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THE PROMISE OF THE FUTURE — AND VICE VERSA: SOME REFLECTIONS ON THE METAMORPHOSIS OF CONTRACT LAW†

Charles L. Knapp*

CONTRACTS. By *E. Allan Farnsworth*. Boston: Little, Brown and Co. 1982. Pp. xxiii, 984. \$25.

With the publication of his new treatise on Contract Law, Professor E. Allan Farnsworth secures his claim to be regarded as the Clark Kent Scholar of modern Contract Law. By day a distinguished Professor of Law at one of our greatest university law schools,¹ by night mild-mannered Reporter (since 1971) of the *Restatement (Second) of Contracts*, Professor Farnsworth has now come forth in yet a third capacity, with a comprehensive treatise on the whole of Contract Law — a work which for most ordinary mortals would by itself be sufficient achievement for a lifetime. Thoughtfully organized and lucidly written, its nearly one thousand pages roam over the whole range of topics currently comprehended under the rubric of Contract Law, including many which ordinarily get short shrift from casebook authors and teachers of the first-year Contracts course.² While, in fairness to other authors of similar works,³ it cannot precisely be said that Farnsworth's new treatise fills what was hitherto a void, it does appear that in terms of ability, background and motivation he is perhaps uniquely qualified to produce a work of this sort at this time.⁴ It seems safe to predict that

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1. In addition to teaching law at Columbia University Law School, Professor Farnsworth has been author or coauthor of several casebooks, including *E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS* (3d ed. 1980).

2. *E.g.*, capacity, pp. 213-32; fraud and duress, pp. 232-71. His discussion of "substance, status, and behavior," pp. 212-71, is particularly helpful.

3. Most notably Professors John D. Calamari and Joseph M. Perillo, authors of *THE LAW OF CONTRACTS* (2d ed. 1977) and Dean John E. Murray, Jr., author of *MURRAY ON CONTRACTS* (2d rev. ed. 1974).

4. Farnsworth's perspective as Reporter for the *RESTATEMENT (SECOND) OF CONTRACTS* (1979) [hereinafter cited as *RESTATEMENT 2D*] enables him to combine his discussion of case law with a survey of the rules and commentary of the *Restatement*. Sometimes he defends the *Restatement* position, as in his discussion of *RESTATEMENT 2D* § 351(3), which proposes a limitation on liability for even foreseeable loss where disproportionate compensation would result. Pp. 893-94. At other times he appears to be skeptical of its approach, as in his discus-

this book will become a standard — perhaps *the* standard — work of its kind, widely consulted, cited, and quoted by anyone concerned with the issues it discusses.

In light of the influence this work is likely to wield, it seems fair to consider not merely what Farnsworth has set out to do, and how well he has done it, but also what he has left undone. One can then ponder what implications the answers to these questions (particularly the last one) may have for the rest of us who study, practice, teach, or write about Contract Law.

I

In his preface (p. xix), Farnsworth declares as his goal the writing of a book that would be useful both to law students taking the course in Contracts and to lawyers seeking a general treatment of some topic in that area. Not surprisingly, in light of his long experience as a teacher and casebook author, he has on the first score succeeded admirably. His textual expositions of the common law rule structure are always carefully and logically set out, and eminently readable; they will be particularly helpful to students who find that after study of the assigned materials and attention to the class discussion they are still unable to construct a recognizable picture from the jigsaw-puzzle pieces spread before them.⁵ His exposition of doctrine is liberally studded with discussions of particular court decisions, with attention to both their holdings and their facts.⁶ And the book begins

sion of the commentary to § 86, calling for enforcement of some promises based on moral obligation. P. 59 n.36. Sometimes he is simply Delphic: A provision analogous to U.C.C. § 1-107 "has found its way into the Restatement Second." P. 293.

5. His discussions of assignment and delegation (chapter 11), conditions and breach (chapter 8) and the parol evidence rule, pp. 447-77, are especially helpful. However, by characterizing the parol evidence rule as applicable only to "prior negotiations," pp. 448, 451 (*but see* p. 460), Farnsworth omits examination of one of the most common parol evidence rule problems: the oral agreement (frequently between a consumer and a merchant or merchant's agent) made at the same time that a standardized form (apparently integrated, and probably with a strong merger clause) is signed.

6. As one would expect, his choices of which cases to single out for discussion in the text are sometimes arguable. Farnsworth's discussion of *Pettersen v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928), p. 133, for instance, seems unnecessary and dubious, particularly since there is no cross-reference to his later suggestion, p. 187 n.15, that a case like *Pettersen* might now be decided along the lines of *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958). On the other hand, there might well have been textual discussion of *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) (briefly mentioned at p. 680 n.17), which seems a perfect example of a case whose facts are particularly conducive to a law-expanding decision. Sometimes Farnsworth seems to trot cases around the ring out of a somewhat weary sense that their appearance is expected: *Dickinson v. Dodds*, 2 Ch. D. 463 (1876), is introduced as "an English case that has achieved a notoriety somewhat exceeding its practical importance." P. 150. Occasionally, he furnishes illuminating background on well-known cases, such as his revelation, p. 56 n.27, that defendant McGowin was in fact president of the company that employed plaintiff Webb in the famous falling-block case, *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1935); students often assume something of the sort but the fact does not appear in the report of the case.

with a brief summary of the historical antecedents of modern Contract Law as well as its current sources (pp. 10-35) — particularly the *Restatements* and the Uniform Commercial Code — which is helpful material often supplied only interstitially, if at all, by casebook authors and classroom teachers.

In format, the book is well constructed for student reference. It has a useful topical index, which includes some innovative features,⁷ and unobtrusive topic headings in the margins throughout the text help a scanning reader to find the precise area of coverage sought.⁸ The only readily apparent shortcoming is the absence of any section-number index for either the Uniform Commercial Code or the *Restatement of Contracts*; entries listed by topic under these headings in the main index are helpful, but sometimes they do not enable the reader to locate discussion of the particular Code or *Restatement* provision under study. In general, however, the book seems to fill the bill for any student seeking in-depth supplementary reading for the conventional course in Contracts.

For practitioners, the utility of the book is perhaps less obvious. As many (including Farnsworth himself (p. 30)) have noted, questions of law involving enforcement of contracts today tend to be answered by more specialized bodies of rules, such as "labor law," "securities law," "insurance law," etc. But for the attorney seeking a refresher or an update on the basic notions of Contract Law, Farnsworth provides an excellent summary, concise enough to be manageable but deep enough to be useful. His footnote citations of cases are regularly accompanied by parenthetical capsule descriptions, calculated to save time that might be wasted going up blind alleys. His marshalling of the case authorities into intelligible patterns should also give the researcher considerable aid in trimming the thicket of case law into, if not a topiary garden, at least a maze with both an entrance and an exit.

Farnsworth treats one specialized area of law, the Uniform Commercial Code (particularly Article 2), in considerable detail because of its powerful impact on general Contract Law, both in individual cases not involving the sale of goods and in the abstracted rules which make up the *Restatement (Second) of Contracts*. Not designed to be a treatise on the Code itself, Farnsworth's book does not aspire to the depth or detail of UCC coverage that other commentaries dis-

7. These include a "words and phrases" index heading, p. 984 (indicating where to look for the meaning of such terms as "plain meaning"), and an index of "[c]ases, real and hypothetical" by such popular names as "hairy hand case" and "tramp hypothetical," pp. 965-66.

8. Somewhat less successful are the tacked-on transition sentences at the end of each section of text, which are apparently supposed to ease the reader gently into the next section. Although intended, perhaps, to emulate the flow of a well-organized lecture, in print the general effect produced is of text sections marching by like so many elephants on parade, each with its trunk hooked onto the tiny tail of its predecessor.

play,⁹ but it is particularly helpful in suggesting ways in which attorneys and judges can approach areas where the Code and the common law intersect.¹⁰ Only occasionally does he appear to falter¹¹ or to stop short where he might well have pressed on.¹² For the most part, these brief glosses on the Code — dealing as they often do with questions on which little or no case authority exists — should themselves serve as authority for attorneys or judges seeking guidance on these issues.

In terms of the goals he has set for himself, Farnsworth has scored a stunning success with this book. Both law students and, to a somewhat lesser degree, practicing attorneys should find it useful. There are, however, other potential constituencies for the book — in

9. *E.g.*, J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (2d ed. 1980).

10. Thus, Farnsworth points out that whether contracts involving a mix of goods and services should be governed by Article 2 need not be an all-or-nothing proposition, but depends on the issue at stake — the U.C.C. Statute of Frauds (§ 2-201) can be applied restrictively, even though the cases extending the implied warranties have taken an expansive position. P. 405. Despite some adverse decisions, he sees no reason why the drafters of Article 2 would have intended in U.C.C. § 2-201(1) to change the prevailing rule that a signed written offer can satisfy the Statute of Frauds as against the offeror, even though it does not by itself evidence a "contract." P. 407 n.16. He supplies case authority for the proposition that evidence of fraud should not be excluded by the Code's parol evidence rule (§ 2-202), even though not specifically mentioned therein, p. 465 (presumably, U.C.C. § 1-103 would also support this result). He notes that the concept of "course of performance," U.C.C. § 2-208, should have general application, despite its omission from U.C.C. § 1-205, which defines "course of dealing" and "usage of trade." P. 514. He also suggests that courts applying U.C.C. § 2-609 may be inclined to follow RESTATEMENT 2D § 251 in dispensing with the requirement that a notice requesting "adequate assurance of due performance" be in writing. P. 645 n.23.

11. Farnsworth analyzes U.C.C. § 2-306(2) ("Output, Requirements and Exclusive Dealings") as having the "curious" effect of imposing a duty of "best efforts" on both buyer and seller under an agreement for exclusive dealing, even though an output contract imposes, he asserts, a duty of only "good faith" (*i.e.*, less than best efforts) on the seller, but an "absolute" duty (*i.e.*, more than best efforts) on the buyer. P. 530 n.19. I have always assumed that § 2-306(2) was simply afflicted with the same malaise of over-inclusive drafting as § 2-207, which lumps "confirmations" together with "acceptances," with confusing results. I would read § 2-306(2) as stating two separate rules, one applying to output contracts and one to requirements contracts. Thus, to take the first example, "A lawful agreement . . . by the buyer [under an output contract] for exclusive dealing in the kind of goods concerned [*i.e.*, an agreement that the buyer will buy such goods from no one else] imposes unless otherwise agreed an obligation by [sic: on?] the [output] seller to use best efforts [instead of mere "good faith," as in 2-306(1)] to supply the goods, . . ." The same process reversed produces a mirror-image rule for imposing a best efforts obligation on the requirements buyer in a case where the seller has bound itself to sell only to that particular buyer.

12. Discussing U.C.C. § 2-205, Farnsworth points out that there is no obstacle to protecting a goods offeree under RESTATEMENT 2D § 87(2) from the surprise retraction of a "firm" offer, even if that offer could have been made in a fashion that satisfied § 2-205, but wasn't. P. 186 n.12. I have elsewhere suggested that an offeree of a goods contract should also be able to claim the protection of RESTATEMENT 2D § 87(2) in cases involving a firm offer to which U.C.C. § 2-205 in fact would apply (*i.e.*, made in a signed writing by a merchant), even though the three-month time limit imposed by § 2-205 had expired, provided the facts made it reasonable for the offeree to rely substantially on the offer while at the same time delaying acceptance until that late a time. *See* Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 65-67 (1981). Such a case is hypothetically put in C. KNAPP, *PROBLEMS IN CONTRACT LAW* 278-79 (1976).

particular, teachers of Contract Law. What will Farnsworth's treatise say to them? Each of us will probably have a different answer to that question; mine is set out in the discussion that follows.

II

Like all of my colleagues in the law teaching world, I have been wrestling since my first day in the classroom with the question of just what the responsibilities of a law teacher are (besides, of course, teaching our students to "think like lawyers" — while at the same time, one hopes, reminding them to think like people). My present tentative conclusion is that we have at least three responsibilities to our students: to set forth, as lucidly as we can, what we honestly believe to be the present state of "the law"; to make, as accurately as we can, our best guess as to what, during the careers of our students, "the law" is likely to become; to disclose, as diffidently but frankly as we can, our opinions as to what "the law" should be.¹³ To the extent that our opinions as to what the law should be may (either through our writings or through the influence of our former students) have some slight effect on what "the law" in fact does become, the second and the third functions described above are interrelated. The line between "I predict . . ." and "I advocate . . ." should always be made clear and visible, however, even if the object of each of those two verbs should on a given point turn out, for us, to be the same.

As a text-writer, Farnsworth is — albeit in a different medium — continuing to serve in his role as a law teacher. As such, he is free (and possibly obligated) to fulfill all three responsibilities of a teaching scholar. As to the first, I have already indicated my admiration for his book's substantial achievement in describing the present state of Contract Law. To what extent does he also attempt either to predict what the law will become, or to advocate what it ought to be?

As he proceeds from topic to topic, Farnsworth does not shy away from indicating the patterns of change he discerns in the accumulated court decisions. I spotted at least the following identified "trends," and I doubt this list is exhaustive: increased enforcement of promises made in recognition of a moral obligation (p. 59); increased protection for pre-acceptance reliance (p. 192); increased readiness to compensate reliance on an agreement which for other purposes might be deemed too indefinite to enforce (pp. 209-10); increased willingness to protect those (particularly consumers) who sign agree-

13. On the third point, that of stating our own views, I am sure some of my colleagues will disagree, either because the "Socratic" tradition may appear to preclude it (although in its purest form that tradition probably precludes also the first two of my suggestions, leaving us with only "thinking like a lawyer" as our subject for communication) or because there is a danger that students will view any expression of our views not as an invitation to discussion but as a directive for acquiescence. I agree that the latter is a danger, particularly in the first year of law school.

ments without reading them (p. 248); expansion of the grounds on which excuse will be granted for "duress" (pp. 262, 271); a narrowed application or even abolition of the "pre-existing duty" corollary of the consideration requirement (pp. 274-75); development of new techniques to relieve against "contracts of adhesion" (p. 296); erosion of the Statute of Frauds (p. 373); a narrowed application of the Parol Evidence Rule (pp. 452-53); less insistence on strict compliance with express conditions (p. 565); expanded relief in cases of unilateral mistake (p. 663); increased readiness to excuse performance because of extraordinary events (p. 683); greater availability of specific relief (p. 823); more frequent awarding of consequential damages where the harm complained of was or should have been reasonably foreseeable (as opposed to any requirement of a "tacit agreement" to that effect) (p. 876); less insistence that damages be shown with certainty (pp. 881, 887); increased sensitivity to the willful character of the breacher's conduct (p. 882); and greater willingness to enforce liquidated damages clauses (pp. 898, 901).

Having identified all these trends in the law, however, Farnsworth nowhere attempts to pull them together into a larger pattern, or to sketch some overall picture of what, in his judgment, Contract Law is in the process of becoming. Perhaps, as a good Socratic teacher, he thinks it appropriate to leave this task to his readers. If so, what should a dutiful if timid Socratic pupil venture in response?

First, one has to concede that not all of these various trends appear on their face to be consistent with each other. In some respects, the area of liability is expanded, while in others it is reduced; in some ways, the law is readier to enforce the agreement which the parties themselves have made, while in others it is quicker to modify or even nullify that agreement in light of the court's view as to what their bargain ought to have been. These tensions are reconcilable, however, if some basic distinctions are first noted. One is the distinction between parties who have apparently dealt with each other on a footing of substantial equality-in-fact (such as two merchants not grossly disparate in bargaining skill, technical expertise or economic power) and parties who have dealt from positions of relative inequality-in-fact (such as a consumer — perhaps poor, unsophisticated or at least uninformed about the subject matter of the transaction — dealing with a merchant of at least ordinary competence). More strongly in the latter case than in the former, the overall trend clearly appears to be away from enforcement of the "bargain-in-form" (the standardized written form-contract) and toward (a) enforcement of any agreement actually made, even if "informal," as well as (b) relief from any grossly "unfair" terms of the bargain-in-form, even if those terms were not in fact varied by informal agreement between the parties.

A second distinction to be observed is between the question of whether a contractual obligation has been created and the question of whether a contractual duty has been discharged or excused. On the former question, that of threshold liability, the trend is clearly toward greater readiness to impose liability, as witnessed by the weakening of the formal rules of offer and acceptance (in favor of giving effect to "intention to be bound"), the protection of foreseeable and reasonable pre-acceptance reliance, the atrophy of the Statute of Frauds, the willingness to enforce gratuitous and/or non-commercial promises if foreseeably relied on, and the increased disposition to find a basis for enforcing promises actuated by feelings of "moral obligation" or made in recognition of "past consideration." If quicker to impose liability than in the past, however, the law has also become quicker to excuse it, by expanding existing grounds for excuse (duress, impossibility, fraud) or by creating new ones (impracticability, unconscionability, promisee's failure to act in good faith).

If one simply assumes that the various trends identified by Farnsworth will continue, unchecked by countertrends, and that the larger generalizations ventured above accurately describe the overall pattern to which those trends conform, then one could from these premises attempt to extrapolate a vision of what Contract Law might look like at some future date — say, the year 2000. Assuming that the felt need for Restatements of Law will also continue to that time (certainly that is a trend which presently shows no sign of subsiding), one could even attempt to encapsulate the central tenet of such a system in a typical Restatement provision, complete with the usual clutch of supporting comments (which would, of course, only hint at the wealth of detail awaiting the reader in other portions of that Restatement). In doing so, one might come up with something like the following:

§ 1. PROMISES ENFORCEABLE

Every promise made apparently with serious intention to perform is enforceable by any person foreseeably injured by its unjustified nonperformance.

Comment:

a. Types of promises covered. There is no limitation as to subject matter on the types of promises covered by this principle. Promises in a business setting will often take the form of "offers" to engage in a present or future exchange of performances, or "acceptances" of such offers, but they may also include promises made not as part of any present or projected exchange. They may be made between persons engaged in commercial transactions, between family members, or even between strangers (although the likelihood of enforcement in

the last case will be strongly affected by other factors, such as apparent seriousness of intent and foreseeability of injury). Expressions of commitment are also frequently conditioned, either expressly or (in light of all the circumstances) impliedly, on the happening of other events; see the discussion in Comment *j*, below.

b. Voluntariness. The term "promise" as used herein refers only to voluntary manifestations of commitment. Promises which are procured by improper coercion are not enforceable hereunder. "Improper coercion" includes physical force; it also includes various types of "duress" not involving such force. (As to promises made as a result of fraudulent or material misrepresentations, see Comment *j*, below.)

c. Form. If a promise would otherwise be enforceable under this principle, it is not unenforceable because it was made only orally, or informally, although in the absence of a signed writing evidencing the promise or in other cases where for any reason there is substantial doubt whether the promise was actually made, the court may in the interest of avoiding possible injustice limit the remedy to compensation of plaintiff's reliance. It is sometimes asserted that a promise has been made in a case where a written agreement between the promisor and promisee appears to negate, or to be inconsistent with, the asserted promise; in such a case this factor may be taken into account in deciding whether the asserted promise was in fact made.

d. Intention to Perform. The principle stated above applies only to promises which appear to have been seriously made, creating in the promisee a reasonable expectation of performance. In cases where there is neither a business relation (present or prospective) nor ties of affection between promisor and promisee, there may be little or no reason for the promisee to infer a serious intent to perform on the promisor's part.

e. Standardized Forms. In cases where one person has expressed apparent commitment to one or more promises in a form prepared or supplied by the other, it is a question of fact whether the supplier of the form could have reasonably understood the other's assent to that form to manifest commitment to the promises contained therein. The degree of relative sophistication of the parties (particularly if the "promisee" is a merchant and the "promisor" is not) are relevant to this issue, as is the degree to which the promises contained in the form appear to reflect a bargain unconscionably favorable to the supplier of the form.

f. Enforceability. In many cases, a decree of specific performance will be available, particularly where it appears that (because of the difficulty of calculating damages or for other reasons) injustice would otherwise result. In other cases, the court will enforce the

promise by ordering the promisor to pay damages, calculated in light of the benefit which the promisee reasonably expected to gain from performance (the "expectation interest"), the extent to which the promisee has suffered by virtue of reliance on the promise (the "reliance interest"), or the amount of unjust enrichment which the promisor would otherwise retain (the "restitution interest"). Ordinarily, damages awarded for nonperformance of a promise made in a commercial setting will be based on the promisee's expectation interest, if that can be calculated with sufficient certainty and the test of foreseeability is met. See Comment *h*, below. Damages for nonperformance of a promise made in a nonbusiness setting may in the court's discretion be limited to the plaintiff's reliance or restitution interests, as justice requires.

g. Persons who may enforce. The principle expressed is not limited to enforcement of the promise by the promisee. In some cases, the promisee may assign its right to performance to another person, in which case the latter will ordinarily have the right of enforcement. Or, substantial and foreseeable reliance by one other than the promisee may make enforcement in favor of that person appropriate in order to prevent injustice. Unless the person seeking enforcement is the promisee, an assignee thereof, or some person apparently intended by the parties to have a right to enforce that promise, enforcement will ordinarily be limited to damages calculated to compensate the claimant for substantial and foreseeable reliance on the promise.

h. Foreseeability. In the area of promissory liability, as in the area of liability for tortious conduct, the law generally requires as a condition for enforcement that the defendant be shown to have had reason to foresee the injurious consequences of which the plaintiff complains; this is because ordinarily it is considered unjust to hold an actor liable for harm which he or she did not either actually foresee or at least have reason to foresee. This requirement, however, will be affected by other factors in the case. Thus, particularly where the promise is made in a commercial setting, certain types of harm so commonly result from nonperformance that the promisor will be held as a matter of law to have had reason to foresee them; others, less common, may be found as a matter of fact to have been reasonably foreseeable in all the circumstances. When a promise is made in a noncommercial setting, the court is likely to insist on a higher degree of foreseeability, particularly where the promise was not made as part of a bargained-for exchange, present or projected.

i. Injury. The principle stated above provides for the granting of a remedy only in cases where injury has occurred from the nonperformance of a promise. In cases where the injury is to the plaintiff's reliance or restitution interest, a remedy will ordinarily be awarded

if the other requirements of this principle are satisfied. Where the injury is to the plaintiff's expectation interest only, it is for the court to decide in all circumstances whether enforcement by protecting plaintiff's expectation of performance (either by specific performance or by an award of damages) is appropriate in order to do justice between the parties. See Comment *f*, above.

j. Justification for nonperformance. In some cases, the promisor's statement of intention to perform will itself have been expressly conditioned on the occurrence of some event; in others, it will be reasonable for the court to imply such a condition. This condition may consist of some performance which the promisor had been promised in return, or may be some other event. Even if the court finds that there has been a failure to perform the promise, it may conclude that no enforcement is appropriate, because that failure to perform was justified. This may be because of some circumstance that the law regards as a sufficient excuse in such cases generally, such as impracticability of performance or frustration of purpose; it may be because the promise was the result of fraud or material misrepresentation, or undue influence exerted on the promisor; it may be because some change in circumstance has occurred (or come to light) which the promisee should have realized would justify nonperformance by the promisor. Some changes in circumstances (for example, financial inability to perform) which ordinarily do not excuse the duty of performance in a business setting may constitute a sufficient excuse for nonperformance where the promise was made in a nonbusiness setting, particularly where it appears to have been made for altruistic motives and/or not to have generated any substantial reliance on the promisee's part.

III

Given "world enough and time," a committee of drafters could produce a full-scale "restatement" by elaborating the principles set forth above. (It probably would not be called a "Restatement of Contracts," for obvious reasons — perhaps "Restatement of Promissory Obligations" would do for a working title.) Suppose they did, and suppose the draft were promulgated by a body as prestigious as the American Law Institute, thereafter to be regarded as strongly persuasive authority by courts across the land. What real changes from the present state of the law would result?

For one thing, the way law teachers organize and present legal principles in this area would be affected. Some concepts which now receive substantial attention — such as "consideration," to take the most obvious example — would be relegated to the status of historical footnotes. Like window decals on a tourist's auto, their function would be to remind us of where we've been, not to tell us where we

are now. Other concepts which we now regard as central — such as “contract,” “offer” and “acceptance” — would continue to be useful and important tools of analysis, but they would be neither as crucial nor as dominant as they now are in our discussions. However, the evolution of terms and concepts is hardly a startling or radical notion; both *Restatements of Contracts* have included suggestions for the abandonment of terminology previously employed.¹⁴

Far more important than the question of terminology is the question of impact on court behavior. Would such a “Restatement of Promissory Obligations” actually “change the law,” in the sense of changing the decisions which courts make in the cases brought before them? In the first place, the above elaboration suggests virtually no outcome that has not in fact already been reached by courts, operating under the rules as now articulated, in order to reach the apparently just result in a particular case. So if the rule-shift suggested above were in fact to work a change in results overall, this would not be a radical change in the kinds of decision reached, but at most a shift in the “mix” of outcomes, with some types being rarer and others more common.

Whether even this much change would actually occur is open to question; quite possibly it would not. As an example, consider the evolution — described with approval by Farnsworth — of the “pre-existing duty” rule (pp. 271-93). That rule, developed as a logical corollary of the general doctrine of consideration, required the proponent of an asserted agreement made in modification of an already-existing contract to demonstrate that the modification agreement itself was not “one-sided,” but was supported by consideration on both sides.¹⁵ In addition to its consistency with the general consideration principle, the rule was said to have the virtue of policing “extorted” modifications.¹⁶

14. *E.g.*, the decision of the drafters of the RESTATEMENT OF CONTRACTS (1932) to avoid classifying promises as “dependent” or “independent,” p. 579 n.15, and the *Restatement 2d’s* avoidance of the terms “bilateral” and “unilateral contract,” p. 110, “condition subsequent,” p. 543, and “donee” and “creditor beneficiary,” p. 716.

15. RESTATEMENT 2D §§ 75, 78.

16. Farnsworth offers *Alaska Packers’ Assn. v. Domenico*, 117 F. 99 (9th Cir. 1902), as a case where “particularly outrageous threats” were employed to coerce a contract modification. P. 278 n.10. In that case, the court declined to enforce defendant employer’s promises of increased compensation, made in response to the plaintiffs’ refusal to perform their contract obligations to work on defendant’s fishing boats. The plaintiffs had attempted unsuccessfully to convince the court that their actions were justified by the “rotten and unserviceable” condition of the defendant’s nets. 117 F. at 101. Today, the workers’ action in *Alaska Packers’* would probably be described as a “wildcat strike,” and a court just might be a little less inclined to swallow whole the employer’s argument that *of course* the nets provided were not “rotten and unserviceable” because the employer’s profits were dependent on them; from the employer’s point of view, the decision whether to repair or replace the nets, “rotten” or not, would probably have been made on a cost-benefit analysis comparing the cost of repair or replacement with the likely loss in fish netted during the season.

In time, however, the pre-existing duty rule fell into disfavor, and courts developed the knack of getting around it where it appeared that otherwise injustice would result. In some cases this was done by manipulation of the notion of consideration itself,¹⁷ and in others by development of a new exception to the rule, based on the occurrence of "unanticipated difficulties" making the revised agreement appear to be a fair one, after all.¹⁸ In some cases courts were ingenuous (or ingenious) enough to buy the notion that the parties to an existing contract could simultaneously rescind that contract and create a new one, which could then be held to satisfy the consideration requirement for enforcement.¹⁹ The drafters of the U.C.C. simply abolished any requirement of consideration for modification agreements under Article 2, while noting the possibility that enforcement of such an agreement might nevertheless be avoided on the ground that it was procured by the "bad faith" conduct of its proponent.²⁰

In light of widespread judicial dissatisfaction with the pre-existing duty rule, and the various ways of avoiding it in cases where it would work an injustice (plus the availability of the concept of duress as a means of avoiding enforcement of "extorted" modifications²¹), it seems that the Article 2 drafters' shift in doctrine was not a global one after all, but merely a shift in the burden of proof, away from the proponent of the modification and toward the one who would avoid it. The pre-existing duty rule had already become, as we say, "a rule that can be understood only in light of its exceptions." But the same thing can be said of the consideration doctrine in general, given the Mack-truck-sized exception made for cases of unbargained-for reliance;²² the Parol Evidence Rule, given the long catalogue of reasons why extrinsic evidence will be admitted and considered for some purpose despite the existence of an apparently integrated writing (pp. 447-77); and the Statute of Frauds, given three hundred years of judicial whittling-down, capped by the recent tendency to hold that the Statute bends to substantial reliance on an

17. See, e.g., *Swartz v. Lieberman*, 323 Mass. 109, 112, 80 N.E.2d 5, 6 (1948) (discussed by Farnsworth at p. 275 n.22).

18. See, e.g., *King v. Duluth, Missabe & N. Ry.*, 61 Minn. 482, 63 N.W. 1105 (1895) (discussed at p. 276 n.3).

19. See, e.g., *Schwartzreich v. Bauman-Basch*, 231 N.Y. 196, 131 N.E. 887 (1921) (discussed at p. 274 n.17).

20. U.C.C. § 2-209(1) and comment 2 thereto.

21. See, e.g., *Austin Instrument Co. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533 (1971) (discussed at p. 278 n.12). As Farnsworth points out, p. 278, the concept of duress is a better tool than the consideration requirement for policing coerced modifications, since it will support not only a refusal to perform, but an action for restitution where the extorting party has succeeded in coercing not only a promise of increased compensation but the performance of that promise as well. Presumably the same restitutionary result should be available in an action for bad faith breach under the U.C.C.

22. Pp. 89-98; see generally Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

oral bargain.²³ If a rule is indeed understandable only in light of its exceptions, then one should consider whether the exceptions together do not now make up "the rule," with the former rule being itself relegated to the status of an exception.²⁴ When judges leave office, they are usually addressed as "Judge" for the rest of their days, a custom that does little if any harm and honors their past service. When a rule ceases to be a rule in fact, however, we deceive each other and our students if we continue to call it "the rule" when it is really only our recollection of one.²⁵

With that thought in mind, I would suggest that the above "Restatement" of the rules respecting promissory obligations might work only the following real changes: (a) ensuring that the court would not feel obliged to deny an uncounseled party the benefit of a "one-sided" but non-coerced modification of a non-goods contract;²⁶ (b) enabling the recipient of a non-goods "firm offer" to avoid the effect of a surprise retraction without the necessity of demonstrating actual acts of reliance;²⁷ and (c) permitting the court to enforce a purely gratuitous promise even in the absence of substantial reliance thereon. Even on the latter point, the discussion of "enforceability" in the "Comment" indicates that the court should feel free to continue to restrict the gratuitous-promisee to protection of his or her reliance interest;²⁸ in many cases that may appear to be all that justice requires. But the court would have discretion to enforce a promisee's "expectation interest" in the performance of a purely gratuitous promise that had not been relied upon. Perhaps this is truly the only substantial change that the rules set forth above would necessarily produce. If so, is that change an undesirable one?

Professor Farnsworth's answer to this question appears to be "yes." Conceptually, Farnsworth approaches Contract Law from

23. See chapter 6 ("The Requirement of a Writing: The Statute of Frauds").

24. Readers of Lewis Carroll's "Through the Looking Glass" will recall the White Queen's version of a rule more honored in the exception: "[J]am to-morrow and jam yesterday — but never jam *to-day*." L. CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 52 (S.H. Goodacre ed. 1983).

25. For an example of a court oscillating between two versions of a "general rule," see *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 147 Md. 588, 128 A. 280 (1925). Compare 147 Md. at 593, 128 A. at 281 ("It may be stated as a general rule that a contract cannot be enforced by or against a person who is not a party to it."), with 147 Md. at 598, 128 A. at 283 ("[A] party to a contract may as a general rule assign all his beneficial rights . . .").

26. Presumably a counseled party in this situation would have foreseen the consideration issue, and structured the modification agreement to meet that objection.

27. Cf. RESTATEMENT 2D § 87(2), which requires reliance for this result. Comment *e* to that section suggests that such reliance must be "substantial as well as foreseeable," while at the same time conceding that the foregoing of alternatives is a likely form of reliance. Since, at minimum, the offeree in such a case is likely to rely to the extent of delaying acceptance and neglecting to seek out alternatives, it would appear that in most cases of surprise retraction there will indeed have been substantial reliance, but perhaps of too "intangible" a nature to be objectively proveable.

28. This would appear to approximate the effect of RESTATEMENT 2D § 90.

the classical perspective of bargained-for consideration (pp. 4, 41-82) and mutuality of obligation.²⁹ The utility of contract law for him appears to lie in its enforcement of exchange transactions (pp. 4-10), and while he seems generally to approve of the increased employment of notions of good faith and fairness in resolving disputes between commercial bargainers,³⁰ he seems little inclined in general to replace the notion of "contract" with that of "promise."³¹ Of course, he concedes the legitimacy of promissory estoppel as an alternative basis for liability, but, however well-established, promissory estoppel appears still to sit considerably below the salt at the feast of law that Farnsworth has spread.³²

As further evidence of Farnsworth's likely disapproval of this proposed expansion of liability, consider the Case of the Gold Watch. Several times,³³ Farnsworth asks us to consider the hypothetical case of an employee whose employer promises to give him a gold watch. At first, the watch is said to be a Christmas present (p. 46); later, it is called a reward for the excellence of past services (pp. 50, 58, 86). At one point, the employer adds a requirement that the employee stop by the office to pick it up (p. 61). Never, however, does the employee acquire an enforceable right to performance of

29. Despite the decision of *Restatement 2d's* drafters to play down the concept of "mutuality of obligation" (§ 79 states that there is no such additional requirement for enforceability, provided the requirement of consideration is satisfied), Farnsworth brings mutuality of obligation onstage early and approvingly as a basic principle to be respected, pp. 106-08, and calls it back repeatedly in order to justify or question more particular rules, e.g., pp. 139 (offeree not bound where acceptance did not comply with terms of offer), 169 (mailbox rule), 210 (indefinite agreements), 219 (requirement of prompt ratification by minor coming of age), 255 (misrepresentation), 267 (duress).

30. Pp. 33-34, 526-27, 610-11. His enthusiasm for these notions is not, however, unbounded. Pp. 240-41.

31. Although he introduces the notion of "promise" immediately, Farnsworth quickly makes it clear that a single promise is important for the same reason that one wheel of a bicycle is important; it is one of two vital parts of a larger machine — in this case, the machine we call "exchange." Pp. 8-10. At one point Farnsworth describes, with seeming approval, the common law's historic position of assuming that promises are generally not enforceable, unless some positive reason for enforcement is shown in a particular case, rather than assuming a general rule of enforceability, with exceptions of nonenforcement being made where appropriate. Pp. 12-13.

32. By the end of the second paragraph of chapter 1, Farnsworth has declared that "if nothing has been given in exchange for the promise, it has no legal consequences; and if it has no legal consequences, there is no contract." P. 4. There is no accompanying citation to the later discussion of promissory estoppel at pages 89-98. "Promissory estoppel" is not even an independent heading in the index; it is shunted over to "Reliance," which of course includes not only references to applications of what we ordinarily think of as promissory estoppel, but to reliance in other contexts as well. This may be as good a place as any, incidentally, for me to mention the only error I detected in my perusal of Farnsworth's 900-odd pages, an error which Farnsworth himself later corrects: Professor Williston did not, as asserted on page 96, "assiduously avoid" using the term "promissory estoppel" in the first *Restatement*. As Farnsworth later notes, p. 438 n.13, although not employed in § 90 itself, that term was indeed used in Comment f to § 178, which approves application of promissory estoppel to overcome the Statute of Frauds where defendant has promised to execute a writing.

33. Pp. 46-47, 50, 58, 61, 86.

the employer's promise. Repeatedly, arguments on the employee's part are set up only to be knocked down: there is no consideration for the promise (pp. 46-47); past services cannot be consideration for a present promise (p. 50); the employer has not been unjustly enriched (p. 58); "stopping by to pick it up" is not bargained-for consideration (although it could have been³⁴), but merely a condition to a gratuitous promise (p. 61); a recital of something said to be "consideration" will not make it so (p. 86). Farnsworth's determination to turn the Gold Watch Case into the paradigm of the unenforced gratuitous promise is admirable for its stubborn tenacity, but otherwise puzzling, particularly if the question is turned around. Instead of asking why the promise should be enforced, suppose we ask: "Why not?"

The hypothetical employee and employer are obviously parties to an ongoing contract of employment; even if "at will," it is nevertheless a contractual relationship until terminated. If we take the approach of the Uniform Commercial Code,³⁵ the burden is on the one who would avoid a promise made in modification of an existing contract to show why that promise should not be enforced. No reason appears why this promise to pay more for services already performed should be regarded as the product of "bad faith" on the part of the promisee. Therefore, if this were a sale of goods contract, the promise should be enforced.

Even under the "new" common law of the *Restatement (Second)*, the result could be the same. The employer's promise of a gold watch seems likely to be the result of "unanticipated circumstances" (i.e., the employer has had a more profitable year than he anticipated, thanks at least in part to the good work of the employee, or the employee's services have turned out to be substantially more valuable than the employer had anticipated when the contract fixing the employee's salary was made).³⁶ If the policy against extortion is now

34. As an illustration of this point, he puts a different hypothetical:

Compare this promise by a father to his daughter: "If you will meet me at Tiffany's next Monday at noon, I will buy you the emerald ring advertised in this week's New Yorker."

If one supposes that the father and daughter are estranged and that the daughter had refused to see the father, it is possible to make a case for bargain.

P. 62 n.7. This example does indeed make Farnsworth's doctrinal point; however, as a counterpoint to his repeated assertions of non-liability on the part of the promising employer, the "meet at Tiffany's case" (it is so indexed) gives the unfortunate impression that the Fleur Forsytes of the world are more deserving of the law's solicitude than the Bob Cratchits.

35. U.C.C. § 2-209(1). The *Restatement 2d* has an analogous rule, § 89, which preserves, however, the underlying requirement of consideration:

A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or

(b) to the extent provided by statute; or

(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

36. This would presumably make it possible to invoke RESTATEMENT 2D § 89, quoted in

effectuated by the common law rule against duress, that rule would hardly appear to be offended by enforcement of this freely-given promise of a "bonus" for work well done. Only the doctrine of consideration in its unalloyed form appears to stand between the employee and his gold watch.³⁷ Is preservation of this doctrine worth the nonenforcement of that promise?

I would answer that it is not. My reasons for doing so relate not only to the hypothetical Gold Watch Case, but to the desirability of articulating principles of promissory liability in the general way suggested above. They have to do with the effect that such changes might have on the overall perspective of (a) those who decide cases, (b) those who counsel clients with respect to the law in these matters, and (c) all the rest of us — students, teachers or just plain citizens.

IV

Commentators on Contract Law sometimes suggest that in this area it is particularly desirable for the rules of law to be predictable in their effect, because those rules will be used as a basis for transaction-planning. It is also not uncommon, however, for both courts and commentators to observe, somewhat inconsistently, that in this area no case is necessarily a sure guide to the decision of any other, since every case must turn on its own facts.³⁸ Farnsworth himself repeatedly suggests that whether a given rule will apply in a particular case must depend on "all the circumstances" of that case.³⁹ In the case of the Gold Watch, one of those circumstances is the existence of an employment relationship between the promisor and promisee. In deciding whether that promise should be enforced, what is the importance of that circumstance?

First, it provides a motivation for the making of the promise. (Employers often have reason to feel grateful to their employees for past service well performed; they also often wish to spur their em-

note 35 *supra*, provided the employer's promise were made no later than one minute to five on the last business day of the employee's term of employment. Illustration 3 of § 89 upholds an agreement raising an employee's rate of pay for the future, despite the existence of a binding contract calling for a lower rate; the only circumstance "not anticipated" is the fact that the employee has received a better offer from another employer.

37. See pp. 47-48. Farnsworth's tenacity in holding fast to the requirement of consideration is the more remarkable in light of the fact that he has earlier defended it with something of the enthusiasm displayed by Dr. Johnson for the dancing dog:

[I]n view of the difficulty that other societies have had in developing a general basis for enforcing promises, it is perhaps less remarkable that the basis developed by the common law is logically flawed than that the common law succeeded in developing any basis at all. P. 20.

38. For illustrative expressions of these two views, see *Borg-Warner Corp. v. Anchor Coupling Co.*, 16 Ill. 2d 234, 242, 254, 156 N.E.2d 513, 517 (1958) (opinions of Klingbiel, J., for the court, and Bristow, J., dissenting).

39. *E.g.*, pp. 125, 266-67, 457.

ployees to greater efforts in the future by behaving in a generous fashion.) Second, by the same token it provides a reason why the employee can reasonably believe the promise to have been seriously intended. Third, it means that any foreseeable reliance on the promise is likely to deserve compensation, in light of the employee's reasonable belief that the promise will be kept. (For example, if the employee had responded to the promise by saying, "Great, now I can give my old watch away to the Salvation Army," and — having received no retraction or cautionary word from the employer — proceeded to do just that, would those facts not trigger promissory estoppel?) Finally — and this, I fear, may entail a leap of faith — it provides a reason why it is *just* that the promise be enforced. If instead of the promise of a gold watch (since promises of a gold watch on retirement tend in fact to get performed, at the "retirement dinner"), one hypothesizes the promise of a pension or other benefits after retirement, then that strikes this observer as a promise which, in all the circumstances, ought to be kept, and ought to be enforceable if not kept — in part because reliance of all kinds (tangible and intangible) is likely in the long run, and in part simply because justice demands it.⁴⁰ If the court agrees, I believe it should have sufficient discretion under the rules of law to so decide.

In light of what has just been said it might seem that the reordering of rules suggested above would, in the end, come down to little more than telling courts that they should, in the light of all the circumstances, do justice in the particular case.⁴¹ However, since the proportion of claims and disputes which actually go to litigation is only a minuscule fraction of the total, "the law" in this area is not simply what the courts say it is: it is rather the way that people be-

40. Although Farnsworth states that the rule denying enforcement of a promise made for "past consideration" has been most important in cases where pensions were promised, p. 50, he elsewhere notes that such promises are likely to be enforceable on the basis of reliance. Pp. 89, 94 n.30. Such reliance could consist of retiring from work if that were optional, in which case *Restatement* § 90 would apply (as in *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (discussed at p. 89 n.2)); or it could consist of continuing to work (in which case not only might § 90 apply, but the consideration test might also be satisfied). If a pension were promised to an employee after all her services had been performed, and her decision to retire had already been made (or, perhaps, she had arrived at an age of mandatory retirement), then Farnsworth would apparently allow the promise to go unenforced, because it was neither bargained for nor relied on. P. 94. It is possible, of course, that after retirement the employee would rely on the promise, particularly if it were being performed, in various ways such as not taking another job or spending money she would otherwise save; whether Farnsworth would regard these types of reliance-by-forbearance as sufficient to justify enforcement is unclear. P. 94 n.31. Before the promise is relied on, even by forbearance, should it be enforced? Although Farnsworth would apparently answer no, he elsewhere cites with no indication of disapproval or doubt case law enforcing against an employee a covenant not to compete, made at the end of the employee's service for the promisee (and thus at a time when both consideration for and reliance on the promise would be difficult to show). P. 339 n.20. If it is just to hold an employee to a promise made at that point, it seems no less just to hold an employer to a promise then made.

41. Of course, the same could be said about the present rule of *RESTATEMENT 2D* § 90.

have in light of their own or their attorneys' predictions of how a court *might* decide the dispute between them, should it be asked to do so. Abolition or at least de-emphasis of the "technical defenses" would force anyone seeking to avoid liability to concentrate on the substantive aspects of the case: Was the promise in fact made? Is its nonperformance legally excusable for some reason? The parties' own attempt to resolve their dispute would then be more likely to center on the merits of those substantive issues, rather than on unproductive "stone-walling" behind the barrier of a technical defense. Furthermore, if every contract imposes on all parties a duty to act in "good faith" (and thus on merchants the duty to act in accordance with reasonable commercial standards of fair dealing), it will behoove each party to any commercial dispute to behave so as to maximize the chance that a court would later find that he or she acted "fairly" in the circumstances.⁴² If, long before the courtroom door is in sight, the attorneys on both sides are counseling their clients to behave so as to give at least the appearance of fairness, there is substantial chance that this appearance will be more than skin deep. The upshot of all this is not increased likelihood that the parties will manage to settle their dispute — that would be likely in any event, because of the substantial cost of litigation — but that their settlement will be reached on terms which a disinterested and fair-minded arbitrator might have imposed.

My final point is directed not only at judges or lawyers, but at all those (judges and lawyers included) who are teachers or students (or both) of the law. One comes away from Farnsworth's account with the distinct feeling that there is a deep and unresolved conflict at the heart of what we call "Contract Law," a conflict visible in the variety of views advanced, particularly in recent years, by the Contracts "theorists." At its most fundamental level, this can be described as the divergence between those who see the decision to enforce promissory obligations as primarily an expression of moral values, and those who see it as promoting market efficiency.⁴³ One might, of

42. As an example of "fairness" paying off in court, see *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944) (lessor offered to lower the rent and waive the restriction against subleasing; lessee held to lease despite claim of frustration of purpose). (Farnsworth discusses this case at page 693.) Another result of limiting the effect of the technical defenses could be a lessening of the dilemma an attorney may face between counseling a course of conduct which is "ethical" (and thus either "morally right" or at least "good business") and advising a client of the full limit of his or her "rights" under all the available legal rules. See, e.g., Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952); Yonge, *The Unheralded Demise of the Statute of Frauds Welsher in Oral Contracts for the Sale of Goods and Investment Securities*, 33 WASH. & LEE L. REV. 1 (1976).

43. It is obviously possible to take the position that "morality" is also "efficient," or that "efficiency" is also "moral" (or, perhaps, both?), so the characterization of particular commentators according to the dichotomy suggested in the text is, at best, arguable. With that caveat, it is possible to identify certain writers as concerned primarily with questions of efficiency, others with those of morality. In the former camp, in addition to the obvious choice of Profes-

course, conclude that (a) either point of view is in any case only a rationalization for the system we have, rather than an explanation of why we have it,⁴⁴ or that (b) whether one holds one point of view or the other is really of little importance, since most case outcomes can be defended and/or attacked by persons holding either view.⁴⁵ Both of these observations have more than a grain of truth in them. Therefore, does a choice at the theoretical level really matter?

Ultimately it does, if only as a symbolic expression of the values of the society which has created, and is served by, "the law." When discussing the rules of the "tort" law system, we constantly propound and seriously discuss hypothetical cases in which tortious acts of various kinds — assault, battery, slander, etc. — are committed under circumstances which obviously would generate damage claims so trivial in amount that they would never be litigated. This does not deter us, however, from seriously characterizing such conduct, at least in theory, as "tortious." Why should the same not be true with promises? Instead of dwelling on only the reciprocal aspect of many ordinary contracts of exchange, why not focus on the broader underlying principle that whenever a promise is made which generates in the promisee a reasonable expectation of performance, its unjustified

sor (now Judge) Richard A. Posner, one might include Professors John H. Barton, Robert Birmingham, Charles J. Goetz, Anthony T. Kronman, and Robert E. Scott. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983); Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978). Among the moralists, one could perhaps list Charles Fried, Peter Linzer, and Patricia H. Marschall. See, e.g., C. FRIED, *CONTRACT AS PROMISE* (1981); Linzer, *On the Amoralism of Contract Remedies — Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981); Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733 (1982). As "moralists" on a different level — certainly concerned with values other than "efficiency," at least as the "efficiency school" would define it — one might also refer to those identified with the "Critical Legal Studies" group who write in the Contract area, such as Professors Jay M. Feinman, Duncan Kennedy, and Karl E. Klare. See, e.g., Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Klare, *Book Review*, 54 N.Y.U. L. REV. 876 (1979) (reviewing C. KNAPP, *supra* note 12).

44. See, e.g., Holahan & Sussna, *Book Review*, 28 J. LEGAL EDUC. 234, 234 (1976) (reviewing R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972)).

45. Thus, writers using efficiency-analysis tools will not necessarily arrive at the same conclusions. Compare Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (judicial hostility to agreed remedies anachronistic and inefficient), with Note, *Liquidated Damages and Penalties Under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages*, 72 NW. U. L. REV. 1055 (1978) (traditional rule regulating liquidated damages economically justifiable). On the other hand, pursuit of the goals of efficiency and morality may sometimes lead to the same outcome. Compare Linzer, *supra* note 43 (specific performance should be routinely available, in interests of morality and fairness), with Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (greater availability of specific performance would be more efficient).

nonperformance should in theory be an actionable wrong? A promise that does indeed generate a reasonable expectation of performance is likely to do so for one (or perhaps both) of the following two reasons: either the promisor in making the promise was actuated in part by reasons of self-interest, known to the promisee, which make performance of the promise for that reason likely to occur; or the promisor stands in such a relation to the promisee as to make it reasonable to believe that the promise was actuated by altruistic concern for the promisee's welfare, which concern is likely to generate performance for the same reason that it generated the promise. To state this principle as a base-line is not to overlook the possibility that in a particular case the reason for nonperformance will be regarded as a legal excuse. Indeed, the more "gratuitous" the promise, the more likely it may be that various changes in circumstances will be so regarded. But this principle would emphasize the fact that promise-keeping in general is not merely praiseworthy behavior, but an absolutely necessary glue for holding society together,⁴⁶ and that promise-breaking — whether "efficient" or not⁴⁷ — is a socially undesirable activity, destructive of the social fabric, and productive of all types of harm, both measurable and immeasurable.⁴⁸

Like the first and second of Dickens' visiting spirits, Professor Farnsworth has spread before the eyes of his readers a panorama of what Contract Law was and of what it has become: Contract Past

46. A number of commentators have attempted in recent years to focus our attention on the interrelation (or, sometimes, the lack thereof) between law and behavior, particularly the behavior of businesspersons in a commercial setting. At the head of anyone's list in this area would be Professors Ian R. Macneil and Stewart Macaulay, whose contributions Farnsworth singles out for brief mention when discussing the agreement process. Pp. 110-13.

47. Farnsworth generally spends little time in discussion of "Contract Theory," but he does at least occasionally cite and briefly discuss the views of writers such as Richard Posner (see, e.g., p. 316 n.51). He does, in addition, devote three pages of his chapter on Remedies to a brief introduction to the economic analysis of law. In the course of that discussion, he summarizes the notion generally referred to as "efficient breach," see Birmingham, *supra* note 43; Goetz & Scott, *supra* note 45, although he does not himself employ the term. P. 817. While noting that economic analysis is "not without shortcomings," Farnsworth concludes that it does indeed "support . . . traditional contract doctrine in this area." P. 818. He does not cite, probably because it appeared too late for mention, Professor Ian Macneil's recent answer to the "efficient breach" theorists. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982). A citation to Macneil's article should, in my opinion, be appended to future discussions of the doctrine of efficient breach, as routinely (and for roughly the same reason) as the Surgeon General's warning is appended to a pack of cigarettes.

48. To restate Contract Law as suggested in Part II, *supra*, would obviously heighten its resemblance to Tort Law. This possibility has been recognized by others, particularly where liability based on promissory estoppel is concerned. See pp. 96 n.38, 98 n.47 (Farnsworth's reference to such suggestions by Professors Seavey and Posner). The possibility that Contract Law as a whole is becoming "con-torted" was put forth by Professor Grant Gilmore in his famous *THE DEATH OF CONTRACT* 90 (1974); in his view, however, Contract Law's evolution into something resembling Tort Law lay in the increasing tendency of the former to impose "implied" obligations, not bottomed on consent. In commenting on Gilmore's thesis, Professor Richard Speidel has rightly stressed the continued primacy of consent. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975).

and Contract Present. While providing a number of tantalizing glimpses, he has on the whole left it to us to provide a vision of Contract Future. Of that future, perhaps only two things can be said with any assurance: it will arrive in due course, whether we wish it or not; when it does, it will be our creation.