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Teaching Law as a Vocation: *Local 1330*, Promissory Estoppel, and the Critical Tradition in Labour Scholarship

Richard Michael FISCHL^{*}

*A central feature of early work associated with critical legal studies was an effort to 'break the seal' between teaching and writing, the supposedly dichotomous dimensions of academic life. This essay locates the link in a 'demythification' project – a relentless focus on the recurring rhetorical structures of legal reasoning and argument – and nowhere is it more evident than in critical labour scholarship. The essay offers an extended illustration by deploying a series of critical classroom techniques in a study of *Local 1330 v. U.S. Steel*, a tragically unsuccessful effort by a union to prevent the closing of a steel mill via promissory estoppel and an early symptom of late twentieth century deindustrialization, the declining fortunes of labour unions, and the shift from labour law to contract law in the legal regulation of the American workplace.*

1 INTRODUCTION

I am greatly honoured by this opportunity to offer my perspective on what critical legal studies (cls) brings to labour law scholarship. As I have argued elsewhere, a singular if under-heralded contribution of cls was to 'break the seal' between teaching and writing, the famously dichotomous dimensions of academic work.¹ It is no coincidence that the book most prominently associated with the critical 'method' in labour scholarship begins with an account of a question innocently posed by a student in the midst of a labour class: Why, the student asked, did American courts persist in ignoring or minimizing employee rights that were 'clearly and unequivocally set out in the National Labor Relations Act' in favour of limitations that were 'neither discussed in the legislative debates and reports nor expressed in the statute'? The book's author – Jim Atleson – recounts that he

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¹ See R. M. Fischl, *Pedagogy and Critique: Values and Assumptions in the Law School Classroom*, 58 Buff. L. Rev.: Dkt. 1, 6 (2010), available at http://www.buffalolawreview.org/docket/content/58/Fischl_Docket.pdf (last visited 10 Feb. 2017).

'began patiently to answer with the verities [he] had been taught, that no statute or right is absolute and that all rights had to be balanced against competing interests', but was seized by the moment, suddenly losing faith in 'the traditional dogma' and ultimately inspired to provide an extended response in what we now know and love as *Values and Assumptions in American Labor Law*.²

Many first-generation critical studies – in labour law and beyond – focused considerable energy on the connection between pedagogy and legal theory,³ and those of us who followed our mentors into law teaching continued the effort with great enthusiasm.⁴ My own fifteen minutes of fame came when a classroom exercise I described in my first scholarly publication – a hypothetical devised to provoke students into questioning why profits follow capital rather than labour – appeared in its entirety under the caption 'What the Fuss Is About' in a *New York Times* account of the struggles over cls at Harvard Law School during the mid-1980s.⁵ Indeed, much of what I have written in the years since has had its source in the classroom, from a thought experiment designed to quell a student rebellion against the assigned readings on work and family;⁶ to a meditation on why students who opposed attending off-campus classes during a janitors' strike defended their position with contract-based arguments while students wishing to honour the picket line did not;⁷ to an article exploring the integration of American work law inspired by perceptive questions from labour students that forced me to draw on principles, practices, and doctrines drawn from other areas of law in formulating my answers.⁸

² J. B. Atleson, *Values and Assumptions in American Labor Law* (University of Massachusetts Press 1983). On the connection between the book and cls – which its author has occasionally disputed – see Fischl, *supra* n. 1, at 2–3.

³ See, e.g. K. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. Rev. 876 (1979); D. Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 Seton Hall L. Rev. 1 (1983); J. M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829 (1983); J. Feinman & M. Feldman, *Pedagogy and Politics*, 73 Geo. L. J. 875 (1985); M. J. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Amer. Univ. L. Rev. 1065 (1985); R. W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195 (1987); R. W. Gordon, *Critical Legal Studies as a Teaching Method*, 35 Loy. L. Rev. 383 (1989).

⁴ See, e.g. J. Boyle, *The Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003 (1985); J. Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. Leg. Educ. 249 (1986); J. Paul, *A Bedtime Story*, 74 Va. L. Rev. 915 (1988).

⁵ See J. A. Kingson, *Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial*, N.Y. Times, § 4 (Week in Review), at 6 (sidebar) (30 Aug. 1987), quoting R. M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. Miami L. Rev. 505, 527–528 (1987).

⁶ R. M. Fischl, *A Woman's World: What If Care Work Were Socialized and Police & Fire Protection Left to Individual Families*, in *Women, Work, and Globalization: Critical and Comparative Perspectives* (J. Conaghan & K. Rittich, eds, Oxford 2005).

⁷ R. M. Fischl, *The Other Side of the Picket Line: Contract, Democracy, and Power in a Law School Classroom*, 31 N.Y.U. Rev. L. & Soc. Change 517 (2007).

⁸ R. M. Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 Berkeley J. Empl. & Lab. L. 163 (2007).

There is obviously a politics to foregrounding the classroom experience in one's scholarly work. Treating students as collaborators in the enterprise – taking their opposition seriously and recognizing their Emperor's New Clothes moments as a potential source of insight – reflects a commitment to 'eliminating illegitimate hierarchy' in the academic workplace (bet you haven't heard *that* expression in a while) and offers a critique-by-example of the use of the Socratic method to lord professorial expertise over charges who have been studying law for all of ten minutes. But it seems to me that the central link between pedagogy and theoretical work in the critical tradition is substantive rather than symbolic and lies in the relentless focus on the recurring rhetorical structures of legal justification, a 'demystification' project that has produced enormously effective classroom teaching tools and at the same time exposed to a broader academic and professional audience the revealing patterns of thought lurking in the nooks and crannies of legal reasoning.

I will offer an extended illustration of the demystification link here and will take as my topic the Local 1330 case, the storied challenge to the closing of a pair of aging steel plants in the industrial Midwest some three and a half decades ago.⁹ In particular, I am going to focus on the effort by union locals representing the plant workers to enjoin the threatened closure on the basis of promissory estoppel. In a nutshell, that challenge was premised on a claim that U.S. Steel – the plants' owner – had broken its promise to keep the plants open if the workers redoubled their production efforts and succeeded in making the operation 'profitable'. In the litigation that ensued, there was little dispute that the workers had accomplished and indeed sacrificed a great deal on the faith of that promise, but in the end the courts rejected the promissory estoppel claim on the basis of a finding that the workers' efforts had fallen tragically short of the 'profitability' benchmark.

I have chosen to focus on *Local 1330* for a number of reasons. For one thing, inspired by a most engaging conference marking the thirtieth anniversary of the decision, I have resumed teaching the case in my labour and contracts courses, and it is high time I wrote about it.¹⁰ For another, the case represents a nodal point in American labour history, a harbinger of late twentieth-century deindustrialization as well as of the declining fortunes of labour unions and the 'rust belt' workers they

⁹ *Steelworkers Union, Local No. 1330 v. U.S. Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio E.D.), aff'd in part, vacated in part, *Local 1330, Steelworkers Union v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980).

¹⁰ See *Local 1330 v. U.S. Steel: 30 Years Later* (Harvard Law School 25 Feb. 2011), proceedings available at <http://legalleft.org/conferences/local-1330-conference/> (last visited 9 Feb. 2017). The conference was organized by Unbound: Harvard Journal of the Legal Left, and three articles that have greatly influenced my thinking about the case were published in Volume VII of the Journal (2011). See B. Rogers, *Dead Man's Town: Violence and Legal Interpretation in Local 1330*; J. W. Singer, *The Reliance Interest in Property Law Revisited*; and especially K. Klare, *Teaching Local 1330 – Reflections on Critical Legal Pedagogy*, <http://legalleft.org/previous-issues/vol-vii/> (last visited 9 Feb. 2017).

represented, developments explored with alarm by progressive economists and legal scholars long before recent events brought them forcefully to forefront of American politics.¹¹ And for still another, the case signalled a corresponding shift from labour law to employment law and especially contract law in the legal regulation of the American workplace and its study in the academy.

Following this introduction, the essay proceeds in two parts. In section 2, I introduce promissory estoppel the way I often do in my contracts and labour classes, contrasting mainstream, legal realist, and critical ‘stories’ about the history and role of the doctrine in American law. I warn my students – as I am warning readers here – that the contrasting accounts are to some extent caricatures, for surely no self-respecting legal academic would actually *admit* to being ‘mainstream’, and I gather from what I read in the casebooks as well as from discussions with others teaching these subjects that most of us bring insights from a mix of realist, critical, and other schools of thought to our classroom work. But the point of proceeding in this fashion is to attempt to highlight the contributions of the cls tradition to pedagogy as well as legal theory, and in section 3 I will bring those contributions to bear on a critical study of the promissory estoppel claim in *Local 1330*.

2 LAW STORIES

2.1 THE MAINSTREAM ACCOUNT

The mainstream story of promissory estoppel goes something like this. In the bad old days, promises were unenforceable unless supported by consideration, and under the so-called ‘bargain theory’ of consideration – developed in the latter part of the nineteenth century along with so many other heartless and cruel common law doctrines – a promise was not legally enforceable unless it was part of an exchange transaction. Thus, if you promised me a barrel of widgets and reneged on that promise, I had no legal recourse against you; your promise was ‘gratuitous’, and the point of bargain theory was to render such promises unenforceable. But if you promised me that same barrel of widgets in exchange for something I gave or committed to give in return – that is, for some sort of quid pro quo for the widgets – then your failure to make good on the promise was an actionable breach of contract.

Now most of the time the requirement of bargained-for consideration was not a problem, for in the commercial world the vast majority of transactions involve giving and getting on both sides: I work and for my efforts receive a salary and

¹¹ See, e.g. B. Bluestone & B. Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* (Basic Books 1984); J. W. Singer, *The Reliance Interest in Property Law*, 40 Stan. L. Rev. 611 (1988).

benefits; you sell a house and accept payment in return; and so on. But in some commercial contexts, and in many familial, social, and charitable settings, people make promises with no expectation of receiving anything in return – apart, perhaps, from the pleasure of giving itself. So what happens if I make a promise – say I promise my sister-in-law a safe place to raise her family after the untimely death of her spouse, to take a not quite random example – but secure no ‘price for my promise’ in return?¹²

Far more often than not, what happens is that the promising party will make good on the commitment; fortunately for familial and other forms of social harmony, most people seem to keep most of their promises most of the time. And even if the promising party has second thoughts – where, for example, an ill-considered promise is made in a state of momentary exuberance or extreme grief – there may be no lasting problem if the second thoughts follow upon the first quickly enough.

But if the promising party reneges after the would-be beneficiary has pursued some costly course of action on the faith of the promise – say the grieving widow abandons her former home and moves her family many miles through dangerous terrain in order to take advantage of the promised place to live, only to find herself and her children out on the street a short while later – then the requirement of bargained-for consideration has bite, and the one who gets bitten is the widow or (more generally) the party seeking the law’s assistance in holding the promising party to his word. The promise is gratuitous, the court would say; you gave nothing in return, so your mere reliance on the promise – no matter how much that reliance hurt – will not secure its enforcement.

In the mainstream account of American contract law, the requirement of bargained-for consideration was the ‘majority rule’ in the late nineteenth century, seemingly just another example of the preference for commerce over caring during an era very much in the thrall of Social Darwinism and *laissez faire*. But in our enlightened modernity, along came a knight in shining armour to rescue the widow and others who rely to their detriment on gratuitous promises: promissory estoppel, a cause of action sprung fully formed from the First Restatement of Contracts in the early 1930s. The notion of enforcing promises on the basis of reliance was of a piece with a broader movement towards the liberalization of American contract law – as often as not in the service of widows, workers, and other vulnerable parties – and, during the ensuing half century, promissory estoppel smote the cold-hearted bargain theory in jurisdiction after jurisdiction, soon becoming a majority rule all of its own.

¹² Readers who have been subjected to a first-year Contracts course in the US will no doubt recognize the reference here to the facts of *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

2.2 THE REALIST ACCOUNT

The legal realist version of the promissory estoppel story is a little different. Instead of a knight in shining armour, we get Dorothy Gale from Kansas, and she has had the ruby slippers all along. And in place of the mainstream account of liberalizing progress, it is a story of conflict between black-letter judicial pronouncements and the law ‘on the ground’. In this account, we focus on the debates over the First Restatement, when the drafters – led by Samuel Williston, a/k/a Oz the Great and Powerful – were busy making the bargain theory of consideration the doctrinal centrepiece of their black-letter masterwork. They were not only enshrining it as an invariant requirement for the enforcement of promises but also using it to rationalize a host of other hoary doctrines, including the rules governing ‘past’ consideration (which infamously permitted a father to renege on a promise to pay for nursing care previously provided to his son by a good Samaritan)¹³ as well as those governing mid-term contractual modifications (which likewise infamously permitted a ship’s captain to renege on a promised raise for sailors forced to work with assertedly unseaworthy fishing nets).¹⁴

Then along came Arthur Corbin, in the role of Toto pulling back the curtain to expose the Wizard’s humbug. As legend has it, Corbin announced to his fellow Restaters that he had found hundreds of American decisions in which courts had enforced promises with no bargain in sight – an intervention made all the more impressive by the absence in those days of photocopy machines, let alone on-line research tools.¹⁵ Some of the cases hailed from jurisdictions that had yet to adopt bargain theory and continued instead to embrace the antecedent English ‘benefit/detriment’ test for consideration. Under that test, either a benefit to the promisor or a detriment to the promisee would do the trick,¹⁶ and thus the widow’s move or other reliance suffered on the faith of even a concededly gratuitous promise might well have secured legal protection by establishing consideration via the required detriment. In other cases Corbin brought to the debate, courts expanded longstanding legal doctrines in order to enforce gratuitous promises that induced detrimental reliance. Foremost among those was equitable estoppel, a device available then as well as now to protect a party’s reliance on a misrepresentation

¹³ *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

¹⁴ *Alaska Packers Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902).

¹⁵ The account offered here of the respective roles played by Corbin and Williston follows the narrative made famous in Grant Gilmore, *Death of Contract* 62–63 (Ohio State University Press 1974). Subsequent scholarship has called aspects of Gilmore’s narrative into question, but even those critiques credit Corbin’s work with exposing the considerable gap between bargain theory and then-existing case law. See, e.g. J. Gordley, *Enforcing Promises*, 83 Cal. L. Rev. 547, 565–568 (1995); E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1454–1462 (1986–1987).

¹⁶ See, e.g. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

of existing fact by ‘holding the perp to his lie’ – preventing (or ‘estopping’), for example, a minor from citing youth as a basis for avoiding contractual liability where he has misrepresented his age to a merchant. For some courts, it was a short leap from ‘holding the perp to his lie’ to ‘holding the perp to his broken promise’, when it was a promise of *future* conduct – rather than a representation of existing fact – that had induced reliance by its would-be beneficiary.¹⁷

Corbin’s demonstration of a yawning gap between supposed black-letter rules and ‘the law on the ground’ was part of a larger realist project that called into question the extent to which judges actually do what they *say* they are doing when they decide cases. That project was perhaps exemplified most dramatically by Karl Llewellyn’s iconic analysis of the ‘canons of construction’, which presented a lengthy list of frequently encountered and utterly noncontroversial judicial pronouncements about how courts should interpret statutes, each of them paired with a likewise frequently encountered and utterly noncontroversial trope that completely contradicted its twin. (Compare, for example, ‘statutes in derogation of the common law shall be strictly construed’ with ‘remedial statutes shall be liberally construed’ – bearing in mind that ‘remedial’ statutes almost invariably ‘derogate’ the very common law they are designed to ‘remedy’).¹⁸

As the realist story continues, Williston and his fellow drafters – who were committed, after all, to ‘restating’ the law of contracts – had no choice after Corbin’s demonstration but to include a doctrinal mechanism for enforcing promises on the basis of reliance. As a result, in the First Restatement promissory estoppel took its place alongside consideration doctrine with no effort on the part of the drafters to explain how to square the supposed bargain requirement with its seeming negation – at least where ‘injustice can be avoided only by enforcement of the promise’ – a few short provisions later. So the lesson we are to learn from the realist account is this: Do not take all those confident black-letter pronouncements too seriously, for we should pay as much attention to what courts actually *do* as we do to what they *say*. What they do turns out to be messy and complicated, often more responsive to facts, equities, and social policies than to solemn professions of doctrinal entailment. In other words, we should pay a lot more attention to the *actions* of the man behind the curtain and a bit less to his sound and fury.

2.3 THE CRITICAL ACCOUNT

And what is the critical version of the story? In a nutshell, critical scholars found order in all that decisional messiness, contending that the man behind the curtain

¹⁷ See, e.g. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

¹⁸ K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–535 (Little, Brown 1960).

was not just randomly contradicting himself; rather, they argued, he was contradicting himself in recurring and hence revealing ways. What their scholarship brought to the surface was the profoundly *ideological* dimension of legal analysis and argument. While most critical scholars would have whole-heartedly agreed with the realist insight that judicial professions of doctrinal entailment promise a great deal more than they deliver, they nevertheless took the content of those professions seriously, mining the doctrinal material for hints, suggestions, and (with surprising frequency) forthright declarations of ideologically loaded assumptions and commitments. A principal critical lesson is thus that what courts *say* is very much a part of what courts do, and that careful attention ought therefore be paid to the justificatory rhetoric of legal decisions as well as to decisional results.

Turning to promissory estoppel, Duncan Kennedy's seminal critical legal study explored the persistent ideological conflict between individualism and altruism in American law – individualism characterized by an ethic of private autonomy and a legal system devoted to the facilitation of self-interested exchange vs altruism characterized by an ethic of solidarity and a legal system at the ready to protect the vulnerable and powerless.¹⁹ On this account, the tension between bargain theory and promissory estoppel is neither historical accident nor drafting error, but instead merely an instance – albeit a telling and central instance – of this larger and abiding conflict. Thus, under bargain theory, private autonomy and self-interest are trump, and the reneging promisor needn't provide the widow with a place to live since there is nothing in it for him; but under promissory estoppel, solidarity rules the roost, and we shall hold the cad to his word in order to protect the widow and family made vulnerable by reliance on his promise.

What were students to make of this? My own experience – as a student of Kennedy and other first-generation critical scholars many, many years ago – was that critical teaching marked a vast improvement over what was going on in most of our other law school classes. By the mid-1970s that was decidedly *not* legal realism, the lessons of which were typically reduced to sound-bites about the occasional role of policy in judicial decisions but otherwise ignored or dismissed with a snide reference to the contents of a judge's breakfast. Indeed, critical scholars revived and reloaded realist insights about the gap between the rhetoric of reasoning and decisional results, unearthing ideological conflict not only in legal doctrine but also in the analysis of facts, equities, and social policies that realists had offered in their effort to explain the law 'on the ground'. For those of us who entered the legal academy during that heady time, exploring patterned conflict in every darkened corner of legal analysis became a principal frame for the use of theory in the classroom, a practice some of us continue to this day. We offer it not

¹⁹ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

for its own sake nor in order to demonstrate our chops with fancy philosophical concepts and jargon – great fun though that may be – but instead as a tool of demystification, of unveiling the law’s politics while at the same time recasting those otherwise seemingly random invocations of fact sensitivity, situational equities, and social policy as an integral part of the law rather than as the occasional handiwork of a rogue or dyspeptic judge.

Paired Arguments. In my own classes, for example, we explore the ways in which ideological conflict frames not only the choice of legal rules (e.g. between bargain theory and promissory estoppel) but also the application of rules in particular cases. To continue our widow’s saga, let us say the governing jurisdiction has a robust body of caselaw embracing the use of promissory estoppel in situations involving unbargained-for reliance, so there is not much doubt that a court will apply promissory estoppel instead of bargain theory in the widow’s case. But as any victim of the Socratic method will tell you, this does not mean a sure win for the widow, for the lawyers on each side still have plenty to argue about. Thus, familiar conflicts will likely emerge over how to interpret the facts, with one side emphasizing the ‘four corners’ of the brother-in-law’s promise (he never said the widow could stay ‘forever’) and the other emphasizing the ‘reasonable expectations’ of the parties (but the promising party is her deceased husband’s brother whom she should surely be able to trust, and he has offered the widowed mother of his brother’s children ‘a place to raise her family’); how to balance the equities, with one side emphasizing the point of view of the put-upon promisor (he is doing all the giving and getting nothing in return) and the other emphasizing the plight of the relying promisee (but the widow and her children moved many miles over difficult terrain on the faith of his promise, and they no longer have a home to return to if the eviction stands); how to further sound social policy, with one side contending that promises should be narrowly construed lest folks be reluctant to make them, and the other contending that promises should be broadly construed lest folks be reluctant to rely on them; and how to reach a decision consistent with the overarching goals of contract law, with one side insisting that liability should be based on – and thus strictly limited by – the scope of the promise and the other responding that liability should be imposed to provide robust protection for justifiable reliance.

Nesting. If I am doing my job well, my students soon learn to recognize and even anticipate these and other ‘paired arguments’ on their own.²⁰ With the aid of

²⁰ Most of them eventually figure out that a book on legal reasoning and law exams co-authored and shamelessly promoted by their professor can be of considerable assistance in this endeavour. See R. M. Fischl & J. Paul, *Getting to Maybe: How to Excel on Law School Exams* (Carolina Academic Press 1999), which draws extensively on the ‘legal semiotics’ work of Duncan Kennedy as well as the scholars cited *supra* n. 4.

some Socratic prodding, my students may also begin to discern the outlines of a larger pattern that frequently frames the deployment of the argument pairs they encounter: Conflict over the *application* of a legal rule often recapitulates the conflict attending the *choice* of that rule in the first place. To continue with the widow's case, bargain theory may have 'lost' out as the governing rule of the jurisdiction in cases involving unbargained-for reliance, but it lives to fight another day as lawyers and judges contend over the application of promissory estoppel to particular facts. Thus, note that each of the 'against the widow' arguments rehearsed in the previous paragraph emphasizes the threat to the brother-in-law's freedom and/or the absence of an exchange relation and thus draws on the individualistic underpinnings of bargain theory itself. Likewise, each of the 'pro-widow' arguments highlights the vulnerability that results from her reliance on her brother-in-law's promise and thus draws on the solidaristic underpinnings of promissory estoppel. The fancy name for this pattern – in which seemingly settled arguments re-emerge again and again at other levels of analysis – is 'nesting', a phenomenon that is as familiar in contemporary life (from our recurring and stylized political stalemates to longstanding points of contention between married couples) as it is in American legal reasoning.

Framing. But the ideological character of law does not stop there. A further insight of critical scholarship is that ideology not only organizes and permeates the arguments lawyers and judges routinely deploy but also helps to shape the way legal decision-makers *think* about and come to understand legal issues and disputes. Consider one more time the widow's case and yet another rhetorical pattern that is evident in the arguments posed on each side. Note that the arguments against the widow focus intensely on the brother-in-law's promise, carefully delimiting its precise terms and emphasizing the absence of anything sought in return. By contrast, the arguments in the widow's favour treat the promise as merely a starting point for analysis and focus more broadly on the context of the promise-making and on the events that follow.

In class, I describe these contrasting approaches to the underlying facts as 'the snapshot vs. the film', and it's easy to see how they might emerge from the competing world-views associated respectively with individualism and bargain theory (on the one hand) vs altruism and promissory estoppel (on the other). To someone in the thrall of the former, virtually everything a legal decisionmaker needs to know can be captured at the moment of promising – either something is sought in exchange for the promise or it is not, and at all events any restriction on a promisor's freedom is strictly limited by the precise terms of his freely made promise. To someone of the opposing bent, the analysis certainly takes the promise into account but treats it as simply one event occurring within a larger narrative of the promisee's susceptibility to the promisor's lure and the life decisions she proceeds to take on the faith of his promise.

Of course these competing approaches to the framing of facts can be deployed strategically. If you are a lawyer representing the brother-in-law – or a judge inclined to rule in his favour – you would be wise to emphasize ‘the snapshot’ (since those are the facts that favour his case) rather than ‘the film’ (since those facts tug the other way), and the reverse is naturally true of the widow’s lawyer or a judge sympathetic to her cause. But the argument here is that these competing conceptions of contractual obligation can also influence and shape the way a dispute is *understood* by legal actors, operating as a powerful heuristic through which lawyers arguing a case – and judges deciding it – may come to decide what counts as a legally relevant fact and what feels like a compelling story.

Flipping. One might assume from the discussion thus far that the critical take follows the mainstream and realist accounts in treating promissory estoppel as the ‘hero’ and bargained-for consideration as the ‘villain’, and that is indeed often the case; promissory estoppel has frequently come to the rescue of widows, workers, and other vulnerable parties left out in the cold by bargain theory. But in much the same way that the ‘wins’ at the choice-of-rule level can turn into ‘losses’ during rule-application, the choice of rule can itself have unintended consequences, and advocates need to be careful what they wish for. If today consideration doctrine thwarts the effort of workers to modify existing employment contracts and secure additional pay for unexpectedly difficult work,²¹ tomorrow they might deploy the doctrine in their favour and resist contractual modifications by an employer seeking to eliminate previously promised job security.²² And if today promissory estoppel might come to the aid of the widow Kirksey in her efforts to house and feed her children, tomorrow it might be deployed in an effort to force her to give up a child she has brought to term.²³ We call this ‘flipping’ – using a rule against its seemingly natural beneficiary – and lawyers who succeed in the manoeuvre are likely to enjoy the double-entendre almost as much as the win.

The Taken-for-Granted, the Trump, and the ‘Tells’. The argumentative techniques I have just described suggest a great deal of ‘play in the joints’ in legal reasoning. The fancy term for this is ‘indeterminacy’, the notion that (some, many, most, all?) cases might be decided ‘either way’ despite the ritual declarations of doctrinal constraint by American judges. Yet there is a competing tradition of critical work that takes those declarations seriously, searching them for hints of what is ‘taken for granted’ by decisionmakers, assumptions so deeply ingrained in American legal thinking that they may trump more conventional sources of law in what passes for reasoning and analysis. Examples abound, and seasoned observers

²¹ See *supra* n. 14 and accompanying text.

²² See, e.g. *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 13–17 (1995).

²³ See, e.g. B. C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interests of the Child*, 87 St. John’s L. Rev. 899, 940–942 (2013).

learn to recognize the ‘tells’: when, for example, a court introduces a proposition reeking of race, gender, or class bias with an ‘of course’, a ‘clearly’, or similar language designed to assure the reader that what follows is *so incredibly obvious* it needs neither authoritative nor evidentiary support;²⁴ or bases the resolution of a factual dispute on a cringeworthy economic analysis parading as a dispassionate evaluation of the evidence;²⁵ or runs roughshod over statutory text, legislative history, and precedent as it confidently reaffirms existing relations of power (merchants over consumers, capital over labour, racial domination, patriarchy, hetero-normativity, and so on).²⁶ In such cases, the reader can be forgiven for suspecting that something other than random error is at work and that ideological commitments are shaping what passes for ‘common sense’ among legal thinkers. You could fill books and book-length articles with tales of ideologically charged ‘values and assumptions’ exerting their influence on various areas of American law, and critical scholars developed a rich body of work doing just that during the final decades of the twentieth century.²⁷

²⁴ See, e.g. *Teamsters v. Daniel*, 439 U.S. 551 (1979), rejecting the argument that employee pension plans are investments protected by the antifraud provisions of federal securities law: Only in the most abstract sense may it be said that an employee ‘exchanges’ some portion of his labor in return for [his pension plan] ... He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, *it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.* *Ibid.*, at 560 (footnote omitted) (italics added).

²⁵ See, e.g. *Domenico v. Alaska Packers Ass’n*, 112 F. 554 (N.D. Cal. 1901), *aff’d*, 117 F. 99 (9th Cir. 1902), the case previously mentioned parenthetically in which the court refused to enforce a promised raise for sailors forced to work with assertedly inferior fishing nets:

The contention of [the sailors] that the nets provided them were rotten and unserviceable is not sustained by the evidence. The [employer’s] interest required that [the sailors] should be provided with every facility necessary to their success as fishermen, for on such success depended the profits [the employer] would be able to realize that season from its packing plant, and the large capital invested therein. In view of this self-evident fact, it is highly improbable that the [employer] gave [the sailors] rotten and unserviceable nets with which to fish.

Ibid., at 556.

²⁶ For a particularly striking example – and you really have to read it to believe it – compare *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing fine-print terms of document first encountered by consumer upon opening shipping carton containing goods consumer had ordered and already paid for) with the usual rules of offer and acceptance and the express language of U.C.C. § 2-206(1)(b) (under which the deal would have been closed – and the contract fully formed – no later than the moment the merchant shipped the goods); the express language of U.C.C. § 2-207(2) (under which the fine-print terms of the merchant’s ‘late hit’ would have constituted mere proposals for addition to the contract, which the consumer was free to reject); and Official Comment # 1 to the latter provision (which makes it clear that § 2-207 applies to transactions involving a single form, contrary to the court’s terse and 100% authority-free assertion that the provision is ‘irrelevant’ when ‘there is only one form’, 105 F.3d at 1150).

²⁷ The quoted phrase is taken from the title of Jim Atleson’s iconic book on US labour law, discussed in the opening passage of the essay. For other classic examples of the genre, see A. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978); K. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of*

So what did the insights of cls mean to those of us who came to law school eager to use the law for social justice work? That depended a lot on what you *wanted* from the law. If you were looking for a sure bet in the service of progressive transformation, you were in serious trouble. In Dorothy's immortal words, there was nothing in that little black bag for you – no invincible argument in the Constitution, the common law, or anywhere else you could count on to get you where you wanted to go.

But if you wanted to *understand* the law – to move beyond the mainstream myths of liberalizing progress and 'just doin' my job ma'am' doctrine-crunching – it seemed like you'd come to the right place. Armed with an ever-growing arsenal of argument pairs, you found yourself well-positioned to identify the outlines of a response to most any claim you encountered and, equally important, to anticipate points likely to be made by the other side in response to your own. At the same time, you learned that identifying argument pairs was only the beginning of a useful analysis, and that the 'heavy lifting' in argument construction and mobilization lay in tying argument-bites to legal authority (such as precedent and statutory language) as well as to facts, policies, and equities implicated by the case in question. And in that effort, the lessons of 'nesting', 'framing', and 'flipping' were invaluable tools.

As you prepared for law practice, the relentless revelation of argument-pairs and larger structures of ideological conflict went some distance to diminish the sense that the law was hopelessly stacked against the good and the true. You learned that there was a lot of 'deviant' doctrine out there – that hidden in the maze of legal argument there was altruism as well as individualism; there was social responsibility as well as self-regard; there was a long history of regulation as well as *laissez-faire*. There was, in other words, the thrill of mastering the master's tools and sometimes the master himself, for it was often possible – with the help of hard work, creative energy, and a wee bit of luck – to develop a counterargument that might find some purchase and do some good.

Developing a keen eye for the 'taken for granted' and a deep appreciation for its influence was enormously useful as well, offering more than occasional glimpses of the law's otherwise hidden argumentative terrain. To be sure, familiarity with that terrain was seldom a cause for celebration, but – to recall the mantra of untenured critical scholars during the anti-cls backlash of the 1980s – at the very least it meant you would 'never underestimate the danger you are in'. Yet a clear-eyed understanding of the law's politics was not invariably or inevitably a downer, for there were emancipatory possibilities as well. For one thing, it was liberating

Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265 (1978); F. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

(even sanity-preserving) to vindicate the intuition that law – and especially Contracts, Torts, and Property, the so-called private law subjects of first-year study – had a politics, countering the mainstream message that law and politics were distinct and dichotomous phenomena. For another, there was the prospect that exposing the exercise of power behind the pretensions of constraint and necessity – much as Toto tugged back the curtain to reveal the Great Wizard as an ordinary man – might embarrass power’s apologists into a change of course or at least a day of reckoning.

3 PROMISSORY ESTOPPEL AND *LOCAL 1330*

So let us turn to the role of promissory estoppel in *Local 1330*, and we shall start with a statement of the case.

3.1 LOCAL 1330

Local 1330 began as an action brought in late 1979 by union locals representing some 3,500 employees of two aging steel plants owned and operated by U.S. Steel in Youngstown, Ohio. The locals (hereafter ‘the union’ for ease of expression) sought to enjoin the threatened closure of the plants via promissory estoppel as well as other legal theories that need not concern us. As stated at the outset, the promissory estoppel claim was based on an allegation that U.S. Steel had broken a promise to keep the plants open if the workers helped make them ‘profitable’. The United States District Court for the Northern District of Ohio rejected that claim, and the United States Court of Appeals for the Sixth Circuit affirmed.²⁸

The case was decided under § 90 of the First Restatement of Contracts, which provides as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.²⁹

Virtually any analysis of the doctrine’s application to a particular case is likely to begin with the conventional ‘elements’ that courts and commentators have teased out of that provision: (1) a promise, (2) a reasonable expectation by the promisor that the promisee will rely in a definite and substantial manner – i.e. act or forbear

²⁸ *Steelworkers Union, Local No. 1330 v. U.S. Steel Corp.*, 492 F. Supp. 1, 3–8 (N.D. Ohio E.D.), aff’d in part, vacated in part, *Local 1330, Steelworkers Union v. U.S. Steel Corp.*, 631 F.2d 1264, 1269–1279 (6th Cir. 1980).

²⁹ Restatement (First) of Contracts § 90 (1933); see 492 F. Supp. at 5 (quoting and relying on provision); 631 F.2d at 1270 (quoting First Restatement though citing it incorrectly as the Second Restatement).

to act on the faith of the promise, (3) reliance-in-fact by the promisee – i.e. a showing that the promise did indeed ‘induce’ the expected action or forbearance, and (4) a showing that injustice can be avoided only by enforcement of the promise.³⁰ Let us take a close look at each of those elements – in a slightly modified order – as we review the union’s case against closure in *Local 1330*.

The promise. The story begins in late 1977, when rumours were circulating in the Youngstown community that U.S. Steel planned to close the local plants. The asserted ‘promise’ was prompted by those rumours, as company representatives undertook a vigorous campaign of assurances – offered repeatedly through the press as well as directly to the workers via an in-plant telephonic ‘hot line’ – that the plants ‘will stay open if they become profitable’.³¹

Reliance-in-fact. The union offered a similarly strong case that the promise ‘induce[d]’ considerable and indeed sometimes dramatic ‘action’ as well as ‘forbearance’ on the part of the workers and the union alike. Thus, the union pointed to repeated statements by company officials praising the workers for ‘outstanding efforts’ that set new productivity records.³² Moreover, the union demonstrated that U.S. Steel was permitted to take over two dozen cost-cutting decisions – some with potential risks to worker health and safety; some at the expense of seniority rights; and some involving diminished staffing levels – that would have been impermissible under the existing collective-bargaining agreement if the union hadn’t agreed to the measures in the effort to achieve plant profitability.³³ Finally, the union offered ‘[b]y way of illustration’ three instances of major life decisions made by individual employees on the faith of the company’s promises: the decision of a worker whose pension had already vested to stay put in the

³⁰ See, e.g. E. Allan Farnsworth, *Contracts* § 2.19 (4th ed.) (Wolters Kluwer 2004).

³¹ 631 F.2d at 1272 par. j (statement by U.S. Steel public relations official to press) (17 Apr. 1978). To the same effect, see, e.g. *Ibid.*, at 1270–1271 par. a (‘The continued operation of these plants is absolutely dependent upon their being profit-makers’) (statement on ‘hot line’ by superintendent of Youngstown works) (1 Sept. 1977); *Ibid.*, at 1271 par. b. (‘it is on the basis of the plants’ profitability that they will continue to operate’) (statement by public relations official to press) (14 Sept. 1977); *Ibid.*, at par. e (‘if and when there will be a phase-out depends on the plant’s profitability’) (statement on ‘hot line’ by superintendent of Youngstown district) (4 Jan. 1978); *Ibid.*, at par. g (‘The future of our continued operations at Youngstown is dependent upon our ability to be a profit-maker’) (statement by company official on ‘hot line’) (undetermined date during winter 1977–1978).

³² *Ibid.*, at 1274 par. c (‘Many improvements have been made to our Open Hearth and through the outstanding efforts of our personnel, Youngstown’s productivity gains are second to none’) (statement on ‘hot line’ by superintendent of Youngstown district) (8 Mar. 1978). To the same effect, see, e.g. *Ibid.*, par. d (‘For the second month in a row, I am happy to report that, due to your outstanding performances, Youngstown Works has, again, been a profitable steel plant’) (statement on ‘hot line’ by superintendent of Youngstown district) (12 May 1978); *Ibid.*, at 1275 par. e (‘I’m very happy to report that for the second month in a row my crew in the Blast Furnace Department has set a monthly production record’) (statement on ‘hot line’ by company official) (1 June 1978).

³³ See, e.g. *Ibid.*, at 1273–1274 (listing 25 issues involving health, safety, and other topics that the union locals agreed not to grieve); *Ibid.*, at 1275 par. g (agreement to combine seniority lists); *Ibid.*, at 1275–1276 (agreement to combine shifts with resulting layoffs).

Youngstown area rather than seek work elsewhere;³⁴ the decision of a second worker to purchase a new car and to send his child to a private college rather than to a state school;³⁵ and the heartbreaking experience of a third who, having just closed on a new home, was leaving the bank when he heard the news on his car radio that the plants were shutting down despite the workers' efforts.³⁶

Reasonable expectation of reliance. This element was likewise easily established by the evidence, for the redoubled efforts and the cost-saving sacrifices outlined in the previous paragraph weren't just 'reasonably expected' by company officials; rather, they constituted precisely the course of conduct actively sought by officials who repeatedly summoned 'the full support' of the workers in reaching the profitability benchmark.³⁷

Injustice. The arguments supporting the fourth and final conventional element – i.e. that injustice could be avoided only by enforcement of the promise – are captured in the opinions of both the district court and the court of appeals, which were extraordinarily prescient about the likely effect the plants' closure would have on the workers and their communities. From the opinion of the court of appeals:

For all of the years United States Steel has been operating in Youngstown, it has been a dominant factor in the lives of its thousands of employees and their families, and in the life of the city itself. The contemplated abrupt departure of United States Steel will, of course, have direct impact on the 3,500 workers and their families. It will doubtless mean a devastating blow to them, to the business community and to the City of Youngstown itself. While we cannot read the future of Youngstown from this record, what the record does indicate clearly is that we deal with an economic tragedy of major proportion to Youngstown and Ohio's Mahoning Valley.³⁸

The district court described the plight of the workers and their community in similar terms:

Everything that has happened in the Mahoning Valley has been happening for many years because of steel. Schools have been built, roads have been built. Expansion that has taken place

³⁴ See *Ibid.*, at 1276–1277 par. a.

³⁵ See *Ibid.*, at 1277 par. c.

³⁶ See *Ibid.*, par. b.

³⁷ *Ibid.*, at 1270–1271 par. a (statement on 'hot line' by superintendent of Youngstown works) (1 Sept. 1977). To the same effect, see, e.g. *Ibid.*, at 1271 par. e ('[S]ome progress has been made in reducing our losses. With your help, this effort will continue [...] I intend to give this my best effort and I am confident you will too.') (statement on 'hot line' by superintendent of Youngstown district) (4 Jan. 1978); *Ibid.*, par. g ('To achieve this end [i.e., making the Youngstown plants profitable] each of us must accept the challenge to be innovative and continue to produce quality products for our customers') (statement on 'hot line' by company official) (undetermined date during winter 1977–1978); *Ibid.*, par. k ('Improved productivity is almost entirely up to you. I am asking each of you to consider how you may help in keeping Youngstown the going plant it is today.') (statement on 'hot line' by superintendent of Youngstown district) (8 Nov. 1978).

³⁸ 631 F. 2d at 1265.

is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel.³⁹

Indeed, the district court's discussion of the stakes left no doubt of its view of the injustice that was bound to result from the planned closure: 'United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years.'⁴⁰

The Profitability Thing. Summing up the foregoing evidence, the court of appeals concluded that it was 'beyond argument that the local management of U.S. Steel's Youngstown plants engaged in a major campaign to enlist employee participation in an all-out effort to make these two plants profitable in order to prevent their being closed' and that it was 'equally obvious that the employees responded wholeheartedly'.⁴¹ But it bears emphasis that the promise on which the workers relied was not a promise to avoid closure of the plants if the employees just worked harder. Rather, it was a promise to keep them open *if* the workers succeeded in the quest for 'profitability', and at the end of the day it was this issue that undid the union's case.

For its part, the union took its evidence straight from the horse's mouth, citing repeated representations by company officials that the profitability benchmark had indeed been achieved during the period in question. Thus, in May 1979, the superintendent of the Youngstown District announced to the press that 'we currently have an operation here that has been going profitably since the early part of 1978'.⁴² And a month later, no less than the Chair of the U.S. Steel Board of Directors publicly confirmed that '[t]he Youngstown plant is profitable' and that '[w]e are operating in the black there'.⁴³ In 1978 and 1979, a chorus of company representatives echoed this point in communications to the workers over the 'hot line' as well as in various statements to the press.⁴⁴

³⁹ 492 F. Supp. at 9.

⁴⁰ *Ibid.* On the eventual, and devastating, consequences of the closure for the Youngstown community, see Rogers, *supra* n. 10.

⁴¹ 631 F.2d at 1277.

⁴² *Ibid.*, at 1273 par. n (statement to press of Bill Kirwin) (2 May 1979).

⁴³ *Ibid.*, at par. p (statement of Board Chair David Roderick reported in the press and on network television) (18 June 1979).

⁴⁴ See *Ibid.*, at 1271–1272 par. h ('In the month of March, for the first [time] in a long time, the Youngstown Works earned a profit for the United States Steel Corporation.') (statement on 'hot line') (7 Apr. 1978); *Ibid.*, at 1272 par. j ('Company management has repeatedly said that the works will stay open if they become profitable. Well, now they are profitable.') (statement of public relations official to press) (17 Apr. 1978); *Ibid.*, at par. o ('the Youngstown District finished 1978 in the black') (statement of superintendent of Youngstown District to press) (5 June 1979); *Ibid.*, at 1274 par. d ('For the second month in a row, I am happy to report that, due to your outstanding performances, Youngstown Works has, again, been a profitable steel plant.') (statement of superintendent of Youngstown District on 'hot line') (12 May 1978).

The record reveals but a single deviation from the company line, an errant message that was dealt with swiftly and in a very public manner. Thus, when the *Wall Street Journal* published a story in April 1979 suggesting that the Youngstown plants were ‘eroding’ the company’s profits, company officials responded immediately with a letter published in the *Journal* insisting that the report was ‘nonsense’ and that a ‘complete turn-around ha[d] been achieved’ at the plants – a letter that was, as the court of appeals observed, ‘widely read by [U.S. Steel’s] employees, as it was intended to be’.⁴⁵ In addition to these statements and communications, the union introduced documentary evidence – described by the court of appeals as ‘summary sheets of operating profitability for the Youngstown facilities’ – confirming gross profit margins of USD 41.8 million for 1978, USD 32.6 million for 1979, and a projected USD 32.4 million for 1980, figures on which company officials had apparently relied in making the statements recounted above.⁴⁶

In response, the company argued that the gross profit margin evidence was accurate only with respect to the fixed costs of operating the Youngstown plants and did not take into account a fair allocation of company-wide purchasing, sales, and management expenses (e.g. expenses associated with accounting, auditing, engineering, and marketing). When the latter were included in the calculus, company officials claimed, it turned out that the Youngstown plants were operating at a loss, despite their many contemporaneous public declarations to the contrary.⁴⁷

In the event, both the district court and the court of appeals embraced the definition of profitability U.S. Steel asserted at trial, though the courts offered differing rationales for doing so. The district court treated the profitability benchmark as a ‘condition precedent’ to liability under promissory estoppel and concluded that the union had failed to demonstrate that the company’s definition was ‘unrealistic or unreasonable’ or offered in ‘bad faith’.⁴⁸ The appellate court steered clear of the lower court’s ‘condition precedent’ analysis, reasoning instead that the test under promissory estoppel ‘is one of reasonable expectability of the “promise” detrimentally relied upon’ and that under that test the promise to keep the plants open if they became profitable ‘had to be read in the context of normal corporate profit accounting’, which would necessarily include a portion of company-wide expenses.⁴⁹ We take a closer look at the reasoning of both courts in the next and final section of the essay, but the punchline is that for want of this particular nail, the union’s case – and with it the kingdom of Youngstown steel – was infamously lost.

⁴⁵ See *Ibid.*, at 1272–1273 par. m.

⁴⁶ See *Ibid.*, at 1278 (exhibits 32–37), 1279.

⁴⁷ See *Ibid.*, at 1279.

⁴⁸ 492 F. Supp. at 7.

⁴⁹ 631 F. 2d at 1279.

3.2 CRITIQUE

So what would a critical legal study of *Local 1330* look like? Let us see how an understanding of the case might be enhanced by devoting sustained attention to its ideological dimensions, deploying the argumentative techniques outlined earlier and exploring the politics of what's 'taken for granted' in the courts' opinions.

3.2[a] *The Road Not Taken*

A central lesson of the 'critical legal history' of promissory estoppel is the tension between the ethic of solidarity and mutual dependence reflected in that doctrine (on the one hand) and the ethic of private autonomy and individual self-interest reflected in the bargain theory of consideration (on the other). Thus, when a court treats promissory estoppel as the governing rule – as did both the district court and the court of appeals in *Local 1330* – solidarity has seemingly won the day.

From the union's perspective, then, so far so good, since the heart of its case was the reliance of the workers on assurances by U.S. Steel officials that the plants would stay open if they could be made profitable and that the profitability benchmark had indeed been achieved by their redoubled efforts. But if the union thus enjoyed the legal equivalent of 'the home field advantage', why did it not go on to succeed with its claim? As suggested earlier, an important insight of critical work is that the choice of the governing rule (in this case, promissory estoppel rather than bargain theory) frequently marks just the beginning rather than the end of ideological conflict and that the application of the chosen rule to the facts of a particular case presents an occasion to renew and re-enact that conflict. As it happens, *Local 1330* offers a striking illustration of this phenomenon.

Let us begin – as critical work often does – with a close examination of the reasoning offered by the courts in support of the result, and at this point we will focus on the court of appeals since it had the final and authoritative say. Thus, the appellate court began its analysis by asserting that 'this record demonstrates without significant dispute that the profitability issue in the case depends in large part upon definition' and went on to critique the union's 'definition' for failing to take into account company-wide expenses fairly allocable to the Youngstown operation.⁵⁰ 'Obviously', the court observed, 'any multiplant corporation could quickly go bankrupt if such a definition of profit was employed generally and over any period of time'.⁵¹ The court's analysis continued:

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

Plaintiffs point out, however, that this version of Youngstown profitability was employed by the Youngstown management in setting a goal for its employees and in statements which described achieving that goal. The standard of Restatement (Second) of Contracts § 90, upon which plaintiffs-appellants rely, however, is one of reasonable expectability of the 'promise' detrimentally relied upon. The District Judge did not find, nor can we, that reliance upon a promise to keep these plants open on the basis of coverage of plant fixed costs was within reasonable expectability. We cannot hold that the District Judge erred legally or was 'clearly erroneous' in his fact finding when he held that the 'promise' to keep the plants open had to be read in the context of normal corporate profit accounting and that profitability had not been achieved.⁵²

The court thus acknowledged that the union's definition of profitability was the version embraced by U.S. Steel in contemporaneous public statements but dismissed that fact as irrelevant to its 'reasonable expectability of the "promise"' test. Exactly *why* the statements of company officials to the workers, their community, and the readers of the *Wall Street Journal* had no bearing on 'reasonable expectability' is not explained; a simple 'however', offset by the obligatory pair of commas, is all we have to work with. So let us take a closer look at the 'reasonable expectability of the "promise"' test to see what it may be doing behind the scenes.

The sole authority the court offered for its formulation was § 90 of the Restatement, and here once again is the language of that provision:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.⁵³

Straightaway there appears to be an important difference between the court's test and the quoted provision, for missing from the former are the *parties* to the promise as well as the expectations of one of them (the promisor) with respect to the likely effect on the other (the promisee). Instead, the court's formulation directs us to assess the 'reasonable expectability of the "promise"' – with 'promise' in scare quotes – suggesting a focus on the promise *in and of itself*, which is precisely what the court's analysis delivered. When the inquiry is framed that way, it is no surprise that the promise would be viewed through the lens of ordinary meaning (here, the rules of 'normal corporate profit accounting') and that events subsequent to its making (here the assurances of profitability) would be treated as beside the point. And though the court did not cite any, there is caselaw support for such an interpretation of § 90.⁵⁴

⁵² *Ibid.*

⁵³ Restatement (First) of Contracts § 90, *supra* n. 29.

⁵⁴ See, e.g. *Prenger v. Baumhoer*, 939 S.W. 2d 23, 27–28 (Mo. App. 1997) (rejecting argument that promissory estoppel claim should focus primarily on 'how the promise relates to "its ability to provoke

Students who have begun to master the hunt for ‘paired arguments’ will recognize the move the court has made here – i.e. focusing like a laser beam on the ‘four corners of the promise’ – and begin the search for its missing rhetorical twin, a focus on the ‘reasonable expectations’ of the parties. This argumentative pattern is evident throughout American contract law, not only in our imagined re-litigation on behalf of the widow Kirksey (‘I didn’t promise she could stay *forever!*’ vs ‘He’s my dead husband’s brother, and he said he wanted me to have a place to “raise my family!”’) but also in a host of familiar cases from the American contracts canon.⁵⁵

As it happens, the missing twin can without much difficulty be teased out of the legal materials in *Local 1330*. Indeed, the appellate court’s own formulation offers a nod in the direction of reasonable expectations, but the concept is treated as a quality *of the promise* (‘the reasonable expectability of the “promise”’), while the text of § 90 focuses on the ‘reasonable expectations’ *of the parties* and specifically on the expectations of the promising party regarding the likely effect of the promise on the promisee (‘A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee’). The language of the provision can thus be read to ask not how the promise should be read in isolation and by some disinterested third party – let alone by a ‘corporate accountant’, normal or otherwise – but instead how the promising party should reasonably expect the real-world promisee to understand it and respond.

Nor is there any suggestion in the Restatement text that inquiry should be limited to the promisor’s expectations at the moment the promise is made – though the drafters knew well how to impose such a limitation when they wanted to⁵⁶ – and there is caselaw support for taking post-promise developments into account.⁵⁷ Turning

reliance” rather than just the promise in isolation’ and basing analysis instead ‘on the alleged promise itself’).

⁵⁵ See, e.g. *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927) (compare the dissent, which argued that the ‘four corners’ of the charitable pledge form established the transaction as an unenforceable promise to make a gift, with the majority opinion, which found that subsequent party conduct gave rise to ‘reasonable expectations’ of binding mutual obligations); *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (compare the dissent, which argued that the ‘four corners’ of a commercial burglary insurance policy required ‘visible marks upon’ or ‘physical damage to’ the exterior of the premises in order to qualify for coverage, with the majority opinion, which found that the ‘reasonable expectations’ of the insured were that the purchased policy would cover burglaries within the ordinary lay and legal understandings of that term, including those committed by perps too clever or lucky to leave signs of their handiwork on the exterior of the burgled building).

⁵⁶ See, e.g. Restatement (Second) of Contracts § 89 (permitting mid-term contractual modifications that are ‘fair and equitable in view of circumstances not anticipated by the parties *when the contract was made*’); § 208 (court may limit or refuse enforcement of contractual terms that are ‘unconscionable *at the time the contract is made*’) (emphasis added in each case).

⁵⁷ See, e.g. *Burgess v. Ford Motor Co.* 2012 WL 4503188 (Tenn. Ct. App. 2012) (slip op. at 15) (post-promise events support claim of reasonable reliance on the promise); *Ulrich v. Goodyear Tire Co.*, 792 F. Supp. 1074, 1081–1082 (N.D. Ohio 1991) (post-promise events relevant to reasonableness of promisee reliance).

back to the case at hand, then, once you bring our particular promisor's expectations about the likely reliance of the particular promisees into the picture – interpreted in light of subsequent as well as contemporaneous events – it is hard to dispute that U.S. Steel should have expected its workers to believe precisely what company officials had repeatedly and emphatically told them to believe right up to the moment the parties headed for court – i.e. that the Youngstown plants were once again operating in the black.

Note that the 'four corners of the promise' vs 'reasonable expectations' stand-off presents a classic example of argument 'nesting' as well. If bargain theory lost the 'choice of governing rule' debate with promissory estoppel, it nevertheless lived to fight another day in the application of the supposed winner to the facts of *Local 1330*. Thus, if the union's argument was all about the reliance generated by the company's promises, the company focused instead on the price it exacted for the continued operation of the mill and resisted enforcement because it did not in the end get what it had sought in return (dare we say 'bargained for?'): profitability.

We can likewise see how these opposed legal theories 'framed' the parties' contrasting presentations of the case. The company's pitch enabled it to 'stop the action' at the moment of promising and offer a 'close-up' of the promise itself. Although a picture is worth a thousand words, this picture was framed to limit our focus to only one of those words – profitability – and to view it in isolation from either context or consequence. If this sounds a bit like what we described earlier as the 'snapshot', then the union's contrasting account offers 'the film', bringing the story of the workers' reliance into sharp relief and revealing the role that the company's assurances of profitability played in its multi-year effort to induce its workers to act and forbear to the hilt.

To put it another way, the company's 'snapshot' focused on what the word 'profitable' *meant* whereas the union's 'film' focused on what the word 'profitable' *did*, and there was little doubt about how the story would end once the court embraced the 'snapshot' and accepted the company's characterization of the dispute as turning on the 'definition' of profitability. In the abstract, it is hard to argue with the court's logic that 'any multiplant corporation could quickly go bankrupt' if apportioned company-wide expenses were not taken into account in determining the profitability of an individual plant. But it demeans the Youngstown workers to suggest – as did the court of appeals, the company, and not a few contemporaneous commentators – that their expectations were the product of a naïve and under-educated failure to come to grips with the rules of 'normal corporate profit accounting' when those expectations were in fact shaped by the repeated and very public proclamations of company officials that the redoubled productivity effort was in fact succeeding and that the plants were once again profitable. Company officials thus deployed the assurances of profitability for

precisely the same purpose, and to precisely the same effect, as they had deployed the initial round of promises: As part of a calculated effort to boost the workers' morale and encourage them to continue their sacrifices and 'all-out effort' right up to the last possible moment.

3.2[b] *Here Be Dragons*

If cogent arguments might thus have justified an outcome in the union's favour, why did those arguments fail to persuade judges otherwise so seemingly sympathetic with the workers' plight? We have been focusing thus far on the opinion of the court of appeals, but a close look at the district court's handiwork may be revealing in this respect. It will be recalled that the lower court treated the profitability benchmark as a 'condition precedent' to promissory estoppel liability and that the appellate court took a different analytical approach, treating profitability as a part of the company's promise under § 90. The appellate court nevertheless affirmed the lower court's finding that the company's definition of the term, rather than the union's, established the applicable productivity target, quoting with approval the following passage from the lower court opinion:

This Court is loath to exchange its own view of the parameters of profitability for that of the corporation. It is clear that there is little argument as to the production figures for the Youngstown mills – the controversy surrounds the interpretation of those figures. [...] Perhaps if this Court were being asked to interpret the word 'profit' in a written contract between plaintiffs and defendant, some choice would have to be made. Given the oral nature of the alleged promises in the case at bar and the obvious ambiguity of the statements made, this Court finds that there is a very reasonable basis on which it can be said that Youngstown facilities were not profitable. Further, plaintiffs have made no showing of bad faith on the part of the Board of Directors in the Board's determination of profitability, nor have they given any grounds to suggest that defendant's definition of profitability is an unrealistic or unreasonable one.⁵⁸

In sum, the district court found that there was 'a very reasonable basis' for the company's interpretation of 'profitability' and further found that the union had failed to counter that position by showing it to be 'unrealistic or unreasonable' or offered in 'bad faith'. But the court did not explain why the union bore a burden that the company did not. Perhaps the court's thinking was influenced by its view that profitability was a 'condition precedent' to company liability, prompting it to assume that the union bore the burden of proving the condition's fulfilment. Yet the court didn't *say* that and focused instead on the 'oral nature of the alleged promises', suggesting somewhat cryptically – and without explanation, authority,

⁵⁸ 631 F. 2d at 1278–1279, quoting 492 F. Supp. at 7.

or argument – that its decision might have favoured the union if a ‘written contract’ were at stake. (Because we construe writings against the drafter but oral statements against the listener?) But less cryptic is the opening sentence of the quoted passage – ‘This Court is loath to exchange its own view of the parameters of profitability for that of the corporation’ – a sentiment that might go a long way to explain why the court viewed the union’s challenge to the company’s interpretation as an uphill and ultimately unsuccessful battle.

A seasoned labour lawyer would have smelled trouble the moment she encountered the just quoted phrase, for it is a ritual incantation in cases challenging an employer’s right to close a business and decided under (if not exactly in accord with) the National Labor Relations Act. Thus, the Act prohibits all manner of retaliation against employees who decide to unionize, but under the *Darlington* rule there is a judicial carve-out for business closure in retaliation for a pro-union vote despite the Supreme Court’s candid acknowledgement that such closure ‘is encompassed within the literal language’ of the governing provision.⁵⁹ And the Act likewise requires an employer to bargain with a union representing its employees over ‘wages, hours, and other terms and conditions of employment’, but via *First National Maintenance* there is a judicially created exception for an employer’s decision to close a plant despite the Court’s candid acknowledgement that the quoted statutory language ‘plainly cover[s] termination of employment which ... necessarily results from closing an operation’.⁶⁰ To appreciate the vigour with which this particular American exceptionalism is policed, consider the following passage quoted with approval by the Supreme Court in *Darlington* (the italics are mine):

But none of this can be taken to mean that an employer does not have the *absolute* right, *at all times*, to *permanently* close and go out of business ... *for whatever reason* he may choose, whether union animosity or *anything else*, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act.⁶¹

Who *talks* like that? Certainly not American judges in any other setting and especially not in labour law cases when they are ruling in favour of *employee* rights, which are almost invariably described in oh-so-carefully hedged and even apologetic terms.⁶²

⁵⁹ *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263, 269 (1965).

⁶⁰ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (internal quotation marks omitted).

⁶¹ *Darlington*, *supra* n. 59, at 271 (quoting *NLRB v. New Madrid Manufacturing Co.*, 215 F.2d 908, 914 (8th Cir. 1954))(ellipsis in original).

⁶² See, e.g. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257–261 (1975) (affirming the right of an employee to the presence of a union representative at an investigatory interview the employee reasonably believes might result in disciplinary action but holding (1) that the employer has no obligation to deal with or even listen to the union representative, (2) that the employer may decide to terminate the interview rather than permitting the representative’s participation, and (3) that the right applies only if the employee asks nicely). I exaggerated – the employee does have to ask for her union representative though she need not do so nicely – but you see my point.

If the unambiguous provisions of a federal statute cannot resist this confident if overheated business closure override, a ‘mere’ state-based common law doctrine like promissory estoppel is not likely to fare much better. And in *Local 1330*, it did not; witness the district court’s odd choice of the word ‘loath’ to describe its reaction to the prospect of calling into question U.S. Steel’s in-court claims about the profitability of the Youngstown operation. Why not ‘reluctance’? Or ‘hesitation’? Why a word suggesting that the court regarded the inquiry with ‘utter abhorrence and disgust’?

What is even more telling about the deployment of the ‘won’t exchange our own views for the company’s’ trope in *Local 1330* is its utter inapplicability to the facts at hand. The union was not, after all, asking the court to substitute the court’s ‘own views’ of profitability for the views of responsible officials at U.S. Steel. It was asking instead that the court hold the company to the meaning of ‘profitability’ repeatedly and publicly proclaimed by its officers and agents – from the Chair of the Board of Directors to senior management at the Youngstown plants and the folks in public relations – and to prevent its lawyers from insisting on an entirely different meaning of the term despite the extensive and intended reliance of the workers on those earlier proclamations. In *First National Maintenance*, the Chamber of Commerce had fought vigorously all the way to the Supreme Court for the right of American employers to keep unions in the dark about plant closure plans, thus ensuring that workers would maintain a full-court productive press up to the bitter end without the distractions that might accompany news of the impending loss of one’s livelihood.⁶³ U.S. Steel did that strategy one better by repeatedly and publicly assuring its workers that their efforts to keep the Youngstown plants open were succeeding and thus that the company was not going to do exactly what it had been planning to do all along.

There is a name for holding a party to out-of-court representations designed to mislead in this manner: equitable estoppel, the tried-and-true common law doctrine that (as noted earlier) was one of the important historical precursors to estoppel of the promissory variety. In its application, the court’s ‘own views’ of the meaning of profitability would have been no more relevant than the court’s own views of the ‘real’ age of a minor who passed a fake I.D. to a merchant and then attempted to invoke his minority to disaffirm the contract thus procured. Yet an American court hears the words ‘plant closure’ and finds itself in a robotic trance (‘Must ... Not ... Substitute ... My ... Views ... !’), drawn nigh irresistibly to an all too predictable result, never mind the facts.

⁶³ See A. Hyde, *The Story of First National Maintenance Corp. v. NLRB: Eliminating Bargaining for Low-Wage Service Workers in Labor Law Stories* 281, 294–296 (Laura J. Cooper & Catherine L. Fisk, eds, Foundation Press 2005).