

Michigan Law Review

Volume 98 | Issue 6

2000

Law and Regret

Eric A. Posner
University of Chicago

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Contracts Commons](#), [Legal Remedies Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Eric A. Posner, *Law and Regret*, 98 MICH. L. REV. 1468 (2019).
Available at: <https://repository.law.umich.edu/mlr/vol98/iss6/6>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LAW AND REGRET

*Eric A. Posner**

CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS. By *E. Allan Farnsworth*. New Haven: Yale University Press. 1998. Pp. xi, 271. \$30.

Professor Farnsworth's¹ topic is what he calls the "law of regretted decisions," those laws "that apply when you change your mind and reverse a decision" (p. ix). One finds such laws across many doctrinal divisions. Contract law influences the decision to change one's mind about keeping a promise. Tort law influences the decision to change one's mind after starting to rescue another person. The law of wills influences the decision to change one's mind about the distribution of one's assets among heirs. Farnsworth believes there are general principles that underlie the law of regretted decisions. Although there are some "anomalies," Farnsworth hopes to "further the rationalization of legal concepts and the identification and eventual correction of their deficiencies" (p. ix). The rationalization of legal concepts appears to mean the identification of the common principles that underlie them and the revision of the legal concepts that violate those principles.

What are these principles? Farnsworth identifies six: reliance, intention, dependence, public interest, anti-speculation, and repose. But only the first two play an important role in Farnsworth's argument. The dependence principle, which appears to refer to cases in which conduct (rather than promising) puts others in a vulnerable position, is summoned to explain why a person might be liable in tort for beginning but failing to complete a rescue, and why family law holds a stepfather liable for child support after divorce if he has cut off the child's relationship with the natural father (pp. 93-96). The public interest principle, which is apparently a principle of economizing judicial resources, is ushered in to explain a handful of rules of civil procedure that discourage parties from changing their arguments.² The anti-speculation principle is hauled out to explain why certain "elections" — by the victim of breach, to choose one remedy rather than another,

* Professor of Law, University of Chicago. B.A., M.A. 1988, Yale; J.D. 1991, Harvard. — Ed. Thanks to Richard Craswell and Jack Goldsmith for very helpful comments, and to the John M. Olin Fund, the Sarah Scaife Foundation Fund, and the Ameritech Fund in Law and Economics, for generous financial support.

1. E. Allan Farnsworth is Alfred McCormack Professor of Law, Columbia Law School.

2. Pp. 188-89; *see also* p. 131 for an application to contract remedies.

or to terminate the contract, or by the victim of fraud to avoid the contract — are irreversible (p. 184). If they were not, the victim would in effect have a valuable option, but “there is a pronounced judicial distaste for allowing one party to speculate at the other’s risk” (p. 184). And the repose principle is trotted out to explain why statutes of limitation bar claims even when there is no reliance on the claim holder’s inaction (p. 194). These arguments may be reasonable, but they are peripheral, and unsurprising as well, so I will not focus on them.

The reliance principle has the starring role in Farnsworth’s book, with the intention principle playing a supporting part. The reliance principle holds that the law should protect people who (reasonably?) rely on the representations or actions of others. The intention principle holds that the law should protect people’s intentions. Farnsworth’s grand claim appears to be — he is nowhere very specific — that the law of regretted decisions can be explained using these two principles (when the other four do not intervene). The law does not allow a person to change his mind (and, more important, act on that change of mind) when doing so harms someone who has (reasonably?) relied on the initial representation or action. When the reliance principle fails to explain a law, the intention principle is called upon. The law does not let a person change his mind when he did not intend to leave himself the opportunity to do so.

The argument runs into trouble quickly. Farnsworth correctly points out that the reliance explanation is circular (p. 40). If the law did not enforce promises, people would not rely on them — or at least people would not rely on them being legally enforced. So reliance cannot be the reason why the law enforces promises.

To understand this argument, observe initially that frequently the law does not enforce promises on which people rely. For example, if you break your promise to give me \$100 as a gift, courts generally will not award me a remedy even if, relying on your gift, I buy a \$100 widget on credit. Or, if you break your promise to buy my house, but I did not accept by making a return promise to sell my house and then rely on your promise by firing my real estate agent, courts will not give me a remedy. Or even if I did accept, but we never reduced the contract to writing, courts generally will not give me a remedy even if I rely in some way. In all these cases, I rely on your promise, but would not receive a remedy.

Even when the law enforces promises, it does not always provide a remedy that compensates a person to the full extent of his reliance. Consider a construction contract between an entrepreneur and a contractor that provides that the contractor will complete a new store on a certain date. Making no allowance for delay, the entrepreneur orders stock to be delivered on the day after the completion date. When the contractor fails to finish on time, the entrepreneur claims as damages the cost of providing additional transportation and storage for the

stock.³ A court will not usually award such damages. Reliance is protected only when it is reasonable.

But the theory that the reliance principle protects reasonable reliance, rather than any reliance, is not useful without an account of what is reasonable. To understand what reasonable reliance is, one needs a separate theory about what counts as reasonable reliance and what counts as unreasonable reliance.⁴ The claim that contract law reflects the influence of a reliance principle, without more, does not provide such a theory.

Farnsworth understands all this. Yet he says:

These objections . . . ignore the certain outcry from those in the workaday world if the value of a promise had to be as deeply discounted as it would if the law did not protect the resulting expectations or reliance. The circularity argument overlooks the possibility that, regardless of legal consequences, a promise may arouse expectations or induce reliance because the promisee supposes that the promisor will be encouraged to perform by extralegal restraints. [p. 40]

The first point confuses the explanation and the thing that is to be explained. Everyone agrees that the legal enforcement of promises is sensible, but that does not settle the question of *why* legal enforcement of promises is sensible. That's what one needs a theory for, a theory different from the reliance theory. The "workaday world" would not object to learn that a theory other than the reliance principle explains why people can rely on promises; it would not care. Farnsworth's second point needs further development to be convincing. If extralegal restraints are effective, why is it necessary for the law to replace them? If they are not effective, why would people rely on them?

The most plausible answer to the question of why promises are enforced, is that by enforcing promises, the law enables people to make commitments that they would otherwise not be able to make, and these commitments allow people to obtain good things in return (cash, services, goods). If I cannot legally commit myself to repay loans with interest, banks will not lend me money to buy a house. One does not need to be a thoroughgoing Benthamite to recognize the value of laws and institutions that enable people to accomplish goals that are important to them and enhance their well-being. Indeed, Farnsworth, who

3. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 11-12 (1985).

4. A discussion of this argument can be found in Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986). Farnsworth's argument is, as he acknowledges, derivative of Fuller and Perdue's argument. See generally Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52 (1936), and the literature that it has spawned. As Richard Craswell shows in a recent article, the influence of Fuller and Perdue's article has been unfortunate. See generally Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000).

does not seem to be a thoroughgoing Benthamite, agrees with this welfarist explanation for the enforceability of promises (see Ch. 1 and pp. 38, 42). But he does not attempt to reconcile the welfarist view and the reliance view that he adopts; indeed, he does not even say what he thinks is the relationship between these two explanations.

The circularity problem dissolves as soon as one sees that the promisor and promisee have a joint interest in taking actions that maximize the expected value of their contractual relationship. This will usually involve (a) the promisor keeping his promise or paying damages, and (b) the promisee engaging in an efficient amount of "reliance," or investment in anticipation of the promisor's performance. Reasonable reliance is then understood as the amount of reliance that maximizes the value of the promise. The law can encourage reasonable reliance by awarding damages upon breach of contract equal to what the promisee would have gained if the promise had been performed and he had engaged in reasonable reliance, whether or not in fact he did.⁵

Farnsworth might agree or disagree with this argument. If he disagrees with it, he should explain why, as it avoids the circularity problem and it has long been a part of the contracts literature. Instead, Farnsworth moves on, and uses his reliance theory, despite its acknowledged defects, to explain various doctrines of contract law.

In Chapter Five, Farnsworth puzzles over the question of why unrelieved-upon promises are enforced, which seems to contradict the reliance principle. He concludes that unrelieved-upon promises are enforced because reliance (especially reliance consisting of the forgoing of other opportunities) is difficult to prove (pp. 57-59). This response is not so much wrong as it is unhelpful. Promises that take place within markets are, in a sense, always relied upon. When a buyer commits to buying from a seller, he detrimentally relies by giving up the opportunity to buy from another seller. Promises that occur outside markets are not always relied upon, though they may be. The beneficiary of a gratuitous promise may rely on a promise by shifting his position, but he also may not. When he does, and when doing so increases the value of the promise, there is an argument for enforcing the promise. When he does not, the argument for enforcing the promise is weaker.⁶ Difficulty of proof is always a consideration for courts, and it is reflected in the use of presumptions, burden-shifting, and other devices of civil procedure. But something more is needed to explain patterns of contract doctrine.

5. See Jim Leitzel, *Reliance and Contract Breach*, 52 LAW & CONTEMP. PROBS., Winter 1989, at 87, 91.

6. See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401 (1991).

A similar point emerges from Farnsworth's discussion of why courts award expectation damages given that (in his view) the reliance principle explains contract enforcement. He argues that the expectation measure of damages is justified, because reliance includes lost opportunities, and "since lost opportunities are hard to prove, expectation is a surrogate measure for reliance."⁷ Again, lost opportunities are not always hard to prove, and the difficulty of proof is dealt with more easily by giving the promisee a presumption that reliance has occurred. If the reliance principle is so important, why not give the promisor the chance to rebut the presumption by offering proof that the promisee did not incur opportunity costs?

Farnsworth next argues that the expectation measure "produces the apparently satisfying result of forcing the promisor to take into account the contract's value to the promisee when calculating the effects of breach, thereby enhancing the promisor's incentives to perform and encouraging people to deal with promisors" (p. 115). This is a reference to the so-called "efficient breach" theory. Farnsworth does not explain why, if he thinks that reliance is the explanation for contract enforcement, here he adopts an economic or welfarist view. Further, he does not explain why we want to: (1) enhance the promisor's incentive to perform (and if so, why not award damages higher than expectation damages?); (2) encourage people to deal with promisors (even when doing so is unwise?); and (3) ignore other incentives for which the expectation measure is ill-suited, such as the promisee's incentive to take care.⁸

In the second half of his book, Farnsworth turns from commitments (or promises) to what he calls relinquishments and preclusions. Relinquishments and preclusions occur when a person surrenders something that he has to someone else (pp. 120-22). I will ignore the small distinction that Farnsworth makes between them, and focus on what happens when a person makes a transfer — either as a gift, or as part of an exchange — and then changes his mind and seeks to reverse this transfer.

Farnsworth asks the interesting question why the law treats transfers and promises differently. If I promise to give someone my car as a gift, I generally can change my mind, retract the promise, and keep the car without paying a penalty. But if I actually transfer title to the do-

7. P. 115. These claims are staples in the literature, as Farnsworth acknowledges. They derive from Fuller and Perdue, *see supra* note 4, at 60, and are periodically resurrected, *see e.g.*, Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 788-89 (1982).

8. Put more bluntly, Farnsworth wants to use the insights of law and economics, but he does not take the trouble to provide an adequate account of the complexities that the literature has identified. For a recent survey, see Steven Shavell, *Contracts*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 436, 436-45 (Peter Newman ed., 1998).

nee, I can't change my mind and get the car back. A similar, though less stark, difference applies in the commercial context. If I breach my promise to sell my car to you for \$5000, I have to pay you damages. If, however, I sell my car to you for \$5000, and deliver it to you, I cannot get the car back from you by forcing you to accept payment of the damages that you would receive for breach of contract. Instead, I must obtain your consent. In other words (although not in Farnsworth's), both nongratis and gratis transferees are protected by a property rule; nongratis promisees are protected by a liability rule; and gratis promisees are not protected at all (or, if you want, the gratis promisor's interest in the promised goods is protected by a property rule).⁹

This pattern is interesting, as other legal scholars have recognized,¹⁰ but what are we to make of it? Farnsworth argues that the "intention principle" explains why transfers are not generally reversible. This will surprise the reader. If Farnsworth believes that the reliance principle, and not the intention principle, explains why *promises* are enforced, why does he then appeal to the intention principle in order to explain why *transfers* are enforced? As Farnsworth's argument is difficult to follow, I will take it step by step.

Farnsworth first observes that what counts as performance is defined by the parties' intent. In the case of the sale, the parties intend that ownership pass from seller to buyer. By contrast, in the case of a lease or bailment, the parties intend that the transferee will keep the goods only for a certain period of time (pp. 129-31). It is unclear, however, what Farnsworth makes of these examples. He appears to think that they illustrate the relevance of the parties' intentions. But in both cases, a certain right is passed from one person to another — the right to keep the goods for all time, or the right to keep the goods for a certain period of time — and in neither case can the transferor change his mind and take the goods back (at all in the first case and during the time period, in the second case). Intention explains the right, but it does not explain the remedy, which is the subject of Farnsworth's concern.

To see why this first step is not helpful, observe that Farnsworth could have said the same thing about a promise. When a person promises to make a sale, he promises to transfer title. When he promises to lease an item, he promises to transfer possession for a certain period of time. So intentions control the nature of the property right that will move from one person to another, but they do not explain why a liability rule protects the promisee but a property rule pro-

9. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

10. See generally Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992).

fects the transferee. Indeed, when discussing promises, Farnsworth thinks that the reliance principle, not the intention principle, explains the remedy.

Farnsworth's next point is that parties can contractually arrange for the seller to retain an interest in the goods after delivery, so that if the buyer fails to come up with the money, the seller can recover the goods rather than, or in addition to, damages (p. 130). In other words, parties can contractually provide for remedies in certain cases, as well as rights. Farnsworth adds for good measure that a seller may be able to obtain possession of the goods, even if he does not provide for such a remedy in the contract, if he was unduly influenced by the buyer (pp. 130-31). Farnsworth thus concludes, with some additional complications that need not occupy us here, that the intention principle explains why sellers cannot repossess goods after delivery if the buyer breaches.

It is not clear why Farnsworth thinks that these observations support his claim that the use of property rules to protect the transferee is based on the intention principle. The law gives parties a great deal of freedom to craft property interests, but it also gives parties freedom to craft remedies in case of breach of contract. Yet Farnsworth believes that remedies for breach of contract are based on the reliance principle. His mistake is in thinking that the law's respect for free choice explains anything. The problem he seeks to solve is the law's treatment of regretted decisions exactly in those instances where the parties *do not* provide an answer by contract. When the parties do not stipulate that the promisor can change his mind, and either not perform a promise or take back some item, the law must supply some default. We need a theory to explain why the law chooses particular defaults; the fact that the law allows people to depart from the defaults is not relevant.

It should be clear by now where Farnsworth goes wrong. He confuses the question of who should get the entitlement with the question of what is the proper remedy. If the intention principle and the reliance principle mean anything (and one should have doubts about whether they do), they mean that a promisee should have the entitlement, and that the transferee should have the entitlement. That is what both parties intend, and that is how both parties rely. But these principles cannot answer the further question of whether the relevant entitlement should be protected by a property rule or a liability rule when the parties do not express an intention. When the parties do not express an intention, either rule is consistent with their intentions and

either rule can protect, in the loose sense used by Farnsworth, the entitlement holder's reliance.¹¹

Farnsworth fares no better when he again invokes the intention principle to explain the law's treatment of gratuitous transfers. He makes two arguments. First, he argues that "a gift speaks to the present," whereas a promise speaks to the future, so "there is less reason for a legal system given to paternalism to protect [the donor] from his own improvidence" (p. 134). The implication is that some intentions matter more than others, but how can we evaluate intentions without having some theory that explains which intentions are pure and which are corrupt? The reference to paternalism is not helpful. The law allows me to promise someone \$100,000 in return for some internet stocks that might have no value tomorrow; why would it not allow me to promise to give away that much money?

Second, Farnsworth argues that "a gift is limited to what one has," so one is "powerless to squander [one's] future by means of a gift" (p. 134). Again, having invoked the intention principle to explain why transfers are enforceable even though gratuitous promises are not, Farnsworth bases his explanation on paternalism. The intention principle can make no sense of the different treatment of gratuitous promises and gratuitous transfers. Both are intended, yet only gratuitous transfers are enforceable.

What, then, explains the patterns of law that we have been discussing? There is not space here to provide a complete theory, but a few observations are in order. First, note that transferees receive stronger protection than promisees. So the theory must show that a person who possesses a good can more effectively invest in it than can a person who merely expects to receive the good in the future. This is plausible because a possessor is likely to have more information about a good than a person who does not yet possess it. The good is in the possessor's hands; he knows best how to store, maintain, and use it. So even if the person who no longer has the entitlement — whether transferor or promisor — does turn out to value the good more, the transferor should not be able to violate the transferee's rights as freely as the promisor should be able to violate the promisee's rights. The location of possession distinguishes the two cases.

Second, note that recipients of gifts (including promises) receive less protection than people who receive transfers or promises pursuant to an ordinary exchange contract.¹² This observation suggests that we need a theory for why gifts are treated differently from commercial

11. Cf. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) (arguing that available philosophical theories about promises provide no basis for choosing among default rules).

12. See Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 592-95 (1997).

exchanges. Perhaps the social value of gifts is more ambiguous than the social value of exchange — an old theme, about which there are interesting arguments on both sides.¹³ Whatever the case, only such a theory, not an appeal to principles of intention or reliance, can explain the law's different treatment of gifts and exchanges. Intentions cannot explain the law because the law regularly violates people's intentions to give gifts. Reliance cannot explain the law because people's reliance depends on what the law is.

* * *

Farnsworth's book is framed by a quotation from Rousseau — “it is absurd that the will should put itself in chains for the future” (p. 70) — that does not mean what Farnsworth says it means. Farnsworth interprets this statement to mean that an individual would never rationally commit himself to performing some action. But Rousseau means nothing of the sort. The passage from which Farnsworth appears to have taken the quotation concerns the nature of the sovereign (the “general will”), not the interests of an individual's will.¹⁴ It is clear from other passages in the book that Rousseau sees the obvious advantages that accrue to individuals when they make binding commitments.¹⁵

This does not detract from Farnsworth's substantive claims, but it is symptomatic of the problem with his book. Farnsworth is a thorough and sophisticated scholar of contract doctrine — this is evident from his superb treatise — but he does not fully take advantage of the disciplines that might be used to understand that doctrine. Philosophy and literature are mined for quotations but not for ideas. Economic concepts are introduced but not explained or integrated with the argument.¹⁶ Insights from sociology and psychology are ignored. Farnsworth seems to think that doctrine itself can supply the principles that will explain it, but it cannot. The doctrine itself has inconsistencies, so narrow principles are falsified and principles broad enough to encompass the contradictions have no critical edge.

Farnsworth's intermittent discussion of the case of *Enricho Navarroli* illustrates these problems.¹⁷ The state of Illinois had charged Navarroli with drug dealing. The prosecutor promised Navarroli that if he cooperated in the investigation, the prosecutor

13. *See id.* at 585-92.

14. *See* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 69-70 (Maurice Cranston trans., 1968).

15. *See id.* at 60-61.

16. *See supra* note 8.

17. *See* *People v. Navarroli*, 521 N.E.2d 891 (Ill. 1988).

would reduce the charges. Navarroli did cooperate, but the prosecutor broke his promise. When Navarroli objected, claiming breach of contract, the trial court held in his favor, but the Supreme Court of Illinois reversed the decision and held for the state. The court held that Navarroli was not denied any of his constitutional rights because he did not plead guilty in reliance on the prosecutor's promise. Navarroli relied by cooperating in the identification of other criminals, not by giving up constitutional rights. Farnsworth's criticism of the court's holding can be quoted in full:

But even if [Navarroli] had no constitutional right, the reliance principle surely justified the relief granted by the trial court. In finding it, with Rousseau, "absurd that the will should put itself in chains for the future," and in allowing the state to change its mind to what Papinian would have called Enricho's "disadvantage," the Supreme Court of Illinois disregarded this widely recognized general principle of contract law. [p. 203]

This argument is unconvincing. Navarroli relied on the prosecutor's promise, but we have seen that reliance is not always sufficient to justify relief. Suppose that a detective told Navarroli soon after picking him up (and after Navarroli waived his constitutional rights) that he would release Navarroli if Navarroli identified another suspect. Navarroli, relying on this promise, identifies another suspect, but the detective breaks his promise to release Navarroli. This kind of deceit is common, and courts do not provide criminals with a remedy when detectives engage in it. The suspect relies, but the reliance has no normative import in the theories that we use to justify the criminal justice system.

It should be clear that sometimes reliance matters while other times it does not matter. How do we decide whether reliance should matter? If we think the police should not break promises made to suspects in custody, then we should punish the detective in my hypothetical. If we think prosecutors should not break promises made to criminal defendants, then we may object to the state's action in the Navarroli case. But we need a theory for why we should think this. That theory might balance a sense of fair play or respect for the autonomy of citizens, on the one hand, and the exigencies of criminal law enforcement, on the other hand, and where that balancing takes us is by no means obvious. We might think that detectives should be able to break promises but that prosecutors should not. The point, though, is that we cannot resolve this question by appealing to the principle of reliance.

One theory is that the prosecutor should take whatever actions maximize the likelihood of successful criminal prosecutions, consistent with constitutional protections. A defender of Navarroli could point out that prosecutors will not be able to extract information from criminal defendants if prosecutors cannot make enforceable promises in return. If courts do not enforce agreements between prosecutors

and defendants, prosecutors will lose a valuable weapon for fighting crime.¹⁸

But there is a contrary argument. Prosecutors know that if they violate agreements, defendants will not enter them; therefore, prosecutors have every incentive not to violate such agreements, at least if they think that defendants learn about prior violations. Prosecutors violate agreements only when the benefits (such as the capture of a particularly vicious criminal) exceed the harm to the prospects of future cooperation with other defendants. Prosecutors are in the best position to make this tradeoff, not courts; so courts should not enforce agreements that prosecutors violate. True, rogue prosecutors might violate some agreements in order to obtain short-term political gains, and the institution would be better off if courts restrained such behavior. But courts are not well-suited for regulating the internal governance of prosecutor's offices, and supervision is perhaps best left to higher political officials.

Much more can be said about these interesting issues. There are philosophical questions about the proper treatment of regret; sociological questions about the internal organization of prosecutor's offices and the extent to which prosecutorial policy filters down to the street; political and institutional questions about the relationship between courts and prosecutors; economic questions about the optimal design of plea agreements; psychological questions about the ability of criminal defendants to understand plea agreements and to make voluntary decisions in difficult circumstances. But these questions are invisible in the methodology on which Farnsworth relies. One cannot answer hard questions about the design of criminal justice institutions by appealing to abstract notions of reliance, notions that themselves are wrenched from contexts as different as gift-giving among family members and commercial exchange.

* * *

What leads Farnsworth down this path? Farnsworth sees himself as describing the principles of contract law, and he appears to think of principles in the following way. At the highest level, there are normative goals and ideals, including enhancement of well-being and perhaps various deontological constraints. At the lowest level, there are the cases and doctrines themselves, like the consideration doctrine. In between are the principles. These are generalizations about the doctrines and cases, but they are justified only to the extent that they

18. This argument was made by the dissent. The dissenting judge did not simply appeal to the reliance principle; he argued that the majority's view would discourage plea agreements. See *Navarroli*, 521 N.E.2d at 897-900 (Clark, J., dissenting).

make sense in light of our normative ideals. The principles are *intermediate* between the normative ideals and the cases themselves.

The intermediary role of principles creates tensions, and this can be seen at both the positive and normative levels at which the book operates. Consider first the positive arguments. Farnsworth claims that contract law obeys the reliance and intention principles, as well as other principles. But he notes the many ways in which these principles fail to explain certain doctrines. Farnsworth acknowledges that the reliance principle cannot explain why gratuitous promises to charities are enforceable. He accordingly appeals to the intention principle here (pp. 78-79). But if the intention principle holds, why don't courts enforce gratuitous promises made to non-charities? The answer appears to be, in Farnsworth's mind, that charitable gifts are socially valuable and other sorts of gifts might be impulsive. But then the real positive explanation of the cases is some combination of social values — the desire to promote charitable giving, the desire to protect people from their impulsiveness — and the intention principle plays no role. Farnsworth could have skipped a step by arguing that courts do not enforce gratuitous promises because they think that these promises often are made impulsively, unless the beneficiaries are charities, because the courts think that charities should be promoted. If this is the explanation for the doctrine, it is unnecessary to appeal to intermediate principles like the intention and reliance principles.

A similar point can be made about Farnsworth's normative arguments. For example, he regrets that gratuitous promises that meet some formality are not enforceable. If the enforcement of such promises is desirable, but violates the reliance principle, then the mere fact that the reliance principle can be derived from contract cases (if it can) does not give it normative force. But if the reliance principle does not have normative force, we cannot use it to praise or condemn particular contract cases or doctrines. Yet Farnsworth does exactly that when he criticizes the *Navaroli* court for violating the reliance principle when refusing to enforce the plea agreement.

The problem with Farnsworth's methodology is that the content of the principles depends on their justification. As noted before, no sensible intermediate principle would hold that all reliance should be protected. Rather, only reasonable reliance should be protected, but one needs a theory to explain what reasonable reliance is. Similarly, no sensible intermediate principle would say that all intentions should be protected, and one needs a theory to distinguish intentions that should be protected from those that should not be protected. The intermediate principles, then, do not have a critical edge unless one refers constantly to more general normative ideals, and that is what Farnsworth does. The result is that the intermediate principles disappear as sources of explanatory power, from both a normative and a positive perspective.

The intermediate principles could be understood in another way: as descriptions of general patterns that appear in the doctrine. Various doctrines that might otherwise seem unrelated display interesting consistencies. The consistencies can be described as principles; the principles have no explanatory value, but need to be explained. To explain them, we rely on economic, philosophical, or some other high-level analysis.

There is nothing wrong with this style of scholarship as an a priori matter, and it has a long and distinguished tradition. The problem is that typically the search for principles takes over and becomes an end in itself. All effort goes toward showing that cases are consistent (or not) with each other, and the higher-level analysis comes through the back door, usually to explain the occasional deviations, so the principles themselves, and most of the law, are left unexplained. This happens repeatedly in Farnsworth's book. A deviation from the intention principle is described as "paternalism," but paternalism is a complex idea, and raises more questions than it answers. What kind of paternalism? Is it justified? And so on. Farnsworth argues that people are, or should be, released from certain commitments when the attractiveness of the commitment is the result of cognitive biases. But what are these cognitive biases? Surely they do not justify releasing a person from every commitment; but if not from every commitment, which ones? Farnsworth says that expectation damages allow efficient breach. But is breach always efficient? When is it efficient, and when is it not?

Many scholars have abandoned the doctrinal approach taken by Farnsworth because that approach takes for granted all of the difficult questions. How would they write a book about the "law of regretted decisions"? One can only speculate, but let me say a few words.

To the economist, regret is not a special or interesting concept. When people make promises, or induce reliance through their conduct, it will sometimes be the case that the joint value of the promisor and promisee's investment will be maximized if the promisor can avoid keeping his promise, perhaps paying damages or perhaps not. Optimal contract law will enforce promises to the extent that maximizes value. Whether or not the promisor regrets his promise is immaterial.

To the psychologist, regret *is* special. Some psychologists believe that a person's fear of feeling regret will cause him to engage in behavior that is irrational under standard economic assumptions. Whether it follows that the law or the courts have a role in regulating this behavior is a difficult question. But the research project is clear: to show ways in which the law recognizes this cognitive bias.¹⁹

19. See Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 62-73 (1999).

To the philosopher, regret is also special. It raises the question of why the “future self,” the person who is bound to keep a promise, should suffer as a consequence of the behavior of the “present self,” the person who makes the promise.²⁰ In some ways, the future self is a different moral entity, so the benefit that the ability to make commitments confers on the present self does not necessarily justify the harm to the future self — any more than the benefit that a government project confers on me justifies the harm that it imposes on you.

Farnsworth acknowledges this research but does not use it. That is too bad. The research is often legally unsophisticated, simplifying the law so much that it is almost unrecognizable. A synthetic approach to the research by a legally sophisticated scholar like Farnsworth might have produced a more distinctive contribution to contracts scholarship.

20. See DEREK PARFIT, *REASONS AND PERSONS* (1984).