Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel

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[D]efendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it.¹

Learned Hand in Baird v. Gimbel (1933).

Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not.²


I. INTRODUCTION

In 1958, Judge Roger Traynor, writing for a unanimous California Supreme Court in Drennan v. Star Paving, rejected a form of analysis offered exactly twenty-five years before by Judge Learned Hand in the Second Circuit Court of Appeals decision of Baird v. Gimbel. Both cases addressed a contractual problem in the bidding process in the construction industry: What are the legal consequences of a general contractor's use of a subcontractor's low bid that is subsequently discovered to have contained a mistake? Although the decisions have often invited comparison, I believe those comparisons have overlooked the evidence that Traynor deliberately targeted and rejected the Baird decision and Hand's reasoning.

* Professor, School of Law, State University of New York at Buffalo. I am grateful for the permission of Jonathan Hand Churchill, literary executor of the estate of Learned Hand, to quote from the Hand Papers on deposit at the Harvard Law School Library. I would like to thank David Leve for his valuable research assistance; Marcia Zubrow, Head of the Reference Department at the Law Library, State University of New York at Buffalo, for her help in locating source material; and Joyce Farrell for her assistance in preparation of the manuscript. A number of readers provided helpful comments: Greg Alexander, David Engel, Gerald Gunther, Eric Holmes, Peter Linzer, Stewart Macaulay, James McCall, Catherine McCauliff, Frank Munger, Edward Purcell, John Henry Schlegel, G. Edward White, and James Wooten. In particular, Dianne Avery contributed a variety of important insights. The usual disclaimer about responsibility applies.

¹ James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933) (emphasis added).

Applying traditional common-law rules of consideration and offer and acceptance, Hand determined that no liability for breach of contract flowed from subcontractor to general contractor because the subcontractor had exercised the right to revoke the offer before the general contractor had accepted. Therefore, according to Hand, no bilateral contract had been formed. He also went on to say that no liability could be assessed against the subcontractor as a result of reliance-based notions of promissory estoppel, strongly suggesting that promissory estoppel had no place in the rough and tumble world of commercial practice.

A generation later, Traynor also concluded that no legal liability arose in the situation if the conventional rules of offer and acceptance applied. Unlike Hand, however, Traynor believed that liability should be imposed in this factual context by application of the doctrine of promissory estoppel, which, from his point of view, accurately reflected the true vulnerability of general contractors in the marketplace caused by their reliance on bids prepared and submitted to them by subcontractors.

Baird and Drennan are frequently juxtaposed in contracts casebooks as a "textbook" example of contrasting doctrinal approaches to a legal problem. Students are often asked in notes following the cases to evaluate the relative strengths and weaknesses of the analyses developed by the judges. Treatise and textbook writers, concerned with a higher level of generality and theory, have likewise noted the relationship between the two opinions—commenting that Drennan "is inevitably to be con-


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tressed with" Baird,5 or that Drennan "made a dramatic departure from [the] traditional analysis" in Baird.6

The scholarly literature on the cases is voluminous. Most of the commentary on the subject fits broadly into the law reform tradition, prevalent in law reviews, that seeks the best expression or distillation of the legal rule to fit the commercial situation. The lead articles and student notes and comments range from attempts to address the narrow doctrinal issues raised by the cases (and to choose which approach is better) to analysis that places the cases in the wider world of promissory estoppel doctrine and its jurisprudential context.7 Some of the studies present empirical evidence to test whether the legal rules reflect commercial reality. Implicitly or explicitly, they argue that law ought to conform to business practice as part of a legal reform agenda in support of better rules (whatever that means) or a more re-

fined application of rules. Like latter-day Llewellyns, these scholars march relentlessly in pursuit of the “situation sense” with the assumption that by either pouring in or drawing out the “realities” of the bidding process, they will yield a normative rule satisfactory to all parties. Perhaps Malcolm Sharp’s warning, issued over forty years ago, bears repeating: “[H]owever much the judgments of members of a trade may need careful attention by courts, it is always possible that in some respects their judgments represent limited or biased points of view which must be discounted.”

The historical change from Hand’s approach to Traynor’s analysis focuses on the introduction of the modern innovation of promissory estoppel into the realm of commercial litigation. The conventional interpretation of the rise of promissory estoppel positions it as a primary example of the shift from the “highly individualistic” contract doctrine of the late nineteenth century to a twentieth century contract environment emphasizing an “interventionist, protectionist spirit” leading “to the welfare state and beyond.” Under this view, “promissory estoppel is probably best seen as an outgrowth of a more interdependent, community-oriented moral climate . . . .” The norm of “discrete transactions among autonomous actors” is replaced by “integrated exchanges” in which people rely on one another. Therefore, in order to encourage reliance, modern doctrinal devices in contract law have been created stressing the value of “foster[ing] trust between economic actors. Trust is viewed as a moral good,


11. Metzger & Phillips, supra note 7, at 475, 505, 506.

12. Id. at 506-07.

13. Feinman, supra note 7, at 716.
as well as an economic asset. It allows coordination and planning between economic actors and fosters the formation of valuable economic institutions.”

Historically, “[p]erhaps . . . traditional contract law was adequate to foster the degree of trust society needed in economic activities. Today, an increasingly interdependent society needs to foster trust in a variety of relationships not readily organized through the device of the formal contract.”

The presumption, then, is that the triggering mechanism for doctrinal change in twentieth century contract law is the recognition of the concept of “interdependence” in modern capitalist relations. In the aftermath of the Depression, Lon Fuller observed that “with an increasing interdependence among members of society, we may expect to see reliance . . . become increasingly important as a basis of liability.” In Baird, Learned Hand viewed the commercial transaction at issue through the lens of individualism and formalism. Traynor, however, impatient with the traditional application of individualism to contract law, sought to transform that law by sanctioning the increasingly interdependent activities of marketplace actors. Hand apparently feared that sanctioning such inroads into conventional contract doctrine would inhibit the individual exercise of freedom in a democratic society. Traynor, on the contrary, believed that individual autonomy would be encouraged by freeing economic actors to arrange their transactions in light of an “increasingly” interrelated world. Therefore, Traynor thought that the reliance principle recognized and enhanced individual freedom in an interdependent universe.

Traynor offered a modern doctrinal revision of the ideology of contract law, forged in the late nineteenth and early twentieth centuries, that Hand had embraced. Traynor did not entirely reject the individualistic rationale of contract law. Rather, by altering the relationship between freedom and individualism, Traynor sought to insure the survival of individualism and to contribute to its growth by refurbishing the ideology with a current, modern version. Freedom and individualism became compatible with trust, reliance, and interdependence because, in a modern economy, it would be in one’s self-interest to behave in this rational, related way rather than in an atomistic manner that pitted everyone against each other. Traynor seems to be treating promissory

14. Farber and Matheson, supra note 7, at 945.
15. Id.
16. Lon Fuller, Consideration and Form, 41 COLUM. L REV. 799, 823 (1941).
estoppel not as an idealistic concept derived from altruism and community, nor as an alternative to an individualistic ethic—as some historical accounts would have it—but instead as a modern adaptation or strain of individualism. Although it would be easy to portray Hand as the "formalist" and Traynor as the "progressive," this characterization would miscast the complexities of their ideas. Both believed in the efficacy of legal rules and in the primacy of individual freedom and its attendant responsibilities and opportunities.

Terry Fisher has recently identified four major trends in legal history that can be traced to methodologies of modern intellectual history: structuralism, contextualism, textualism, and the new historicism. "Textualists," he observed, "typically concentrate on 'great' or canonical texts (read noncanonically) . . . and the Contextualists typically seek to identify the common themes and assumptions in the writings of the members of a discursive community (and then interpret individual texts in light of those assumptions). . . ."17 This examination of legal doctrine is being offered not just for what it says about doctrine as doctrine, but also for whatever broader meaning it reveals through the use of the methodology it employs. Although textualist and contextualist arguments might be viewed as antagonistic, this essay suggests that it is possible to write at the boundaries between the methodologies and perhaps to imply the possibility of convergence by using legal doctrine as text—not as an end in itself, but as a method of investigating the evolution and influence of legal ideas that, in part, provide the context of judicial decisionmaking.

I propose to study Baird and Drennan by addressing the extent to which Traynor specifically focused on reforming Hand's solution to the legal problem in Baird. There is internal and external evidence for this claim. Within the cases, for example, Traynor's Drennan opinion in 1958 directly uses Hand's language from 1933 in reaching an opposite conclusion. In other words, Traynor carefully selected words that Hand employed and turned the phraseology on its head. I do not think that Traynor's use of Hand's words was accidental. In addition, some of Traynor's opinion is parallel in structure to Hand's organization. Traynor also provides an ideological justification for the result in 1958

that directly repudiates Hand's rationale in defense of the result in *Baird*.

The external evidence that Traynor discarded Hand's mode of analysis stems from Traynor's general attitudes about the relationship between precedent, social change, and legal change. In his extrajudicial writings, as well as in his opinions, Traynor evinced a certain impatience with what he perceived to be roadblocks to effective legal change. Traynor, in fact, indicated not just that the doctrinal result in *Baird* ought to be different, but that a fundamental rethinking of contract law was in order. To Traynor, Hand represented a remnant of the past—the iron rule of formalism. Traynor suggested a new model of contract analysis, and he forthrightly proposed to jettison both the outcome and the reasoning reached by Hand's generation of judges. What better way to accomplish this purpose than to demonstrate that Hand's own language could be used to justify a directly opposite approach and conclusion? More importantly, Traynor wrote about the *Drennan* case on more than one occasion, revealing what he thought the case signified as he detailed its doctrinal contribution and consequences. He was engaged in and defended self-conscious change.

This is an essay then about both the fragility and endurance of legal ideas. It is also an essay on the nature of legal reform, revealing both its long term origins centered around particular ideas, as well as its contingent and idiosyncratic nature. In order to understand the *Baird* and *Drennan* cases and the relationship between them, it will be necessary to recreate the contexts in which Hand and Traynor wrote their opinions. The factual and doctrinal setting of Hand's opinion in the *Baird* case will be presented in light of the trial record at the federal district court level, the appellate briefs, and the Second Circuit preconference memorandums circulated between the judges. The examination of these materials will help place Hand's work in the context of the legal ordering of the dispute. The analysis of Traynor's opinion will also take into account the appellate briefs filed in the *Drennan* case, as well as the intervening legal developments between 1933 and 1958. In addition, Traynor's extrajudicial views on judging and the legal process will be examined for the light that they shed on the *Drennan* opinion, and even, perhaps, for what Traynor may have thought about Learned Hand.
II. THE CASES

A. The Factual Setting

Both *Baird* and *Drennan* involve the general contractor/subcontractor bidding process in public works or building construction projects. Both cases also share certain factual similarities primarily related to the nature of the bidding process itself. In *Baird*, as the general contractor prepared to bid for the contract 'to construct a public building in Pennsylvania, it received numerous bids for different aspects of the project from various subcontractors. The subcontractor in this dispute was a linoleum jobber who "sent to some twenty or thirty contractors, likely to bid on the job, an offer to supply all linoleum required by the specifications." Unfortunately, the subcontractor’s bid to the general contractor contained a mistake because "the employee [who] computed the amount of the linoleum which would be required on the job, underestimat[ed] the total yardage by about one-half the proper amount." Because the subcontractor's bid was the lowest bid for the linoleum work on the project, the general contractor relied on it in calculating the total amount of its own bid on the final project.

The chronology is important. The subcontractor sent the "offer" to the general contractor on December 24. The offer said: "'If successful in being awarded this contract, it will be absolutely guaranteed, * * * and * * * we are offering these prices for reasonable' (sic), 'prompt acceptance after the general contract has been awarded.'" The general contractor received the offer on December 28 and used it almost immediately in aggregating and submitting its own bid. Later, on the same day, the subcontractor discovered the mistake and notified the general contractor that as a result of the mistake it was withdrawing its offer. Therefore, the telegram containing the withdrawal information arrived after the subcontractor’s bid was used by the general contractor. In fact, the trial transcript establishes that the telegram arrived after all of the bids on the public building project had been opened in Harrisburg and after the general contractor learned that it was the low bidder. The public authorities for-
mally accepted the general contractor's bid on December 30. The subcontractor confirmed its withdrawal in a letter received by the general contractor on December 31. Despite having been notified twice that the subcontractor had withdrawn its bid, the general contractor "formally accepted the offer on January second." 22 When the subcontractor refused to perform the work, the general contractor sued the subcontractor for breach of contract, seeking to recover the difference between the price that the subcontractor bid for the job and the cost incurred by the general contractor to obtain another subcontractor to do the linoleum work.

As in Baird, the facts in Drennan revolve around a mistake in the bidding process. The general contractor, in this instance, bid on a public school construction project, and the subcontractor submitted a bid to the general contractor for the paving work at the job site. The public authorities required that the general contractor submit its overall bid by 8:00 p.m. on July 28. Apparently, "it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids." 23 When the bids were received by phone, they would be placed "on a master cost sheet setting forth the names and bids of all subcontractors." 24 The paving subcontractor phoned in a bid in the late afternoon of July 28. The general contractor recorded the bid, posted it on the cost sheet, and selected it as the low bid for paving. The general contractor's overall bid, including the subcontractor's offer, proved to be the low bid when it was opened on July 28, and the general contractor won the contract. 25

The next morning, the general contractor "stopped at defendant's office" and the defendant informed the general contractor "immediately" that there had been a mistake in its bid and that it could not do the work for the price that it bid. 26 Then, the subcontractor "refused to do the work for less than" 27 a revised

37, 41 (1933) [hereinafter Transcript of Record].
22. Baird, 64 F.2d at 345.
24. Id. By state law, the general contractor was required to list in its own bid on the complete project all of the subcontractors slated to do work above a certain percentage of the total job.
25. Id.
26. Id. at 758-59.
27: Id.
figure. As in Baird, the general contractor sued the subcontractor for breach of contract seeking to recover the difference between the original bid price and the cost of performing the contract with a substituted paving contractor.

Although the factual contours in the cases are similar, they are not identical. The industries and materials are different. The customary bidding processes are slightly different—written communication (with terms of the offer spelled out) as opposed to logging in on a telephone. The state law in California required the listing of subcontractors whose bids constituted a certain percentage of the general contractor's total bid, while Pennsylvania law in the 1920s and 1930s apparently did not. The timing of the notice of mistake is different although the timing may or may not have legal consequences. And I suppose it is possible to construe the general contractor's visit to the subcontractor in Drennan as an attempt to accept the offer to do the paving work prior to the subcontractor's communication of the mistake and withdrawal of the bid. However, the real question is: What are the legal implications of the facts whether similar or different? Will the subcontractor be contractually bound by its bid to the general contractor if the general contractor relies on or uses the bid?

B. The Legal and Doctrinal Setting

The legal analysis of the cases takes place against the backdrop of the rules governing the revocability of offers—one of the eternal verities of the common law of contracts. The rules stipulate that an offer may be revoked at any time prior to acceptance.\(^2\) As a result of the legal operation of the rule, an offeree, faced with the presumption of revocability, can only change revocability to irrevocability by purchasing a change in its status, an option. A statute may also alter the legal situation in some jurisdictions and so may a seal. The offeree may exchange consideration—usually money—in order to limit the offeror's legal right to revoke prior to acceptance. Unless a bargain has occurred on the subject of revocability itself, the legal presumption of revocability applies. It is in this way that consideration doctrine casts its shadow onto the domain of offer and acceptance. Reform of this system of analysis has been slow on the common-

\(^{28}\) See Farnsworth, supra note 6, at 161; Restatement (Second) of Contracts § 42 (1981).
The firm offer provisions of the Uniform Commercial Code have made some progress on the subject for signed writings, stipulating that those offers with terms which indicate that they will be held open will, therefore, not be revocable even though they lack consideration.\[^{29}\] However, under the standard rules of offer and acceptance, the subcontractor would be entitled, after discovering its mistake, to revoke its offer to the general contractor provided that the general contractor had not already accepted the offer in some way.

The assumptions underlying the traditional rules of offer and acceptance seem to stem from a design for a simple, rather than a complex, world—a universe composed of face-to-face transactions in which people deal with one another on an individual basis rather than engaging in impersonal communication. It is a bipolar world—offer and acceptance, or offer and counter-offer, or offeror and offeree. The problem is that the modern world of general contractor/subcontractor is not exactly a bipolar world of diametrically opposed actors seeking pure individual advantage against each other, although it retains overtones of this premise.

First, the reality of this particular commercial situation is that the general contractor/subcontractor relationship is only one of many similar bipolar settings that are repeated often as the general contractor gets ready to bid. In effect, each individual subcontractor, as a result of the aggregation of all bids, has an impact on the outcome of every other subcontractor’s bid submitted on different, often unrelated parts of the project. Second, each general contractor/subcontractor bid process triggers another set or level of potential offer and acceptance situations between the general contractor and the awarding or granting authority. In effect, the general contractor/subcontractor bipolar exchange is embedded in a multipolar and multilevel system. For instance, if the general contractor is never awarded the main contract—with its own offer and acceptance—then the subcontractor is never awarded its subcontract. On the other hand, the subcontractor’s bid seems to be grounded on the idea that it wants the general contractor, to whom it has submitted a bid, to be awarded the general contract so that the subcontractor can get the work. The transaction between the general contractor

\[^{29}\] U.C.C. § 205.
and the subcontractor may be individual or discrete, but their fate appears to be linked.

It is, of course, possible to treat all of the individual and triggered transactions in the general contractor/subcontractor bidding model as discrete transactions awaiting resolution under the traditional offer and acceptance rules. The problems are more than a little reminiscent of the way that the classical apparatus of contract law sought to adapt to the problems of making contracts by correspondence in the absence of face-to-face communication. The “mailbox” rule appeared in early nineteenth-century England to solve a modern, market-expanding, technology-driven dilemma not initially contemplated by the original set of common-law rules. Therefore, out of the common-law evolutionary process emerged a rule that made the acceptance of a contractual offer by correspondence effective upon dispatch in the mailbox, thereby creating an acceptance at the earliest possible moment, so early, in fact, that the original offeror was not yet aware of it. However, the problem was resolved within the paradigm of the conventional rules. It is clearly possible to analyze the general contractor/subcontractor interaction as if it fit under offer and acceptance, classically construed.

Yet, there is at least one other contractual model with which to construe these events. Instead of casting the interaction between general contractor and subcontractor into an individualistic sequence of discrete transactions, it is possible to evaluate the true impact of their interaction in relational terms—terms not always readily translatable into the conventional world of offer and acceptance. For instance, one might interpret the general contractor/subcontractor transaction as only one episode in a relationship dedicated to the same outcome—the awarding of the general contract. Rather than pursuing mutual advantage against each other, both parties might be primarily concerned with finding mutual advantage for each other. One succeeds only if both succeed. It is not necessary for both parties to be engaged in a long-term relationship (like a franchise) for this model to be applied, though, it is possible that a subcontractor may work for a general contractor on many different projects, each of which is separate and discrete. Presumably, subcontractors also are interested in sustaining a long-term reputation within an industry or

trade that would stress reliability, cooperation, and trust. The relationship between a general contractor and a subcontractor, therefore, is likely to appear to be a curious amalgam of discrete transactional and relational norms. If relational norms acquired a certain legal recognition, then one might expect to hear general contractors claiming, after the relationship broke down or was not formally consummated, that their legal rights were based on their reliance on reasonably construed representations or on offers made by subcontractors. The claim would stem from how they understood the relationship was supposed to work and not from the nature of any individual transaction.\textsuperscript{31}

Under either a transactional or relational theory, it is possible to focus on different possibilities of contract formation or obligation in the general contractor/subcontractor setting. One could argue either for or against the formation of a bilateral contract, a unilateral contract, an option contract, or some form of liability arising under promissory estoppel. At some point in these cases, virtually all of these theories were advanced by the parties and considered in the judicial opinions.

C. The Opinions: The Law Applied to the Facts

1. The Path to Baird

   a. The Trial

   \textit{Baird v. Gimbel} was tried in the Federal District Court for the Southern District of New York in December 1931, approximately four years after the precipitating events transpired in late 1927 and two years after the complaint was filed in November 1929. A two-day bench trial was conducted by Federal District Judge Frank J. Coleman.\textsuperscript{32} Exactly one witness was presented on behalf of the general contractor; only three witnesses were introduced for the subcontractor. The trial lawyers were relatively young Wall Street attorneys who were well on their way to prominent and distinguished careers. George Leisure appeared as trial counsel


\textsuperscript{32} See Transcript of Record, supra note 21, at 1. When one considers that the Second Circuit opinion was not issued until April of 1933, perhaps we should not be complaining in the 1990s about delays in the justice system.
for the general contractor around the time that the Donovan and Leisure law firm was founded. Leonard P. Moore of the Chadbourne, Stanchfield, and Levy firm, who within twenty-five years would sit on the United States Court of Appeals for the Second Circuit as Learned Hand's colleague, represented the subcontractor.33

The plaintiff's complaint in the action alleged two causes of action—one sounding in contract and one in promissory estoppel. The contract cause of action asserted offer and acceptance of the subcontractor's bid; the promissory estoppel cause of action asserted the general contractor's reliance on the subcontractor's bid. The subcontractor's answer to the complaint denied that any offer, acceptance, or reliance had occurred and additionally contended that no binding agreement was formed because the "offer" had been revoked before acceptance and there had been a mistake in the offer; therefore, no meeting of the minds occurred.34

The overwhelming majority of the trial testimony was on the subject of mistake. The general contractor's only witness, Thomas McKnew, vice-president of the Baird firm, was called primarily to authenticate and to introduce the documents exchanged by the parties at the time of the events—hardly a contested matter. Most of his testimony on cross, redirect, and recross examination, devoted to the subject of mistake, focused on whether the general contractor should have noticed the mistake in the bid. McKnew deftly fended off Moore's suggestion that the general contractor somehow shared responsibility for the mistake. He countered that general contractors usually did not know the individual specifications of the specializations on jobs—that was the job of the subcontractor—and that the final bid gathering process was chaotic with little time to check for errors, which was why subcontracting firms are selected based on good reputations, such as Gimbel—they were careful and responsible and could be trusted.35

The defense witnesses all focused on mistake. Presumably, once the documents were introduced, the issue of offer and ac-

34. See Transcript of Record, supra note 21, at 10-16.
35. See id. at 62-68.
ceptance and revocation resolved itself into a legal issue. The only meaningful factual inquiry left was raised by the subcontractor's defense of mistake. The three defense witnesses, a linoleum contract department estimator from Gimbel, a linoleum contract department salesman from Gimbel, and a manager/estimator for another general contractor who had bid on the project, all sought, in various ways, to establish that a genuine mistake had occurred and that the general contractor should have recognized it. For instance, there was some testimony at trial about whether the variations in bid figures should have alerted the Baird firm, as it apparently did other general contractors, that a mistake had been made.36

Two unpublished federal district court opinions emerged from the pretrial and trial stages. First, in July 1931, Judge William Bondy issued an opinion in response to a defense motion for judgment on the pleadings. Bondy denied the motion; therefore, clearing the way for trial. He chose to interpret the first cause of action "as meaning that the offer was made in consideration of or on condition of plaintiff's submitting [to the public granting authority] a proposal in writing computed and based on defendant's offer to plaintiff."37 In other words, the allegation was that "the defendant bargained for an act by the plaintiff in exchange for its promise to install the linoleum at the option and on demand of plaintiff at that price."38 When the general contractor submitted its bid including the bid prepared by the subcontractor, "the performance of the act, before any notice of revocation, constituted the consideration which made the offer irrevocable."39

As a result of Judge Bondy's strained interpretation of the nature of the offer, the general contractor barely survived the defendant's motion:

The defendant's offer, as alleged in the complaint, was not limited to an offer to install the linoleum at a certain price but there was an additional promise that if the offer was used by the plaintiff in making its bid, it could call on defendant to furnish the linoleum at the stated price. By reason of that promise and the submission of a bid for the general contract by the

36. See id. at 80-134.
37. Brief of Defendant-Appellee, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), in 2257 U.S. Circuit Court of Appeals—Second Circuit—Cases and Briefs, app., at 54-55 (1933) [hereinafter Brief of Defendant-Appellee].
38. Id. at 55.
39. Id.
plaintiff computed and based upon defendant's offer the plain-
tiff was assured that the linoleum could be installed at that
price. 40

Judge Bondy was not at all certain, however, about the promis-
sory estoppel claim. "It is doubtful," he wrote, "whether a cause
of action can be based on a promissory estoppel in this case," 41
because, although the general contractor alleged that he relied
on the subcontractor's promise, he did "not allege that the
promise was made in order to induce this action in reliance." 42
Section 90 of the first Restatement of Contracts, which estab-
lished the elements of a promissory estoppel, might be employed
in theory. "But this doctrine has been applied only to charitable
subscriptions, promises to make gifts, etc. . . . and not to ordi-
nary business transactions." 43 Therefore, the suggestion was
made: promissory estoppel should not apply to commercial
promises.

Judge Coleman issued his opinion less than two months after
the conclusion of the trial. He found in favor of the subcontrac-
tor. "The principal question presented," he wrote, "is whether
the defendant had a right to withdraw an offer to supply lino-
leum for a building about to be erected, before the offer was for-
mally accepted." 44 According to Judge Coleman, the general con-
tractor had argued that the subcontractor had no right to
withdraw its offer for two reasons paralleling the two counts of
the complaint. First, "the circumstances gave rise to an implied
contract between the parties that the offer would not be with-
drawn until the plaintiff had had a reasonable opportunity to ac-
cept it," and second, "if no such contract to continue the offer
could be spelled out, the defendant was, nevertheless, estopped
from withdrawing it because of a change of position by the plain-
tiff in reliance upon it." 45

About the general contractor's first argument, Judge Coleman
concluded:

40. Id.
41. Id.
42. Id. at 55-56.
43. Id. at 56 (citation omitted). Section 90 read: "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 forbear-
ance is binding if injustice can be avoided only by enforcement of the promise." RE-
STATEMENT OF CONTRACTS § 90 (1932).
44. Transcript of Record, supra note 21, at 190.
45. Id. at 191.
The parties undoubtedly expected that the offer would be kept good and they contemplated that it would be some guide to the plaintiff in determining the cost of the building and consequently the amount of the plaintiff's bid. The circumstances, however, are not sufficient to justify a finding that there was a mutual intention that the offer would be kept good in consideration for the plaintiff's doing some definite thing. The defendant had no way of anticipating exactly what use the plaintiff might make of it.\textsuperscript{46}

Therefore, nothing had transpired legally to convert the offer from revocable to irrevocable, and the offer had been withdrawn prior to acceptance.

The plaintiff remained free to reject the offer even if it were included in the bid submitted to the State. The fact that the parties contemplated that the plaintiff might possibly make some undefined use of the offer in determining the amount of its bid was insufficient to show in conjunction with defendant's letter that the parties made a contract that the offer would not be withdrawn.\textsuperscript{47}

Addressing the reliance claim, Judge Coleman responded to Judge Bondy's admonition about the applicability of promissory estoppel to commercial transactions by observing that "\textsuperscript{[w]}hether or not the theory of promissory estoppel should be applied to ordinary business contracts the present case lies outside the rule because of the vagueness and indefiniteness of what the plaintiff might do in reliance on the offer."\textsuperscript{48} Then, Judge Coleman revealed what really troubled him about using promissory estoppel to alter the common-law understanding of the revocability of offers: "To hold otherwise would make a large proportion of all offers irrevocable because of the indubitable possibility that the offerees might rely on them and change their positions accordingly."\textsuperscript{49} In other words, in a business environment, there was no real limitation on the possible claims of reliance on offers. Recognizing these claims and changing the legal rules might lead to unlimited chaos, vulnerability, and liability unless parties adjusted their dealings accordingly. Certainty and predictability were threatened by the specter of business people running around wildly seeking enforceability based on specious claims of

\textsuperscript{46} Id. at 194-95.
\textsuperscript{47} Id. at 195.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 195-96.
noninduced and open-ended reliance. The opinion concluded without a single mention of the legal problem of mistake, which had been the primary focus of the trial. A revoked offer before acceptance apparently meant that there was no need to discuss the defense of mistake.

b. The Appellate Briefs

By the time the appellate briefs were filed in February and March of 1933, George Leisure had left the case for the general contractor. William L. Glenn, who apparently had handled the original pleadings in 1929 while at a different law firm, resumed control of the case. He changed the strategy in light of Judge Coleman's opinion, since the problem was now how to find a legal basis for contending that acceptance had taken place before revocation.

Glenn argued that "[d]efendant's offer for the linoleum subcontract ripened into a contract at and with plaintiff's bid to the State." In other words, the use of the subcontractor's bid by the general contractor amounted to an acceptance of an offer. The plaintiff now argued that "defendant plainly meant, 'If you choose to accept my offer you may act upon it by bidding.' " In addition, "[t]he proposal, in short, called for an unilateral contract, it was accepted by plaintiff's act, and plaintiff was not required to notify defendant of acceptance."52

The justification for this form of analysis was based on the nature of the wording of the subcontractor's offer:

The bid was made, as it had to be, within an hour or so after this letter was received. Under such circumstances the phrase, "reasonable prompt acceptance after the general contract has been awarded," must be interpreted as a condition subsequent to a contract already made. By acting on defendant's bid, plain-

50. See Transcript of Record, supra note 21, at 8. On the brief with William Glenn was Garrard Glenn, a legal treatise writer and law professor. Garrard Glenn taught at Columbia's law school in the teens and early twenties. In 1933, he was teaching at the University of Virginia Law School. He practiced law in New York City between leaving Columbia and joining Virginia. See Julius Goebel, Jr., A History of the School of Law: Columbia University 252-53, 264 (1955); W. Hamilton Bryson, Garrard Glenn, in Legal Education in Virginia 1779-1979: A Biographical Approach 241-48 (W. Hamilton Bryson ed., 1982).

51. Brief for Plaintiff-Appellant, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), in 2257 U.S. Circuit Court of Appeals—Second Circuit—Cases and Briefs, at 9 (1933) [hereinafter Brief for Plaintiff-Appellant].

52. Id. at 10.
tiff would change its position. Defendant’s letter did not say, “You may act on our bid, and still have no contract with us.” The more reasonable interpretation is, “We mean to be bound if you act on our bid. But, in case you do not get the award from the State, then our contract shall be at an end.” Else of what value was defendant’s offer, and how could plaintiff act on it safely? But with this treated as a condition subsequent it was natural that defendant should desire to be advised promptly if plaintiff got the contract.53

So, “[v]iewed in that light, neither defendant’s telegram nor its letter, both of which reached plaintiff after the latter had put in its bid to the State . . . , could operate as the revocation of an offer which called for acceptance by act, plaintiff having performed the act before notice of revocation.”54

Addressing the promissory estoppel issue, the brief writers observed that “plaintiff’s act (submitting to the Commonwealth its proposal, based upon the defendant’s offer) was induced by the defendant’s offer and thus furnished a consideration which rendered the offer irrevocable.”55 The entire discussion of the substantive operation of promissory estoppel was one paragraph in length and occupied exactly one-half of a page in a twenty-three page brief.56 In contrast, over half of the entire brief was devoted to various aspects of the mistake issue even though Judge Coleman did not mention it at all in his opinion and neither would Judge Hand for the Second Circuit.

The subcontractor’s brief was long—fifty pages plus an appendix reprinting Judge Bondy’s opinion. Signed by Leonard Moore and David Hecht of the Chadbourne firm, the brief focused evenly on the revocation, promissory estoppel, and mistake issues. The defendant offered a forceful and direct rebuttal of the theory that the general contractor accepted the subcontractor’s bid by using it before the subcontractor attempted to revoke it. The defendant argued that the “proposal . . . was without consideration and subject to withdrawal and revocation at any time before acceptance in the manner required by the proposal.”57 Notice that the operative word is “proposal,” not offer, not bid,
and not promise. The plaintiff’s only purported acceptance took place well after revocation.

This attempted acceptance, not made until defendant had withdrawn its gratuitous offer, was ineffectual, since an offer not under seal and without consideration may be revoked by the offeror at any time prior to the acceptance of such offer. To hold otherwise would be to violate the doctrine of mutuality of obligation and defendant would be bound to sell although plaintiff was not bound to purchase.\textsuperscript{58}

In addition, the subcontractor “invited the formation of a bilateral contract by an acceptance in the form of a promise by the plaintiff to perform what the offer requested, namely, the purchase of the linoleum. This was not the case of an offer looking towards a unilateral contract.”\textsuperscript{59} To the contrary, “[t]he letter does not indicate that defendant bargained for or desired anything other than to sell its linoleum.”\textsuperscript{60} Then, the defendant offered an insight that would be reflected in Hand’s opinion and rejected many years later by Traynor. The defendant argued, “It had nothing to gain by plaintiff’s submission of its own bid to the State for the general contract . . . .”\textsuperscript{61}

The brief then turned to promissory estoppel, allocating a full fourteen pages to a subject that the plaintiff’s brief had covered in one paragraph that consisted of four sentences totaling ninety-three words. It was like taking a sledge hammer to a pebble. The defendant’s brief described the general contractor’s theory as a claim that promissory estoppel should be invoked because the submission of the bid to the state was in reliance on the subcontractor’s offer, which “either estopped defendant from withdrawing its offer or constituted sufficient consideration to make the offer irrevocable.”\textsuperscript{62} Reliance, under any circumstance, was not justified—particularly as a substitute for consideration—because unequivocally “[t]he doctrine of promissory estoppel may not be invoked in ordinary commercial transactions.”\textsuperscript{63} The doctrine was reserved for “a limited group of cases such as charitable contributions [and] [e]ven in these cases courts are loath to talk in terms of promissory estoppel for fear of asserting too general a

\textsuperscript{58} Id. at 10.
\textsuperscript{59} Id. at 12.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 20.
\textsuperscript{63} Id. at 21.
principle of law which might be misunderstood to be precedent for other situations where its application would be undesirable."  

The threatening implications of allowing promissory estoppel were spelled out:

If this doctrine were invoked in the usual business transaction, where the person making an offer desires primarily an advantageous contract and is not seeking to bestow a benefit upon someone else without contemplating the receipt of something in return himself, it would radically change universally accepted and relied upon sound precepts of commercial contract law. Assume a business firm desires to sell merchandise and makes an offer, without receiving any consideration therefor, to sell at a price and before the offer is accepted and before it receives an assurance that the offeree will buy the merchandise it has an opportunity to sell the same merchandise to someone else. Must it then forego this opportunity to sell because the original offeree without communicating to it in any way and without obligating itself to buy the merchandise may have entered into some arrangement with a third person to purchase the merchandise which was the subject of the offer, perhaps only to learn thereafter that the original person to whom the offer was made will not buy the merchandise? Is a business firm which makes a gratuitous offer to sell merchandise not to be permitted to revoke before acceptance because the offeree does an act not called for and in no way beneficial to the offeror? Such a rule would not only be unduly harsh on the offeror, but would achieve a result opposed to commonly accepted commercial practice, as well as being commercially undesirable.

The defendant maintained that nothing should interfere with an individual’s business judgment about what was in its best interest or how best to calculate its own advantage, certainly not the unbargained for reliance of another party. An individual’s autonomy was central to freedom of contract and should not be limited, particularly by an action not contemplated, expressed, and memorialized by some type of bargain.

The answer, according to the brief and soon to be echoed by Hand, was for the parties, consistent with the idea of pursuing self-interest, to “protect” themselves. “Sufficient safeguards are afforded by the law at the present time to protect an offeree who desires to secure an irrevocable option upon which he may justi-

64. Id. at 21-22.
65. Id. at 24-25.
fiably rely; he may pay consideration for it if the offeror is willing to accept the same."66 The general contractor's bid submission to the state did not constitute such consideration. Therefore, the "offer" had not been converted from revocable to irrevocable. Reliance was only justified if it was induced by a full-fledged bargain. Once again the refrain was that "the defendant had nothing to gain by the plaintiff submitting its own bid to the [state]."67 "[The subcontractor] was not bargaining for, nor did it make any difference to it, whether plaintiff submitted its bid to the [state]. To hold the defendant bound would destroy the legal character of an option."68 The promissory estoppel section of the brief concluded with generous quotations from Judge Bondy's opinion and Judge Coleman's opinion, which rejected promissory estoppel as an acceptable theory of recovery in the case.69

The general contractor's reply brief reinforced its position that the use of the bid amounted to an acceptance, characterizing the defendant's position on the subject as "unintentionally misleading"70 and as undermining "the only rational result."71 More importantly, in response to the subcontractor's attack on promissory estoppel, the reply brief substantially increased its discussion of the doctrine—two full pages, or about twenty percent of the reply brief, instead of the single paragraph in the original brief. In support and rehabilitation of its argument, the reply brief quoted a recent editorial from the New York Law Journal to counter the defendant's assertion that promissory estoppel did not belong in a commercial setting. As the briefs were being submitted and shortly before oral argument, an editorial dated February 11, 1933, had appeared that was entitled "Promissory Estoppel." The critical line from the editorial quoted by the reply brief was the conclusion of the author that "[t]he promissory estoppel doctrine is not confined to the charitable subscription cases."72 The attorneys thought that the editorial was important

66. Id. at 25.
67. Id.
68. Id. at 32.
69. See id. at 33-34.
70. Reply Brief for Plaintiff-Appellant, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), in 2257 U.S. Circuit Court of Appeals—Second Circuit—Cases and Briefs, at 4 (1933).
71. Id. at 5.
72. Id. at 7 (quoting Recent Cases, Contracts: Promissory Estoppel, 11 Tex. L. Rev. 248 (1933) [hereinafter Recent Cases], reprinted in Promissory Estoppel, N.Y.L.J., Feb. 11, 1933,
enough to inform the judges that they would "hand up" a clipping of it at oral argument.\textsuperscript{73}

The editorial was no more than a verbatim reprinting of a student casenote from the February 1933 issue of the \textit{Texas Law Review}.\textsuperscript{74} The timing of its publication in the \textit{New York Law Journal} is a little suspicious because it does not seem that promissory estoppel as applied to business transactions was a hot legal topic in 1933. Clearly, the subcontractor would not have had an interest in having the editorial published,\textsuperscript{75} and the general contractor did not seem to know about it when its original brief was submitted. Whether the attorneys for the general contractor manipulated the editorial publication in the intervening time period before oral argument is purely speculative, but they certainly were interested in bringing it to the attention of the court after the subcontractor's assault on the subject.

As the law stood at the time, the subcontractor may have had the better argument, or at least it seems to have argued its position more cogently. The general contractor's contentions in the face of contemporary law were a bit of a reach, which may explain why they were poorly argued. The general contractor was scrambling to escape the logic of the revocation rules governing offer and acceptance. The only alternative framework was promissory estoppel—attractive, yet undeveloped and uncharted as applied to this subject area. The Second Circuit would reflect what the lawyers presented.

c.\textit{ The Preconference Memoranda}

The oral arguments took place in March 1933. After oral argument, it was the custom in the Second Circuit for each individual judge on the panel to write a preconference memorandum. Gerald Gunther has described the procedure:

\footnotesize

\textsuperscript{73} See \textit{id.}

\textsuperscript{74} See \textit{Recent Cases, supra} note 72. The note discussed \textit{Langer v. Superior Steel Corp.}, 161 A. 571 (Pa. Super. Ct. 1932), an application of the promissory estoppel doctrine to a pension case, and one of an early line of cases to discuss whether or not promissory estoppel could make certain types of promises enforceable, like pensions, which could otherwise be treated as donative in intent and therefore not enforceable. \textit{See Recent Cases, supra} note 72, at 248-49.

\textsuperscript{75} The subcontractor's brief in fact had cited and distinguished the \textit{Langer} case, the subject of the casenote and editorial. \textit{See Defendant-Appellee's Brief, supra} note 37, at 23-24.
During Hand’s years, members of the judicial panel hearing a case typically did not discuss its issues until more than a week after the end of the week in which they had heard arguments. Meanwhile, each judge individually worked through the case and reached tentative conclusions before ever consulting with his colleagues. In each judge’s chambers, the secretary would type an informal memorandum on long legal pages, with carbon copies on onionskin sheets to be distributed to the other judges. Most of the time, a judge’s memos made no reference at all to his colleagues’ memos; ordinarily a judge had not read them until after he had completed his own. Then, when the judges met face-to-face a week or two later, they had a far greater familiarity with the facts and legal issues than was possible otherwise.76

Fortunately, “Learned Hand saved virtually all the pre-conference memoranda he and his colleagues wrote during his more than thirty-five years on the Second Circuit.”77 The Baird v. Gimbel memorandum is one of them.

The panel was composed of Hand, Thomas Swan, and Martin Manton. Hand had a low opinion of Manton,78 a view unfortunately confirmed in 1939 when Manton’s resignation from the bench was followed by his indictment, conviction, and sentencing on charges of judicial corruption.79 Manton’s preconference memorandum is one of them.

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77. Id. at 288.
78. See id. at 278, 503.
79. See id. at 503-13. There is an interesting and ironic sidelight to the Manton scandal involving some of the actors in the Baird case. Thomas L. Chadbourne was the founding partner of Chadbourne, Stanchfield, and Levy, which was Leonard Moore’s law firm when he handled the Baird case. In 1985, Chadbourne’s autobiography was published with a foreword written by Moore. (The foreword was published after Moore’s death in 1982.) Moore commented that “at the end of 1936 some disagreement must have occurred between Chadbourne and Levy because as of January 1, 1937, the firm reverted to its original components,” and “that Chadbourne had separated from Stanchfield & Levy.” Leonard P. Moore, Foreward to THE AUTOBIOGRAPHY OF THOMAS L. CHADBOURNE xvi-xvii (Charles C. Goetsch & Margaret L. Shivers eds., 1985) [hereinafter CHADBOURNE]. Moore continued:

Levy took with him very few partners. The cause of the sudden breakup was never disclosed either publicly or to the rank and file of the former firm. Chadbourne was not one to temporize with any situation that was not acceptable to him. Thus, whatever the cause, it must have been sufficient in his judgment to call for immediate separation.

Id. at xvii. The afterword to the book reveals a more complete version of the events. While still a partner in the Chadbourne firm in 1932, Levy had “arranged” for a $250,000 loan to Manton’s business partner “at a time when one of [the firm’s] . . . cases was pending decision before Chief Judge Manton. The case . . . subsequently was decided in favor of Levy’s client in an opinion written by Chief Judge Manton, and the $250,000 loan was never repaid.” Id. at 231, 294 n.10. Levy was disbarred after Manton’s
memo in *Baird* is shoddy and rushed. Gunther reports that the Second Circuit memos "typically ran two to four pages;"\(^8\) Manton's memo was two paragraphs—one paragraph only two sentences long. Gunther also notes that it was the "norm" for Manton's memos not to be as "erudite as Hand's."\(^8\) In addition, Manton "had . . . a reputation of being a 'scissors and paste-pot' judge who produced many of his opinions simply by lifting useful passages, complete with precedents and legal authority, from the briefs of the prevailing side."\(^8\) All that Manton wrote in his *Baird* memo was that the offer or "effort" had been withdrawn before acceptance and that "liability may not be predicated upon a promissory estoppel." No acceptance had occurred before the general contractor made its bid to the state, and "the application" of promissory estoppel "is limited to acharitable [sic] promiser [sic]" and "not to offers made looking forward to the creation of a by-lateral [sic] contract."\(^8\)

Hand was a great admirer of Thomas Swan and was "the leading promoter of Swan's appointment to the Second Circuit"\(^8\) after Swan's service for a decade as the dean of the Yale Law School. Swan's memo, although also short, was far more analytical, trenchant, and searching than Manton's. It was also just as traditional. The memo paralleled the structure of the subcontractor's brief. "Plaintiff's contention that its making of a bid to the [s]tate . . . was an acceptance of defendant's offer . . . is a most preposterous proposition."\(^8\) On the contrary, "[p]laintiff was privileged to bid on the building for its own account and defendant could not by volunteering an offer to supply part of the material so limit plaintiff's privilege as to convert its bid into an acceptance of defendant's offer."\(^8\) Although the language of privilege was Hohfeldian, the heart of the idea was pure freedom of contract. In addition, "[p]laintiff's act of bidding was not the consideration defendant wanted to receive in return for its

\(^{80}\) Gunther, *supra* note 76, at 288.

\(^{81}\) Id. at 507.

\(^{82}\) Id.

\(^{83}\) "M.T.M.," Preconference memoranda, Baird v. Gimbel, Box 191, File 7, Learned Hand Papers, Special Collections Department, Harvard Law School Library.

\(^{84}\) Gunther, *supra* note 76, at 283. See generally id. at 281-84. See also Learned Hand, *Thomas Walter Swan*, 57 *Yale L.J.* 167 (1947).


\(^{86}\) Id.
promise to furnish linoleum." 87 These were just atomistic actors looking out for their best interests and, until they thought it was in their own individual interests to agree, there was no contract. Indeed, Swan pointed out that the language in the general contractor's letter of January 2, formally accepting the subcontractor's offer, undercut the argument that acceptance occurred upon submission of the bid. The January 2 letter "did not say 'we hereby notify you that we accepted your offer by tendering our bid on December 28th'-as it should have said if it construed the proposal as Glenn's extraordinary argument would have it; it said 'we hereby accept your proposal.' "88

Swan turned next to the promissory estoppel claim, acknowledging that "more may be said for [Glenn's] alternative position—namely, that defendant's offer was irrevocable after plaintiff had acted in reliance upon it. Contract [sic] Restatement sec. 90."89 Nonetheless, as Moore had urged in the subcontractor's brief, Swan noted that "[t]his principle, however, has never been extended to an offer to enter into a bilateral contract with the offeror or to ordinary commercial transactions, and it should not be."90 For authority, Swan cited three cases in the precise order that they appeared in Moore's brief for the subcontractor.91

Three days after Swan's memo, Hand produced his own. Like Swan, he too followed the structure of the subcontractor's brief. On the revocation issue, Hand was clear. The general contractor never accepted the subcontractor's offer prior to revocation. "Nor had the parties by their past transactions made the plaintiff's bid an acceptance of the offer. No inference of assent was to be drawn from bidding, not even assent upon condition that the plaintiff should get the state contract."92 Because the terms of the subcontractor's offer looked towards a formal acceptance (i.e: a reasonably prompt acceptance), "[i]f the plaintiff chose to bid without accepting, it took its chances of revocation."93 The general contractor could have chosen "[t]o protect itself" by making some sort of contract conditional on being awarded the state job.94 Having failed to do so, "[c]ertainly there was no con-

87. Id.
88. Id.
89. Id.
90. Id.
91. See id.; Defendant-Appellee's Brief, supra note 37, at 26-31.
93. Id.
94. Id.
tract on ordinary principles."\textsuperscript{95}

As for other than "ordinary principles," the general contractor did not fare any better. Promissory estoppel could not be applied. "[I]t is a total misapprehension of the doctrine to apply it to an offer which requires a consideration. In such cases the promise cannot become a contract without the consideration; that is not its meaning."\textsuperscript{96} The general contractor’s unilateral contract theory was also rejected. According to Hand, "the defendant did not promise to deliver if the plaintiff should bid and the bid was accepted."\textsuperscript{97} Hand believed, echoing Moore’s brief, that the subcontractor “had no interest in the plaintiff’s success, it expressly required an acceptance, a promise to pay, and it never got one.”\textsuperscript{98} In other words, the subcontractor only became interested after the awarding of the general contract, when the general contractor was in a position to close a deal. Therefore, invoking mutuality, the inequality between the parties, and the vulnerability of the subcontractor rather than the general contractor, Hand concluded that “[i]t would be a great injustice to hold the defendant to the outcome of the bid, while the plaintiff was free to refuse the offer, if it could get better terms elsewhere.”\textsuperscript{99}

All three judges indicated that they would vote to affirm the district court’s judgment. Despite the prolonged discussions in the briefs on the defense of mistake, only Swan mentioned the problem in his memorandum, concluding that, because there was no contract formation, the decision need not address the issue.\textsuperscript{100} The legal issues had been funneled by the trial, the appellate briefs, and the preconference memorandums into the application of the formal rules of offer, revocation, and acceptance arrayed against the potential inroads of promissory estoppel theory, freshly minted as announced only recently in 1932 by the American Law Institute in section 90 of the Restatement of Contracts. There could be little doubt about which alternative Hand preferred.

\begin{itemize}
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} See “T.W.S.,” Preconference memorandum, supra note 83.
\end{itemize}
Hand's opinion begins with a sparse, straightforward, perfectly serviceable rendition of the facts summarized in one long paragraph. The rest of the opinion, comprising just four paragraphs, is a model of the formalistic application of contract doctrine. Hand elaborated on themes he had identified in his preconference memorandum, which were in turn derived from the subcontractor's brief. He began by stating the black letter rule and its operation in this case's factual setting: unless something "out of the ordinary" occurred, "since the offer was withdrawn before it was accepted, the acceptance was too late." Hand then proceeded to evaluate the general contractor's response to the invocation of the revocation principle.

Hand noted that the general contractor argued that "[i]t was a reasonable implication from the defendant's offer that it should be irrevocable in case the plaintiff acted upon it, that is to say, used the prices quoted in making its bid, thus putting itself in a position from which it could not withdraw without great loss." The general contractor, in other words, was stressing its vulnerability—a vulnerability in part created by the use of the subcontractor's bid. It was too late to bid after the mistake was discovered, and the linoleum was a minor portion of the whole project; therefore, why risk losing this major project ("an unreasonable hardship") and perhaps its substantial deposit by withdrawing its bid on the project after learning of the mistaken bid? The general contractor might have "secured a contract conditional upon the success of its bid," but the subcontractor did not have that arrangement in mind. In fact, according to Hand, the general contractor asserted that such a conditional contract was unnecessary because the subcontractor knew that the general contractor "would use its offer in their bids," thereby binding themselves to provide the linoleum. "The inevitable implication from all this was that when the contractors acted upon it, they accepted the offer and promised to pay for the linoleum, in case their bid was accepted."

101. James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 345 (2d Cir. 1933).
102. Id.
103. See id.
104. Id.
105. Id. at 346.
Hand then proceeded to demolish the general contractor's argument. The premises were purely formalistic. Hand suggested that the arrangement was possible, but he first analyzed whether that was what the parties meant or intended—what could be "imputed to the words they used." Hand did not entirely ignore that the general contractor might have a point, if not a legal right. "Whatever plausibility there is in the argument, is in the fact that the defendant must have known the predicament in which the contractors would be put if it withdrew its offer after the bids went in." However, upon closer examination, Hand decided: "[I]t seems entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids." The commercial setting suggested that the general contractor preferred to retain as much autonomy as possible. For instance, if the general contractor did not carry out its contract with the state or if it went bankrupt, the subcontractor would have no right of action. Therefore, "there was no contract between them." Furthermore, the language of the offer, inviting "'prompt acceptance after the general contract has been awarded,' looks to the usual communication of an acceptance, and precludes the idea that the use of the offer in the bidding shall be the equivalent." Other interpretations of the acceptance process proffered by the general contractor "would wrench [the] natural meaning" of the offer's language "too far." The lesson was clear: plan ahead, particularly if you believe you are vulnerable and sense a "predicament." A conditional contract provided "a ready escape from their difficulty." Hand closed his discussion of the issue with an admonition: "[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves."

With that parting shot, Hand then turned to the general contractor's promissory estoppel claim. It did not fare any better. The doctrine, according to Hand, was "chiefly found in those cases where persons subscribe to a venture, usually charitable,  

106. Id.  
107. Id.  
108. Id.  
109. Id.  
110. Id.  
111. Id.  
112. Id. For the conditional contract, see supra text accompanying note 104.  
113. Baird, 64 F.2d at 346.
and are held to their promises after it has been completed." 114 However, he noted that "[i]t has been applied much more broadly . . . and has now been generalized in section 90, of the Restatement of Contracts." 115 Having conceded that promissory estoppel, as recognized in section 90, had moved beyond the relatively confined world of charitable subscriptions, Hand retreated from the implication—derived from the New York Law Journal/ Texas Law Review source: "We may arguendo accept it as it there reads, for it does not apply to the case at bar." 116 It did not apply because this case arose out of the cold, cruel, hard-headed, practical world of the bargain—offers, consideration, counter-offers, promises, counter-promises, exchanges—and not the soft, fuzzy world of donative intent or gratuitous promises, in which people might need to be protected by promissory estoppel "to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise." 117

Hand maintained that the general contractor/subcontractor relationship was not gratuitous; rather, it presupposed establishing a bargain at some point. "[A]n offer for an exchange is not meant to become a promise until a consideration has been re-

114. Id.
115. Id.
116. Id.
117. Id. One of the solutions may be found, believe it or not, in the revival of the sealed instrument, signifying the presumptive enforceability of the donative promise. See id. The passage is accompanied by a "cf." citation to Cardozo's opinion in Allegheny College v. National Chautauqua County Bank of Jamestown, as Executor of Mary Y. Johnston, 159 N.E. 173 (N.Y. 1927), in which Cardozo discussed promissory estoppel in the charitable subscription context, though concluding that the subscription amounted in that set of circumstances to a bargain, precluding the necessity of applying promissory estoppel. The "cf." cite, suggesting comparison, indicates that Hand understood its holding. Both the general and subcontractor briefs cited Allegheny College, and, needless to say, interpreted the holding in the case differently. See Brief for Plaintiff-Appellant, supra note 51, at 14; Brief of Defendant-Appellee, supra note 37, at 23; Reply Brief for Plaintiff-Appellant, supra note 70, at 6. See generally, Alfred S. Konefsky, How To Read, Or at Least Not Misread, Cardozo in the Allegheny College Case, 36 BUFF. L. REV. 645 (1987). Hand was familiar with the debate over the range of the applicability of promissory estoppel. As a member of the American Law Institute, he attended the meeting in the spring of 1926 in Washington, D.C., at which the tentative draft of the First Restatement of Contracts was discussed. See 4 A.L.I. PROC. app. at 5 (1926). In the morning session of April 29, Hand asked a question about consideration doctrine. See id. at 64. During the famous afternoon session of the same day, when Williston defended the draft section on promissory estoppel (section 88 at the time, later section 90), Hand asked an additional question from the floor on a minor, technical point, see id. at 90, but he apparently witnessed the entire, vigorous debate. See id. at 85-114.
ceived, either a counter-promise or whatever else is stipulated.”

He argued that the formal elements must be satisfied, otherwise the bargain fails. “In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff’s acceptance, not for its bid, which was a matter of indifference to it.” The bid may have been a nice idea, but it was not what the subcontractor wanted, which was an acceptance—a promise “to take and pay for” the linoleum—demonstrating that a bargain had been reached. Hand concluded that “[t]here is no room in such a situation for the doctrine of ‘promissory estoppel.’”

Finally, Hand dismissed any notion that an option had been created, allowing the general contractor “to accept the linoleum at the quoted prices if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere,” i.e., engage in bid shopping. Hand did not think the subcontractor “meant to subject itself to such a one-sided obligation.” Under those circumstances, with mutuality lacking, the vulnerabilities and inequalities would lie on the subcontractor’s side. Hand did note that, if such an option had been created, it “might” be supported by promissory estoppel if the general contractor had “acted in reliance upon” the option offer. However, he decided the cases did not support the application of promissory estoppel to the option theory, and in support, he cited two cases drawn from the subcontractor’s brief and used by Swan in his preconference memorandum.

Thus, Hand had found no bilateral contract because the offer had been revoked before acceptance, promissory estoppel did not apply, and an option had not been created. The opinion stands as a pillar of traditional, formal, Willistonian contract analysis. Depending on one’s point of view, Hand also relied on, reflected, was influenced by, or indebted to, the subcontractor’s appellate brief. Some of Hand’s most striking concepts and language are drawn from that document even though the opinion is phrased in his characteristically spartan and crafted manner. Moore suggested the legal means by which the general contractor might “protect” itself; yet, Hand picked up on the insight

118. James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933).
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
and expanded it by drawing general policy implications. "[N]or," asserted Moore, "did it make any difference" to the subcontractor whether the general contractor used its bid; Hand converted that thought into his "indifference" principle.125

The opinion rests on the twin related ideological insights of "protect yourself" and "indifference"; in other words, the central tenets of atomistic individualism embodied in the law of contracts. The problem in the case first appeared at trial in a colloquy during the cross-examination by George Leisure, attorney for the general contractor, of one of the subcontractor's witnesses, Harry R. Grotz, a linoleum contract salesman for Gimbel. The discussion involved Leisure, Grotz, and eventually, an intervening, frustrated, if not incredulous federal district judge. The problem focused on whether the subcontractor "realized" that the general contractor "might act" on the subcontractor's bid.

Q. When you had made this bid you realized that a general contractor might act on that, did you not?
A. Sometimes they do and sometimes they don't. It is never binding; these estimates that we have are never binding.

Q. I didn't ask you for that. The Court will endeavor to determine that question. I am asking you whether or not you sent out your offer or proposal or option or letter, whatever you want to call it, with the impression that the general contractors would use it?
A. I was hoping that I would get a chance to get the job. That was the purpose of the letter.

Q. Won't you just answer the question? Did you or did you not intend that the general contractors should use it?
A. That is not for me to determine. That is for the contractor to decide, which is the low bid.

The Court: What is the use of fencing, Mr. Grotz? Can't you tell me whether or not you expected or hoped that a general contractor would base his bid for the entire job, in part at least, upon your bid for the linoleum?

The Witness: That is the purpose of our estimate.

125. Brief for Defendant-Appellee, supra note 37, at 32. To facilitate comparing Hand and Moore, see Moore on the following subjects. On indifference: "[the subcontractor] had nothing to gain by plaintiff's submission of its own bid to the State," id. at 12; "the defendant had nothing to gain by the plaintiff submitting its own bid . . .," id. at 25; "[d]efendant was not bargaining for, nor did it make any difference to it, whether plaintiff submitted its bid . . .," id. at 32. On protection: "Sufficient safeguards are afforded by the law at the present time to protect an offeree who desires to secure an irrevocable option upon which he may justifiably rely; he may pay consideration for it . . .," id. at 25. There is also brief mention of the seal, see id. at 10, and mutuality, see id.
The Court: It is with that purpose that you sent the estimate, that a contractor would use your figure in computing his figure, wasn't that so?

The Witness: That is the hope, surely.

The Court: That is what you sent it out for, wasn't it?

The Witness: That is the hope.

Q. Mr. Grotz, you sent out 24 letters with no other hope in mind nor not any other intention. There is no dispute about that, is there?

A. There is no dispute about that.126

The lesson that Moore seemed to draw from the dialogue for purposes of legal argument was that the subcontractor did not care about bids, only about the result of bids, i.e. whether it was awarded the contract. It was completely within the discretion of the general contractor to do what it wished; it was only going to select one low bid. Therefore, the conclusion that Moore drew, which attracted Hand's attention, was that the subcontractors had nothing to gain from general contractors submitting bids that included subcontractors' bids, or that it did not make any difference to the subcontractor that the general contractor was "submitting its own bid."127 Just how a subcontractor could be awarded work without first submitting a bid to a general contractor was not explained. What Moore and Hand apparently meant was that the subcontractors were interested only in bargains (perhaps even bargains about how to use or interpret bids), not just bids. However, how a subcontractor could get to a bargain without a bid was not spelled out. The term "indifference," therefore, probably had a very limited meaning.

What Hand must have meant by the term "indifference" was that the subcontractor was indifferent legally, or as a matter of law, about whether the general contractor used the subcontractor's bid, particularly if the general contractor's use of the bid was not treated as an acceptance. The general contractor's use of the bid had no legal consequences, setting the scene for an effective revocation prior to acceptance. If the general contractor wished to change the legal character of the offer from revocable to irrevocable, it was free to do so within the standing rules. The subcontractor could go from being "indifferent" to being "interested," and technically obligated, if a bargain was created on the subject, or if the general contractor accepted the offer. Only con-

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126. Transcript of Record, supra note 21, at 108-09.
127. See Brief of Defendant-Appellee, supra note 37, at 12, 25, 32.
consideration automatically transformed the subcontractor from indifferent to interested and permitted the general contractor to rely on the subcontractor's bid. The general contractor could protect itself if it wished; if it did not, the formal rules operated ruthlessly.

It is hard to believe that, as a sophisticated and subtle observer of the way the world works, Hand could have concluded that the subcontractor was indifferent economically to whether the general contractor used the subcontractor's bid in bidding on the total project. Obviously the firms were not directly linked economically. They were separate firms with separate assets and were not financially "interested" in one another. In a common-sense way, is the subcontractor not just a tiny bit curious about whether the winning bid by the general contractor contained the subcontractor's bid? This curiosity, however, did not affect the legal result unless the general contractor acted to change the subcontractor's indifference to a bargain through consideration and, thereby, transformed indifference into a legal commitment. The parties became interested in each other only when they reached a bargain signifying that they had legal rights against each other that could be enforced in the event of breach. Then, the parties were protected, but only then. Furthermore, the categorical imperative that promissory estoppel did not belong in the commercial setting guaranteed that precommitment factors, like reliance, would not change the legal relationship. In justifying the result in Baird, Hand maintained his vision of freedom of contract. He would not force commercial actors into agreements that they did not wish to enter. The rules of offer and acceptance compelled that result. The autonomy and freedom of the parties were paramount. Until a party indicated a desire to limit its freedom by entering into a bargain, it would be protected from unwanted entanglements. When a party was ready to commit, the law would ratify its decision; nothing less certain would suffice. Everyone knew the rules; judges and lawyers should not try to evade them by distorting everyday understandings and meanings. If a party wanted something else, it could abide by the formalities, and the courts would enforce that choice. Individuals in the domain of contract law demanded no less respect.
2. The Path to Drennan

a. The Trial and the Intermediate Appellate Court

Little is known about the trial in Drennan v. Star Paving. It took place in the Superior Court of Kern County, north of Los Angeles. The case was tried on behalf of the general contractor by a solo practitioner from Bakersfield and on behalf of the subcontractor by an associate in a two-member firm in Van Nuys. The trial judge entered judgment for the general contractor. Among the trial court's findings was that the subcontractor “made a definite and specific offer or bid to perform” the paving work, that the subcontractor's “manner and method of submitting its bid to plaintiff was in accordance with the usual and accepted customs and practices of the local contracting and construction business,” and “[t]hat in reliance upon [the subcontractor's bid], plaintiff computed his final figures . . . and submitted his bid . . . specifically naming . . . the subcontractor selected by him to perform said asphaltic paving work.”128 There is not a single mention of the general contractor's formal acceptance of the subcontractor's offer.

The subcontractor's brief to the District Court of Appeals is merely ten triple-spaced pages, half of which are devoted to reprinting the trial judge's findings. Most of the argument is focused on the “position that there never was a firm bid given to the plaintiff.”129 Because there was no bid, “the basic question of formation of a contract arises.”130 The brief was confused and unfocused, and the word “reliance” was not used once, nor was the term “promissory estoppel” employed. I suppose that choice is understandable if the strategy was simply to emphasize that no offer was ever made so that no formation was possible. On the other hand, promissory estoppel was the winning theory of liability in the case as established by the trial judge's findings; therefore, it probably would not have been a bad idea to at least mention it.

129. Appellant's Opening Brief, supra note 128, at 7. Indeed, part of this argument, later dropped, was the absurd proposition that no bid was ever actually placed on the telephone. See id. at 6.
130. Id. at 8.
The general contractor's reply brief was considerably more sophisticated and, of course, paid substantial attention to promissory estoppel. The general contractor summarized the subcontractor's argument as merely stating "that there is no consideration given for the promise" of the subcontractor.131 "For the sake of this argument," responded the general contractor, "we will agree that consideration for Appellant's promise or bid in the prosaic sense is non-existent here. Nevertheless that fact is not fatal to Respondent's action."132 In other words, it was going to be promissory estoppel, all or nothing. Further, emphasizing that theory was not a fatal strategic move because of the significance of section 90 of the Restatement of Contracts.

As a general proposition, a subcontractor knows of the general contractor's desire to place a bid . . . , and will promise or bid to do such specified work for the general contractor . . . , and the general contractor relies upon the promise or bid of the subcontractors in submitting his bid to the awarding authority . . . .133

This process "is the basic cornerstone of all bidding in the construction business today."134 "[I]t would be unjust and unfair," after the general contractor has been awarded the prime contract, "to allow the subcontractors to then retract their promises or bids and permit the injustice and effect of such retraction to fall upon the general contractor."135 The general contractor maintained that promissory estoppel ought to be applied in this situation "for the benefit and protection of the party who relies upon another's promise to his detriment, such as did the Respondent general contractor in the instant case."136

Furthermore, public policy supported the use of promissory estoppel. The public works bidding process, regulated by state law, "protects the general public" against "irresponsible and unqualified" firms.137

If the subcontractors could withdraw their bids or refuse to perform with impunity after the acceptance of their general contractors' bids, the net result would be uncertain and irresponsi-

132. Id. at 9.
133. Id. at 10-11.
134. Id. at 11.
135. Id.
136. Id.
137. Id. at 13.
ble work and increased costs, to the detriment and injury of the general public, all of which is opposed to public policy and ordinary common sense.  

If promissory estoppel was not applied, "a chaotic state would exist in all public and private construction work in California, and no one could be sure of any fixed bid for such work, to the obvious detriment of the general public."Obviously the economic assumptions underlying the general contractor's brief were different from Hand's view of the problem in *Baird*. California was in the middle of a building boom and, so the argument went, not recognizing reasonable reliance on bids would lead to chaos. Yet, it was a chaos ratified by Hand in the autonomy of individual actors free to do what they wanted unless they protected themselves. Ironically, the general contractor's brief in California asserted implicitly that Hand's model, with its emphasis on individual conduct, did not allow for rational economic planning because each individual actor was free to go their own way. Hand's particular set of certain and predictable offer and acceptance rules promoted "chaos." A modern certain and predictable rule was needed to insure order. Oddly enough, however, neither brief at this stage cited or discussed *Baird*. Neither did the opinion of the California District Court of Appeals in affirming the superior court's judgment. The district court briefly examined the trial court findings that "a definite and specific offer or bid" had been made and that, "in reliance upon . . . the bid, plaintiff computed" and "submitted" his own bid, and the court held that they were "supported by substantial evidence" and could not be disturbed. The court went on in a cursory fashion to conclude, after examining two cases, that promissory estoppel was recognized in California and that the doctrine was "applicable under the facts and circumstances shown by the record herein." No other discussion or elaboration occurred—no mention of the revocability of offers, the suitability of promissory estoppel, or the implications of the outcome on bidding practices in the construction industry.

138. *Id.* at 13-14.
139. *Id.* at 14.
141. *Id.*
b. The Petition and Reply for a Hearing in the Supreme Court

In its petition for a hearing in the California Supreme Court, the subcontractor listed a number of important questions that needed to be settled. The very first question, according to the subcontractor's new appellate attorney, was "Is this a case of breach of contract, or does the doctrine of promissory estoppel apply?"142 "It is the defendant's contention," argued the petition, "that the question at issue was not the question of promissory estoppel," as framed by the district court, "but that the primary and probably sole issue was whether a contract was made between the parties as a result of the alleged bid by the defendant, and the plaintiff's actions thereafter."143 No contract could have been made because the general contractor selected the subcontractor's bid without the subcontractor's knowledge, and therefore, the subcontractor had revoked the bid before the subcontractor even knew that its bid had been used by the general contractor. The conventional rules of offer and acceptance dictated that an offer may be revoked prior to acceptance.144 The issue that the petition urged on the supreme court was whether a contract could have been formed under the conventional rules and, if not, could promissory estoppel somehow overcome an otherwise effective revocation.

The general contractor's short reply to the petition urged its denial on the grounds that the district court had "properly affirmed" the general contractor's promissory estoppel "theory of the case" and applied the theory correctly to the facts. In addition, there were no unsettled questions of law worthy of the supreme court's exercise of discretion for review.145 Concerning the settled nature of the law, the general contractor placed primary emphasis on exactly one case, a case it had cited in its brief to the district court,146 a case not from California, but a 1943 case from the South Dakota Supreme Court, Northwestern Engineering Co. v. Ellerman.147 The reply to the petition pointed out that the

143. Id. at 3.
144. See id. at 4-5.
146. See Respondent's Reply Brief, supra note 131, at 11.
147. 10 N.W.2d 879 (S.D. 1943).
South Dakota decision was "on all fours with the instant case."\textsuperscript{148} The South Dakota decision was indeed a subcontractor/general contractor bid case that applied promissory estoppel to its facts. However, more importantly, it contained a rejection of the reasoning in \textit{Baird v. Gimbel}, "despite the eminence of its author."\textsuperscript{149} The \textit{Baird} case had yet to surface in any of the papers filed in the litigation, which is particularly surprising given the subcontractor’s legal position in the case. However, that changed soon after the California Supreme Court granted the petition for a hearing.

c. \textit{The Appellate Briefs}

At the California Supreme Court level, the subcontractor’s attorney suddenly shifted gears when he realized he had a “mistake” case on his hands. The attorney devoted about half of the argument in the brief to the mistaken bid and its legal consequences. Not until the very end of the brief did the attorney revisit the issue of promissory estoppel, urging that it was not applicable to the facts of the case.\textsuperscript{150} The general contractor seemed “to base his entire theory of his right to recover on this proposition: [t]hat even though no bilateral or enforceable contract was made, the appellant should respond in damages under the doctrine of ‘promissory estoppel.’ ”\textsuperscript{151}

The subcontractor’s position was simple—promissory estoppel did not apply because it is confined to cases of donative intent, in which one “does not expect to receive an equivalent consideration in return” and in which it “would shock the moral conscience, to permit the moral promisor to refuse to carry out his promise.”\textsuperscript{152} On the other hand, “where an offer is made in expectation of a consideration it becomes merely a matter of offer and acceptance, and the well-known doctrine that an offer can be revoked before acceptance is made known, would apply.”\textsuperscript{153} If, at this point, the subcontractor’s brief had cited \textit{Baird v. Gimbel} for that proposition, everything would have appeared correct. Instead, the \textit{Baird} citation followed the next troubling sentence:

\begin{itemize}
\item \textsuperscript{148} Respondent’s Reply to Appellant’s Petition, \textit{supra} note 145, at 5.
\item \textsuperscript{149} E/erman, 10 N.W.2d at 883.
\item \textsuperscript{150} See Appellant’s Supplemental Brief at 19, Drennan v. Star Paving, 333 P.2d 757 (Cal. 1958) (No. L.A. 25054).
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 20.
\end{itemize}
“In such case also, an offer made through mistake or error can be rescinded even after acceptance.”\textsuperscript{154} Although it probably made no difference in the long run, this was a misstatement of the holding in \textit{Baird} (and a little reminiscent of how the parties misused the facts and holding in \textit{Allegheny College} in the \textit{Baird} briefs). Maybe it was just a careless reading or an overstatement made by a zealous advocate. However, it did create confusion and left the impression that the revocation in \textit{Baird} occurred after acceptance had taken place. If that was true, when was there an acceptance that formed a bilateral agreement in \textit{Baird}? Was the acceptance the use of the bid, as was argued by the general contractor in \textit{Baird}? It could not be that, in \textit{Baird}, a revocation occurred after any other type of acceptance because clearly a revocation was received before a formal acceptance. The subcontractor’s brief did not help its case.

The general contractor’s reply brief began by noting that the defense of mistake had been raised for the first time in the subcontractor’s brief on appeal. It claimed that, because the defense was only being raised at this late stage, it should not be considered now.\textsuperscript{155} Most of the rest of the reply brief was devoted to an elaboration of promissory estoppel doctrine and an explication of its applicability to the case.

The subcontractor’s bid “caused Respondent to rely on the bid in submitting his final and irrevocable” bid to the public authorities. “There is no question” that the subcontractor could have withdrawn the bid before the general contractor used it, “but its attempt to withdraw was subsequent to Respondent’s irrevocable change of position” and the awarding of the project to the general contractor.\textsuperscript{156} If the subcontractor’s position prevailed, injustice would result, fair play would be denied, and losses would be “force[d] down the throat of every general contractor.” In addition, “a pad for ‘rescission insurance’ ” would be added to bids, presumably to protect profit margins and to spread the costs of whatever posted bonds might be forfeited. “Chaos,” argued the general contractor, would reign “throughout the construction industry in California today, [and the court] should be well aware of the fact that the major portion of heavy construction in the

\textsuperscript{154} Id.


\textsuperscript{156} Id. at 6.
State of California today consists of public works projects."157 The general contractor maintained that the solution was to apply promissory estoppel.

"In California," the general contractor remarked, "our Courts have assumed leadership in the development of the doctrine of promissory estoppel."158 The reply brief spelled out the elements of a promissory estoppel claim under section 90 of the Restatement of Contracts and demonstrated how the elements were satisfied. The argument was that "[e]stoppel is a proper substitute for consideration" when the subcontractor promises "to do specified work . . . with knowledge" that the general contractor intends to bid on a job and "where the promise or bid is relied upon by the general contractor in submitting his bid to a public body, which bid is accepted."159 Furthermore, "[i]n the field of general construction work where bidding is highly competitive, subcontractors invariably expect their bids (however communicated) to be relied upon by the general contractor and acted upon by him."160 In other words, subcontractors know or understand (for whatever reason—right or wrong, vulnerable or not, equal or not) that the business operates in this way, and the law ought to recognize that practice.

Having vigorously defended the appropriateness of promissory estoppel in the case, the reply brief ended by devoting almost two pages to distinguishing Baird v. Gimbel. The attempt to distinguish Baird was garbled factually and contained an inaccurate statement that could have weakened the general contractor's chances in Drennan—that, in Baird, the general contractor had time after receiving notice of the revocation to submit a new bid on the overall project.161 However, regardless of the result in Baird, the reply brief stressed that Baird "has been severely criticized in law review articles . . . and was not accepted" in the South Dakota case cited in the general contractor's briefs.162 Most significantly, "in 1933, when the Baird decision was rendered, the construction industry was not the basic backbone of our economy that it is today."163 Of course, that suggested that the Baird rule was outdated and not currently functional—a gen-

157. Id. at 9.
158. Id. at 10-11.
159. Id. at 10.
160. Id. at 11-12.
161. See id. at 16.
162. Id. at 17.
163. Id.
eral theme that, as we will learn shortly, was of some interest to Traynor.

Just in case, however, the general contractor appended to its brief a cautious alternative to the promissory estoppel analysis. The general contractor accepted the subcontractor's bid when it appeared the next morning at the subcontractor's office. However, unlike the general contractor's argument in Baird, the contention here was not that the use of the bid amounted to an acceptance. The general contractor, according to this argument, had accepted the offer when it told the subcontractor face-to-face that it had been awarded the primary contract. Either a bilateral contract or promissory estoppel obligated the subcontractor, but the overall argument was keyed to promissory estoppel. The general contractor's brief quickly returned to the Ellerman case for a final quotation and exhortation on the rationality of adopting promissory estoppel in subcontractor/general contractor bidding situations. The California Supreme Court accepted the invitation both to apply the analysis and to use the quotation, but only after an almost perfunctory oral argument.

d. The Oral Argument

The opinion of the court was not affected by oral argument. In fact, it seemed to contribute nothing of significance to Traynor's eventual opinion. In 1958, the California Supreme Court allocated thirty minutes per party for oral arguments. The fourteen and one-half page transcript of the argument would lead one to believe that the argument consumed a total of only thirty minutes, rather than the full hour to which the parties were entitled. Almost two-thirds of the argument was devoted to the subcontractor's opening presentation and rebuttal, but the general contractor's argument accounted for only one-third of the time. The justices' participation in the argument was distinguished by their silence. Only Chief Justice Gibson asked any questions, and almost all of them were directed towards the subcontractor—probably a bad sign for their position. Once the general contrac-

164. See id.
165. See id. at 18.
166. During this period of the California Supreme Court, a court reporter's transcript was made of each oral argument before the court. The arguments might prove to be a useful, untapped source for legal historians. Some transcripts may be found in the individual case files housed in the California State Archives in Sacramento.
tor’s argument began, Gibson interrupted only once with a question. Traynor did not say a word. Chief Justice Gibson asked a total of only nine questions and seemed primarily concerned, even a little impatient, with moving the argument along.

Appellants, of course, carry special burdens in arguing for reversal. Even so, the subcontractor’s attorney, Norman Soibelman, should have been alarmed at the inauspicious way his argument began when Chief Justice Gibson badgered him and boxed him into an appellate corner. The introductory dialogue provided the only sparks in the oral argument and revealed that the Chief Justice, if not his colleagues, had already made up his mind. He seemed to suggest that this was an open and shut reliance case, as the subcontractor’s lawyer desperately tried to fend off the conclusion.

THE CHIEF JUSTICE: The trial court found that there was a definite bid to perform the job. Is there substantial evidence to support that finding?

MR. SOIBELMAN: There was contradictory evidence, if your Honor please.

THE CHIEF JUSTICE: If there was substantial evidence to support the finding you are bound by it, and there is the further fact that there was reliance upon the bid.

MR. SOIBELMAN: We have to go further than that, if your Honor please. Reliance itself is not sufficient.

THE CHIEF JUSTICE: Why not?

MR. SOIBELMAN: As I see it, there has to be something more than that. There has to be damages. There has to be a right to rely on.

THE CHIEF JUSTICE: Well, a man makes a bid and says, “I will do this job for so much money,” and the contractor says, “All right, I accept your bid.” In reliance upon that bid he proceeds with the work. Why hasn’t he a right to rely upon that definite bid?

MR. SOIBELMAN: If your Honor please, at that moment he has a right to rely on it.

THE CHIEF JUSTICE: All right.

MR. SOIBELMAN: But then there comes a time when it is shown that that bid was a bid made in error. Then we have something more than the rule of law to apply. We have the rule of equity . . . the rule of rescission, the right to rescind by reason of mistake . . . .168

Quickly seeking to alter the focus after this ominous, opening flurry, Soibelman tried to deflect the reliance argument by retreating to a position that framed the case as a common bidding-mistake situation that fit into standard equitable rescission categories, a position raised for the first time in the brief he filed with the supreme court. 169 “With respect to reliance and the doctrine of promissory estoppel, . . . it would be unconscionable to enforce what would be the rule of law, rather than the rule of equity.” 170 The court had to select between “two conflicting or two equal, well-established rules of equity involved in this case, one the doctrine of promissory estoppel and the other the equitable doctrine of rescission.” 171 But the argument focused on the grounds for rescission for mistake, generally ignoring the assertion of liability under promissory estoppel terms. Thus, the subcontractor strategically pinned its hopes on a rescission theory and ignored the facts that did not support the legal elements of a promissory estoppel claim.

Drennan's lawyer, S.B. Gill, immediately sensed the weakness in his opponent's argument and took advantage of it by cleverly emphasizing the appellate court's limited role. “We started out in the trial court,” he reminded the justices, “with the doctrine of promissory estoppel as our basis for recovery. We stuck to that point before the District Court of Appeal, and the point of rescission was never raised in the pleadings or before the District Court of Appeal.” 172

The rest of the general contractor's argument amounted to approximately a ten minute, uninterrupted soliloquy. Abruptly rejecting the factual and legal foundation and the pretension of the rescission cases, Gill promptly redirected the court's attention to promissory estoppel:

[T]his Court has taken as the basis for promissory estoppel, both theories of contract and theories of tort, and they are justified in either situation, but it all boils down to this. The name of promissory estoppel is new. The application at the present

169. See id. at 3-8; see also supra text accompanying note 150.
171. Id. at 5. The Chief Justice asked Soibelman if he thought that the rules in California rescission cases like M.F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7 (1951), applied to the facts in the Drennan case. See Reporter's Transcript, supra note 168, at 5. In his opinion, Traynor disposed of the relevance of the line of California rescission cases, beginning with Kemper, in precisely one sentence. See Drennan v. Star Paving Co., 333 P.2d 757, 761 (Cal. 1958).
time may seem somewhat new . . . , [b]ut it is as old as the doctrine of contracts itself . . . .

Why? "[B]ecause when we stop to think about it, a simple contract in the first instance was made in the basis of a reliance action and reliance upon the promises made by the promissor, and not as it is today, a promise bought for consideration or a price."¹⁷³

Gill concluded by echoing the policy refrains drawn from his appellate brief. "We have to go beyond the matter of promissory estoppel in this case also. There is a matter of vital policy involved," he implored.¹⁷⁵ He further added:

[The heavy industry in this case is one of the basic backbones of our economy. We didn’t have the recession [sic] in California that we had through the rest of the country because of the success of our building industry, and we are coming out of it faster because of the stability in the industry.]¹⁷⁶

That stability would be threatened if general contractors could not rely on subcontractors’ bids. “The tax payers of the State of California would suffer from interminable delays. The price of construction would go up radically if this were permitted in this type of situation.”¹⁷⁷

The entire argument on both sides concluded without a single mention of Hand’s opinion in Baird. Virtually nothing in the oral argument would find its way into Traynor’s opinion. The attorneys were not much help, and if Traynor was to develop the law of promissory estoppel on this subject, he would have to do it himself.

e. The Traynor Opinion in Drennan

Justice Traynor began his opinion in Drennan v. Star Paving by summarizing the interactions between the parties and the trial court’s resolution of those events. He introduced his analysis by relating the subcontractor’s argument “that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communi-

¹⁷³. Reporter’s Transcript, supra note 168, at 11-12.
¹⁷⁴. Id. at 12.
¹⁷⁵. Id.
¹⁷⁶. Id. at 13.
¹⁷⁷. Id.
icated his acceptance to defendant”—a position entirely compatible with *Baird v. Gimbel*; however, the case is not mentioned at this point in the opinion. Traynor determined that “[t]here is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff’s use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff’s use of defendant’s bid as the acceptance . . . .”179 In other words, the result, as enunciated so far, was consistent with the outcome in *Baird*, accepting the premises of the formal system of offer and acceptance. Like Hand, Traynor found “neither an option supported by consideration nor a bilateral contract binding on both parties.”180 Traynor disposed of the arguments that were based on the traditional application of the rules of offer and acceptance in one short paragraph. All that remained now was the general contractor’s contention “that he relied to his detriment on defendant’s offer . . . . Thus the question is squarely presented: Did plaintiff’s reliance make defendant’s offer irrevocable?”181

Traynor’s answer to the question began by quoting section 90 of the Restatement of Contracts in full and by observing that “this rule applies in this state.”182 He then analyzed whether the elements required for a promissory estoppel claim under Section 90 were satisfied. “Defendant’s offer constituted a promise to perform on such conditions,” either stated expressly, implied, or by operation of law, and “[d]efendant had reason to expect that if its bid proved the lowest it would be used by plaintiff,” and defendant induced the plaintiff’s definite and substantial action.183

What about the legal relationship between the subcontractor’s bid or offer and rules governing revocation? “Had defendant’s bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was si-

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179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* Section 90 of the Restatement (First) of Contracts reads: “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.” *RESTATEMENT OF CONTRACTS* § 90 (1932).
lent on revocation," and therefore, the task in this case was to determine whether a limitation on the right to revoke might be derived by the operation of law or inferred from the circumstances. For assistance in answering this question about bilateral

184. *Id.* It is unclear why the offer's silence on revocation matters because one could presume that the operation of legal rules on revocability would provide a good indication of the intention of the parties. In other words, why not assume that in the absence of any mention of the subject, the parties assume that the existing legal rules apply? However, Traynor seems to treat the absence of formal terms or discussion on the subject as an invitation to determine what the real intent of the parties must have been. The logic seems to go something like this: If the subcontractor is the master of the offer, the master can indicate any terms in its offer that it so chooses. If the master says nothing in its offer about revocation, how do we know that it meant to incorporate in its offer generally applied norms of revocation that we assume it knows, understands, agrees with, or wishes to apply to this transaction? We should be able to look elsewhere to figure out what the intent of the offeror might be in the absence of any direct communication on the subject. This predilection for moving beyond or overlooking the presumptive operative effects of legal rules to the "real intent" of the parties is more than a little reminiscent of Traynor's approach to the parol evidence rule. In the well-known case of *Masterson v. Sine*, 436 P.2d 561, 565 (Cal. 1958), he employed the "silence" strategy to avoid the restrictive operation of the parol evidence rule. "The option clause in the deed in the present case does not explicitly provide that it contains the complete agreement, and the deed is silent on the question of assignability." *Id.* at 565. Normal legal assumptions about assignability might apply in the face of the failure to mention the subject, but then how can we be sure we are interpreting the contract in the way the parties intended? A modern discussion of the problem might focus on default rules. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. Legal Stud. (1990). The point seems to be to reject the formalistic overtones of the application of the rule and to set to sea in search of the subjectivity that words or their absence might inadequately express. It could be Corbinism run rampant, and its effect might be the practical obliteration of the parol evidence rule already riddled or eaten up by exceptions. On the other hand, it may actually reveal the true intentions of the parties as opposed to frustrating the pursuit of that intention occasionally when the rule is strictly applied. For approval of Traynor's approach, see W. Richard West, Jr., Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 Stan. L. Rev. 547 (1970). For criticism of one aspect of the approach (as exemplified in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 F.2d 641 (1968)), see the opinion of Judge Kozinski in *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988), particularly his charge that Traynor's approach "chips away at the foundation of our legal system." *Id.* at 569. For a less alarmed evaluation of Traynor's views by a different Ninth Circuit panel implicitly chastising Kozinski's rhetoric, see *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 496-97 (9th Cir. 1988). Believe it or not, the *Wall Street Journal* chimed in on the debate on the occasion of Kozinski's opinion, praising the good judge, and criticizing Traynor. See L. Gordon Crovitz, *Rescuing Contracts From High Weirdness*, Wall St. J., August 3, 1988, at 18. I feel safer at night knowing that someone in the *Wall Street Journal* is reading Federal Reporter advance sheets or, better yet, that there is a fully functioning public relations office hidden somewhere in the recesses of the Ninth Circuit. For a more sanguine analysis than Judge Kozinski's of the fate of the parol evidence rule in California, see Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. Rev. 1 (1995).
contracts, Traynor looked by analogy at the rules governing the formation of unilateral contracts.

In the world of unilateral contracts, Traynor noted that "the theory is now obsolete that the offer is revocable at any time before complete performance." Section 45 of the first Restatement of Contracts had changed that, and Traynor quoted the rule that altered what generations of law students had endured as the "climbing the flagpole" or "crossing the Brooklyn Bridge" hypothetical. If the offeror had promised to pay the offeree one hundred dollars for climbing the flagpole, under unilateral contract rules, a contract would not be formed until the performance-reaching the top of the flagpole—had been completed. Therefore, the offeror had the right to revoke the offer even though the offeree had started performance and was halfway up the flagpole. Section 45 changed the rule, and according to one of the comments to section 45, it changed it because "[t]he main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer . . . [p]art performance or tender may thus furnish consideration for the subsidiary promises." The comment also suggested that "merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)."

Traynor noted that, in the unilateral contract situation, the implied subsidiary promise precluded the "injustice" of allowing revocation after someone had started performance in reliance on the promise, i.e. venturing halfway up the flagpole. He also concluded that the analogy could be applied in the bilateral context, as well as in the unilateral context. "Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract."

The analogy only partially worked. In the bilateral contract setting, Traynor asserted that "the absence of consideration is not fatal to the enforcement of such" an implied subsidiary promise

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185. Drennan, 333 P.2d at 759.
187. RESTATEMENT OF CONTRACTS, supra note 186.
188. Drennan, 333 P.2d at 760.
The unilateral contract promise not to revoke hinged on an implied mini-bargain or exchange supported by consideration—tendering of part performance produced a promise not to revoke. However, Traynor argued that the reference in comment b of section 45 to section 90 "makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.'" Although revocation rules in the unilateral contract situation conformed to the bargain theory of consideration, consideration under the bargain theory was missing in bilateral contexts that had only the reliance of one of the parties to show for it. Traynor's conclusion, therefore, was that "[r]easonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding." Traynor engaged in a very subtle, and somewhat thinly veiled, attack on consideration as a required element in all bilateral contracts.

Traynor suggested that, in a commercial context, there might be alternative reasons for enforcing agreements that lacked consideration. The justification for this form of analysis came from a sister supreme court—South Dakota in the Ellerman case. Traynor employed a fuller version of the quotation from the case that had closed the general contractor's brief. The Ellerman court had written that, in enforcing promissory estoppel in the bidding process, "[w]e cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application." The passage quoted by Traynor from the South Dakota case focused on the fact that the promise, unsupported by consideration, ought to be enforced anyway because the subcontractor "should have reasonably expected [that it] would [have induced] the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of

189. Id. Traynor's use of the word "fatal" may have been drawn from the discussion of consideration in the general contractor's brief in the district court. See supra text accompanying note 132.
190. Dreman, 333 P.2d at 760 (quoting 1 Corbin, Contracts 634 et seq.).
191. Id.
192. Id. (quoting Northwestern Eng'g Co. v. Ellerman, 10 N.W.2d 879, 884 (S.D. 1943)).
the promise."\textsuperscript{193} The quotation and its cite to \textit{Ellerman} is followed by a very quiet, lonely citation—some have commented on its "coyness"\textsuperscript{194}—cf. \textit{Baird v. Gimbel}.\textsuperscript{195} Traynor seemed to suggest that \textit{Baird} offered an alternative analysis although he refused to follow its model.

The rationale for adopting promissory estoppel follows almost as an attempt to explain why injustice can be avoided only by applying the doctrine to these circumstances. It is worth quoting extensively because it is the most crucial part of the opinion, revealing how Traynor viewed the relationship between the parties and because it is the part of the opinion in which Traynor most thoroughly rejected Hand's view of the legal problem. Self-consciously, Traynor contrasted his approach to Hand's.

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontractor bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.\textsuperscript{196}

From Traynor's point of view, therefore, Hand had missed the point. Just because a formal bargain had not existed on the subject of using the subcontractor's bid did not mean that the sub-

\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{KNAPP & CRYSTAL, supra note 3, at 239.}
\textsuperscript{195} See \textit{Drennan}, 333 P.2d at 760.
\textsuperscript{196} \textit{Id}. Traynor's point in this paragraph is a little reminiscent of the colloquy between attorney, judge, and witness at the \textit{Baird} trial on the subcontractor's expectations and reasons for entering the bid process. It is, of course, highly unlikely that Traynor had access to the \textit{Baird} trial transcript. Instead, he seems to be employing his intuitive sense of the subcontractor's motivation. For comparison to the \textit{Baird} trial, see \textit{supra} text accompanying note 126.
contractor was not involved in a web of understandings about
the bid or was indifferent to its use. That offered too atomistic a
view of the world. Instead, Traynor stressed a combination of two
ideas. First, the subcontractor was interested in having a general
contractor use its bid, particularly a winning general contractor,
because its fate was tied up with the fate of the general contrac-
tor—low bids on parts of the project aggregated to low bids on
the complete project. The subcontractor “had a stake in plain-
tiff’s reliance on the bid.” Second, it was in the self-interest of
the subcontractor for the bid to be used and for the general
contractor to be awarded the contract. Practical, hard-headed
reasons existed to think of the interaction this way. These rea-
sons were just as practical as the reasons that Hand thought con-
cerned the formal rules of offer and acceptance. Self-interest was
reinforced by each party relying on the relationship. It was not
reinforced by sending the other party on his own way. Plaintiff’s
reliance had made defendant’s offer irrevocable.

Traynor left a few loose ends to be tied up in the rest of the
opinion. Technically, the general contractor may not be required
to hire the subcontractor after receiving the award for the over-
all project. Because the application of promissory estoppel gave
the general contractor an opportunity to accept the subcontrac-
tor’s offer after being notified of the award of the general con-
tract, the general contractor was “not free to delay acceptance
. . . in the hope of getting a better price” (perhaps elsewhere),
“or reopen bargaining with the subcontractor” (perhaps with the
hope of getting a lower price from the subcontractor anxious to
get the job).197 If the general contractor reopened bargaining, he
ran the risk of forfeiting the “continuing right to accept the
original offer.”198 Otherwise, the subcontractor would be placed
in a vulnerable or unequal position, and Traynor tried to prevent
the problem of bid shopping. One party should not be allowed
to suffer at the expense of another just because promissory es-
toppel was the preferred solution.

197. Drennan, 333 P.2d at 760.
198. Id. The scholarly literature is replete with discussions of whether allowing the
general contractor the right to shop around while binding the subcontractor is fair,
equal, or efficient. Compare James Gordley, Enforcing Promises, 83 CAL. L. REV. 547, 612-13
(1995), with Avery Katz, When Should an Offer Stick? The Economics of Promissory Estoppel in
Preliminary Negotiations, 105 YALE L.J. 1249, 1277-78 (1996); see also infra text accompany-
ing notes 289-95. I am somewhat of an agnostic on the academic debate over which is
the “better” solution—Hand’s or Traynor’s. Rather, I prefer to focus on the historical
process by which Traynor arrived at his conclusion.
The question of mistake remained. "If plaintiff had reason to believe that defendant’s bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it." Traynor decided that the general contractor, "however, had no reason to know that defendant had made a mistake in submitting its bid" because the subcontractor’s bid fell within the variance in bids for projects of that type in that locale. "Under these circumstances defendant’s mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost of doing the paving." The subcontractor should have been more careful because it knew that it was preparing bids that would be relied on by others. "Moreover, it was motivated by its own business interest." The subcontractor’s error on these facts “should not defeat recovery under the rule of section 90 of the Restatement of Contracts. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it.”

There were no surviving impediments to applying promissory estoppel.

III. THE CASES COMPARED: TRAYNOR’S DIRECT RESPONSE TO HAND

There are a number of factors that would lead one to believe that Traynor directly targeted Baird in Drennan, particularly elements such as structure, law, language, and ideology. Those elements, combined with Traynor’s extrajudicial discussions of Drennan, as well as his general views on precedent and the evolving nature of law, encourage one to think that the Drennan opinion was more than a coincidence and was more likely an opportunity.

199. Drennan, 333 P.2d at 761.
200. Id.
201. Id.
202. Id.
203. For a discussion about where the loss caused by mistake might fall, see SCOTT & LESLIE, supra note 4, at 245. Traynor also dismissed the subcontractor’s argument that the cause of action ought to be dismissed for failure to allege an attempt to mitigate damages, ruling instead that the general contractor “clearly . . . acted reasonably to mitigate,” and that the defendant had waived any objection to the pleadings on the subject by not raising the issue by special demurrer. Drennan, 333 P.2d at 761.
A. The Internal Evidence

1. The Structure of the Legal Rules

In the twenty-five years after Hand's decision in Baird, no judge considered the legal categories discussed in Baird as seriously and carefully as Traynor did in Drennan. For logical and organizational reasons, Traynor telescoped into one introductory paragraph both Hand's rejection of the general contractor's bilateral contract formation argument (acceptance occurred when the general contractor used the subcontractor's bid) and his rejection of the option contract analysis. In effect, he streamlined what was, in his view, an unnecessary technical debate so that he could proceed with the promissory estoppel analysis. This strategy is particularly noteworthy because the general contractor in Drennan never argued that the use of the bid was an acceptance or that an option had been created. Instead, it created a fallback position that an acceptance prior to revocation had taken place after the general contract had been awarded. In fact, in his careful summary of the parties' legal "contentions," Traynor never ascribed to them an argument about the bid as acceptance. Where else could Traynor have seen the argument other than in Baird, and why bother to discuss it if the parties had not raised the issue in Drennan?

After quickly disposing of the revocation analysis, Traynor addressed promissory estoppel in the same place and order in the opinion that Hand did. However, Traynor spent no time at all discussing whether the doctrine applied to commercial transactions—a theme that was still being discussed in one of the intervening cases cited by Traynor. He simply ignored the problem, explaining that promissory estoppel had been adopted in California and applying the doctrine to the facts of the case.

204. See, e.g., Northwestern Eng'g Co. v. Ellerman, 10 N.W.2d 879 (S.D. 1943); Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Albert v. Farnsworth & Co., 176 F.2d 198 (5th Cir. 1949).
205. See Drennan, 333 P.2d at 759.
206. See Respondent's Reply Brief, supra note 155, at 17.
207. Robert Gordon, 117 F.2d at 661; see also Ellerman, 10 N.W.2d at 883-84. For an important discussion of the evolution of promissory estoppel's applicability to bargain or commercial transactions, see Henderson, supra note 7. For insights about where Baird and Drennan fit in that evolution, see id. at 355-57.
2. Language

The most striking example of the identical use of language is the concept of “indifference.” No other case uses the concept. The phraseology is employed to describe the same event in both opinions—the legal implications of the use of the subcontractor’s bid by the general contractor in submitting its bid. Hand argued that the subcontractor’s offer was to provide the linoleum only if the general contractor formally accepted the offer, “not for its bid, which was a matter of indifference to it.” When Traynor examined the same event, he drew different conclusions, but used the same language. “Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not.” He continued to emphasize his disagreement with the indifference principle in the very next sentence, beginning with the phrase “on the contrary”: “[o]n the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract.”

The paragraph in which Traynor discussed indifference immediately follows the citation of Baird at the end of the preceding paragraph. The “cf.” citation to Baird, at that point, served as an invitation to compare the Baird approach on the use of promissory estoppel (i.e., rejecting it) with the quotation from the Ellerman case (i.e., adopting, defending, and applying it). However, Traynor then took the occasion to accept his own invitation to examine and to compare Baird with his own approach in Drennan. Traynor began with indifference because the appropriateness of promissory estoppel in these circumstances hinges on its implications.

The use of indifference, therefore, occurs in the same place in both opinions—in the discussion about reasons for the rejection or for the application of promissory estoppel. Hand used the word in his paragraph that explained why promissory estoppel should not be used in the commercial context. His point in invoking the concept was to support his belief that this was a conventional bargain and that no contract on the subject would be found because, without a bargain about the use of the bid, the subcontractor was indifferent about what the general contractor did with the bid. Indifference is deployed as a strategy to ration-

208. Baird v. Gimbel, 64 F.2d 344, 346 (2d Cir. 1933).
209. Drennan, 333 P.2d at 760.
210. Id.
alize the rejection of promissory estoppel. Traynor likewise discussed indifference in the context of promissory estoppel. Indifference is an impediment to Traynor's analysis of promissory estoppel, and he must explain its inaptness. Traynor's entire paragraph defending the use of promissory estoppel is a rejection of the indifference principle. In its place, he suggested that a form of commitment or obligation, through reliance, should be substituted for indifference. It is in the best interest of the subcontractor to pursue a commitment to the general contractor, and that interest logically calls for legal recognition through promissory estoppel.

3. Ideology and Indifference

Hand's view of the case's resolution was driven by a particular image of self-interest: people should understand that expressions of self-reliance are the only recognized interests in contract law applied to business obligations. "[I]t does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." So protect yourself; be vigilant; do not enter into bargains you do not wish to. The law's purpose was to further this individualistic, atomistic conception of society on the assumption that in the long run everyone benefited under conditions of freedom that encouraged individual productivity and increased wealth. People were free to choose whether to enter into transactions. When the particular legal rules governing a transaction were in question, the courts stood back and let the parties tell them what to do. The courts will not force or coerce people into going where they do not wish to go. Freedom of contract also means the freedom not to contract, which must be guarded closely for the very reason that an expression of the freedom of contract involves a voluntary, consensual limitation of that freedom. The reason you limit your freedom is because you get something in return, you calculate that it is in your interest—that calculation is the central tenet in the explanation of the psychology motivating economic liberalism. A decision not to contract means that you do not choose to limit your freedom because you will not get, in your judgment, something sufficient in return. Thus, judges attentive to issues of personal freedom, need to be particularly careful about binding people in transac-

211. Baird, 64 F.2d at 346.
tions they do not wish to enter. This was no world for soft-hearted paternalistic intervention.

The offer and acceptance rules about revocation are an example of the freedom of contract norms. Because people making an offer are free to revoke the offer before acceptance, they have the right to change their minds and to decide not to contract, or not to limit their freedom in this instance. If individuals wish to alter the presumptive operation of the rule and make revocable offers into irrevocable offers, they need to use a clear sign of intention—consideration for the shift in legal entitlement. The shift in rules may be purchased in some way that indicates a choice to limit the freedom to revoke; it has been made worthwhile to the offeror to make the offer irrevocable. The actors are presumed to be indifferent to anything short of that because it is not signified or ratified by consideration. The subcontractor's stance or proclamation is that, without consideration, it is indifferent. The subcontractor only gets interested in a formal, legal way when its attention or stake is purchased. Protection is provided only to those who have behaved as rational actors in the marketplace act—by asserting individual self-interest.

Traynor had a different idea about self-interest—one stemming from the language of section 90 itself—what the reasonable expectations of the parties should be, given the nature of the transaction. However, one rule did not fit all situations. In his indifference paragraph, Traynor repeatedly invoked reasonable expectations as an alternative to pure individualism—e.g., "[i]t is reasonable to suppose"; "[i]t was bound to realize"; "it was to its own interest"; "[d]efendant had reason not only to expect plaintiff to rely on its bid but to want him to." Traynor was saying to Hand in the language of Llewellyn—your "situation sense" is all wrong. Traynor argued that these parties were not purely atomistic actors meeting randomly in the marketplace. Rather, they were embedded in a relationship in the marketplace—a relationship they engaged in out of mutual self-interest. The subcontractor could not obtain the job unless the general contractor

212. The Restatement (First) of Contracts reads in part: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character . . . ." RESTATEMENT OF CONTRACTS § 90 (1932) (emphasis added). For a discussion of the origins of the reasonable expectations idea, see Catherine M.A. McCauliff, Reprise on a Classical Theme: Can Bargained-for-Exchange Theory Accommodate Promissory Estoppel?, (manuscript at 46 n.10) (on file with author); see also John H. Baker, From Contract to Reasonable Expectation, 32 CURRENT LEGAL PROBS. 17 (1979).

213. Drennan, 333 P.2d at 760.
received the job. The use of the lowest bid helped both parties—why would the subcontractor not hope that the general contractor used its bid if it was the lowest? It is the only way the subcontractor would get the work.

Traynor’s response to Hand seems to be that reliance on others can facilitate one’s own interest or market behavior in an increasingly interdependent, complex world. In his view, it is in the subcontractor’s own self-interest to have the general contractor rely on its bid. Traynor’s model of economic activity in this sphere posits a dialectical relationship between individual self-interest and relational norms, between individualism and altruism. It is possible, I suppose, to conceive of capitalism in terms of a type of altruism, where people just wish to be paid for services offered to each other that each might need, but cannot provide for themselves. But I do not think that is what Traynor is proposing. Traynor wants to adjust the market to modern realities. We sometimes need each other to get what we want: Why not recognize that reliance in law? From Traynor’s vantage point, Hand had a narrow, insufficient idea of what constituted self-interest.

In addition, Traynor seems to suggest that the concept of reliance does not in any way violate freedom of contract and its attendant norm of individualism. Freedom of contract just requires readjustment. The reasonable expectations of the parties seem calculated to fit the remedy in this case within freedom of contract. Traynor says to Hand, in effect, that there is more than one way to think about freedom of contract. How can freedom of contract be undermined if the action of promissory estoppel ends up giving the parties their reasonable expectations? Isn’t freedom of contract maintained by providing for the outcomes that the parties expected? If the market participants believed the process should work in a practical way in this manner, then freedom of contract is enhanced by meeting their needs. It is an expression of their freedom—an elaboration of their understanding. It turns out, after all, that the parties are protecting themselves—as they get what they apparently want. Their reasonable expectations end up being protected.

B. The External Evidence

The evidence that Traynor targeted Baird is supported by a number of external factors. Traynor often went on the extrajudicial record about his attitudes toward social change, legal
change, and precedent. All these attitudes seem to inform his views in Drennan. In addition, he wrote on the Drennan case itself on a number of occasions, and even had some thoughts about the responsibilities of judges in a democratic society—thoughts stimulated by one of Learned Hand’s own most famous extrajudicial efforts. For Traynor, Baird seemed to be a remnant of the past—formalistic, time-bound, and oddly not in keeping or consistent with the rational, orderly evolution of the common law. It was to be discarded in keeping with Traynor’s own attitudes about the necessity of keeping legal change in touch with social change.

1. Social Change

To Traynor, the problem of social change began with an understanding of the lessons of the past. “This much we know,” he wrote, “that we have left the daisy fields, the silent plains of the nineteenth century, when laissez-faire commanded easy acceptance. We could afford then to take extravagant risks and to be heedless of their consequences.” Furthermore, “laissez-faire had ceased to be acceptable by the depression years, the years of reckoning for the age of heedlessness.” In addition, the two world wars “compelled us to realize that each of us has a direct responsibility for the general welfare. Inevitably some part of that obligation had to be made legally enforceable by a society given the opprobrious term of ‘welfare state’ by those who would have it remain static.” In short, “[f]ree enterprises are no longer free in the old sense.” What we needed now, according to Traynor, was a world dedicated to rational social and economic planning that took into account the fact that we were in the midst of “ ‘[t]he Twentieth Century Capitalist Revolution’ ” that “has catapulted us into a new world of collective enterprise wherein great corporations as well as government determine how we live.” Rampant individualism inhibited the change necessary for the benefit of all. The conditions of freedom should be ac-

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216. Id.
217. Id.
218. Id.
219. Id.
commodated to provide for economic prosperity and growth. 220

"Whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve . . . . There is now general agreement that we have moved out of the Ice Age."221

2. Social Change and California

Traynor was particularly concerned about the effects of social change in California. He referred to the enormous growth that occurred in mid-twentieth-century California: "[w]ithin that generation the state evolved from a thinly populated landscape of vast mountains and deserts and farmlands to the seventh largest economy in the world."222 Traynor often discussed data and personal observations in legal speeches and writings: "the population has been increasing at the rate of some 33,000 a month,"223 "[b]y the forties the population rush westward was on, and real estate prices were trending upward,"224 California was "good, despite its massive growing pains,"225 and it "was a forward-looking society. Though not an elder state in the Union, it [was] a pacesetter."226

As G. Edward White observed, "[t]he corpus of legal doctrine created by the California Supreme Court prior to 1940 had been of average size and scope for a moderately populated, predominantly rural state in an age of quiescent government." However, "suddenly California became one of the nation's most populous and most urbanized states, with attendant growth pains."227 In addition, "[j]udicial decisions, in this context, needed to be modernized, so that they could be responsive to the social conditions

220. See id.
of contemporary California life . . . ."\(^{228}\)

White commented that:

More than any appellate judge of his time, Traynor witnessed a dramatic change in the social context of his decisions. If American society in the years between 1940 and 1970 became increasingly complicated, heterogeneous, consumer-oriented, diversified, and dominated by the presence of institutions of government, California was at the crest of those trends. No state in the nation had developed so rapidly.\(^{229}\)

Therefore, when the general contractor's attorney, in his brief in *Drennan*, argued that the construction industry was growing rapidly in California and would be thrown into chaos if the old rules of offer and acceptance applied, and that California was a leader in the invocation of promissory estoppel, he tapped, consciously or not, into one of Traynor's pet themes.\(^{230}\) The theme resonated with Traynor, and progress had its day. Traynor frowned on old ways of looking at the world and welcomed change.

3. Precedent and Law Reform

Because *Baird* was a decision by the federal circuit court of appeals, it technically did not serve as precedent for the California Supreme Court. Nevertheless, Traynor had a broad view of legal decisions in need of reform. If the reasoning of any case might interfere with the development of a rule suited for California, it needed to be addressed and rebuffed. During his tenure, Traynor "helped set the law's ghosts at rest in the past to which they belonged. In property, family law, conflict of laws, taxation, and procedure, he discarded or reformulated older doctrines to recast the law in contemporary terms."\(^{231}\) Of course, his torts and products liability decisions remain prime examples of his reformist impulses. Lest there be any doubt about what was happening in Traynor's decisions, G. Edward White has noted that one of the central, preoccupying themes of Traynor's speeches was "the

\(^{228}\) Id.

\(^{229}\) Id. at 314. For additional confirmation of this observation, see BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 527-28, 531 (1993).

\(^{230}\) See supra text accompanying notes 157-58.

\(^{231}\) SCHWARTZ, supra note 229, at 530 (citations omitted). He also rewrote other doctrines, including the rules of charitable, family, and sovereign immunity. See id. at 529 (citations omitted).
problem of the obsolete precedent.”

Traynor had plenty to say about precedent—of all sizes, shapes, lineages, and jurisdictions. He started at an early age in 1926 in law school with a student casenote that he wrote on the rule from 1603 in *Dumpor's Case.* “The extent to which courts sometime blindly follow precedent” was illustrated by the “history” of *Dumpor's Case.* “It was originally without foundation [and still is,] [i]f no law should survive the reasons upon which it is founded surely it should not be perpetuated if it is founded on no reason at all.” Traynor essentially followed that insight for more than the next half-century.

Though Traynor had been a relatively prolific scholar as a law professor before joining the bench in 1940, he virtually stopped writing, other than in opinions, for the fifteen or so years after his appointment. However, in 1956, he returned in earnest, and began reflecting on his judicial experience. A central theme of this work was precedent, and Justice Traynor did not much care for it.

The examples are almost too numerous to catalogue, but a few will convey the sentiment.

In the interest of coherence as well as efficiency, it is for the courts to consign to oblivion what has proved over the years to be chaff. Now that space and time are at a premium for the storage and study of even superlative matter, it is folly to clutter and confuse work papers with materials that are either obsolete or repetitious or ridden with inept or fallacious analysis that cannot survive the light of reason. Less than ever can we assume that all the good enough thoughts and ways of yesterday are adequate today, however superbly undated some remain.

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It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 469 (1897). Perhaps Traynor was influenced by Holmes's sentiment, published less than thirty years before Traynor wrote his student casenote.
What is indelibly dated as of yesterday may now be a light-year’s distance from problems that reach deep into tomorrow. There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.\(^{235}\)

The theory of judging that emerged was not exactly passive. “The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun . . . .” For “[c]ourts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned and reformulated to meet new conditions and new moral values.”\(^{236}\)

“None of us would disturb the law that is truly and rationally settled.”\(^{237}\) Yet “the plea of reliance would perpetuate archaic precedents.”\(^{238}\) Therefore, “we should examine old rules regularly, as a good workman examines the machines to which he is assigned, to see first if they are properly put together, and then if they are in good working order.”\(^{239}\) Otherwise, “[t]he alternative is to live uneasily with an unfortunate precedent by wearing it thin with distinctions that at last compel a cavalier pronouncement, heedless of the court’s failure to make a frank overruling, that it must be deemed to have revealed itself as overruled by its manifest erosion.”\(^{240}\)

As a judicial strategy, Traynor thought that it was far better to face the fact:

There are of course precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation. Unfortunately a court often lacks the forthrightness to bring about their demise. Instead it may pursue the unhappy alternatives of keeping them alive and kicking irrationally or of sustaining them half alive. It may blindly follow a sorry precedent only because it lacks the wit or the will or the courage to spell out why the precedent no longer deserves to be followed.\(^{241}\)

The lesson was clear. “[D]ogmatic adherence to the past per-


\(^{236}\) Traynor, supra note 215, at 232.

\(^{237}\) Roger J. Traynor, Unjustified Reliance, 42 MINN. L. REV. 11, 14 (1957).

\(^{238}\) Traynor, supra note 221, at 54.

\(^{239}\) Traynor, supra note 237, at 14.

\(^{240}\) Traynor, supra note 221, at 54.

petuates bad law." For his contribution, Traynor, of course, was branded as an activist. However, as G. Edward White has noted:

The term had no such [pejorative] meaning during the years of Traynor’s tenure. Activism for Traynor merely meant a sense that, for a variety of reasons, judicial performance of a given task, as opposed to the performance of the task by a jury or a legislature or an administrative body, furthered the values of rationality, competence or disinterestedness.

Opinions needed to be justified by reason; the past could not stand in the way of reasons forged from social change. Bernard Schwartz has placed a discussion of Traynor in a chapter entitled “Pragmatic Instrumentalism.” The labels, however, are unimportant.

Traynor was suspicious of the term “activism,” referring to it once as “so befuddled a term.” As an interpreter,” he noted, the judge “is necessarily an active analyst and not a passive oracle. An actively analytical judge bears no relation to the ill-defined character, the so-called judicial activist.” As for Justice Traynor, he simply described himself “[a]s one receptive to change but wary of dogma in old forms or new . . . .” Therefore, Traynor viewed Hand’s opinion in Baird as dogma, taking the unusual position on more than one occasion to explain why he thought Drennan was important.

4. Traynor on Drennan

Traynor did not say much on the general subject of contract law in his extrajudicial writings. On occasion, he focused on the Statute of Frauds, urging its reform. However, he primarily confined himself to general observations which revealed his views of the common law. He talked about “property and contracts, where reasonable expectations are the dominant rules of the game,” and “reasonable expectations” informed his promissory estoppel analysis in Drennan. However, he also linked contract

242. Id.
243. White, supra note 232, at 2; see also White, supra note 227, at 307-09.
244. Schwartz, supra note 229, at 527-35.
246. Id. at 1026.
248. See Traynor, supra note 224, at 554-56.
249. Traynor, supra note 245, at 1035.
law to his outlook about the requirement of legal change. In the year following the decision in *Drennan*, he remarked that "the law of contracts was once well served by delightful causeries of learned judges that clarified the meaning of obligation. Such causeries, however, proved inadequate to provide an expansion and diversification of words to correspond with that of business enterprise."\(^{250}\) He announced, "We are taking a new look at contracts."\(^{251}\) The footnote for the observation cited just one case—*Drennan*.\(^{252}\)

Twice in the 1960s, Traynor chose to discuss the *Drennan* case at some length. Significantly, within a year or so after *Drennan* was decided, Traynor began integrating commentary on the case into his general speechmaking. His discussions of *Drennan* in 1960 and 1968 are very similar in their factual renditions, as well as in retracing the steps he took to arrive at his doctrinal result (and he occasionally borrowed from the opinion without benefit of quotation—they were his words after all).\(^{253}\) Traynor recounted his journey from no bilateral contract, through unilateral contract, to promissory estoppel. However, the tale now had a number of more elaborate arguments.

The first argument was doctrinal. Traynor pointed out that under section 45 of the Restatement (First) of Contracts the implied subsidiary promise raised to prevent revocation once performance began was "ingeniously contained within conventional terminology . . . [w]hatever its orthodox language, this implication was contrived to give effect, not to a considered bargain, but to the justifiable expectations of the parties."\(^{254}\) The real purpose or intent of section 45, therefore, was not to continue to enshrine bargain theory, but to pave the road for getting at how the parties expected the relationship to work. This "tacitly opened the way for a shift in emphasis from the language of bargain and consideration to the language of reliance as a basis for implying an enforceable subsidiary promise not to revoke an offer."\(^{255}\) In other words, "[t]he real significance of part performance is not that it may be construed as consideration . . . but

\(^{250}\) Traynor, *supra* note 221, at 48-49.
\(^{251}\) Traynor, *supra* note 235, at 110.
\(^{252}\) See id. at 110 n.4.
\(^{254}\) Traynor, *Badlands, supra* note 253, at 162.
\(^{255}\) Id. at 163.
that it can be identified realistically as one form of reliance."\textsuperscript{256}

From this point in the unilateral contract analysis, it was a short step to its application in the bilateral contract context.

Was it not then possible for other forms of justifiable reliance likewise to call up an implied promise and render it enforceable? We advanced to the analogy, in the offer for a bilateral contract such as the subcontractor’s bid, that reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke. We could not equate this form of reliance with bargained-for consideration as the reliance evinced by part performance had been equated. Thus the issue resolved itself that plaintiff’s reliance served to make the defendant’s offer irrevocable, even though there was no consideration “in the sense of something that is bargained for and given in exchange.”\textsuperscript{257}

In short, “[t]his solution combined the theory of implied promise in section 45 of the Restatement of Contracts with the theory of promissory estoppel set forth in section 90.”\textsuperscript{258}

The second argument identified what the purpose of this doctrinal exercise had been—to attack older rule-bound notions of consideration doctrine that prevented the parties from attaining their reasonable expectations.

Our analysis leading to that decision brought us up sharply against the question-begging word consideration, which labels so many disintegrating trees along judicial trails, awaiting to give dubious shelter to contemporary cases. We looked beyond them to the oaks from little peppercorns growing and placed a contemporary case within the sheltering ambit of contemporary live oaks.\textsuperscript{259}

Therefore, it was time to reexamine consideration doctrine as applied to the subcontractor/general contractor bidding process. Hand’s opinion in Baird was a good example of the intrusion of consideration doctrine and bargain theory in the realm of offer and acceptance. “If in the process of evolution the peppercorn suffered one more diminution of status, few would dispute that it had long evinced no sign of growth other than growing tinier.”\textsuperscript{260}

Therefore, “[j]udges too are bound to have learned from the

\begin{footnotes}
\footnote{256. Id.}
\footnote{257. Id.}
\footnote{258. Id.}
\footnote{259. Id.}
\footnote{260. Traynor, supra note 224, at 560.}
\end{footnotes}
cases that there has been evolution in the law of contracts as in other law, the stir of subterranean growth that will push through ground that has been well tended.”\textsuperscript{261}

The third and final argument, therefore, addressed why legal change was required in \textit{Drennan}. Traynor described the position he faced in the case as one where “the choice lies between an uncomfortably narrow traditional shelter and one expansive enough for the case but as yet untried, though within easy reach.”\textsuperscript{262} When the case arose, “it soon became apparent that the few precedents on comparable problems offered no ready solution to the instant case.”\textsuperscript{263} Realistically what “precedent,” other than \textit{Baird}, could have fit his description? Traynor voiced surprise at the resistance to an obvious resolution, “because the facts are so simple that you may wonder how they could possibly prove baffling to a court.”\textsuperscript{264} So there was Traynor’s view of the Hand opinion—an unsatisfactory “precedent” that made a correct result “baffling” to a court. Traynor, to extend his forest metaphor, simply uprooted the obsolete precedent that stood in the way of new growth.

5. Traynor on Hand

When Traynor ended his almost complete self-imposed extrajudicial silence in 1956, he began by reflecting on “Law and Social Change in a Democratic Society.”\textsuperscript{265} At the very end of the article, he confronted the views of Learned Hand. The subject was civil liberties, not private law, and Traynor was concerned about the position “that courts have no active responsibility in the safeguard of those” liberties.\textsuperscript{266} Courts may “not have the sole or even the major responsibility; but can we say that they have none?”\textsuperscript{267} He quoted Hand’s “haunting words”\textsuperscript{268} from his famous speech entitled “The Spirit of Liberty.”\textsuperscript{269}

\textsuperscript{261.} Traynor, \textit{Badlands}, \textit{supra} note 253, at 163.
\textsuperscript{262.} \textit{Id.} at 162.
\textsuperscript{263.} Traynor, \textit{supra} note 224, at 558.
\textsuperscript{264.} \textit{Id.}
\textsuperscript{265.} \textit{See} Traynor, \textit{supra} note 215.
\textsuperscript{266.} \textit{Id.} at 241.
\textsuperscript{267.} \textit{Id.}
\textsuperscript{268.} \textit{Id.}
\textsuperscript{269.} \textit{Learned Hand, The Spirit of Liberty} 189-91 (1952). Hand’s speech was delivered before a huge crowd, which was estimated at one and a half million, in May of 1944 in New York City’s Central Park on the occasion of an “I Am an American Day” ceremony at which 150,000 recently naturalized citizens were sworn. For a full account
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I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.\textsuperscript{270}

To this sentiment Traynor entered a very gentle, respectful, and pointed demurrer. "But is it not precisely because it lies there that it has declared itself in a constitution to be invoked by courts insistently, unfailingly, against those in power, in legislatures or out of them, who threaten to use that power to make men fearful and finally still?\textsuperscript{271} Like other men and women, "[t]he judges whose job it is to apply it must carry liberty in their hearts even when other men have ceased to . . . Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others?\textsuperscript{272} The responsibility for preserving liberty "in the hearts of men and women" is "a joint concern of judges and people—not people in a symbolic mass—but individuals."\textsuperscript{273} Traynor concluded, "[s]o Learned Hand's words continue to haunt us; one would not say them nay. One would only restate the court's obligation, perhaps as an act of faith."\textsuperscript{274} Traynor simply understood the obligation of judges, in the spheres both of public and private law, differently than Hand.\textsuperscript{275}

of the speech and its reception, see Gunther, supra note 76, at 547-52.
\textsuperscript{270} Traynor, supra note 215, at 241.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} For Hand's deferential view towards precedent, see Gunther, supra note 76, at 148-49, 298-300, 619-20. A measure of Hand's distance from Traynor on the subject is the following from Hand:

Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best as it can, what would be the event of an appeal in the case before [it].

\textit{Id.} at 620 (quoting Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944)). The differences between the two judges' views might be partly explained by their distinctive places in the judicial system (Hand, first as a trial court judge, and then as an intermediate appellate court judge, as opposed to Traynor, always a judge of a court of last resort within a state system), but the evidence indicates that the disagreement ran deeper than that.
IV. CONCLUSION

In 1961, Stewart Macaulay published an interesting and important article: "Justice Traynor and the Law of Contracts."²⁷⁶ Macaulay undertook his task about two-thirds of the way through Traynor's tenure on the bench, but Drennan had been decided relatively recently. Of course, Macaulay was compelled to take account of it. Generally, Macaulay found that Traynor's "work in contracts excites ... academic interest because he is willing, perhaps even eager, to strike out in new directions, overturning and modifying old rules and establishing new ones."²⁷⁷ He also warned that "Justice Traynor's contracts opinions cannot always be taken at face value. Some are ingeniously technical and legalistic with almost no hint of the reasons for all the virtuosity. See, e.g., Drennan."²⁷⁸ Macaulay used Drennan as an illustration of a type of opinion that "involved matchless legalistic argument but shunned any policy discussion."²⁷⁹ The Drennan case, however, placed in the context of a confrontation with Baird, looks like an example of Macaulay's Traynor, implicitly and explicitly, "willing, perhaps even eager, to strike out in new directions."

Macaulay also sought to explain where Traynor fit more broadly into the general theoretical goals of contract policy. He divided these goals into two general categories—"support of the market institution" and "social control to achieve economic welfare." The goals were further subdivided into means to attain the goals: on the market side were self-reliance, and transactional and functional policies, and on the nonmarket side were relief of hardship and economic planning policies.²⁸⁰ Macaulay's problem

²⁷⁷. Id. at 812.
²⁷⁸. Id. at 812 n.1.
²⁷⁹. Id. at 813 n.1.
²⁸⁰. See id. at 813-17. The categories, as acknowledged by Macaulay, see id. at 813 n.4, are not unlike those suggested by a reading of FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, CASES ON CONTRACTS 1-9 (1953), stressing the tension between freedom of contract and the regulation, social or otherwise, of individual bargains. For further development of the insights, see FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 1-14 (2d ed. 1970). See also George K. Gardner, An Inquiry into the Principles of the Law of Contracts, 46 HARV. L. REV. 1 (1932). For Macaulay's own elaboration and application of the models, see Stewart Macaulay, Restitution in Context, 107 U. PA. L. REV. 1133 (1959), and Stewart Macaulay, Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards, 19 VAND. L. REV. 1051 (1966). For a later version, see Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976), and Duncan Kennedy, Distributive and Paternalist Motives in
in classifying *Drennan* was to determine on which side the case belonged—as an example basically of market support activity or as an example of an interventionist model of social control. Macaulay's solution was to place *Drennan* primarily on the market side, though not within all of its policies. He noted that "there is no clear example of the self-reliance policy to be found in his contracts decisions, and many of them reach results directly contrary to those called for by this policy."281 The self-reliance/market policy, according to Macaulay, emphasized that "[w]herever a rational economic man could have protected himself or made a choice the court should not protect the individual or make a choice for him."282 That policy, of course, has more than faint echoes in Hand's opinion in *Baird*, and so it is not surprising to find no trace of it in Traynor's contracts jurisprudence.

On the market side, Macaulay placed *Drennan* within the category of functional policy—as an example of the creation of "generally applicable rules which facilitate bargaining by producing a system or structure in which exchanges can take place. Rules should be adopted which aid quick and rational bargaining . . . ."283 Among the purposes of functional rules is "indicating when reliance will be protected. . . ."284 *Drennan* was an example of a functional rule that, first, protected "reliance by one bargainer, . . . in situations where that reliance is foreseeable by the other party"; second, followed "common business practices rather than attempting to force bargaining into the legal stereotype"; and third, involved "the imposition of absolute liability because . . . the obligation turns neither on a manifestation of choice nor on fault but" instead on Traynor's "view of the demands of functional policy."285

Yet, Macaulay also recognized that *Drennan* potentially fit in more than one category. In general he thought "[a] great deal of overlap among these policies is possible,"286 and that "things will not [always] fit neatly into a single pigeonhole."287 So the decision may also be placed in the nonmarket/economic welfare

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282. *Id.* at 814.
283. *Id.*
284. *Id.*
285. *Id.* at 833.
286. *Id.* at 815.
287. *Id.* at 833.
category, particularly under the relief of hardship policy. The evidence for placing it on the nonmarket side was vague and sketchy—“unsatisfactory” according to Macaulay.

Some of the reasons for finding nonmarket ideas in Drennan have to do with the plight of the subcontractor. It is possible to view the subcontractor/general contractor relationship as a battle of unequals, or the relatively advantaged and disadvantaged. Each party seeks to highlight the manner in which he will be vulnerable or not, depending on the legal resolution. One can see Traynor’s solution as reducing the exposure or risk of the general contractor in the marketplace, even though it might appear that in most situations the general contractor might be the economically superior party as reflected in its larger stake and risk in the overall transaction. Yet, Traynor seemed to compensate for that market superiority by requiring the general contractor to notify the subcontractor immediately of the award of the general contract and, consequently, of the acceptance of the offer that has been made irrevocable by reliance. In other words, Traynor understood that the subcontractor may be vulnerable and sought to adjust the equities between the parties. Yet, he apparently believed that, on balance, the general contractor bears a disproportionate share of risk because it is relying on numerous subcontractors’ bids that eventually may redound to the benefit of subcontractors as well as general contractors.

Macaulay also pointed out that, six years before Traynor decided Drennan, Franklin Schultz had published an empirical study on business practices in the construction industry. Schultz’s data suggested “that some generals, after using a particular sub’s bid in computing their own, when they get the job renegotiate with a number of subcontractors to get even lower bids.”

288. See id. at 844. Macaulay mentioned that “Traynor has had little to do with the relief-of-hardship policy” because, in part, it “stands directly opposed to the transactional policy as a means of supporting the market, which he has so often championed.” Id. at 844. The market transactional policy seeks “to carry out the particular transaction brought before” courts, therefore, “[t]he court should discover the bargain that was made and enforce it.” Id. at 814 (emphasis in original). Macaulay observed that the “bulk” of Traynor’s contracts rulings fell into the transactional category. Id. at 818.
289. Id. at 845-46.
290. See id. at 845 (citing Schultz, supra note 8).
291. Id. There is another way to look at the data: most general contractors who are awarded the general contract do, in fact, “feel bound to give [the] subcontractor the job,” as 65 of the 80 general contractors surveyed responded, and 75 of the 93 subcontractors surveyed “feel bound to do the job” knowing their bid has been used despite an intervening price increase of materials (a different situation from a discovery of a
Schultz thought binding the subcontractor through Section 90, but leaving the general contractor free to bid shop was unfair, and recommended not invoking reliance, thereby allowing the subcontractor to revoke and leaving some measure of power in the subcontractor's position. Macaulay noted that "Traynor rejected Professor Schultz's advice in deciding the Drennan case," but I do not believe this is entirely true. From Traynor's point of view, Schultz had committed a cardinal sin—he approved of Baird. "Can it be," asked Schultz, that "the critics of Judge Learned Hand for his opinion in Gimbel Bros. have looked at the question solely from the general contractor's point of view?" Schultz's accusation of bias could not be applied to Traynor because he recognized the vulnerabilities of the subcontractor. By improving the rationality of the market process, he hoped to have the best of both possible worlds. The general contractor's reliance would be ratified legally, and the subcontractor would be protected as far as feasible from bid shopping by requiring an immediate response from the general contractor without the possibility of resuming negotiations or bargaining. Presumably, that would answer some of Schultz's concerns, but more impor-

mistake in the bid). See Schultz, supra note 8, at 260, 267. It is, of course, possible that Traynor read the survey and concluded that the result in Drennan was generally consistent with trade practice. Despite the common-law rule on the revocability of offers, other factors or sanctions, such as reputation, goodwill, or moral or ethical sentiments about promises or good faith, may lead parties to conclude that they are bound to each other. One general contractor reported feeling bound because the subcontractor was now "part of your organization." Id. at 260. Interestingly enough, in an empirical study conducted after Drennan was decided, subcontractors unanimously indicated that they felt bound to perform the work if "the general has used your bid in his own bid but you also discover that you made a mistake in your bid." See Note, Another Look, supra note 8, at 1734. Of course, the surveys did not fully address the question of the subcontractors' motivations or whether their responses were a result of feeling pressured, coerced, or vulnerable in the marketplace, and the surveys provided only limited evidence about whether whatever rule emerged as the legal solution to the problem helped or hindered the bidding process.

292. See Schultz, supra note 8, at 284-85.
293. Macaulay, supra note 276, at 845.
294. Schultz, supra note 8, at 284.
295. Schultz wrote:

Some proof of reliance can be found in the inclusion of the exact bid in the general estimate. Better proof is evidence that the general not only used the bid as a partial basis for his total bid but that he had no intention of negotiating with the sub for a better price or of "shopping" for a cheaper bid from another sub after the general contract was awarded.

Id. at 248 (footnotes omitted). Schultz further stated that "[a] corollary fact discounting reasonable reliance would be any delay on the general's part in accepting the bid after the award . . . . Even if there is no time stipulation, the general must accept within a
tantly, in providing as much protection for all parties, Traynor was free to reject Hand's analysis of the legal problem.

Macaulay's placement of *Drennan* in both market and nonmarket camps (however tentatively on the nonmarket side) is instructive because it reveals the duality of Traynor's thought in response to Hand. Traynor seemed to be saying that it was time to rethink and modernize the categories of market goals—that nonmarket and market factors could be harmonized, rather than poised forever in opposition. In furtherance of promoting or facilitating market activity, it might make sense to think of the parties as embedded in a relationship, with each party pursuing the same goal. (It might even be possible to interpret the results of Schultz's study as an indication of the reasonable expectations of most market actors). If the goal was to harmonize the relationship, then the vulnerabilities of each party should be reduced. The tort-like notion of absolute liability for a mistaken bid helps take the situation away from contract norms to point instead to a concept of responsibility imposed from external nonmarket sources. When people deal with each other in the marketplace, they have duties imposed on them that do not arise out of traditional contractual categories. However, Traynor implies that the duties do derive from contract norms because the notion of responsibility comes from both the parties' decisions to engage voluntarily in market behavior and their reasonable expectations about what should occur.

Near the end of his life, Traynor wrote "[f]reedom in the view of many special pleaders, is not the harmonizing of many individual interests within a variegated society, but the supremacy of the capital I against a lower-case world." Thus, for Traynor, the wisdom in a modern, interdependent, interrelated market society was not in the pursuit of unrestrained, unprotected individualism. It was, instead, in the recognition that many interests might be harmonized, and that freedom would be maximized by learning how to deal with different interests in an increasingly complex society. People act in this way because, as he repeatedly stressed in *Drennan*, it is in their best interest to do so; therefore, the courts should acknowledge that fact legally. It was neither pure altruism, nor pure individualism. The trajectory of individual freedom had changed. This is perhaps why Macaulay per-

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ceived that Drennan might have claims on both his market and nonmarket categories. Macaulay concluded that Traynor’s “innovations on a case-by-case basis may have provided a needed dynamic in the California system of contract law to modernize it and align it with the goal of supporting the market.”

Yet, he noted that Traynor’s contracts opinions contained balances and “compromises” between the sometimes conflicting goals of contract law. Perhaps rather than balancing the competing demands of contract policy, Traynor was groping, successfully or not, for a resolution of its inherent tensions. For Traynor, the only way to continue to foster freedom was to recognize that others can help us enhance that freedom, rather than continually pose a threat to limit it.

Not long ago, Charles Fried announced that he had changed his mind about Hand and Traynor, Baird and Drennan. Where once he had approved of the result in Drennan, and as eventually codified in section 87(2) of the Restatement (Second) of Contracts, he now preferred “the terse hard-headedness of

David M. Engel, The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18 L & Soc’y Rev. 551, 558-59 (1984). See also id. at 559 n.11 (acknowledging that the categories “emerged from an ongoing dialogue” with me, so I guess it is all right for me to use them here).

Though Engel’s discussion is about personal injury cases, and not contracts, the self-sufficiency category is similar to Macaulay’s self-reliance market category (never used by Traynor), and to Hand’s “protect yourself” rhetoric in Baird. In addition, Engel suggests that the self-sufficiency model of individualism may have “originated in an earlier face-to-face community,” id. at 559, perhaps not unlike a face-to-face community that once yielded the traditional rules of offer and acceptance.

300. See CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 54-56 (1981). The bidding process hypothetical that forms the basis of Fried’s analysis does not contain a mistake in the bid. See id. at 55. Section 87(2) of the Restatement (Second) of Contracts reads: “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the of-
Learned Hand as against the more prolix—and I now think sometimes sentimental—ruminations of Roger Traynor.\textsuperscript{301} Ironically enough, Traynor rejected all claims to "sentimentalism" in judging. He believed "that hard cases can make good law. . . . I have in mind, not the proverbial hardship cases that we say make bad law if they are sentimentally decided in violence to a clearly applicable rule of law, but those hard cases that could plausibly go either way."\textsuperscript{302} And, he once remarked, a judge in family disputes "who must somehow resolve such shattering conflict is no soft-hearted sentimentalist; he could not judge wisely if he were."\textsuperscript{303} Fried and Traynor would no doubt have debated about the definition of sentimentalism. Traynor might also have responded that both Fried and Hand, far from being hard-headed, were hopelessly naive. The world no longer functioned in the way Hand imagined. On the contrary, Traynor, thought he, rather than Hand, was rational, hard-headed, and practical in redesigning old rules for a new set of economic understandings.

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\textsuperscript{301} Charles Fried, \textit{Sonnet LXV and the "Black Ink" of the Framers' Intention}, 100 \textit{Harv. L. Rev.} 751, 752 n.10 (1987).
\textsuperscript{302} Traynor, \textit{supra} note 241, at 224.
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