In a previous article, I explored the ways in which conflicting presuppositions about the functions of tort law produced alternate answers to standard problems in the law of negligence. These alternate answers, while often formulated in the same phrases, represented divergent conceptualizations of torts law, different views of the tort world. The ability of an answer to meaningfully resolve a problem was dependent on the overview adopted, and the sense of one approach was the nonsense of another. In this article I intend to enlarge upon the analysis of that prior article in two ways: first by extending the analysis from the tort of negligence to the misrepresentational torts, and second by articulating the structure that an organizing sketch of an area of law will have and the role of such a structure in legal reasoning.

I. THE STRUCTURE OF LEGAL REASONING

Legal reasoning is analogous reasoning. Since the reasoning is analogous the primary mode of analysis is not the syllogism. The central issues in legal analysis are of class membership. Once cases are placed in the appropriate classes, deductive reasoning, though used, is the easy part of the process. However, the description of the reasoning as analogous goes beyond this distinction between analogy and deduction. Since reasoning is analogous, invariant criteria of class membership are not available. Analogy was traditionally distinguished from univocal predication. In the univocal case, some common element, definitive of class membership, was present in each case in which a term was applied. Socrates was a man and Plato was a man because each had a human essence. In the case of analogy, however, only similarities were present. Cake is good, and God is good, but cake and God do not contain within them a set of common elements which justified the

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application of the phrase "good." In more modern terms, to say that legal reasoning is analogous is to state that it is a process of recognizing the presence or absence of family resemblances among cases.

If there are fixed criteria of class membership, then the reasoning is not analogous. If, however, there are not fixed criteria, then how does one know a family member? In part, the process of recognizing resemblances or analogous reasoning is the process inculcated through the Socratic method of classroom law teaching. A case is taken as an accepted solution to a legal problem. The facts of the case are varied in a series of hypotheticals. Some of the hypotheticals are enough like the original case to be treated the same way, others are not. Thus, the original member of the family, the starting case, presents the picture of the family which will serve as the model to which others must match ways if they are likewise to be regarded as family members.

This explanation merely pushes the question further back. If the similarities are factual similarities with the accepted case, what caused it to be the accepted case, and which of its facts are relevant in determining class membership? In part, what makes a case an accepted exemplar is its source. It comes from the authoritative problem solver. This answer, however, does not totally avoid the question of reasons for acceptance. Unless one has a sense of the authoritative problem solver's reasons for decision, one will never know what to look for in later cases. Hence, the

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9. "We are now in a better position to state the ratio decidendi of a case. The ascertainment of the ratio decidendi of a case depends upon a process of abstraction from the totality of facts that occurred in it. The higher the abstraction, the
question of relevance cannot be answered without an answer to the question of acceptance.

An individual case standing alone would never be an example of anything. An individual case can become an example of a particular class only within a set of interrelated cases exemplifying a scheme of classification which provides a set of solutions for an interrelated set of problems. A case takes on its role as an exemplar solution by fitting together with a number of other cases which evidence an overall understanding of the job legal rules are doing in a particular area. And conversely, that overall understanding is abstracted from the family of acceptable solutions, which are the exemplars of the classificatory system being used.10

While the foregoing discussion may seem abstract, it lies at the root of both the analysis of legal reasoning and the understanding of the process of legal change. For example, if assumption of risk is an appropriate defense, then assumption of risk cases become part of the stuff of which an overall model of negligence law is made.11 In an assumption of risk case an actor enters into a transaction, which he can only enter into with the consent of another, knowing that that other party's performance will contain some deficiency. The actor cannot complain when the deficiency materializes since he was forewarned. Treat assumption of risk cases as examples of appropriate tort solutions, and the overall function of negligence law becomes the vindication of reasonable expectations about safety engendered by the conduct of others.12 Conversely, accept this sketch of the function of tort law, and an assumption of risk case decided for the defendant is an example of an appropriation resolution of a negligence problem. Adopt an alternate reading of tort cases, as embodying an effort to guarantee some safety level to individuals, and the assumption of risk case drops out as an appropriate exemplar.13

An organizing sketch, which gives coherence to a set of indi-

10. Which facts, then are significant? . . . Only the group of cases will give you any start at solving that. . . .” K. LLEWELLYN, THE BRAMBLE BUSH, 55 (1951).

11. “Acquiring an arsenal of exemplars, just as much as learning symbolic generalizations, is integral to the process by which a student gains access to the cognitive achievements of his disciplinary group. Without exemplars he would never learn much of what the group knows. . . .” T. KUHN, THE ESSENTIAL TENSION, supra note 6, at 307.

12. Id.

13. Id. at 44-45.
individual problem solutions, gains its validation because it reflects widely shared understandings of people and their relationships which justify social action. As one of these basic understandings loses its hold, organizing sketches which once seemed valid lose their meaning. For example, the expectational approach to tort law with its emphasis on responsibility for choices views the individual as capable of knowing his own good and fitting his conduct to its achievement. No assumption of infallability is required, only the belief that over time most people do a good enough job of making choices so that they ought to be left to their own devices. Each individual will seek his own satisfaction in an environment in which he is dependent upon others. The environment will need to be sufficiently predictable so that he can make reasonable choices. A first step in achieving predictability is a reduction in the randomness of the behavior of other actors. Other actors are sufficiently like himself so that he can make predictions about their behavior. If such a prediction is reasonable and is engendered by the conduct of another, then tort law will generally vindicate it.

The same anthropology validates the use of a unitary category of buyers in all sales cases. Treat most people as capable of making their own plans and there is no need to distinguish among such persons when they purchase goods. However, view some people as incapable of matching their desires with the means of achieving them, either because of deficiencies in knowledge or manipulation, and one creates two categories, the manipulators and the manipulated.

14. See Vernon, Politics as Metaphor: Cardinal Newman and Professor Kuhn and Wolin, Paradigms and Political Theories both of which are reprinted in Paradigms and Revolutions: Applications and Appraisals of Thomas Kuhn's Philosophy of Science at 246-67; 160-91 (G. Gutting ed. 1980) [hereinafter cited as Paradigms and Revolutions]. Both Vernon and Wolin extend Kuhn's notion of a paradigm to the area of political theory. Cf. C. Fried, Contract as Promise: A Theory of Contractual Obligation 1-6 (1981), wherein Fried offers two organizing sketches of contract law and their underlying presuppositions—sketches which he then places in debate throughout the balance of the volume.

15. Wolin, supra note 14, summarizing Kuhn's views, notes: [A] decision between paradigms appears more like an adversary proceeding, more competitive than deliberative. What is at issue are new cognitive and normative standards, not new facts. A new theory embodies a new way of looking at phenomena rather than the discovery of hitherto inaccessible data. It represents a break with the existing tradition of scientific practice and proclaims new standards of legitimate activity; it proposes somewhat different rules for inquiry, a different problem-field, as well as different notions of significance and of what constitutes a solution.

16. See Green, supra note 1, at 45-47.

17. C. Fried, supra note 14, at 82, 109-10.

18. Classic examples of this approach include Henningsen v. Bloomfield Mo-
tors are businessmen. When a manipulator buys from a manipulator the rules about buyers make sense.\(^{19}\) When a manipulator sells to a consumer, special rules are required.\(^ {20}\) Two categories of buyers are needed. The unitary notion no longer makes sense, since it deals with unlike cases under the same rules.

The structure of an area of law from a concrete case which exemplifies a particular category, through an explanatory sketch which holds together the individual categories into a unified system of rules, to the ultimate moral vision justifying the scheme, is both a movement from the most concrete to the more abstract elements of the system and a movement from the explicit to the implicit elements of the scheme. The individual categories and their consequences can be manipulated with only a hazy mastering of the explanatory sketch. The sketch requires articulation only when the boundary lines between categories come into question or more especially when the membership within the scheme of a particular class is challenged. The normal work of the lawyer or the judge is within the categories with the explanatory sketch presupposed. The traditional work of legal scholarship was the reading off of the explanatory sketch from the categories being used, and the articulation of the sketch as a device for the clarification of the categories. The final aspect of the structure, its morality, does not normally need articulation either within the work of lawyering and judging or within the work of legal scholarship. It is a presupposition shared by all within the system yet not necessarily articulated by anyone.\(^ {21}\) The need for articulation arises only from the loss by the morality of its hold. As the hold of the morality is lost, existing sketches lose their ability to organize, particular classifications seem less meaningful, and new structures are articulated which conform to newly accepted moralities.\(^ {22}\)

The process of change in law interfaces with its logical structure. Some changes are at the level of conceptual analysis and are justified largely in terms of the better fit of a new rule with the


\(^{22}\) H. BROWN, supra note 21, at 111-27.
existing explanatory sketch. One sketch, with its subsidiary set of concepts, can gradually be replaced by another on the grounds of a better fit with the morality that underpins each. Finally, and most sweepingly, a change in underpinning morality can put at risk all existing sketches.

II. THE TRADITIONAL LOGIC OF TORT LAW

The development of the law of misrepresentation is illustrative on the one hand of the underlying logical structure of legal thought and on the other of the interrelationship between that structure and the process of legal change.

Tort law in its original articulation imposed obligations where an actor's voluntary conduct engendered reasonable expectations in others about his future conduct.23 The roots of a tort claim was disappointed reasonable reliance.24 Contract law also vindicated expectations about future conduct, where they were disappointed.25 However, the basis of the action was not the reasonableness of the expectation but the purchase of a promise regarding the future from the actor.26 The tort principle of reliance had the potential of swallowing up the contract principle of consideration.27 If the contract principle was to survive, the field of obligation had to be subdivided in such a way as to preserve a contractual sphere. That process of subdivision gave the law of misrepresentation its shape.

The group of rules which limited the sphere of tort law began with the rule that no tort obligation existed in the absence of action.28 Only when one had begun to act at all was he obligated. Promises standing alone did not ordinarily amount to action.29 Where action had taken place and there was reasonable reliance, loss from subsequent disappointment was measured by what the relying party had staked on his expectation of the future, rather than on what he hoped to gain from it.30 Finally, expectations were only regarded as reasonable to the extent that they anticipated normal behavior from others.31 Effort beyond the normal, however

23. Green, supra note 1, at 44-45.
24. Id. at 45-47.
25. C. Fried, supra note 14, at 18-19.
27. C. Fried, supra note 14, at 3-5.
30. Restatement (Second) of Torts § 901, comment a (1979).
31. The normal, then, is the measure of the reasonable in traditional negligence law. See Green, supra note 1, at 45-46, 50-51.
necessary it might be to protect another from harm, was not re-
quired.\textsuperscript{32} Moreover, the expectation of normal conduct was only
justified with regard to the safety of one's person and property. In
deciding what kind of conduct to engage in, an actor could ignore
another's existing economic relationships.\textsuperscript{33}

The effect of these tort rules was to leave a wide sphere for the
contractual principle of consideration. Consideration was neces-
sary if one wanted to coax a non-actor into action.\textsuperscript{34} It was neces-
sary if the only action of the actor was a promise.\textsuperscript{35} It was
necessary if one desired more than normal protection from an ac-
tor. In addition, if one bought more than normal protection from
an actor, others could not free-ride on the purchase price.\textsuperscript{36} Finally,
any protection for economic interests ordinarily had to be pro-
cured through contract.\textsuperscript{37}

The no duty rule leaves a broad scope for contract. If duty is
defined as that which must be done because of status or position,
independently of choice, while obligation is defined as that which
must be done because one has undertaken to do it, then the no
duty rule leaves one free of duty. Obligation is enforceable, but
obligation presupposes undertaking. Tort and contract both in-
volve obligation arising out of free undertaking. However, the tort
obligations are broader than the contractual obligations. In tort
law an actor may be required to meet a performance standard by
reason of the action which he has voluntarily undertaken, even

\textsuperscript{32} The traditional approach to negligence had much in common with the law
of nuisance. Each began with "a notion of increased danger" which "presupposes a
notion of the level of danger inherent in the normal activities of life." Cane, \textit{Justice
normal level of risk is "what a neighbour must expect to suffer." Goodhart, \textit{Liabil-
ity for Things Naturally on the Land}, 4 Cambridge L.J. 13, 28 (1930). Above the
normal danger level, a duty arose: in nuisance, not to create the risk; in negligence,
to take normal steps to reduce it to an ordinary level.

\textsuperscript{33} See generally Atiyah, \textit{Negligence and Economic Loss}, 83 Law Q. Rev. 248
(1967); James, \textit{Limitations on Liability for Economic Loss Caused by Negligence: A

\textsuperscript{34} This is the result of combining the tort "no duty rule" with the contract
docline of consideration.

\textsuperscript{35} This is the rule of Thorne v. Deas, 4 Johns. 84, 100 (N.Y. 1809) combined
with the doctrine of consideration. See note 29 and accompanying text supra.
There is now some retreat from the rule in tort cases. W. Prosser, \textit{Handbook of
the Law of Torts} \S 56, at 344-46 (4th ed. 1971). Fried's analysis is an impressive
assault on the view that contract is based on bargain rather than promise. C. Fried,
\textit{supra} note 14, at 28-39.

\textsuperscript{36} This combines the tort notion of normal care with the contract doctrine of
privity. If the care is more than normal, its basis must be in contract. See Green,
\textit{supra} note 1, at 41. In contract one must be in privity to sue. E. Farnsworth,
\textit{supra} note 26, \S 10.1, at 710.

\textsuperscript{37} See Atiyan, \textit{supra} note 33, at 261-62; James, \textit{supra} note 33, at 43-44.
though he does not personally know of the standard or is incapable of meeting it.\textsuperscript{38} In contract, however, the performance standard is generally known to the promisor and specifically adopted by him.\textsuperscript{39} Hence, the impact of a tort obligation on an individual's freedom of future action is greater than that of a contractual obligation. Tort will bind an actor to a standard which he has not accepted. The tort obligation lies somewhere between the free obligation of contract and the duty imposed by a status.

The tort obligation is a quasi-duty. The pure obligation, with both the obligation to act and the measure of that obligation left to free choice, through bargain, arises only in contract. In tort, voluntary action must precede obligation, but the measure of the obligation is independent of the actor's will.

Under the tort scheme, for example, if one undertakes to act as a physician the scope of obligation is reasonable medical usage, regardless of the will of either party.\textsuperscript{40} In contract, if one undertakes to act as a physician, one may tailor that obligation through specific terms.\textsuperscript{41} Where a contract does not define a performance standard the contrast is less stark. In the absence of specific terms, reasonable practice will measure the doctor's obligation in contract.\textsuperscript{42} Notice and the doctrine of assumption of risk leave room for tailoring in tort.\textsuperscript{43} Contract itself requires the use of language. Meaning is assigned to terms through public usage, not through private will. When an individual contracts to do an act, the act is defined according to the public understanding of its description, not by a private notion held by one party as to its meaning.\textsuperscript{44} Where parties' understandings diverge, the party whose expectations as to meaning are isomorphic with the public understanding will have them vindicated.\textsuperscript{45} Nevertheless, while this distinction is not stark, it remains the case that tort imposes more obligation independently of choice than does contract. The more scope tort law is given, the less scope is left for a pure law of obligation.

Because of the potentially broader bite of tort into freedom of

\begin{footnotesize}
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\item \textsuperscript{38} See, e.g., W. Prosser, \textit{supra} note 35, § 33, at 168 (discussion of custom).
\item \textsuperscript{39} This explains the usual requirement of knowledge of custom in contract. Timmerman v. Hertz, 195 Neb. 237, 245, 238 N.W.2d 220, 225 (1976).
\item \textsuperscript{40} See, e.g., Kortus v. Jensen, 195 Neb. 261, 268, 237 N.W.2d 845, 850 (1976); \textit{Restatement (Second) of Torts} § 299B (1964).
\item \textsuperscript{41} Guilmet v. Campbell, 385 Mich. 57, — , 188 N.W.2d 601, 605-06 (1971).
\item \textsuperscript{42} This is true of a contract involving skill, where no standard is specified. See Henggeler v. Jindra, 191 Neb. 317, 318-19, 214 N.W.2d 925, 926 (1974).
\item \textsuperscript{43} Green, \textit{supra} note 1, at 51-52.
\item \textsuperscript{44} E.g., C. Fried, \textit{supra} note 14, at 88-89.
\item \textsuperscript{45} Id. at 61-62.
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action, the no duty rule is more comprehensive than its description suggests. Even where a party has clearly undertaken to act, the rule may exempt him from obligation. The basis for the exemption is the principle developed in *H.R. Moch Co. v. Rensselaer Water Co.* that an obligation of normal performance is only owed to the extent that an abnormal performance would put another at risk of harm. If the abnormal performance merely deprives the other of a benefit, he has no complaint, and, therefore, the actor was never under an obligation of normal performance.

The line between detriment and benefit is not transparent. It can be drawn at a number of possible places. The particular line drawn will reflect views as to what people may appropriately expect from one another. It represents the line between a socially acceptable risk of harm, that danger we must accept from one another as the price of a society which allows freedom of action, and a socially intolerable danger whose creation threatens detriment. Since the line between benefit and detriment embodies a judgment as to what people may reasonably expect from one another, it illustrates this centrality of the notion of reliance in tort law. The existence of an obligation depends upon an undertaking which creates a risk. Risk, in the tort sense, is not merely the creation of danger. The danger must be at a socially disapproved level. Then its creation amounts to more than a failure to benefit another by minimizing the danger he faces. It becomes the creation of detriment. At that point, reasonable steps must be taken to prevent the detriment from occurring. Those reasonable steps are measured by normal expectation. Thus, on the one hand, reasonable reliance is vindicated, but on the other hand, the scope of the reliance rule is narrowed by the distinction between benefit withholding and detriment creating.

The no duty rule, when enriched with the notion that actions which are mere benefit withholding are not obligation creating, becomes an explanation of the rule that denies liability for economic loss independent of physical injury. Pure economic gain, the ex-
pectancy of profit from a transaction, was the exemplar of benefit. Since it was a benefit, one who interfered with its achievement was not engaged in detriment creation. Hence, one's activities did not come within the scope of tort rules.

While the approach to economic loss is conceptualistic, it is underpinned by the overall analysis. To the extent that an actor may ignore a particular interest of others in determining his course of conduct, he is left a greater freedom of action. Conversely, if others know that their economic interests can be ignored, then in entering into potentially profitable enterprises, they take the risk of the action of others into account in deciding how much potential profit is necessary to justify action. Profit is the return for risk bearing. Even if there is no profit, the other had the opportunity to assess the risk of the enterprise. By taking those risks he demonstrated that he thought they were worth taking. Allowing recovery for economic loss would transfer a risk freely undertaken to the actor.

III. THE CLASSIC STRUCTURE OF MISREPRESENTATION

We have thus far sketched the negative aspects of the interrelationship of tort and contract, which shaped the law of deceit. However, these negative limitations on tort law do not explain the scope left for the tort form of deceit. To understand the tort, it is necessary to understand the area left open for its operation.

The line between a valid area for the tort of deceit and the law of contract might have been formulated around the grammar of tenses. If promise is the hallmark of contract, then deceit should not operate against future tensed statements. Since promises deal with the future, the future tense should be excluded. That would leave present tense statements as an appropriate area for the tort principle of reliance to operate. The problem with the tense approach is twofold. On the one hand the tense approach is too broad in that a promise is a future-tensed statement about one's own conduct. Predictions, which are future-tensed, are not promises. If promise is the principle, the tense approach bars tort action in cases where no promise is present. On the other hand, contracts include statements about the present which, though not promises, are enforced as if they were. A statement of the present conditions of the world is a common feature of a contract. Thus, a

explanations, see Atiyah, supra note 33, at 248; Craig, Negligent Misstatement, Negligent Acts and Economic Loss, 92 Law Q. Rev. 213, 213-41 (1976); James, supra note 33, at 45; Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281, 282 (1982).
large amount of the ordinary stuff of contracts would be excluded from protection by the tense approach.

The division between deceit and contract represented by the emphasis on the tense of a statement is an alternate statement of the view that the essence of deceit is falsehood. Under the falsehood analysis, deceit occurs when there is a discrepancy between a current state of the world and a statement describing it. Yet this approach suffers from the same vices as the tense approach. If we re-analyze deceit, however, the problem can be resolved. Falsehood is not the essence of the action for deceit. A falsehood standing alone is not actionable. An element must be added, that is, knowledge of falsehood. The knowledge is the essence of the action. With knowledge of the falsehood, a false statement becomes an insincere statement. When one states a fact in serious discourse, he vouches for that fact. He vouches by implicitly saying, "I believe that . . ." Belief claims are not made truly or falsely. They are made sincerely or insincerely. Thus belief claims as well as statements of intention and predictions may be made either sincerely or insincerely.

Once insincerity is seen as the hallmark of the deceit action, then the relationship between deceit and contract becomes more apparent. One starts with the simple premise that a contract is a promise about the future. A sincere promise might be broken for a number of reasons. The rules governing the promissory activity will determine which of these reasons constitutes an excuse. In the absence of an adequate excuse, the promise will be enforced. However, where insincerity is present, the constitutive premise of the institution, that one must be sincere at the start, is violated. A rule aimed at insincerity is thus aimed at preserving the institution, rather than at absorbing some of its work.

Treating insincerity as the hallmark of deceit brings out two aspects of the interrelationship between that tort and contract. Deceit, which aims at insincerity, serves the promissory institution by creating liability for the violation of the basic rule of honesty without which the institution of promise cannot get off the ground. In addition, the existence of the tort removes some of the burden that might otherwise rest upon the contractual institution. It makes available to actors a less expensive and less burdensome

52. Exemplary is the emphasis on current mind state in insincere promise cases. W. Prosser, supra note 35, § 109, at 728-29.

device for achieving many of the results that would otherwise re-
quire contract.

Deceit will lie for a statement of intention made where no in-
tention in fact exists. Contract requires something stronger than a
statement of intention. It requires a promise, and the promise
must be supported by consideration. Either a statement of inten-
tion or a promise is made in a context in which an individual is in
doubt about what to do because the speaker's future action can
impact that individual's schemes and plans, and he does not know
the speaker's plans. This individual seeks to have his doubts re-
solved by asking the speaker what his plans are. The speaker tells
him, and the other may then treat the speaker's plans as a given in
making his own plans. The different forms of statement repre-
sented by "I intend" and "I promise" indicate different strengths of
guarantee. "I intend" is a statement of current plan without guar-
antee against change in plan; "I promise" imports a guarantee
against change of plan. The "I intend" form gives less protection
than the "I promise" form; on the other hand, it is more easily ob-
tained since it is less burdensome. That is particularly the case in
a system which treats a promise as a statement of intention unless
it is supported by consideration.

The same analysis is applicable to statements of current fact,
the usual stuff of the action of deceit. When one seeks information
about the current state of the world, when he seeks advice, he
seeks to obtain a kind of guarantee. If a person is in doubt about
the current state of the world, the state of the world becomes for
him as uncertain as the future. He needs to reduce this uncer-
tainty in order to make plans, since he needs to know the starting
point in order to know how to proceed. He can obtain his starting
point in a number of ways. He can seek advice, he can pay for
advice, or he can pay for a guarantee. If he buys a guarantee, he
will be protected against adverse outcome. However, this will be a
costly protection to purchase. If he pays for advice, the advisor
will have to exercise due care in informing himself and in formu-
lating the advice. This again will be costly, since consideration will
be required. However, the individual may seek advice without
paying for it. If he is able to obtain advice in this way, he will re-
ceive neither a guarantee nor a protection against carelessness.
However, he won't have to pay for the advice. When he obtains
free advice, all the law will guarantee him is honesty.54

Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd., 1964 A.C. 465, 494 (H.L. Eng.)
(Morris, L.).
The breakdown between honesty which comes free, and care or guarantee which costs money, enables one seeking advice to maximize the amount of advice he can get with his existing resources. Careful advice or guarantees are costly, but an individual can assure himself of honesty while foregoing these greater advantages and saving resources for situations in which the greater security is actually required. Conversely, if the line between honesty and due care was obliterated, so that the individual could obtain the greater protection for free, the risk of giving free advice would rise significantly. Advisors who would advice for free, where only honesty was required, might well insist on compensation if all advice required due care. Hence, the greater protection for the recipient of free advice might have the paradoxical consequence of cutting off the likelihood that such advice was in fact obtainable for free.

The space open to deceit versus the space reserved to contract is derived from the root notion that tort obligations are based upon reasonable expectations engendered by the conduct of others. Since due care in advising and guarantees are saleable commodities, one who obtains advice without paying for it is generally unreasonable in assuming that he has received as a gift the kind of guarantees for which others have to pay. The reasonable assumption is that he has received honesty and nothing more.55

IV. ALTERNATE LOGICS AND ALTERNATE STRUCTURE

Having outlined the structure of traditional misrepresentation law, I now want to relate changes in that law to the overall structure of legal reasoning which I outlined previously. I begin with a situation that essentially involved conceptual clarification. Pure economic loss was generally excluded from the tort of negligence.56 However, one could hire another to give him advice. If the paid advisor was negligent in formulating the advice, then a suit for negligence was possible.57 The right to sue could be analyzed in either of two ways. First, the suit could be seen as based upon a right directly arising out of a contract, and the right to sue in tort as a mere procedural convenience.58 In that event, the giving of the advice would have to be pursuant to a contractual obliga-

55. Green, supra note 1, at 49.
56. See note 33 and accompanying text supra.
57. This is true unless a gravamen theory is applied. See W. Prosser, supra note 35, § 92, at 621-22.
58. This would clearly be the result reached by a court which allowed election to have procedural but not substantive impact. Such a court sees only one duty, a contract duty, with alternate procedures for its vindication. Id.
tion to advise, and the party suing would have to be the party owed the contractual obligation before a tort suit would lie. On the other hand, the payment could be seen as a necessary prerequisite to a reasonable expectation of due care. The payment would not have to be the contractual consideration for a reciprocal obligation, and the party relying would not have to be a party to the contract. *International Products Co. v. Erie Railroad Co.*[^59] and *Glanzer v. Shepard*[^60] opt for the second theory. If a speaker is receiving a reciprocal advantage in return for a speech or is in a business relationship which will be advanced by speech, then another party to the relationship can rely on careful advice.[^61] This is true even though the giving of the advice is not mandated by contract, or, though mandated by contract, the relying party is not a party to the contract.

The approach taken by *Glanzer v. Shepard* and *Ultramares Corp. v. Touche, Niven & Co.*[^62] to negligence liability, where the performance is pursuant to a contract, but a third party is the relying party, tracks the treatment of the duty issue in *MacPherson v. Buick Motor Co.*[^63] and *H.R. Moch Co. v. Rensselaer Water Co.*[^64] In each case, the existence of duty is determined by tort rules, and not by contractual rules regarding privity.[^65] The question is whether reliance is reasonable. The relevance of the contract is in connection with this issue. One who pays expects more than he would have gotten if he had not paid.[^66] He expects effort rather than mere honesty. Ordinarily, the party who does not pay expects only honesty, and cannot make a freeload claim to a higher standard because someone else expects more.[^67] However, where the expectation of more than an honest effort is reasonable, even without payment, then it will be vindicated without regard to contract rules.[^68]

The movement in the misrepresentation cases traces the movement in the general negligence cases from a view of tort law as a set of special rules applicable to interactions not rooted in con-

[^59]: 244 N.Y. 331, 155 N.E. 662 (1927).
[^60]: 233 N.Y. 236, 135 N.E. 275 (1922).
[^61]: *Id.* at 239, 135 N.E. at 276.
[^63]: 217 N.Y. 382, 111 N.E. 1050 (1916).
[^64]: 247 N.Y. 160, 159 N.E. 896 (1928). *See also* note 46 and accompanying text *supra.*
[^66]: Green, *supra* note 1, at 49.
[^67]: *Id.*
[^68]: See *Hedley Byrne & Co., Ltd.*, 1964 A.C. at 526-28 (Devlin, L.).
tract and subordinated to contract law rules and the emergence of
tort as an independent source of obligation with its own sphere of
operation and rules.69 The privity approach in products liability
cases is mirrored in the rules of misrepresentation embodied in
Derry v. Peek.70 Under the privity rule, due care in the manufac-
ture or repair of chattels was a contractual obligation owed only to
contract parties.71 The exceptional case where a tort suit was al-
lowed involved something like a deliberate misrepresentation of
the actual characteristics of a product.72 One not a party to the con-
tract of manufacture had no legitimate expectations about the
thing, other than the expectation that he not be trapped by a delib-
erate effort to make the thing appear to be other than it was.73 So
also, under Derry, only the parties to a contract could sue for negli-
gent false words.74 However, deliberate falsehood was actionable.75

In MacPherson, the court recognized that persons other than
parties to contracts rely on the appearance of things made at risk of
bodily harm.76 Their reliance is no less reasonable because the
deceptive appearance was produced by negligence than if they
were relying on a deliberate misdescription. The reliance is on the
appearance of the thing and not upon any underlying contract.
The same approach is exemplified in misrepresentation cases such
as Glanzer.77 What makes misrepresentation distinctive is the
type of injury involved, that is, economic injury. As between phys-
ically injured parties where each acted in the belief that the item
causing injury had certain safety features because such features
were an incident of the class of things to which the particular item
appeared to belong, it is difficult to distinguish degrees of reliance
and to see one of the injured parties relying on due care while the
other relied only on simple honesty. Such a distinction is easier to
maintain in the area of economic loss. Parties make out of pocket
commitments on expectations of profit with the recognition that
loss is also a possibility. The party who had the guarantee of due
care might risk a sum for a smaller profit or a less probable profit

69. E. LEVI, supra note 2, at 8-27, traces the history of the products liability
cases.
70. 14 App. Cas. 337 (H.L. 1887).
71. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842); see also W. SEAWEY,
CITATIONS ON TORTS 28-30 (1954).
73. R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 19-21 (1980).
76. 217 N.Y. at 389-90, 111 N.E. at 1053.
because the guarantee of care put a floor on his loss. However, the
party relying on simple honesty would recognize that out of pocket
loss, if it occurred, would be less likely to be recoverable, and
would, therefore, require a larger profit or a higher probability of
profit. The analysis in either the physical injury or economic loss
area is always in terms of "whether the putative wrongdoer has
advanced to such a point as to have launched a force or instrument
of harm or has stopped where an action is at most a refusal to be-
come an instrument of good." 78 Where physical injury is
threatened, we do not generally expect a greater skepticism from
noncontractual parties. In the language of MacPherson, we have
"knowledge that the thing will be used by persons other than the
purchaser and used without new tests . . . ." 79 In the economic
area, however, a variability of reliance equal to the "new test" that
would have negated the MacPherson analysis is to be expected.

On this analysis, the distinctiveness of economic loss lies in
the difference in reliance assumed to be reasonable. The broad-
ened ability to recover for economic loss where negligent words
are involved does not justify an expanded liability in cases of neglig-
gently produced economic loss. 80 An absolute rule barring recov-
ery for economic loss produced by negligence, where it is the sole
injury, would be inconsistent with the Glanzer and Ultramares
analysis. However, most instances where recovery is denied are
consistent with the broader premise that a close relationship must
exist between two individuals before the one can expect the other
to be on the lookout for his economic welfare. 81

Just as there can be cases which raise problems of conceptual
clarification, there can be changes in concept which are compatible
with the over-arching explanation of the area of law. Exemplary is
the movement from the no duty to disclose posture taken in early
sales cases to the disclosure obligation represented by later cases
and the Second Restatement of Torts. 82 The earlier cases drew a
distinction between the sales transaction itself and providing in-
formation about the thing sold. There were many pieces of infor-
mation that a buyer might want before he decided to make a
purchase. The fact that the reasonable buyer would want to know
certain information, however, did not demonstrate that he would

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78. Moch, 247 N.Y. at 168, 159 N.E. at 898.
79. 217 N.Y. at 389, 111 N.E. at 1053.
82. RESTATEMENT (SECOND) OF TORTS § 551 (1976). Compare Swinton v. Whi-
tinsville Sav. Bank, 311 Mass. 677, 42 N.E.2d 808 (1942) with Weintraub v. Krobatsch,
expect the seller to provide the information. Since selling and advising were separate activities, one could enter into the one activity without also entering into the other. Therefore, selling, while refraining from giving advice, was permissible.

On the other hand, nothing in the explanatory sketch forces this approach upon the sales cases. One could view a sale of real estate as a transaction involving both an exchange of title and a disclosure of characteristics of the thing sold. In default of such disclosure, a buyer would be justified in believing that what he saw was what he was getting. Difference in value produced by differences between appearance and reality, then, would not be lost expectations of advantage, but would be detrimental loss produced by reliance on the discursive character of silence.

Whether a failure to disclose a known latent defect in a thing being sold is simply a refusal to become an advisor or whether such a failure is in effect a false statement that a condition is not present if it does not appear to be present, depends on what reasonable people expect from others in sales transactions. The individualistic assumption that in the main one should look out for oneself and not depend on others, which is the essential thrust of the doctrine of caveat emptor, is not an inevitable product of the reliance sketch. Even the rugged individualist sometimes reasonably relies on others. Neither is the imposition of a duty to warn necessarily the imposition of a duty to protect others when they are not in fact dependant. Rather, the question of how much reliance is reasonable is a question of what expectations are legitimate under prevailing usage. If usage about disclosure changes, then reliance which was once unreasonable can become reasonable without changing the essential principle that reliance is required.

Another example of a conceptual change consistent with the organizing sketch is the transition from the rule that false statements made in negotiating a consummated sale were only actionable when embodied in the contract as warranties, or when knowingly false so that deceit would lie. Here, as in the no duty to disclose cases, a distinction between advising and selling was be-

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83. C. Fried, supra note 14, at 79-83. These passages deal with the more knowledgeable buyer; the older cases treated a buyer and a seller’s disclosure duties under a uniform standard.


85. This is essentially the theory that underpins Restatement (Second) of Torts §§ 353, 373 (1964).

86. Id.
ing maintained. If one made a sale, and the sales contract did not contain any declarations about the quality of the thing sold, then the price paid was only applicable to the thing itself.\footnote{87} If advice had been given before the sale, but the advice given was not embodied in the contract, then the consideration did not apply to the advice. The advice was free advice, and like any other free advice was only actionable if it was deliberately false. This analysis accepted the approach rejected by \textit{Erie} and \textit{Glanzer}. An alternate approach, analogous to \textit{Erie} and \textit{Glanzer}, held that the distinction between those words spoken in the dicker phase of bargaining and those things embodied in the bargain, while essential in contract law, was not relevant in tort law. If the declaration was made with the expectation of advantage, then it was not merely gratuitous. Once it ceased to be gratuitous, a reliance on more than mere honesty was reasonable.\footnote{88}

The modern sales cases, however, begin a substantial departure from the traditional expectancy model and a trend toward an alternate model of misrepresentation. This transition takes two forms. First, the tendency to impose strict liability for misrepresentation in sales transactions substantially obliterates any distinction between the tort and contractual area. The traditional tort rule specified a performance standard, while contract guaranteed a result.\footnote{89} If a contract embodied a standard higher than due care, then the right to the extra was a product of the contract and its availability was governed by contract rules.\footnote{90} Where strict liability is available, this distinction is obliterated.\footnote{91} The obliterating proceeds in the sales cases if the benefit of the bargain

\footnote{87. This is the essence of the notion of caveat emptor. A buyer, if he wants some type of protection with regard to quality, must seek it. Otherwise he will be assumed to have desired what he purchased. W. PROSSER, supra note 35, § 64, at 412.}

\footnote{88. \textit{Restatement (Second) of Torts} § 552 (1976).}

\footnote{89. \textit{Compare} \textit{Restatement (Second) of Torts} § 395 (1964) \textit{with} \textit{Restatement (Second) of Torts} § 405 (1964). \textit{Cf. U.C.C. (U.L.A.)} § 2-314(2)(c) (1972). Each of the three sections requires that a product be unreasonably dangerous, as a condition of liability, but § 395 requires that the danger arise because of an unreasonable effort to produce safety.}


rule of damages is adopted.92 Then, the distinction between tort and contract becomes an internal convention of legal discourse. If the same rights and remedies can be gained through either route, then the distinctive base of each area of law is obliterated.93 Contract loses its root in the institution of promise, but tort loses its root in the principle of reliance. Both become tools for the performance of social purposes beyond promise keeping and expectation fulfillment.94 Then, the law of misrepresentation is reshaped into an aspect of the safety sketch model of tort law.95

CONCLUSION

The law of misrepresentation, in the main, bears a structure similar to that of general negligence law as the expectancy sketch would conceive it. Within misrepresentation law, however, an alternate way of proceeding, like the safety sketch, has begun to emerge. Thus, in misrepresentation law, as in tort law in general, the central question becomes not the concrete issues of the particular cases, but the broader issue as to what the whole tort process is about. A choice among competing sketches of tort law is a debate in moral philosophy and philosophical anthropology. That such a debate is going on is obvious to anyone familiar with the literature of tort law.96 Until it is resolved, however, there will be no right answers in tort law. Answers can only be right with an accepted sketch of tort law, and today there is no such generally accepted sketch.97

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93. C. Fried, supra note 14, at 4-5.
94. Id.
95. See Green, supra note 1, at 43-44.
97. Put another way, where there is a strongly held sketch of tort law, alternates are the toys of academics, but where there is no strong commitment, debate about theory is no mere quarrel among clerks.