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Changing Your Mind: The Law of Regretted Decisions

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Changing Your Mind: The Law of Regretted Decisions

By E. Allan Farnsworth

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I. INTRODUCTION

Changing Your Mind: The Law of Regretted Decisions[1] is a literate and beautifully written book. The author, Professor E. Allan Farnsworth, stands at the pinnacle of American contract law scholarship.[2] His subtle and illuminating analysis focuses on problems that are important to all of us: When is a person free to renege on a promise, a relinquishment, or a preclusion? His solutions, which draw upon history, philosophy, the social sciences, and legal principles derived from a number of legal contexts, including contract, property, and the law of trusts, support the increased power of people to create or alter legal relationships by expressing an intention to do so.

The book is divided into two parts. The first part consists of eleven chapters exploring the legal restraints imposed on a promisor who regrets the decision to promise and reneges on a commitment made to a promisee. When is the promise binding in law? Why should any promise be binding? If binding, what is the strength of the obligation in terms of remedies available to the promisee? These questions are important in moral and legal philosophy and are at the core of a first

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1. E. ALLEN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS (Yale Univ. Press, 1998).

2. The author, E. Allan Farnsworth, is an Alfred McCormack Professor of Law at Columbia University School of Law. He is an accomplished teacher and lecturer, co-author of leading casebooks in contracts and commercial law, and author of an influential treatise on contract law and countless law review and journal articles. He was the Reporter for the American Law Institute's Second Restatement of Contracts and a participant in the shaping of both the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts. He remains a well-connected and influential consultant, expert witness, and occasional arbitrator on the domestic and international scenes.

year course in contracts and the work of lawyers and courts in litigating claims of promissory liability and remedy.[3]

The second part consists of nine chapters that deal with what the author calls "relinquishments," which includes things such as performing a duty, giving a gift, discharging a debt, and waiving a condition, and "preclusions," whether by equitable estoppel, laches, rejection, election, or prescription. Unlike promises, relinquishments and preclusions alter the present state of affairs rather than commit to the future. When is a person who reneges on a relinquishment or a preclusion bound even though there has been no consideration or induced reliance? Courts have tended to treat relinquishments and preclusions as disparate problems at the margins of contract law. Professor Farnsworth employs an innovative analysis to integrate the subject matter and resolve the question of regret.

According to the author, the answers to these questions depend upon which of several overlapping principles control. For example, many promises, whether made in a bargain or not, are binding because of the "reliance" principle. Behind the reliance principle, however, resides the so-called "intention" principle, which is a manifested intention to assume a legal obligation or to alter existing legal relationships. Throughout part one and the chapters on relinquishments, a central argument is that beyond the areas covered by the reliance principle, a manifested intention to create or alter legal relationships should be binding. Further, Professor Farnsworth argues that the legal paternalism underlying the current refusal to recognize the intention principle should be softened if not rejected.

This Review focuses upon commitments and relinquishments and the interaction between the reliance principle, the intention principle, and

3. For different perspectives on this area of inquiry, see generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 2d ed. 1995); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991); HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT (1961); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACT RELATIONS (1980); W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW (1996). Grant Gilmore's stimulating book, THE DEATH OF CONTRACT, first published in 1974, was reissued by the Ohio State University Press in 1995 under the editorship of Ronald K. L. Collins and was the subject of Symposium, *Reconsidering Grant Gilmore's The Death of Contract*, 90 NW. U. L. REV. 1 (1995).

legal paternalism.[4] It will conclude with a brief treatment of preclusions.[5]

II. COMMITMENTS

A. Background Principles

Before exploring Professor Farnsworth's theory, some background is in order. At least three major overlapping themes can be identified in contract law. I will call them "Autonomy," "Efficiency," and "Fairness."

The Autonomy theme supports the principle that there can be no contractual obligation without a promise.[6] People are free to promise or not, and when promises are made, promisors have power to condition their commitments. Nevertheless, the exercise of Autonomy alone is not enough; without more, a promise, even when accompanied by the formality of a signed writing, does not create a legal obligation.

The Efficiency theme is implicit in one of the recognized reasons for enforcing promises, consideration.[7] Consideration for a promise must be bargained for and given in exchange for the promise and may consist of a return promise, an act or forbearance. Reciprocity is required. Thus, in an agreed exchange of resources, the promises or performances of both parties must be bargained for and given in exchange for each other.[8] A noted scholar once observed that consideration is both a process of bargaining and an agreed exchange.[9] It is the countless agreed exchanges in private markets that allocate resources and determine, in large part, the distribution of income in our society.[10] On the other hand, a sham bargain, i.e., a gift promise that exacts

4. *See infra* Part II, III.

5. *See infra* Part III.

6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

7. "Efficiency" concepts are central to theories about law and economics. For a helpful discussion, see Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness Into Efficiency*, 73 WASH. L. REV. 249, 266-88 (1998) (discussing the application of theoretical economics to the court system to increase fairness while retaining efficiency).

8. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71-75 (1981).

9. *See* Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 932-33 (1958). *But see* Howard Engelskirchen, *Consideration as the Commitment to Relinquish Autonomy*, 27 SETON HALL L. REV. 490, 493 (1997) (arguing that consideration is best understood as a relinquishment of autonomy).

10. Enforcing promises in an agreed exchange arguably supports both Autonomy and promotes Efficiency. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 71-90 (1997); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 164-87 (1991).

unbargained for or "nominal" consideration, involves a process but not a bargained for exchange. Hence, it is not binding.[11]

The Fairness themes[12] in contract emerge in several situations and perform different functions. In agreed exchanges, Fairness themes protect against disproportion. A court may protect a promisor where duress, mistake, fraud, or alleged unconscionability have impaired the process of bargaining by limiting the promisor's information or choice. Given these impairments and the resulting disproportion in the exchange, there is less reason to protect the Efficiency implicit in the power of the parties to fix their own values.[13] Here, Fairness trumps Efficiency and limits Autonomy.

In promises without consideration, Fairness themes are invoked to enforce the promise to prevent injustice to the promisee. A prime example is found in the famous section 90 of the *Restatement, Second*:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[14]

Section 90 is usually invoked to preclude regret where gift promises rather than bargains are involved. The theory is that unbargained for reliance should not be used to substitute for an invited or required acceptance that was not given before the promisor reneged.[15] The

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11. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c, illus. 6 (1981); *see also*, Comment, *Restatement of Contracts (Second)—A Rejection of Nominal Consideration*, 1 VAL. U. L. REV. 102, 113 (1966) (supporting the draft of the RESTATEMENT (SECOND) OF CONTRACTS that states that nominal consideration makes a promise unenforceable as a contract).

12. *See* Swygert & Yanes, *supra* note 7, at 288-304 (discussing justice as fairness).

13. The usual rule is that if the "requirement of consideration is met there is no additional requirement of . . . equivalence in the values exchanged." RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (1981); *see* Apfel v. Prudential-Bache Secs., Inc., 616 N.E.2d 1095, 1097 (N.Y. 1993) ("[A]bsent fraud or unconscionability adequacy of consideration is not a proper subject for judicial scrutiny."); *see also* James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547 (1995) (arguing, *passim*, that corrective justice (fairness) is a necessary corrective in a society where exchange is an integral part of distributive justice (efficiency)). For a discussion of the law where changed circumstances during performance create disproportion in the exchange, see Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW. ENG. L. REV. 267 (1999).

14. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

15. For example, A makes an offer to B and invites acceptance by a promise to perform. B, induced by the conditional promise in the offer, expends money in preparing to perform but does not accept by promise before A revokes the offer. Here, the reliance does not substitute for the bargained for acceptance. As Judge Learned Hand once said, "there is no room in such a situation for the doctrine of promissory estoppel." James Baird Co. v. Gimbel Brothers, Inc., 64 F.2d 344, 346 (2d Cir. 1933).

reliance theme, however, cannot be so easily contained. Thus, in proposed bargains, reliance in preparing to perform or making part performance has been used to create option contracts to avoid injustice.[16] In some cases, it has been used to protect a relying promisee even though the negotiations fail to conclude a contract.[17] But, as Professor Robert A. Hillman's recent exhaustive case study has demonstrated,[18] reliance (Fairness) has not yet swallowed up bargain (Efficiency). Even though the reliance interest appears to be pervasive,[19] Hillman concludes that a promise (Autonomy) may be binding because of either consideration (Efficiency) or induced reliance (Fairness).

Fairness themes are also invoked where a promise without consideration or induced reliance is made in recognition of a benefit previously received by the promisor from the promisee. Under section 86 of the *Restatement, Second*, this promise may be "binding to the extent necessary to prevent injustice."[20] Here, it is the moral obligation created by the past benefit conferred (unjust enrichment), rather than the moral obligation arising from making the promise, that justifies liability. Even so, the promise is not binding if the benefit was conferred as a gift or to the extent that the value of the promise is disproportionate to the benefit received.[21]

At this point we return to Autonomy. As previously noted, a "naked" promise is not binding even though clearly expressed in a signed writing. Unless there is enabling legislation, there are no formalities that a promisor can invoke to make a gift promise binding even though the promisor expresses an intention to assume a legal obligation.

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16. A recent example is *Ragosta v. Wilder*, 592 A.2d 367 (Vt. 1997), which held that a promise that induces action "of definite and substantial character" may be enforceable under a theory of promissory estoppel when enforcement is necessary to avoid injustice.

17. These and other problems are well discussed in Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385 (1999).

18. *See* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 618-19 (1998) (concluding that courts do not enforce promises without either a bargain or reliance).

19. For the last word (to date) on the pervasive scope of reliance (fairness) in contract law, see Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191 (1998).

20. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

21. *See id.* § 86(2). For some illuminating history and a penetrating critique of the "moral obligation" doctrine, see Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997).

This limitation on power to contract has bothered scholars, if not the courts. In fact, there are several examples in recent literature urging a reform in the direction of increased power to expressly assume legal obligations in gift promises.[22] But, as the law now stands, "neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract."[23] Thus, a promise supported by consideration is enforceable even though the promisor does not also manifest an intention to assume a legal obligation. On the other hand, "a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract"[24] and, in certain cases, the intention of both parties to contract may support contract formation even if material terms are left open or to be agreed.[25]

It is against this background and these themes that Professor Farnsworth writes.

B. Professor Farnsworth's Theory

1. The Promise Requirement

Farnsworth embraces promise as the fundamental behavior upon which contract law is based. At the beginning of the book, there is some useful discussion about when a promise is made, how a promise should be distinguished from both the decision to promise and a resolution[26] and, later, there is an insightful discussion of when a person may be liable for conduct that creates dependence even though a promise cannot be found.[27] The promise, however, is treated as the

22. Notable is Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). Professor Barnett believes that unless a promisor intends to assume a legal obligation, there should be no contract even though consideration or induced reliance are present. *See id.* at 319; *see also* Knapp, *supra* note 19, at 1233-44 (criticizing a recent author's attempts to utilize reliance as merely a factor in determining reliable promises); Watson, *supra* note 21, at 1797-1804 (promoting the enforcement of moral obligation promises regardless of the existence of consideration).

23. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

24. *Id.* For a survey of agreements opting out of legal obligation and their effect, see Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and Modern Practice: United States*, 46 AM. J. COMP. L. 87 (1998) (Supplement).

25. *See* U.C.C. § 2-204(3) (1978).

26. *See* FARNSWORTH, *supra* note 1, at 9-17.

27. *See id.* at 89-98. This is the only place where the principles of relational contracts, pioneered by Professor Ian R. Macneil and others, are mentioned and then only in passing. Relational contract theorists usually downplay the importance of promises, particularly in long term relationships where the promise cannot contain all of the material terms of the deal. *See* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 495-508 (criticizing "promise-centered" theories).

fundamental starting place for a law of obligation based upon Autonomy. But when does a promise create a contractual obligation?

2. Defenses to Binding Promises

Before confronting this question, the author briefly treats the defenses to liability for failure to perform a promise in a bargain that is binding.[28] Given the fact that the dispute arises because the promisor reneges, the usual posture is that the promisee, who is in a position to complain, asserts a claim and the promisor seeks to avoid liability by defending on the ground that there are excuses that justify reneging on the binding promise. In this "freedom from" contract posture, under current law the promisor will win, even if there is a binding promise, if the court accepts certain excuses for regretting that the promise was made. It is here that Fairness themes emerge to limit the effect of Autonomy and Efficiency in bargains.

One set of Fairness excuses is that the decision to promise was unfairly influenced by coercion or misrepresentation, or uninformed due to mistake, or ill-considered because of cognitional or volitional deficiencies at the time it was made. These defects in the process of deciding to promise impair the promisor's information or choice and may persuade a court to excuse the regret.[29]

Another set of excuses is that with the passage of time, the promisor views the decision to promise as improvident due to unanticipated changed circumstances or obsolete as a result of changed preferences. Thus, a seller at a fixed price may regret the promise because of an unanticipated increase in the market price of the goods. Likewise, a buyer of described goods may regret the promise because she no longer needs the goods.[30]

Farnsworth claims that to the extent a court accepts any of these excuses, it is being paternalistic, i.e., imposing legal limitations on "a person's control over the future for that person's own good, usually in the context of the extent of a person's freedom to make a commitment that will be irrevocable."[31] But, after fewer than ten pages of analysis

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28. Assuming that the promise is supported by consideration, this is the theme of Fairness aimed at preventing uninformed or pressured disproportion.

29. *See* FARNSWORTH, *supra* note 1, at 18-24.

30. *See id.* at 24-27.

31. *Id.* at 3 n.5. Although the concept of paternalism is invoked repeatedly throughout the book, this is the only definition or explanation provided. Dean Anthony Kronman's pioneering work, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983), is cited, but the discussion is limited to Kronman's concept of regret. *See* FARNSWORTH, *supra* note 1, at 20 & 209-10 n. 7. In fact, there is a rich literature on paternalism that debates the relationship between

and no discussion of the paternalist's friend, the doctrine of unconscionability, he concludes that "only rarely will a court allow you to change your mind and renege on a binding promise, though there is a trend toward tolerance of reneging and in this sense toward paternalism."[32] He then makes a "fair" guess that "the more paternalistic the courts are in allowing excuses for reneging on binding promises, the more willing they will be to find binding promises in the first place."[33] The implication is that because the excuses recognized for reneging on binding promises are very limited (less paternalistic), the courts will be less willing to find binding promises in the first place (more paternalistic). But then, leaving this intriguing guess and the unexplored concept of legal paternalism,[34] he turns to the question of when a promise is legally binding. This, for him, is the more important question.

3. When is a Promise Binding?

Before considering when a promise is binding, the author explores when a promise expresses commitment.[35] Typically, a promise expresses commitment by an objective expression to a promisee of a commitment to do or not to do something in the future. It is not a representation about the present, a prophecy or an unexpressed intention. It is usually not about events beyond the promisor's control and is made to a promisee or for the benefit of a third person. The expressed commitment constitutes assent (Autonomy), which is a necessary undergirding of promissory liability. This helpful discussion

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Autonomy, Efficiency, and Fairness. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 147-63 (1993); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 572-75 (1988) (favoring paternalistic intervention by the legislature rather than the courts); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 284-86 (1998) (arguing that paternalistic interventions are not necessarily inefficient). None of this literature is cited or discussed.

32. FARNSWORTH, *supra* note 1, at 27.

33. *Id.* at 20. This is the "easy in, easy out" theory of liability. The "guess" is never systematically developed.

34. One might forgive, yea even applaud, the omission of unconscionability in the discussion of excuses because of the diversity of the sources cited in Chapter 2. I am puzzled, however, by both the positioning (too early) and the treatment (too limited) of the excuse discussion. Traditional excuse discussion fits after it is determined that the promise (Autonomy) is supported by consideration (Efficiency) and the attention turns to disproportion (Fairness). Efficiency themes, such as the importance of risk allocation, are downplayed in this discussion or, perhaps, muted by the unitary treatment of paternalism.

35. *See* FARNSWORTH, *supra* note 1, at 28-35.

sets the stage for the fundamental question: Why should a promise bind?[36]

In Chapter 4, Farnsworth recognizes that because of the practices of promising in society and the rules that the practice generates, a promisor can be bound by a contract even though there was no expressed intention to assume a legal obligation.[37] This is particularly true in bargain contracts. But he pushes for a deeper explanation of why promises bind and presents the refreshing and, in my opinion, sound conclusion that "no single explanation will suffice and that the answer is a complex mix of explanations that focus on both promisor and promisee."[38]

In focusing on the promisor, Farnsworth introduces the intention principle, under which the promisor's manifested intention to be legally bound should be the reason for a binding promise. The Autonomy principle recognizes the importance to the promisor of the power to make a binding promise. But, as previously noted, intention alone is not a sufficient reason to make a promise binding. Farnsworth argues that in certain situations it should be.[39] By returning to a pervasive theme, he suggests that by declining to recognize the power of a promisor to intend to assume a legal obligation, courts and contract law again indulge in legal paternalism. In sum, the intention principle is a strong Autonomy power that should, in most cases, outweigh paternalistic concerns.[40]

In focusing on the promisee, the author gets to the heart of the matter. Yes, a promise creates expectations in a promisee and these expectations may be reasonable. But the core to obligation is reliance

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36. *See id.* at 36-42.

37. *See id.* at 36-37.

38. *Id.* at 27.

39. *See id.* at 38. It is neither necessary nor sufficient for obligation that a promisor intend to assume legal obligations. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981). Professor Randy Barnett, however, has argued that an expressed intent to assume a legal obligation should be required even though the promise has consideration or induces reliance. *See* Barnett, *supra* note 22, at 271-91, 310-12 (assessing the flaws in current contract theories and favoring the use of a "consent" theory). Although Barnett's work is cited, *supra* note 22, the extent to which Barnett's "consent" theory is consistent with the "intention" principle and inconsistent with the "reliance" principle is not discussed.

40. One wonders whether paternalism is the only reason for refusing to recognize the intention principle. There appears to be no public demand for this formalistic avenue to increased contract liability. The lack of pressure for legal reform may reflect a judgment that there are no Efficiency gains from the move or that the moral obligation created by making the promise and a variety of non-legal sanctions in every context give promisees all of the protection (Fairness) that they need. Neither of these reasons, if plausible, reflect concern about the ability of promisors to protect themselves.

by the promisee on the promise rather than the reasonable expectations created by the promise. This is the "reliance" principle, which Farnsworth traces to the Roman jurist Papinian, who stated that "[n]o one can change his mind to someone else's disadvantage."[41] Put differently, reasonable expectations created by a promise may be a precondition to obligation but they are not sufficient alone. Rather, a promisor's "power to make a binding promise turns on the reliance it induces, rather than the expectations it arouses."[42] He continues:

> If protection of reliance is not logically inescapable, it is at least practically beyond question. People in the workaday world want to and do rely on promises and have come to view promises as reliable. Legal protection of reliance on them is seen as essential. Hence a *reliance* principle, under which a promise results in a commitment if the promisor should reasonably expect the promisee to rely on it and if such reliance ensues.[43]

4. Consideration

a. An Emerging Theory

At this point, the outline of the author's theory about the law of regretted promises, apart from the scope of the intention principle, is in place.[44] Assent by the promisor in the form of a promise is essential for obligation in contract (Autonomy). But, an expressed intention to assume legal obligations (the intention principle) is not required if other requirements, such as consideration (Efficiency), are satisfied. In contrast, an expressed intention to assume a legal obligation is not sufficient by itself. An expressed intention not to assume legal obligations, however, may be effective. The primary justification for making a promise binding is reliance by the promisee (the reliance principle) and, where consideration is present, reliance both protects the promisee (Fairness) and indirectly supports the market (Efficiency). Farnsworth argues that protection of the reliance principle "will not only protect past reliance but will encourage future reliance" and this will promote "a party's investment in specific relationships, investment that will make a party better off if the other party performs the contract but worse off it the other party does not."[45] Finally, the author suggests

41. FARNSWORTH, *supra* note 1, at 2.

42. *Id.* at 41-42.

43. *Id.* at 42. Note how the emphasis has shifted from the power of the promisor to what the promisor should reasonably expect.

44. He states that there has been a "discussion of theory" in the first four chapters. *See id.*

45. *Id.*

that a rational basis for a large part of the universe of enforceable promises is the "attenuated doctrine of consideration, supported by the reliance principle and its corollary, the assent rule."[46] What does this mean?

b. Attenuated Consideration

Why is the consideration requirement attenuated? According to Farnsworth, the gradual demise of form and formalities as reasons for enforcing promises left consideration as the primary, if not exclusive, requirement for a binding promise. Reviewing some history, he suggests that eliminating the seal undercut the intention principle and represented a paternalistic legal judgment that it was not in the best interests of the promisor to have such power.[47] As the exclusive requirement, however, consideration simply was not a satisfactory test for distinguishing the enforceable from the unenforceable promise. Assuming that a swap was likely to be involved, the early definition of consideration as either a benefit to the promisor or a detriment, worked to identify reliance by the promisee as an important interest. But this neat formula became enmeshed in the snarls of circularity when courts at the end of the 16th century recognized that consideration could be a promise exchanged for a promise. Where was the detriment in simply making a promise?[48] Suppose there was no reliance in fact.

Professor Farnsworth describes the gradual emergence of the requirement that the detriment be bargained for as the price for the promise (and vice versa) as a test rather than a theory. According to the author, the test "has produced scarcely a ripple outside of academe" because the "bargain test is usually satisfied without serious question."[49] He claims further that the "requirement of a bargained-for-exchange never assumed great practical significance in commercial life"[50] and that courts have exhibited a disinclination to monitor either the bargaining process or the substance of the agreed exchange. This apathy toward consideration results in an attenuated requirement of consideration. More importantly, if anything bargained for, such as a

46. *Id.* at 65.

47. *See id.* at 46.

48. *See id* at 46-47. He asserts that "the notion of detriment to the promisee became remarkably attenuated." *Id.* at 47.

49. *Id.* at 48. "And since you do not usually need to bargain for something unless it is a detriment to the promisee, if the new test of bargain is satisfied, so usually is the old one of detriment." *Id.*

50. *Id.* at 49.

peppercorn, is consideration for a promise, then the notion of reliance also has "become so attenuated as to be scarcely recognizable."[51]

Indeed, the author notes that rare is the transaction in which there lingers the slightest doubt that the requirement of consideration is met, and even rarer the transaction in which, with a little good legal advice, any lingering doubt cannot be dispelled.[52]

In commercial transactions this claim rings true.[53] In marginal transactions where values in the apparent swap are disproportionate and the promisor has limited information or choice, however, the courts may search for a real bargain rather than simply infer it.[54] This claim is also consistent with the thorough research of Professor Mark B. Wessman, who assumes that the presence of consideration for a promise is "presumptively a sufficient reason to enforce the promise" (subject to Fairness themes) but argues that it is wrong to conclude that "consideration is a necessary condition for the enforcement of a promise, i.e., that only bargain promises should be enforced."[55]

c. The Enigma and its Surrogate

Farnsworth, however, does not believe that promises made in a "sham" exchange should be enforced under the consideration rubric.

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51. *Id.* at 50. In some illuminating passages on the decline of the intention principle, Farnsworth disputes Holmes's suggestion that "consideration is as much a form as a seal." *Id.* at 53 (citing Knell v. Codman, 28 N.E. 578 (Mass. 1891)). With a seal, a promisor can go through a convenient ritual of affixing a seal, "but a promisor cannot make a binding commitment today by going through the motions of a sham bargain." *Id.*

52. *See id.* at 54.

53. For example, consideration is not an explicit requirement for contracts for the sale of goods under either the Uniform Commercial Code or the United Nations Convention on Contracts for the International Sale of Goods. *See* U.C.C. § 2-204 to 209 (1978); CISG Art. 14-24. Under the U.C.C., consideration is implicit in the definition of "agreement" as the "bargain in fact" of the parties. *See* U.C.C. § 2-201(3). Further, the concept of a sale is recognized as the "passing of title [to goods] from the seller to the buyer for a price." *Id.* § 2-106(1).

54. A perfect example is *Bogigian v. Bogigian*, where a spouse contested the claim that she had released a valuable lien on real estate granted in a divorce settlement in exchange for a release of the mortgage on that real estate when the property was sold without a deficiency. *See* Bogigian v. Bogigian, 551 N.E.2d 1149, 1151 (Ind. Ct. App. 1990). The majority voided the release because the alleged consideration was not "actually" bargained for. *See id.* at 1152-53. The dissent argued that the consideration "flowed from the bargain" and actual bargaining was not required, especially where there was no evidence of fraud. *Id.*; *see also* Comment, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1092 (1935) (arguing that value disparity in an exchange is supportable where the promisor "both knew and desired such disparity").

55. Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 713 (1996). Professor Wessman argues that if the promise is not supported by consideration, the court should not use the consideration requirement as a "gatekeeper" for the enforcement of other promises. *See id.* at 845.

Rather, he argues that the doctrine of consideration is attenuated because it is so easy to find a real bargain, even where there are mixed motives, and that the reliance principle is also attenuated because, in theory at least, it is possible to bargain for a peppercorn in exchange for a promise to pay $1,000. In most cases, however, the promisor will bargain for definite and substantial reliance in return. This reliance, which is the price of the promise, may be in the form of action or forbearance or a promise to act or forbear. The former cases pose no problems for the reliance principle because the action or forbearance will occur before the dispute arises. The latter cases, where the promisor bargains for a return promise, create the enigma. How can a reliance principle be justified if the promisor reneges before the return promise has been performed? Put differently, how can a wholly unperformed and thus unrelied upon return promise be squared with the theory that enforceability "should be based upon reliance rather than assent?"[56]

Farnsworth's answer is that the return promise (the "assent" principle) is a surrogate for hidden reliance in the form of difficult to prove opportunities not taken, which plausibly occur between the time the promise is made and the dispute. In short, a "bright-line" test based upon assent is a surrogate for hidden reliance.

> This reasoning leads to the conclusion that the claims of reliance that should be accepted without proof are those that are hard to prove because negative and those that are plausible because of the availability of similar substitutes. Choosing the moment of assent produces a bright-line rule that binds the promisor at the earliest moment that the promisee could possibly have a claim based on such reliance. Reliance before assent would not be justifiable.[57]

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56. FARNSWORTH, *supra* note 1, at 61.

57. *Id.* at 59. The author illustrates this point by discussing the case of *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954), where the parties laboriously created a written agreement to sell Zehmer's land in a bar just before Christmas. *See id.* at 518. Just after the writing was signed, Lucy tendered $5 to seal the bargain and Zehmer rejected it, stating that he had made his offer to sell as a joke. *See id.* Lucy left the bar insisting that they had a deal and made preparations the next day to finance the transaction. *See id.* Despite conflicting evidence, the Supreme Court of Appeals found that Lucy was told for the first time that Zehmer was not serious the next day after reliance and, reversing the trial court, held that the contract was enforceable. *See id.* at 522. The "bright line" test advocated by Professor Farnsworth, therefore, would apply only if the Supreme Court of Appeals found that Lucy knew of the joke within seconds after the writing was signed. *Cf.* Malcolm P. Sharp, *Mr. Justice Holmes: Some Modern Views—Contracts*, 31 U. CHI. L. REV. 268, 272-73 (1964) (arguing that in light of the costs to individual freedom the objective test should be employed only where the promisor carelessly used language that induced actual and justified reliance by the promisee).

On balance, Farnsworth believes that the defendant should not be given an opportunity to rebut by showing that no reliance in fact occurred: "[o]n the whole it is easier for a court to determine whether there has been assent than to determine whether there has been reliance or the absence of reliance."[58] Moreover, he argues that tenuous claims of possible lost opportunities are as persuasive as the attenuated doctrine of consideration. For these reasons, the bright-line rule is justified.

d. Hedging Your Bets

Most promises are made as part of a bargain even though, according to the author, the reason for enforcing them is either reliance or assent as a surrogate for reliance. To what extent can a promisor at the time the bargain is made hedge her bets and, thus, control subsequent regret without making an illusory promise?[59] To the extent that the hedge is limited, a promise has been made even though it reserves more discretion over performance to one party than to the other.[60]

In Chapter 10, the author explores several hedge techniques, such as conditions of satisfaction, commitments to use reasonable efforts, and terminations clauses. The author also considers what contract law has done to limit their exercise, such as imposing a duty of good faith and a requirement of reasonable notice before termination. Discussing notice or "warning" requirements in particular, he illustrates how these limitations do more than simply hold the deal together. In fact, the limitations provide limited protection to parties who rely on promises containing hedges that may or may not be invoked.

In addition to warning requirements, Farnsworth develops an "evenhandedness" principle that also limits the termination of a contract for reasons other than the other party's breach. In short, if the promisor properly terminates or is excused from a contract, promisees affected by the decision, both before and after the termination, must be treated in the same way. Within the affected class, the promisor cannot favor one

58. FARNSWORTH, *supra* note 1, at 60. The author states that the assent rule is one of substance not form and discusses three other situations where assent is used as a surrogate for reliance. *See id.* at 62-65.

59. An illusory promise, of course, is not a promise and would fail as either an offer or an acceptance.

60. A commitment with a limited hedge is a promise that provides the necessary assent. *See* Omni Group, Inc. v. Seattle-First National Bank, 645 P.2d 727, 729 (Wash. Ct. App. 1982) (condition of satisfaction limited by duty of good faith). In these cases, mutuality of obligation is not required. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79(c) (1981).

affected party over another.[61] Similarly, if a government agency contracts with a group of private parties and promises special treatment in exchange for their taking over of insolvent financial institutions and the promise is made impossible to perform by a subsequent act of Congress, the "evenhandedness" principle requires that the subsequent act by Congress be "public and general."[62]

C. Gift Promises

Suppose that A makes a promise in a signed writing to pay B $10,000 in thirty days. A states in the writing that she "intends to assume a legal obligation." Five days later A repudiates the promise because there has been an unexpected illness in the family and the promised funds are needed at home. Is A's promise binding and, if so, what is B's remedy?

If A's motive is purely altruistic (no swap) and there is no induced reliance[63] or prior benefit conferred, the gift promise is not enforceable. This is true unless a court is persuaded to adopt the *Restatement's* exception for "charitable subscriptions,"[64] or to embrace the intention principle that makes binding a gift promise where the promisor has expressed an intention to assume a legal obligation.

At this point, Professor Farnsworth becomes an advocate for the intention principle. He believes that the "abolition of the seal without the substitution of some other formality [was] rash"[65] and that the use of some legally recognized formality would avoid the enforcement difficulties posed in connection with the search for reliance or past benefits conferred.[66] Without legislative intervention to provide an appropriate formality, however, the courts will have to recognize the

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61. *See* FARNSWORTH, *supra* note 1, at 105-08.

62. *See* United States v. Winstar Corp., 518 U.S. 839, 891 (1996). Even though the act of Congress was public and general, the *Winstar* Court concluded that the agency making the promise was held to the same standards as if it were a private party and those standards dictated that the contracting agency was not excused by the subsequent public and general act. *See id.* at 891-95.

63. A recent student Comment suggests that despite current *Restatement* section 90, which requires only that the promise "induce . . . action or forbearance," the cases still require that the promise induce "definite and substantial" reliance, a requirement of section 90 of the *First Restatement of Contracts*. Gerald Griffin Reidy, Comment, *Definite and Substantial Reliance: Remedying Injustice Under Section 90*, 67 FORDHAM L. REV. 1217, 1217-19 (1998).

64. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981) (stating that a "charitable subscription . . . is binding under Subsection (1) without proof that the promise induced action or forbearance"); FARNSWORTH, *supra* note 1, at 78-79 (reporting that the exception has had mixed reviews in the courts).

65. FARNSWORTH, *supra* note 1, at 82.

66. *See id.* at 83. The author finds support for the intention principle in the doctrine of "estoppel by deed." *See id.* at 83-84.

promisor's expressed intention to assume a legal obligation. And even if they do, a new set of complications will arise. First, the courts will have to rethink the objective standard used in contract interpretation because the intention of only one person is involved, the promisor. Thus, a subjective test will be required.[67] Moreover, questions will arise about when a promisor bound by the intention principle can renege on the promise: "excuses must be fashioned if courts are to enforce more promises to make gifts."[68] The excuses, according to the author, may be provided in the promise itself, such as by a condition, or adapted from the excuse doctrines when a swap is involved, depending on whether or not time plays a role.[69] After discussing some possibilities, Farnsworth concedes that a "coherent set of answers has yet to be developed in the United States" but predicts that if the legal system recognizes the intention principle (more liability), its expansion will "depend on the fashioning of excuses to take account of regret."[70]

In sum, the intention principle is a strong version of the Autonomy theme. Enforcing such a promise is not necessarily Efficient, that is, the welfare maximizing utility of enforcement is not clear. It is not necessary to prevent injustice to the promisee, although expectations are created and hidden reliance is always a possibility. Even though the intention principle trumps paternalism as a restraint on the power to assume legal obligations, paternalistic (Fairness) considerations return if the promise was based upon a mistake or subsequent circumstances create improvidence. The tension here, therefore, is between Autonomy and the same types of Fairness considerations that mitigate against enforcing some promises in a bargain.

D. The Strength of Commitment: Remedies

1. The Remedial Interests

When a binding promise is breached without justification, section 344 of the *Restatement, Second,* recognizes three remedial interests of the promisee that the courts might protect. The first is "expectation," which is the interest of putting the plaintiff in "as good a position as he would have been in had the contract been performed."[71] This remedy is consistent with the Efficiency themes in the consideration requirement.

67. *See id.* at 84-85.
68. *Id.* at 85.
69. *See id.* at 85-88; *see also id.* at 18-27.
70. *Id.* at 88.
71. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981).

From the plaintiff's standpoint, specific performance does this the best, but damages for loss of bargain are a substitution for specific relief. The second is "reliance," which protects losses caused by reliance on the contract by putting the plaintiff "in as good a position as he would have been in had the contract not been made."[72] This remedy is consistent with the Fairness themes associated with *Restatement, Second*, section 90. The third is "restitution," which is the plaintiff's "interest in having restored to him any benefit that he has conferred on the other party."[73] One or more of these interests may be protected in a breach of contract.[74] Which one should be preferred? Should the answer turn on the reason given for enforcing the promise in the first place?

2. Farnsworth's Analysis

Professor Farnsworth has doubts about the strength of the remedies available for breach of contract. He asserts that there are a "variety of rules of contract law [that] operate to soften the commitments of promisors."[75] Then he discusses a "cascading array of remedies," both specific and substitutional, which demonstrate that the purpose of contract remedies is to compensate for loss—not to deter breach.[76] Because compensation, not punishment, is the goal, he then suggests that the common law's preference for substitutional rather than specific remedies is consistent with the often criticized doctrine of "efficient breach." This doctrine, in effect, compensates the promisee in damages for the expectation loss to the promise but leaves the promisor free to keep any gain in excess of compensation made through the breach.[77]

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72. *Id.* § 344(b).

73. *Id.* § 344(c).

74. In a leading case, *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973), a surgeon, without negligence, breached a contract to achieve a particular cosmetic result. *See id.* at 184. The plaintiff elected not to pursue a claim for expectation damages. *See id.* at 185. Instead, the court upheld an award that included restitution of the fee paid to the surgeon, reliance expenditures paid to the hospital, and elements of pain and suffering and mental anguish. *See id.* at 189.

75. FARNSWORTH, *supra* note 1, at 110.

76. *Id.* at 109-12. *But see* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999) (arguing that economic efficiency supports the allowance of punitive damages for any willful breach of contract).

77. *See* FARNSWORTH, *supra* note 1, at 113-14. Note that restitution is limited to recovery of gains conferred by the promisee on the promisor and does not include gains made by the promisor over and above the compensation paid for breach. *See id.* at 116-18. The courts have rejected the argument that the efficient breach thesis explains why there should be a preference for awarding expectation and not punitive damages. *See* Craig S. Warkol, Note, *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321, 352-53 (1998).

Thus, if the breach is deliberate but efficient, the claim for specific performance should be denied.[78]

Having offered an efficiency explanation for the denial of specific performance, he then seems to accept the "conventional answer" that expectation damages are justified because they protect hidden reliance, i.e., reliance in the form of lost opportunities that are hard to prove.[79] In fact, for promises made in bargains "the expectation measure is a perfect surrogate for the reliance measure . . . ."[80] For Farnsworth, however, this does not mean that the reliance measure should always trump expectation recovery in gift promises that are enforceable because of reliance (due to the probability of hidden reliance). Further, this does not mean that the reliance measure should always limit expectation recovery for breach of promises enforceable without consideration or reliance, such as a promise enforceable (hypothetically) under the intention principle or a promise enforceable under the *Restatement's* exception for charitable subscriptions.[81] Finally, the expectation interest in a promise that is enforceable because of a past benefit conferred should be limited to the extent that the value of the promise exceeds the value of the past benefit.

With all due respect, Professor Farnsworth's analysis here is thin and not very persuasive. Assume that the promisee of a binding and breached promise seeks specific performance or is able to prove with reasonable certainty the value of the promised performance. If limitations on proof, foreseeability, causation and mitigation are satisfied, who is to say that the promisee's choice of expectation should not be honored? Obviously, the burden shifts to the promisor to establish that specific performance should be denied or the expectation remedy should be limited to reliance or restitution. Even though those limitations are possible to establish, there is an insufficient treatment in this book of the cases and legal literature to feel comfortable with the thesis that the strength of remedies for breach of a binding promise is limited, and perhaps properly so.

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78. Not all advocates of economic analysis agree. *See, e.g.*, Allan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (stating that "the remedy of specific performance should be routinely available as the damages remedy in the case of breach"); Thomas Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984) (arguing that "specific performance is more likely than any form of money damages to achieve efficiency in the exchange and breach of reciprocal promises").

79. *See* FARNSWORTH, *supra* note 1, at 115. The author relies upon the work of Professor Melvin A. Eisenberg, whose work, in turn, is derived from the seminal work of Professor Lon A. Fuller.

80. *Id.*

81. *See id.* at 115-16.

III. RELINQUISHMENTS AND PRECLUSIONS

A. Introduction

In the first part of the book, Farnsworth argues that promisors should have power under the intention principle to create a binding promise by expressing an intention to assume legal obligations. This power is denied under current law due to the abolition of the seal and the failure of legislatures to supply a substitute formality. This result is explained and sometimes criticized by the author on the grounds of legal paternalism, which is used "broadly to include limitations that the law imposes on a person's control over the future for that person's own good, usually in the context of the extent of a person's freedom to make a commitment that will be irrevocable or a relinquishment or preclusion that will be irreversible."[82] Thus, legal paternalism should not be invoked to deny power to make a binding gift promise, although paternalistic concerns are involved in deciding when the promisor may renege because the promise was based upon mistake or coercion when made or because personal priorities change over time.[83]

In the second part of the book, the focus is on the present rather than the future. The question for the author is not whether a promise is binding, but whether a relinquishment or preclusion is irreversible even though there has been no consideration or reliance. For example, consider what the author calls relinquishments: When is performance under a contract, or delivery of a gift, or cancellation of a debt, or waiver of a condition irreversible? The answer is found in the intention principle (Autonomy) which, because time is not a factor, now trumps the reliance principle. Moreover, there is less reason for legal paternalism to block power in a relinquishment because the relinquishing party is more competent to order the present than predict the future and, significantly, cannot relinquish more than she has. Thus, for example, the expressed intention to relinquish a right by making a gift or to preclude subsequent action by representing a fact to be true should have legal effect, subject to a limited range of paternalistic defenses.

In the final five chapters on preclusions, the author notes the re-emergence of the reliance principle, the inapplicability of the intention principle, and the emergence of a set of new principles associated with

82. *Id.* at 3 & 207 n.5. Again, this is the only place in the book where a definition of paternalism is offered. *See supra* note 31 (citing other sources that thoroughly discuss paternalism).

83. *See* FARNSWORTH, *supra* note 1, at 86-88.

preclusions. These are: the "anti-speculation" principle, the "public interest" principle, and the "repose" principle.[84]

B. Relinquishments

The starting point with most relinquishments is that they are irreversible. There is no promise to relinquish. A seller who performs,[85] a party who delivers a gift,[86] or a party who waives a contractual condition,[87] cannot later reverse that decision. This starting point, irreversibility, is, according to the author, rooted in the intention principle, as augmented by other policies. On the other hand, the relinquishment of a debt owed by a renunciation, i.e., a statement in writing that the debt is discharged, is reversible unless there is consideration. Why should this be?

According to the author,[88] because of the reliance and "consent" principles, the consideration requirement has waned where the creation of a binding promise is involved, but it remains vigorous in the law of discharge. In short, the rule of *Foakes v. Beer*[89] is alive and well in the United States. True, a liquidated debt can be discharged in exchange for a peppercorn, but otherwise the consideration requirement here is in stark contrast to the intention principle and to the treatment of discharge

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84. *See id.* at 124.

85. *See id.* at 127-31. A relinquishment by performance is not reversible even though there is no reliance by the party to whom relinquishment was made. *See id.* at 127. The reason is the intention principle, subject to evidence that the promisor was unfairly influenced or uninformed. *See id.* at 129-31. The potential reliance of third persons, however, gives rise to a "public interest" principle that supports finality. *See id.* at 131.

86. *See id.* at 132-42. In this chapter, the author discusses when a gift is delivered and why it is irrevocable. *See id.* Again, the intention principle coupled with the fact that the donor can give no more than she has supports finality. *See id.* at 133. After particularly insightful discussions of self-declared trusts, constructive delivery, and assignments, Professor Farnsworth returns to his major thesis, which is that under the intention principle, a signed and delivered writing, declaring a relinquishment of something owned at that time, ought to be sufficient delivery of the things and a paternalistic judge might agree. *See id.* at 140. In Chapter 14, he extends that thesis to commitments to give future assets. *See id.* at 143-47. After discussing the difficulties of selling or assigning expected future resources, he argues that there should be no difference under the intention principle between a renunciation by gift of what one has and what one will have, because in either case one can give only what one has or will have. *See id.* at 146-47.

87. *See id.* at 154-62. Why should the renunciation of a condition in a contract be irreversible event though there is not consideration or reliance? When the condition is not promised by the other party, the answer lies in several reinforcing factors, such as the non-materiality of the condition, the potential for forfeiture if the condition is enforced and the pressures for adjustment in continuing relationships. *See id.* at 156-58.

88. *See id.* at 148-53.

89. Foakes v. Beer, L.R. 9 A.C. 605 (H.L. 1884). This rule states that a debt cannot be discharged by payment of a lesser sum.

in the civil law.[90] In the final analysis, the author urges courts to adopt the intention principle and to apply it consistently, without the need for consideration or reliance where there is: (1) a promise to make a gift; (2) a delivered gift; and (3) the discharge by renunciation of a debt.[91]

C. Preclusions

In the concluding chapters, the author considers when a person is precluded by a voluntary act, such as the rejection of an offer, from subsequently asserting facts or a condition inconsistent with the preclusion. For example, if A rejects B's offer, A can no longer accept that offer without further assent by B.[92] Or if B, an infant, elects to ratify a contract with A, B can no longer avoid the contract for infancy.[93]

In preclusions, the conduct is voluntary but there is usually no intention to give up anything. The preclusion is inadvertent and, thus, the intention principle and its arch enemy, legal paternalism, do not apply. As the author puts it: "While relinquishment results in a surrender that you once intended, preclusion results in a surrender that you never intended."[94] The reliance principle, however, returns to center stage, particularly where equitable estoppel or laches are involved.[95] But in preclusions, the reliance principle may be trumped by other policies, such as the immunity of the United States from equitable estoppel despite reliance,[96] and, in certain preclusions,

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90. *See* FARNSWORTH, *supra* note 1, at 149-52. The author finds some inroads into the consideration requirement in the Uniform Commercial Code. *See id.* at 152.

91. This avoids an anomaly found in the following problem. A and B enter into a bilateral contract where A is to deliver goods to B for $50,000. B then gives A a signed writing that says "I renounce my right to the goods (as yet undelivered) and make you a gift of them." The gift is effective as a relinquishment, but can A still enforce the promise to pay $50,000? Farnsworth says:

> If so, this would seem to be a scheme by which [B] could in effect make a commitment to make a fit of that sum to [A], an apparently anomalous result. If, however, as I have urged, the same formality would have sufficed for a gratuitous promise in the first place, the anomaly disappears.

Id. at 153.

92. *See id.* at 174-80.

93. This is an example of preclusion by election. *See id.* at 181-92. Farnsworth clarifies: "[b]ut preclusions, like relinquishments, are fundamentally different from commitments, and equitable estoppel, which results in preclusion, is fundamentally different from promissory estoppel, which results in commitment." *Id.* at 170.

94. *Id.* at 164.

95. *See id.* at 163-73. The reliance principle is also at work in preclusions by rejection. *See id.* at 174-80.

96. *See id.* at 167-70.

policies other than reliance may dictate finality. For example, in preclusion by election, reliance or formality play no role in the irreversible choice.[97] Rather, finality may be supported by an anti-speculation principle or the public interest in finality.[98]

To summarize, suppose that in a ten year lease between A and B, B promised to maintain the premises in good repair provided that A gave prompt notice of needed repairs. Under the author's analysis, the following results might be expected.

First, if B stated to A, "I hereby renounce the notice condition," there would be a relinquishment by waiver to which the intention principle should apply even though there was no consideration or no reliance.

Second, if, after A failed in the third year to give timely notice of repair needs, B repaired anyway, there would be a preclusion by election. B could not thereafter assert the failed notice condition as a defense even though the preclusion was not intended and there was no reliance.

Third, if after B elected not to insist on the notice condition in the third year, B promised not to insist upon the notice condition in the future, there would be a commitment rather than a renunciation or a preclusion. The commitment falls under the intention principle but would probably be binding if A relied upon it.

IV. CONCLUSION

In the final analysis, this is a book about the tension between the intention principle (Autonomy) and the reliance principle (Fairness). In resolving this tension, Efficiency themes are either muted or ignored. Moreover, the book does not pretend to cover the entire domain of contract[99] and makes little effort to apply or critique the plethora of theories about contract that have waxed and occasionally waned over the last fifty years.[100] Rather, Professor Farnsworth draws upon some

97. *See id.* at 183.

98. These principles are skillfully developed and applied in Chapter 19. *See id.* at 181-92.

99. *See* Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 254 (1995) (discussing three parts of the contract domain: contract in fact, contract law, and contract theory).

100. For such an effort, see HILLMAN, *supra* note 3. *But see* Randy E. Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413 (1999) (critically reviewing HILLMAN, *supra* note 3). Professor Barnett's criticisms of Hillman focus on Hillman's alleged failures: (1) to devote enough attention to his (Barnett's) theories; (2) to read enough cases on promissory estoppel; and (3) to consider what, in addition to a promise and induced reliance, must be present for liability. *See* Barnett, *supra*, at 1420-22. Although it is for him to say, my guess is that Professor Barnett

of these theories in a highly eclectic manner to support his argument while using a unitary and relatively simplistic concept of paternalism as a foil throughout the book.

Although the first part of the book involves a sophisticated treatment of some aspects of the law of contracts, the objective appears to be to rework familiar arguments rather than to break new ground. People have a choice to promise or not. Promises, when made, can be conditioned to limit reliance by promisees. Promises are binding, however, when they bargain for or induce reasonable reliance (Fairness) by the promisee, although in a bargain, limited defenses based upon mistake, fraud, or duress will be recognized (Paternalism). In this part of the book, the reliance principle trumps the intention principle in that a promise is binding because of bargained for or induced reliance not because the promisor intended to assume legal obligations. Thus, reliance (Fairness) is a surrogate for intention (Autonomy) once the promise is made. More importantly, the promisee's return promise (assent) in a bargain is a surrogate for actual reliance and, in remedies for breach of contract, the expectation interest is a surrogate for hidden reliance. Implicit in this surrogacy triad is the notion that if the freedom to renege on a promise is limited by the reliance principle, the consistent legal protection of reliance, actual or hidden, will support Efficiency themes.

Where gift promises or relinquishments are made, however, Professor Farnsworth becomes an advocate for law reform. The intention principle should prevail without the need for reliance where a person has expressed an intention to create or change legal relationships in a gift promise or by relinquishment. Autonomy is thus freed from the restraints of paternalism but not from the consequences of mistake or improvidence. The person to whom the promise or relinquishment is made may with the requisite intent count on finality without having to prove consideration or induced reliance. In preclusions, however, the intention principle retreats into the background and the reliance principle re-emerges as the controlling factor. The arguments and policies developed in these settings are sophisticated and extremely persuasive. In many respects, they complement the law of regretted decisions when promises are made and clearly integrate some of the disparate issues in and around contract law.

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would level the same three criticisms at Professor Farnsworth, especially regarding the theory that a manifested intention to assume legal obligations is not needed when a promise induces reliance.

Nevertheless, I am disappointed in Part One of the book. Like many law professors from my generation, I am a realist[101] in that I believe that contract law should respond to the behavior of people who make promises and enter bargains and to the context within which that activity occurs.[102] Moreover, I have incorporated relational contract theory into my work[103] and have tried to be sensitive to the fairness themes involved in consumer protection, if not the more radical premises of critical legal theory.[104] Based upon this book, it is not clear to me whether Professor Farnsworth is a realist or something else. Clearly, he does not like relational theory and hides the problems of consumer protection behind his persistently stated aversion to legal paternalism.

If Professor Farnsworth is not a realist in the tradition of Llewellyn and Corbin, rejects relational theory, does not explicitly embrace efficiency themes, and, except for bargained for or induced reliance, holds fairness at bay, exactly where does he stand? Only he can say for sure. From this reviewer's perspective, I see a formalist at work. But what kind of formalist? The intention principle, which draws heavily on Lon L. Fuller's work on legal formalities,[105] tries to restore the earlier function of the seal by validating a substitute—the expressed intention to assume legal obligations. Thus, form here channels behavior and enhances Autonomy. It is not an example of the "old" formalism that tended to separate law from morality and exalted rules for their own sake[106] or the so-called "new" formalism, which according to Cass Sunstein, is an "intriguing blend of realist and formalist arguments which might increase predictability for all concerned, [and]

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101. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973) (stating "realism is dead; we are all realists"). *But see* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 314-15 (1997) (questioning whether many people understand what it means to be a realist).

102. *See* Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 786-92 (1982) (discussing the difference between theory-based rules and practically-applied standards in contract law, and maintaining that while the RESTATEMENT (FIRST) OF CONTRACTS focused on the former, the RESTATEMENT (SECOND) OF CONTRACTS concentrates on the latter).

103. *See* Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993); *see also supra* note 27 (describing relational contract theory).

104. The combination of realism, relational theory, and fairness themes are important ingredients in critical legal theory. *See* Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467-69 (1988) (discussing the relationship between realism and formalism).

105. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

106. *See* Lyrissa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 818 (1995) (painting a sympathetic portrait of legal formalism); Singer, *supra* note 104, at 474 (discussing a narrow view of legal relations, which embraces "old formalism").

in the process greatly decrease the costs of decisions."[107] No, Professor Farnsworth turns to the past for a distinct brand of formalism and, in the limited domain covered by this book, offers it as a theory for the future. Only time will tell whether the intention principle or any traditional contract doctrine can meet the demands of the complex exchange relationships that characterize the late twentieth and early twenty-first centuries.

107. Cass R. Sunstein, *Must Formalism Be Defended Empirically*, 66 U. CHI. L. REV. 636, 644 (1999); *see also* David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999).