose now that Jones not only ϕ's, but does so in reliance on Smith's assurance that p. The fact of reliance brings a second-order reason into the explanation of Jones' action. And, as we have seen, the presence of this second-order reason makes appropriate an additional way to assess the action, one in which the ordinary balance of first-order reasons is not relevant. After all, the very function of a second-order reason is to make it appropriate in some circumstances to act against the balance of first-order reasons. Stated otherwise, *to rely may well be to act unreasonably, on an ordinary (balance of reasons) assessment.*[117] From this it follows that to assess the reasonableness of reliance simply by assessing the reasonableness of the underlying action would be to misunderstand the nature of reliance.

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several types of "representation" relevant to the law of misrepresentation. *Cf.* Buttitta v. Lawrence, 178 N.E. 390, 393 (Ill. 1931) ("Whether language used is a matter of opinion or a positive averment of a fact depends largely upon the facts of each case.").

116. *See, e.g.,* Max Black, *Reasonableness, in* The Prevalence of Humbug and Other Essays 41, 54 (1983) ("In a situation in which it is uncertain which action to take, an action is reasonable if there is some sufficient reason to take it, and no better reason to choose one of the alternatives.").

117. Indeed, the same is true for any action on a second-order reason. To follow an order or keep a promise may, under the circumstances, be to act unreasonably in the balance of reasons sense.

2. *Reasonableness of Reliance in General*

The previous argument tells us what reasonable reliance is not. It does not tell us what reasonable reliance is. Common usage provides little guidance. However, there are two plausible ways to flesh out the meaning of "reasonable reliance."

One way is to understand it as reasonableness of reliance, simpliciter. To assess reasonableness of reliance in this sense is just to assess the reasonableness of exercising the exclusionary permission. It is to judge the reasonableness of relying in general, without reference to any specific action in reliance; it involves an examination of the reasons for and against exercising the permission. A simple, but striking, example in which reliance, simpliciter, is reasonable but the underlying action is not, involves a situation where Smith asks Jones, a thoroughly trustworthy person, whether a ladder is safe to climb, and Jones answers "No." Smith, wishing to injure himself and gain Wilson's sympathy, climbs the ladder, falls, and is injured. Smith's (general) reliance on Jones' utterance is reasonable, since it is reasonable for Smith to treat Jones' utterance as authoritative and as having exclusionary force. However, the action of climbing the ladder arguably is not reasonable, since on balance of first-order reasons Smith should not have engaged in this conduct.

The second alternative is to understand reasonableness of reliance as reasonableness of acting-in-reliance. To assess the reasonableness of reliance in this sense is to make the hybrid assessment of the reasonableness of exercising the exclusionary permission *and* of performing the action in question. This form of assessment judges the reasonableness of relying, not in general but in a specific way. In the case of Jones and the log, for example, the subject of assessment might be the reasonableness of Jones' relying by running quickly across the log.

On either approach to assessing the reasonableness of reliance, one must judge the second-order activity of disregarding (or not acting on) first-order reasons for action. Commonly, however, there will be just one or only a small number of ways to rely, and in run of the mill cases the two types of assessment may be practically indistinguishable. In the case of Jones and the log, the assessments of reliance, simpliciter, and of acting-in-reliance will be the same for typical forms of action in reliance (i.e., typical ways of walking on the log). However, assessments in some cases may diverge, as in the example

above of Smith and the ladder, e.g., where the underlying action is highly unreasonable.

3. *Reasonableness of Reliance in Misrepresentation Law*

Recognizing the difference between reasonableness of reliance and reasonableness of the underlying action enables one to dissolve a supposed paradox, or at least tension, in the law of misrepresentation. The problem (or tension) ostensibly arises from a clash of two basic principles. On the one hand, it is not a defense to a claim of fraud that the relying party has been negligent in his conduct: the hearer is not required to exercise reasonable care for his own protection.[118] On the other hand, there can be no recovery for fraud unless the reliance is reasonable.[119]

Courts and scholars see a conflict here. They see this pair of principles as at once imposing and refusing to impose a requirement of reasonableness on the actor, and have tried resolving the apparent conflict in several different ways. One is apply a modified standard of care, requiring a victim of fraud only to avoid reckless conduct (rather than to use reasonable care).[120] A more common approach, adopted by the *Restatement*,[121] many courts,[122] and some commentators,[123] is to adopt a plaintiff-specific standard. On this approach, whether reliance is reasonable (or justifiable) is to be determined in light of the characteristics of the actor and the circumstances under which he acted.

Yet these gambits are unnecessary because the two basic principles are not in conflict. They govern different levels of reasoning and different types of conduct. The principle excluding the defense of contributory negligence is concerned with the ordinary action of the hearer. It is a perfectly sensible rule because the speaker's assurance entitles the hearer to act unreasonably, against the weight of the first-order reasons. On the other hand, the rule that reliance should be reasonable is concerned (at least in significant part) with the hearer's

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118. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 545A (1977).

119. *See id.* § 537(b).

120. *E.g.* AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc., 896 F.2d 1035, 1041 (7th Cir. 1990); Chicago Title & Trust Co. v. First Arlington Nat'l Bank, 454 N.E.2d 723, 729 (Ill. App. Ct. 1983).

121. RESTATEMENT (SECOND) OF TORTS § 545A (1977).

122. *See, e.g.*, Field v. Mans, 116 S. Ct. 437, 445-46 (1995); Kempf v. Ranger, 155 N.W. 1059, 1061 (Minn. 1916).

123. HARPER ET AL., *supra* note 61, at 461-63.

exclusion of first-order reasons.[124] It is concerned (at least in significant part) with whether it is reasonable for the hearer to treat the utterance in question as authoritative and disregard certain reasons for action.[125]

IV. EXPECTATION AND RELIANCE

The notion of promise is closely connected with the notion of expectation. A promise may create an expectation that the speaker will do what he said he would. Moreover, according to some contracts scholars, the laws governing contract and promise seek (at least in part) to protect expectation or the so-called expectation interest.[126] To explore this connection further, we briefly examine some concepts of expectation and their links to other assurance-related notions. We will find that a difference in blameworthiness between reliance and

124. What may underlie the failure to appreciate that the two rules act at different levels is the conflation of reliance with belief. For if one sees reliance as merely acting on belief, then action in reliance on an utterance would simply be action on first-order reasons, to be judged for reasonableness as would any other type of action. There would be nothing further to be assessed for reasonableness.

125. An example of the difference between reasonableness of underlying action and reasonableness of reliance can be found in *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1990). There, a contractor installing windows in a large building discovered that many of the screws used to hold the window frames to the walls were cracking even before the heavy glass had been installed. A metallurgist hired by the contractor found minor defects in the broken screws and recommended that the screws already installed be replaced. Unbeknownst to the contractor, the manufacturer's metallurgist found the defects in the screws to be more serious. Nonetheless, the manufacturer's national sales manager told the contractor that the cracking resulted from the contractor installing the screws incorrectly. As for any defects in the screws, he said only that one of the lots was "marginal," that the problem was isolated, and that replacements would be shipped after full inspection by the manufacturer. Replacements were tested and found defective; they were shipped, nonetheless. The contractor used the manufacturer's screws until it discovered that they were breaking. The contractor sued, and the court found that the manufacturer had committed actionable fraud.

It could be argued that the underlying action of continuing to use the manufacturer's screws, at least without testing, was unreasonable in light of, e.g., the discovery of the original defects, the first metallurgist's recommendation, the apparent unreliability of the manufacturer, the small cost of the screws in the overall contract, the potential expense of having to replace them if others proved defective, and the potential liability to the building owner if the screws failed. But this was irrelevant, since the court in effect found that the contractor had reasonably relied on the manufacturer's representation in disregarding these reasons to stop using the screws. As the court noted, the contractor could assume that the manufacturer knew more about the screws and their soundness than an outside metallurgist and that the manufacturer would not ship defective screws a second time, risking loss of reputation and serious liability for the sake of a minor sale. *See id.* at 1043.

126. *See, e.g.*, 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 2 (Joseph M. Perillo ed., 1993) (explaining that contract law "attempts the realization of reasonable expectations that have been induced by the making of a promise").

one sense of expectation illuminates a deep and unexpected feature of the former.

A. Expectation and Expectation Interests

In his article about the reliance interest, Fuller devotes a great deal of attention to expectation, the expectation interest, and the connections between the expectation interest and the reliance interest. Fuller's discussion is useful, among other ways, in showing that there are multiple senses of "expectation."

One sense involves the obligation resulting from an assurance about the future. If Jones promises to ϕ, one can describe the situation in the passive voice and say: it is expected that Jones will ϕ.[127] Although this sense of "expectation" emphasizes the standpoint of the hearer, it is not subjective. It denotes the socially determined scope of obligation resulting from an assurance about the future, and it means something close to "right."[128] If it is expected that Jones will pick up Smith at the airport because Jones assured Smith that he would do so, Smith has a right that Jones pick her up at the airport. An injury to expectation in this sense is a breach of obligation.

The second sense of "expectation" differs from the first in that it is psychologically based. An assurance about the future may give rise to beliefs relating to the propositional content of the assurance. In particular, a promise to ϕ may generate a belief on the part of the hearer that the speaker will ϕ, and perhaps other ϕ-related beliefs as well. Non-fulfillment of an assurance about the future may cause the hearer "disappointment in not getting what was promised."[129] This state of affairs can be characterized as the loss of expectancy, a psychological harm. The second sense of "expectation" captures this notion. It means roughly: a belief relating to the content of an assurance.

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127. *Cf.* Shorter OED, *supra* note 13, at 885 (defining "expect" as "[l]ook for as due or requisite from another").

128. This obligational sense of "expectation" is widely used in law. *See, e.g.*, Brandborg v. Lucas, 891 F. Supp. 352, 357 (1995) (discussing waiver of an "expectation of privacy"); Jefferson-Pilot Life Ins. Co. v. Krafka, 57 Cal. Rptr. 2d 723, 725 (1996) ("Congress enacted various safeguards to . . . secure the rights and expectations that ERISA brought into being."); Techni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996) (stating that where a buyer jointly represents two clients in some matter, "the clients have no expectation that their confidences . . . will remain secret from each other"); State v. King, 925 P.2d 606, 612 n.4 (Wash. 1996) ("[A]n inmate has no constitutional expectation to release prior to serving the maximum term . . . .").

129. Fuller & Perdue, *supra* note 4, at 56.

Fuller uses both senses of "expectation" (and kindred terms) without recognizing that they are distinct.[130] He refers equivocally, for example, to "the expectancy which the promise created." Fuller's failure to distinguish among these senses is most apparent in the discussion of the question at the heart of his article: Why should the law ever protect the expectation interest?

One answer Fuller considers is suggested by the will theory of contract. On this theory, a contract is a set of norms, chosen by the parties and enforced by the legal system precisely because they are norms established by the parties.[131] These contract norms result from the parties' promises and other assurances. To the extent that the will theory serves as a rationale for protecting expectation, it is a rationale for protecting expectation in the first sense, as the obligational aspect of the parties' assurances. But Fuller also considers, without realizing that he has moved to a different concept, a second theory: that an unfulfilled promise creates on the part of the hearer a feeling that he has been deprived, and that the common law treats "this attitude of expectancy" as a bare datum to be protected.[132] This approach views expectation in its psychological sense and treats the legal protection of it as redress of a psychological harm.

Let us call the first sense of expectation *propositional expectation* and the second sense *psychological expectation.* Propositional expectation is based on the obligational features of an assurance, while psychological expectation is based on its illocutionary features. Given an assurance that p, the associated propositional expectation consists of the right that p (and, perhaps, other rights logically or rationally connected with p). The non-fulfillment of a propositional expectation is criticizable per se, as a breach of obligation. By contrast, the associated psychological expectation consists of beliefs (or, perhaps, reasonable beliefs) relating to p, on the part of the hearer, that should not be disappointed. Disappointment of a psychological expectation is criticizable only when additional factors come into play.[133]

130. *See id.* at 54. Compare the conflation of reliance-related notions discussed *supra* note 92.

131. *See id.* at 58.

132. *See id.* at 57.

133. In general, disappointed psychological expectation is a basis for criticism or blame only where considerations of fairness or economic policy justify such criticism or blame. For example, the law of interference with prospective business advantage imposes liability for causing the disappointment of one person's expectation of doing business with others. In this body of law,

B. Psychological Expectation and Reliance

Psychological expectation has close connections with reliance. Both phenomena result from a hearer's acting on one of the reasons essentially involved in an assurance: in the case of psychological expectation, the first-order reason for belief; in the case of reliance, the exclusionary permission. Both result from assurances and thus frequently occur together. And the connection is closer still. As we have seen, the expectation resulting from an assurance may be the reason for relying on the assurance. This co-occurrence and co-dependence helps to explain why expectation and reliance are not always carefully distinguished.[134]

Yet there are fundamental differences: one is the speaker's susceptibility to criticism for causing harm. Examining this difference provides insight into why conduct that induces harmful reliance is a basis for liability and blame.

1. *Criticism and Reasons*

Our social norms only weakly support criticism of a person who induces a belief that leads another to act to his harm.[135] If Jones tells Smith that some of Jones' friends have successfully grown azaleas in Chicago (where Smith lives), then, if Smith believes Jones and if Smith has certain horticultural desires, Jones has given Smith a first-order

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liability is imposed only for interferences that are unprivileged—i.e., for those involving violations of business morality or economic policy. Liability may be imposed on one who steals customers by lying or inducing a breach of contract, but not on one who takes away customers by offering lower prices. *See* Restatement (Second) of Torts §§ 766-68 (1977).

In contract law, courts and scholars are reluctant even to consider disappointed expectations as a type of compensable harm. *See, e.g.*, Becker, *supra* note 5, at 192 ("Pure expectation damages represent only the promisee's disappointed hopes, whereas reliance damages represent real losses."). Yet, there is no a priori reason that disappointed expectations should not be considered "real losses." Tort law provides redress for many types of psychological harm.

134. For example, in the law of agency, apparent authority and agency by estoppel are not carefully distinguished. The former arises where the actions of the principal induce a belief that the agent has authority, *see* Restatement (Second) of Agency § 27 (1957); the latter arises where a third party relies on conduct of the principal which functions as an assurance that the agent has authority, *see id.* § 83.

135. Consider, for example, the common law of pensions. Before the enactment of ERISA, an employer might hold out to employees the prospect of a pension, yet hedge the offer with so many conditions that no sensible person could rationally treat it as an assurance. The aim was to create the expectation of a pension without making it reasonable for the employee to rely on the pension's being granted. *See generally* Jay Conison, *Foundations of the Common Law of Plans*, 41 DePaul L. Rev. 575, 588-89, 599-600 (1992). Courts generally held that an employer was not liable for the mere disappointment of employee pension expectations created by the employer's conduct or representations. *See id.* at 601-10.

reason for attempting to grow azaleas in Chicago. If Smith then squanders money vainly trying to grow azaleas in a cold climate, Smith will have suffered harm through acting on the reason supplied by Jones. However, there ordinarily is no moral or social basis for criticizing Jones—Smith alone is the one held responsible for the harm.

The situation is very different with second-order reasons. We tend to blame a person who supplies another with a second-order reason that leads to harm. If Jones orders Smith to perform a dangerous act and Smith does it, to his harm, we blame Jones. If Jones guarantees Smith that Sparkplug will win the third race, and as a result Smith bets heavily and loses, we blame Jones.[136] In general, we tend to assign blame for harm-inducing promises, guarantees, threats, and orders—all of which give the hearer a second-order reason—but not for vows, statements of intent, and requests—all of which give the hearer only first-order reasons.

Our legal system reflects this distinction between first- and second-order reasons.[137] A promise on which a person relies to his detriment may be a basis for liability, but a hedged statement that merely induces a belief on which he acts to his detriment is not. One who shouts "Fire!" in a crowded theatre (thereby providing an exclusionary reason for fleeing) will be liable for harm, but one who shouts "The movie's terrible; let's all leave!" (providing only a first-order reason for action) will not. And while law enforcement officers have wide latitude to urge upon a suspect genuine first-order reasons for confessing,[138] a confession induced by a promise (which gives the suspect a second-order reason) may well be invalid.[139]

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136. More generally, if Jones is or purports to be an authority on a matter and his assertion regarding it proves wrong, we blame Jones.

137. A person who acts on reasons he has acquired from another's act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent's own judgment. This is not true . . . if, instead of providing you with reasons for thinking [the action] a good thing, I issued orders or commands backed by threats . . . .

> It is a difficult matter to say exactly when legal liability arises in these cases . . . . [But] it has to be something more than merely the communication of persuasive reasons for action . . . .

Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204, 214 (1970).

138. *See, e.g.*, Welch v. Butler, 835 F.2d 92, 95 (5th Cir. 1988) (discussing a confession resulting from prayer session with police officer; "[a]t most, the police set up a situation that allowed Welch to focus for some time on those concerns [about salvation and divine forgiveness] with a fellow Christian in the hope that his desire to be saved would lead him to confess").

139. *See* Bram v. United States, 168 U.S. 532, 542-43 (1897).

2. *Second-Order Reasons and Decisionmaking*

Thus, our social and legal norms distinguish between the blameworthiness of inducing action on first-order reasons and the blameworthiness of inducing action on second-order reasons. We wish to understand why. Now, armchair social science is a hazardous avocation. Yet the conclusions we have thus far reached point toward a plausible explanation.

Second-order reasons generated by speech acts reflect the speaker's real or assumed authority. When a speaker provides a hearer with a simple exclusionary reason or exclusionary permission, the speaker ordinarily calls on the hearer to accept the speaker's judgment in place of the hearer's own. He thus interferes with the hearer's decisionmaking process. Moreover, if the hearer acts on the second-order reason and suffers harm, the speaker may be considered to have assumed responsibility and may fairly be held accountable. By contrast, when a speaker provides only a first-order reason to a hearer, he is not seeking to substitute his judgment for that of the hearer. Indeed, by providing first-order reasons for the hearer to weigh, he is contributing to the normal decisionmaking process. Absent other considerations (such as fairness or economic policy), the speaker is not held accountable for the hearer's action on the proffered reason.

This explanation is surely plausible as concerns authoritative orders and other sources of simple exclusionary reasons. An authoritative order by its nature involves the displacement of the judgment of the person ordered. Evidence that it also explains (at least in part) the potential blameworthiness of assurances and other sources of exclusionary permissions can be found in several areas of law in which consequences attach to reliance on an assurance, even *without* resulting harm.

One such area is the criminal procedural law of confessions. Courts take the view that the decision to confess must be "a product of the suspect's own balancing of competing considerations."[140] From this perspective, confessions resulting from promises are objectionable

140. Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986).

because they result from a distorted deliberative process.[141] A promise gives the suspect an exclusionary permission that, if exercised, necessarily interferes with the straightforward weighing of first-order reasons.[142] As one court explained:

> [C]ourts' actual as distinct from articulated standard [is] to ask whether the government has made it impossible for the defendant to make a *rational* choice as to whether to confess—had made it in other words impossible for him to weight the pros and cons of confessing and go with the balance as it appears at the time.[143]

By contrast, if a confession is made in response to a promise that was requested by the defendant as a precondition to confessing, it is not objectionable.[144] In such a case, the defendant reached his decision—to confess on certain terms—after proper deliberation, unaffected by promises or objectionable second-order reasons. The promise, which comes after the deliberation, does not taint it. The rule protecting suspects from the influence of police promises thus appears to be based on the goal of protecting a suspect's decisionmaking process.

Another area that illuminates the nature of the concern with exclusionary permissions is contract law; in particular, a class of cases that have been troublesome for the doctrine of consideration. These are cases such as *Hamer v. Sidway*,[145] where a person has been led by a promise to take actions that benefit him, and then seeks to recover when the promise is not kept. In *Hamer*, for example, an uncle promised his nephew $5,000 if the nephew would refrain from smoking, swearing, and gambling until he reached age 21. If, instead of this simple promise, there had been an agreement, say, for the nephew to act as a role model for wayward youth by not smoking, swearing, or gambling for a fixed period, it would easily fit the conventional model of contract. The nephew would be performing a service to the uncle for a fee. The difficulty in *Hamer* is that, not only is the nephew performing no service to the uncle (or to anyone else), what he has been induced to do benefits him. He has sustained no evident harm. Why,

141. Courts often explain that promises which induce confessions are objectionable because they overbear the will, *e.g.*, United States v. Walton, 10 F.3d 1024, 1028 (3d Cir. 1993), or are difficult to resist, *e.g.*, Streetman v. Lynaugh, 812 F.2d 950, 957 (5th Cir. 1987). But these explanations, taken literally, make little sense. The whole point of police interrogation is to convince the suspect to confess by giving him reasons that overcome his resistance.

142. *See, e.g.*, *Walton*, 10 F.3d 1024.

143. United States v. Rutledge, 900 F.2d 1127, 1129 (7th Cir. 1990) (Posner, J.).

144. *See, e.g.*, Drew v. State, 503 N.E.2d 613, 617 (Ind. 1987) (collecting cases).

145. 27 N.E. 256 (N.Y. 1891).

then, should he recover any damages when the uncle fails to pay the $5,000?

A legally untutored person might respond by saying that the nephew has, in effect, been manipulated, and that the uncle should make amends for this manipulation. The court's justification in *Hamer*, however, ostensibly focuses on the promise, rather than on the manipulation. The proffered justification is the rule that a promise is enforceable so long as "something is promised, done, forborne, or suffered by the party to whom the promise is made," in exchange for the promise.[146] Now, this rule, taken literally, would suggest that a promise is enforceable whenever it induces the hearer to do something in an exchange, where "do" and "something" have very broad senses—so broad as to include not doing something. And, in fact, other courts and some contracts scholars pretty much come to this conclusion. For example, *Williston on Contracts* summarizes a part of the doctrine of consideration with the rule that a promise is enforceable if the hearer "promises or performs any act, regardless of how slight or inconvenient, which he is not obligated to promise or perform so long as he does it at the request of the promisor and in exchange for the promise."[147] Many decisions quote Williston to this effect or apply similarly stated rules.[148]

There are two noteworthy aspects to cases like *Hamer* and the Willistonian maxim on which they depend. First, courts are purporting to enforce promises of this kind only where the hearer has acted in reliance on the promise, not merely where he has taken action following it.[149] Some opinions are very explicit on this point, for example:

> [E]very sufficient consideration, although not technically an estoppel, contains the substantial elements of an estoppel in pais, for, if a man by his promise induces another to change his situation, and is then permitted to deny the validity of the promise, he is thus perpetrating a fraud, and injuring another by a false promise.[150]

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146. *Id.* at 257.

147. 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 7:4, at 41 (Richard A. Lord ed., 4th ed. 1992). Earlier editions contain similar rules.

148. Wit v. Commercial Hotel Co., 149 N.E. 609, 612 (Mass. 1925). *See also* Gulden v. Sloan, 311 N.W.2d 568, 572 (N.D. 1981).

149. *E.g.*, United States v. Meadors, 753 F.2d 590, 595 (7th Cir. 1985).

150. Finlay v. Swirsky, 131 A. 420, 423 (Conn. 1925). *See also* Land of Lincoln Sav. & Loan v. Michigan Ave. Nat'l Bank of Chicago, 432 N.E.2d 378, 384 (Ill. Ct. App. 1982); Temmen v. Kent-Brown Chevrolet Co. 535 P.2d 873, 880 (Kan. 1975).

Second, courts and contracts scholars persist in calling the action in reliance on the promise "detriment" or "legal detriment."[151] And they do so despite their recognition that there is no detriment in the ordinary sense of the term.[152] This persistence in calling any action in reliance on a promise a detriment may be a recognition that a promise, if acted on, tends to injure the promisee by interfering with his decisionmaking process, inducing him to act in a way other than he might on the balance of first-order reasons. Hence, enforcement of the promise may be a way of responding to the promise's effect on the hearer's decisionmaking. It may be a recognition of the commonsense view that, in cases like *Hamer*, a promise can amount to, or at least resemble, manipulation.[153]

3. *Reliance and Autonomy*

Fuller asks why law protects the expectation interest, and concludes that it does so mainly to protect the reliance interest. But he never asks why law protects[154] the reliance interest, apparently believing it self-evident that the interest merits protection. Yet the matter is not self-evident. Our examination of the difference in treatment between inducing first-order reasons and inducing second-order reasons suggests that the social and legal concern with reliance reflects, at least in part, a concern to protect autonomy in decisionmaking.[155]

There are many concepts of autonomy.[156] We are not speaking here of Kantian or other recondite notions. Rather, we are speaking of autonomy in the more conventional sense of a right of a person to be free of influences that interfere with his making fully informed decisions which promote his best interests.[157] At its simplest level it is the right to be free of threats and manipulation. But it involves much more. In general, it is the right of a person to come as close as he can

151. *E.g.,* Hamilton Bancshares, Inc. v. Leroy, 476 N.E.2d 788, 792 (Ill. Ct. App. 1985).

152. *See generally* 1 CORBIN, *supra* note 126, § 5.10; 3 WILLISTON, *supra* note 147, at 40-41.

153. *See, e.g.*, Devecmon v. Shaw, 14 A. 464, 465 (Md. 1888) ("If [the promise] is not fulfilled, the expenditure will have been procured by a false pretense.").

154. "Protect" is not here used in the technical sense introduced *supra* section II.B.2.c.iii.

155. "The type of interest protected by the law of deceit is the interest in formulating business judgments without being misled by others . . . ." 2 HARPER ET AL., *supra* note 61, at 378. *See* Francis H. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733, 734 (1929) (referring to "the interest which every man has in making an intelligent choice to embark on a course of conduct").

156. *See, e.g.*, Thomas E. Hill, Jr., *Autonomy and Benevolent Lies*, *in* AUTONOMY AND SELF-RESPECT 25 (1991).

157. On autonomy as the ideal fully realizing this right, see S.I. Benn, *Freedom, Autonomy and the Concept of a Person*, 76 PROC. ARISTOTELIAN SOC'Y 109, 116, 124-30 (1976).

to a social ideal of decisionmaking, marked by his having full information and remaining unaffected by "improper" influences.[158]

Our inquiry into reliance and expectation allows us to grasp the respect in which an assurance may be viewed as an "improper" influence and the respect in which reliance—-acting on an assurance—-can be viewed as troublesome. An assurance, by its nature, seeks to prevent a person from exercising his best judgment as to what, on balance of reasons, he ought to think or do. Indeed, that is its function. But precisely because of this function, a decision or action based on an assurance falls short of a social ideal. And it falls short for the same reason that a decision or action based on a lie—-even a benevolent lie, one for the hearer's own good—-falls short. For it is a decision or action based, at least in part, on the judgment of some other person, rather than on the actor's independent assessment of what, all things considered, he ought to do.

Of course, this is not to say that assurances are a social evil to be condemned. That conclusion would be absurd. As we have seen, assurances are essential to the efficiency of communication, and so any criticism of an assurance must, in practice, be based on some additional factor, such as harm. But it is to say that inducing action on an assurance—i.e., inducing reliance—sufficiently intrudes on a fundamental social and legal goal—the protection of decisionmaking autonomy—as to be a matter of concern in any society that highly values autonomy.[159] And our society does highly value autonomy.

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158. "[A] rational decision maker wants not only to have a clear head and ability to respond wisely to the choice problems presented to him; he wants also to see the problems and the important facts that bear on them realistically and in perspective." Hill, *supra* note 156, at 33. *See also* JOSEPH RAZ, THE MORALITY OF FREEDOM 377-78 (1986):

> Manipulation . . . perverts the way that a person reaches decisions. . . . It . . . is an invasion of autonomy whose severity exceeds the importance of the distortion it causes. . . . The natural fact that coercion and manipulation reduce options or distort normal processes of decision and the formation of preferences has become the basis of a social convention loading them with meaning regardless of their actual consequences.

159. One contracts scholar has written, in opposition to the view that so-called reliance damages are the appropriate measure for cases of detrimental reliance on a promise, that:

> The only way the reliance measure can be made to fit th[e] compensation principle is to regard the wrong not as the failure to perform the promise, but as the making of the promise in the first place, at least if it were reasonably foreseeable that people would rely on it. This construction must be rejected as contrary to the mores and practices of our society. As a rule, promising is not wrongful conduct. We do not want to deter promising . . . . Relying on a promise is not an injury in itself; it becomes one only if the promise is not performed.

W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 217-18 (1990). But as we have seen, promising is at least an incipient wrong, to the extent that relying on a promise involves the wrong of interference with decisionmaking autonomy.

Thus, what our inquiry strongly suggests is that inducing detrimental reliance on an utterance is a basis for criticism and liability, indeed is a strong one, not simply because it involves harm, but because it also involves interference with decisionmaking autonomy.

CONCLUSION

The key to understanding reliance and allied notions is recognizing that reliance on a promise or other speech act involves the exercise of an exclusionary permission generated by that speech act. An account in these terms explains many features of reliance and related phenomena. It explains, for example, the similarity between acting in reliance and acting on a belief; the nature and role of reasons for reliance; the function of legal rules as reasons for reliance; the difference between reasonable reliance and reasonable action; and the connections between reliance and expectation.

The account also enables us to understand some of the deeper aspects of reliance and allied phenomena. It enables us to understand that reliance is a disposition to act the same way under a range of different circumstances, and that this is the practical difference between acting in reliance and acting on belief. It also enables us to understand the deep connections between reliance and authority, and between reliance and autonomy. Furthermore, it enables us to see the underpinnings of legal and social concern with reliance, and to understand why detrimental reliance is a predicate for liability and blame. In short, we can begin to appreciate why reliance matters.