

CONTRACT SCHOLARSHIP AND THE REEMERGENCE OF LEGAL PHILOSOPHY

CONTRACTS. By E. Allan Farnsworth.¹ Boston: Little, Brown & Company. 1982. Pp. xxiii, 984. \$25.00.

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There is nothing really new about the iconoclasm of the American realists. What is new, however, is the reception of their notions among lawyers, and in this sense the great significance of the realist movement for legal history lies in the recognition that it is possible to have lawyers, and flourishing lawyers, without law in the sense that law traditionally has been understood. Whether this state of affairs is to be regretted or welcomed is debatable, but it is clear that it offers no hospitality to the legal treatise.

— A.W.B. Simpson³

It has been thirty years since Arthur Corbin's eight-volume treatise on contracts appeared in condensed form as a one-volume edition. No scholarly book on contract law of comparable scope has been published since. This void in contract law scholarship has been filled only by the occasional law review article, by books discussing particular aspects of contract law, and by the ongoing revisions of the *Restatement of Contracts* that culminated in the publication of the *Restatement (Second) of Contracts*⁴ in 1979.

As Simpson pointed out, the dominant legal climate has not been friendly to any form of literature that attempts to explicate legal doctrine systematically, and this attitude has been particularly prevalent in contract law.⁵ That Professor Farnsworth's treatise on con-

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³ Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 679 (1981); see also Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1150 (1981) ("Treatises, some of them splendid, are still being written, but the prestige of the undertaking has tarnished." (footnotes omitted)). Professor Stone also attributes the decline of the treatise to legal realism. See *id.* at 1151.

⁴ RESTATEMENT (SECOND) OF CONTRACTS (1979).

⁵ For a summary description of the intellectual climate among contract scholars, see C. FRIED, *CONTRACT AS PROMISE* 1-6 (1981). At one point in this discussion, Fried identifies a group of critics who maintain that "the search for a central or unifying principle of contract is a will-o'-the-wisp, an illusion typical of the ill-defined but much excoriated vice of conceptualism." *Id.* at 3.

tracts should make its appearance now is, therefore, a development worth explaining. It is my contention that the publication of this book at this time may be in part a product of the increased support from legal philosophers in recent years for traditional forms of legal reasoning based on principle and expressed through doctrine.

This new interest in traditional methods of legal reasoning has been sparked by the resurgence of normative legal philosophy, which over the last fifteen years has been displacing the schools of legal positivism and realism that once dominated legal thinking.⁶ One can demonstrate the power and breadth of the new sympathy for normative legal philosophy and for traditional legal reasoning by merely listing its proponents and their institutional affiliations: Bruce A. Ackerman (Yale, then Columbia), Ronald Dworkin (Oxford), Richard Epstein (Chicago), John Finnis (Oxford), George Fletcher (UCLA, then Columbia), Charles Fried (Harvard), and Anthony Kronman (Chicago, then Yale). Also participating in the debate in an important if somewhat skeptical way are P.S. Atiyah (Oxford) and Joseph Raz (Oxford).⁷ This is a formidable list of thinkers and writers, and it appears all the more formidable when one considers that it is hardly exhaustive. The list excludes many legal philosophers who are not law professors, such as Joel Feinberg and Jeffrie G. Murphy,⁸ and doubtlessly other well-known and less well-known legal writers as well.

As significant as the talents and credentials of the members of this group is the fact that these thinkers represent a spectrum of ideological views, embracing modern liberal, classical liberal,⁹ and conservative philosophies. The legal thinkers constituting this new coalition agree that normative legal philosophy is meaningful and useful and that refining legal doctrine through traditional forms of legal analysis

⁶ The existence of this new movement has been noticed by others, who, incidentally, view it favorably. See, e.g., Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1126 (1981) (commenting upon "the new philosophy (or philosophies) of law"); Shapiro, *On the Regrettable Decline of Law French: Or Shapiro Jettet Le Brickbat*, 90 YALE L.J. 1198, 1203 (1981) (referring to "the new jurisprudence of values"); Sunstein, *Politics and Adjudication*, 94 ETHICS 126 (1983).

⁷ Even a partial list of this group's relevant publications is impressive: B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); P. ATIYAH, *PROMISES, MORALS AND LAW* (1981); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); C. FRIED, *RIGHT AND WRONG* (1978); J. RAZ, *THE AUTHORITY OF LAW* (1979); Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980); Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981); Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

⁸ See, e.g., Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970); Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79 (1981). Feinberg's essay is expanded in *THE PHILOSOPHY OF LAW* 270 (J. Feinberg & H. Gross 2d ed. 1980).

⁹ This position is now sometimes called libertarianism and has recently been identified as the "New Liberalism." See Barry, *The New Liberalism*, 13 BRIT. J. POL. SCI. 93 (1983).

grounded on the identification of moral principles is a defensible and worthwhile activity.¹⁰

In Part I of this Review, I briefly trace the rise of the normative legal philosophy that accounts for the reemergence of traditional legal scholarship. This growth is attributable to certain historical and intellectual developments of recent decades that can be only superficially described here. Nevertheless, a proper historical perspective on Professor Farnsworth's treatise requires such an attempt. Although the book is not itself a philosophical work, the intellectual history of the past thirty years suggests that its publication at this time may reflect a renewal of confidence among jurisprudential thinkers in the value of legal reasoning and doctrinal analysis in private law. In Part II, I discuss some of the strengths and weaknesses of the book and argue that the book fails to employ the rights-based analysis introduced by legal philosophers in recent years, an analysis that could help to resolve fundamental tensions in contract law.

I.

A. *The Decline of Legal Positivism*

In an intriguing address given in 1952 and entitled "The Needs of American Legal Philosophy,"¹¹ Lon L. Fuller noted several "retarding" influences on American legal philosophy that he maintained were keeping it from significant tasks. Among these influences was "a conception that defines the lawyer's lifework entirely in terms of state power, which treats him as a technician whose special aptitude is that of predicting and influencing the impact of state power."¹² Fuller identified both the legal positivism of Holmes and Gray and the American legal realist movement as embodiments of this view.¹³

What characterized this attitude and, in Fuller's view, hampered the growth of legal philosophy was the divorcing of legal thought from

¹⁰ These thinkers are divided, however, about whether to pursue a legal framework dominated by a conception of public law or one organized around private law. The renewal of serious interest in the private law subjects of contracts, torts, and property as a source of social order distinct from and perhaps preferable to public law is a significant development as well.

¹¹ L. FULLER, *The Needs of American Legal Philosophy*, in *THE PRINCIPLES OF SOCIAL ORDER* (K. Winston ed. 1981). For an insightful review of this collection of Fuller's essays that shows its relationship to current controversies, see Sunstein, *supra* note 6.

¹² L. FULLER, *supra* note 11, at 250.

¹³ Professor Summers suggests that, although Fuller used the term "legal positivism," the tradition he was reacting to was broader than positivism. Summers describes this view of law as "pragmatic instrumentalism":

This philosophy is "instrumentalist" in that it conceives of law not as means-goal complexes but merely as means to external goals. It is "pragmatic" in several ways. It focuses on law in action and on the practical differences that law makes. It stresses the roles of legal actors and their technological "know-how." It is experimentalist. It is pragmatic, too, in its professed contextualism — its reliance on time, place, circumstance,

attention to the law as it ought to be. To be sure, the prevailing attitude did not prevent a lawyer from having opinions on what the law ought to be, but the legal positivists and realists deemed the tools of legal reasoning to be unsuited to such an inquiry. When a lawyer expressed his opinions on the law "as it ought to be," he did so not as a lawyer, but as a private citizen with no more expertise than any other.¹⁴

At the time Fuller spoke, and for two decades thereafter, legal positivism and legal realism dominated intellectual discourse about law.¹⁵ But with the appearance of the "Hart-Fuller" debate in the late 1950's¹⁶ — and especially with the publication of Hart's *The Concept of Law*¹⁷ in 1961 and Fuller's *The Morality of Law*¹⁸ in 1964 — it became increasingly apparent that the different schools of legal philosophy were using the term "law" in very different senses. When legal positivists and realists spoke of "law," they were referring only to the sum total of actually enacted statutes and regulations and to the actions of judges — the system of rules that, like it or not (and rightly or wrongly), were backed by the threat of force. The reality of enforcement, they maintained, could not be wished away; the question of what the law is had to be distinguished from fundamentally different concerns about what the law ought to be. By contrast, when natural law thinkers like Fuller discussed "law," they were speaking of the underlying moral character of law that creates at a minimum a prima facie duty to obey the law's dictates and that justifies the use of force to ensure compliance. For Fuller and his allies, therefore, choices about what counted as law could never be value-neutral.

This dispute has important implications for judicial decisionmaking. If the law consists only of enacted statutes and other rules, the judge has a legal duty to enforce these rules; when enforcing the "law"

interests, wants, and the assumed malleability of reality *rather than on theories, general principles, and the "nature of things" as sources of ends and means.*

Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 435 (1978) (emphasis added). Although this Review employs the narrower and more traditional terms of "positivism" and "realism," I will be referring to the larger philosophy identified by Professor Summers. This notion of a larger philosophy is consistent with my suggestion that the law-and-economics movement is in the same intellectual tradition as positivism and realism and that it is this tradition that the new normative legal philosophy is responding to and, perhaps, supplanting.

¹⁴ See L. FULLER, *supra* note 11, at 251-52.

¹⁵ For an excellent narration of this debate and its roots, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973).

¹⁶ See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

¹⁷ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

¹⁸ L. FULLER, *THE MORALITY OF LAW* (1964).

conflicts with principles of justice, the judge can at most bemoan the injustice and urge the legislature to change the law. Within positivism, a judge would have a legal duty to enforce, for example, statutes requiring the enslavement or execution of members of a minority group or some other form of morally repugnant governmental discrimination. On the other hand, if one deems the concept of law to include normative principles of justice in addition to statutory and judicially created rules, a conflict between rule and principle obligates a judge to favor the principle that will lead to the just result. A theory acknowledging that principles of justice are a part of the law would authorize a judge to strike down laws that the positivist judge would be legally obligated to enforce.¹⁹

Although legal positivism still exerts a powerful hold over many legal academics and students, the growing strength of the new normative philosophy may indicate that the positivist separation of law from morals is currently on the wane. Its decline cannot be explained solely by an assertion that the moral analysis foreshadowed by Fuller's writings is a superior approach. Ideas tend to be ineffective unless outside circumstances conspire to make them timely.²⁰ What were the circumstances that made a shift away from the legal positivism of Hart and others so attractive to so many?

Of course, because different people change their opinions for different reasons, such a question will resist the most intense scrutiny. Certain developments, however, seem to be particularly important: The civil rights movement and the war in Vietnam had an enormous impact on a segment of society — students and professional academics — that is normally spared discomfort in times of discomfort. These groups had been America's main repository of value skepticism, relativism, and nihilism. In law schools, the embodiment of these attitudes — legal positivism and legal realism — had created little dissonance in the post-New Deal era. But the increasingly common perception that some laws were "unjustly" discriminatory and that the war in Indochina was "unjust" required a new intellectual acceptance of moral analysis as a legitimate mode of thought. The subjection of millions to the choice among the draft, prison, and exile in Canada often made this requirement a very personal one. Were the draft laws just? Did they have to be obeyed? Were such questions matters of legitimate legal scholarship? Positivism provided less than satisfying answers.

¹⁹ See Fletcher, *supra* note 7. Fletcher hypothesizes that this quandary may be a peculiarly Anglo-Saxon problem. Other legal traditions use one word to describe enacted rules (*Gesetz*, *loi*, *ley*, *zakon*, *torvény*) and another to describe the law that includes principles of justice (*Recht*, *droit*, *derecho*, *prava*, *jog*). See *id.* at 980–82.

²⁰ The best-known description of this process of change in theories is T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

This period also saw a massive crackdown on drug consumption. The poor had long been familiar with this type of encounter with the legal system, but when the middle and upper classes acquired a taste for prohibited drugs, these groups as well became, for the first time, frequent targets of arrest and prosecution for violating statutes that proscribed something other than violations of other persons' rights. The "war on drugs" also shared with the war in Vietnam the cycle of initial promises providing the rationale for the policy, followed by failure to achieve the stated goals and — indeed — aggravation of the very problems the policy had been offered to solve,²¹ and, finally, calls for escalation. An entire generation began to challenge the axiom that the state is us and we are the state.

Classical liberals had long observed that war has always fuelled and justified the growth of state power and increased the wealth of the segments of the population that profit from expansion of the state.²² Objections to these effects were, for a time, squelched by the war against the Nazis and by the postwar policeman role of the United States,²³ but they now began to be reasserted. The redistribution of wealth to the "military-industrial complex" and the massive violations of civil liberties justified by national security may have been tolerated when the country was directly threatened, but not when it was fighting the war in Vietnam.

The social tumult associated with the war was accompanied by a rapid acceleration of social programs that were supposed to redistribute large quantities of wealth from some groups in society to others. These programs created still more feelings of resentment, opposition, and alienation — but this time among people many of whom supported the war and were largely unaffected by the civil rights movement. Furthermore, as time went on, the increasing perception that the social programs had failed to deliver on their promises to correct the causes of such social problems as poverty and crime made it harder to label the critics of these programs cold-hearted.

Before long, except for the interest groups that directly profited from both the "welfare state" and the "warfare state," virtually every important segment of society had serious objections to some portion of the laws of the federal and state governments. Similar social environments of discontent have long provided fertile ground for theories of natural rights that postulate "higher laws" capable of overriding

²¹ See, e.g., J. KAPLAN, *THE HARDEST DRUG* (1983). For a discussion of the relationship between drug controls and a rights-based jurisprudence, see Barnett, *Public Policy and Private Rights* (Book Review), 3 *CRIM. JUST. ETHICS* (forthcoming 1984).

²² See, e.g., J. FLYNN, *AS WE GO MARCHING* (1st ed. 1944); R. RADOSH, *PROPHETS ON THE RIGHT* (1975); Radosh, *Preface* to J. FLYNN, *supra*, at vii-xv (2d ed. 1973).

²³ See R. RADOSH, *supra* note 22, at 15.

ing objectionable state pronouncements. Thus, it is not surprising that legal positivism would suffer in an era when civil disobedience was openly discussed and practiced by large segments of the population and when significant numbers of persons were being imprisoned for violations of draft and drug laws.

As various forms of state intervention came increasingly under fire, a new and lively intellectual movement arose. The "law-and-economics" school applied the insights of neoclassical economics to the ever more apparent problems of social order and welfare, but did not abandon the positivism of science or of law. The application of neoclassical methodology to the study of law differed from previous attempts to merge science with law and gained an enormous and lasting influence on legal discourse by providing a critical analysis of state power in all of its guises at a time when such a critique was widely desired.

Although the law-and-economics approach purported to justify some actions of the state, it also provided potent "scientific" arguments against many others — arguments that were consistent with both positivism and realism. Proponents of law and economics argued that programs of forced redistribution and regulation for the common good did not achieve their stated goals, but instead enriched segments of society other than those for whose benefit they were supposedly implemented. Moreover, this enrichment came at the expense of the productive members of all classes, including the poor. Law and economics promised to answer important questions of policy, provided only that there was consensus about the ends being sought. It refocused attention on the traditional doctrines of contract, tort, and property as the most "efficient" means of ordering society. Law and economics was a view that caught on like no other since realism.

But the law-and-economics movement also had its share of detractors. Quite naturally, the designers and supporters of the social programs under attack were aghast at the increasing popularity of the movement. After all, the "free market" had been successfully banished from civilized discussion along with the Nine Old Men of the *Lochner* era. But the problems of the day and the power of the new approach prevented intellectual defenders of state power from dismissing the law-and-economics movement as a reactionary approach or ignoring it altogether. Without some theory to justify it, the social order that modern liberals had fought so hard to achieve was in danger of sinking under the combined weight of public opposition to its coercive impositions and of the economic analysis that plausibly suggested how and why past statist attempts at social problem solving just "didn't work." What was needed was a defense of statist social-problem-solving techniques that justified their continued and expanded application while excusing their failures.

B. *The Reemergence of Normative Legal Philosophy*

With the publication of John Rawls' *A Theory of Justice* in 1971,²⁴ the intellectual terrain began to shift. Rawls made the philosophical discussion of right and wrong respectable again. He attempted to provide a framework within which principles of justice could be intelligibly discussed and debated. Such a framework promised to provide an antidote to the efficiency or utilitarian analysis of the law-and-economics school and a justification for maintaining some semblance of the New Deal/Great Society approach to social problem solving. For example, if the current redistributive exercises of state power created moral "entitlements" to their continuation, the efficiency of such laws and programs would become irrelevant. But to defend the moral justification of the existing governmental structure, one had to jettison moral relativism or skepticism and legal positivism, and recognize the legitimacy of normative discourse in law.²⁵

This return to moral philosophy had an important — though unintended — consequence. If moral discourse could be used to defend statism, it could also be used to attack modern exercises of state power in much the same way that classical liberals had wielded moral arguments against mercantilism and imperialism in the eighteenth and nineteenth centuries.²⁶ And indeed, it did not take long for classical liberals to capitalize on the newfound respectability of moral principles. In 1974, Robert Nozick's *Anarchy, State, and Utopia* appeared.²⁷ Rawls had opened the door for Nozick's critique of distributive justice.²⁸ Nozick's classical liberal or "libertarian"²⁹ approach conceived of justice as the protection of individual rights.³⁰

²⁴ J. RAWLS, *A THEORY OF JUSTICE* (1971).

²⁵ In constitutional law, the new attractiveness of normative theories of law supported an analogous renewal of interest in the long-belittled theory of substantive due process. *See, e.g.*, G. GUNTHER, *CONSTITUTIONAL LAW* 570-646 (10th ed. 1975). If the 14th amendment did not "enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), it was no longer because it enacted *no* theory of substantive due process — rather, it enacted a different one. Nor could the argument that the guarantee of due process had substantive content any longer be disparagingly characterized as positing a "brooding omnipresence in the sky," *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

²⁶ *See, e.g.*, H. SPENCER, *SOCIAL STATICS* 359-60 (London 1851) ("Indeed, all colonizing expeditions down to those of our own day, with its American annexations, its French occupations of Algiers and Tahiti, and its British conquests of Scinde, and of the Punjaub, have borne a very repulsive likeness to the doings of buccaneers.").

²⁷ R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

²⁸ *See id.* at 149-231.

²⁹ Of course, Nozick was not the first to use this term or defend this position. *See, e.g.*, M. ROTHBARD, *FOR A NEW LIBERTY* (1st ed. 1973).

³⁰

Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise

This view became a newly acknowledged alternative to modern liberalism, conservatism, and Marxism. Nozick's book succeeded in reintroducing the argument that human beings possess certain identifiable and fundamental rights that make state expropriation of their persons and property not only inefficient, but unjust.³¹

Nozick, like Rawls, largely confined his analysis to moral and political philosophy. But although neither thinker attempted to apply his analysis systematically to problems of legal principle and doctrine, the individual rights that underlay Nozick's views of abstract justice were precisely the *private* rights of property, contract, and tort that had long formed the body of the common law. The time was now ripe for a new theory of private rights — a theory that might provide an alternative to public law. Such a theoretical endeavor would consist, in part, of a new appreciation for and defense of the traditional modes of legal analysis — namely, the articulation of principle and doctrine — upon which the common law system of interpretation and enforcement of rights depends.

In a series of articles that began to appear even before the publication of *Anarchy, State, and Utopia*, Richard A. Epstein comprehensively described and defended a rights-based theory of strict liability in tort.³² Epstein's initial explanation of this approach relied primarily on an historical analysis of legal doctrine, but with each article the rights-based nature of his theory became increasingly explicit. Significantly, Epstein's methodology of legal analysis (as well as many of his conclusions) was in direct conflict with the law-and-economics approach that had yielded "efficiency" defenses of negligence theory.

After the publication of *Anarchy, State, and Utopia*, rights-based theories of justice became the subject of intense intellectual discussion.

the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state? The nature of the state, its legitimate functions and its justifications, if any, is the central concern of this book This book does not present a precise theory of the moral basis of individual rights Much of what I say rests upon or uses general features that I believe such theories would have were they worked out.

R. NOZICK, *supra* note 27, at ix, xiv.

³¹ In the first part of the book, however, Nozick elaborates certain circumstances in which, he argues, state expropriation of property and persons may be justified. *See id.* at 1-148. *But see* M. ROTHBARD, *Robert Nozick and the Immaculate Conception of the State*, in *THE ETHICS OF LIBERTY* 229 (1982) (attempting to refute Nozick's argument); *id.* at 247 n.1 (citing other such attempts).

³² *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). Professor Epstein explores these ideas further in C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 47-99 (3d ed. 1977).

In 1977, three years after the appearance of Nozick's book, Ronald Dworkin published *Taking Rights Seriously*.³³ Dworkin stood with Rawls in opposing moral and legal positivism, with Nozick in advocating a rights-based approach to justice,³⁴ and with Epstein in defending normative legal philosophy and traditional modes of legal analysis.³⁵ Legal positivism and the empiricism of the law-and-economics movement were now confronted by challenges from both free-market classical liberals like Nozick and Epstein and modern liberals like Rawls and Dworkin.

In 1979, at a symposium held at the University of Chicago Law School and entitled "Change in the Common Law: Legal and Economic Perspectives," this new coalition of normative legal philosophers emerged. Presenting the case for efficiency were Richard A. Posner, William M. Landes, George Priest, and Paul Rubin. Arrayed in opposition were, among others, Ronald Dworkin, Richard Epstein, Anthony Kronman, and Charles Fried. Significantly, two economists, Gerald O'Driscoll, Jr., and Mario Rizzo, also criticized the efficiency model of law.³⁶ Considering their own substantial disagreements, the critics of law and economics presented a remarkably united front in arguing on behalf of justice and against efficiency as the ultimate measure of law. Dworkin and Kronman concentrated their attack on the normative implications of the law-and-economics approach,³⁷

³³ R. DWORKIN, *supra* note 7. Because Dworkin's words so clearly reflect the social and intellectual turbulence that I have argued accounts for the rise of normative legal philosophy, they are worth quoting at length:

The language of rights now dominates political debate in the United States. Does the Government respect the moral and political rights of its citizens? Or does the Government's foreign policy, or its race policy, fly in the face of these rights? Do the minorities whose rights have been violated have the right to violate the law in return? Or does the silent majority itself have rights, including the right that those who break the law be punished? It is not surprising that these questions are now prominent. The concept of rights, and particularly the concept of rights against the Government, has its most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless I shall not be concerned, in this essay, to defend the thesis that citizens have moral rights against their governments; I want instead to explore the implications of that thesis for those, including the present United States Government, who profess to accept it.

Id. at 184. The similarity between Dworkin's manner of exposition and Nozick's is striking. See *supra* note 30.

³⁴ Curiously, although Dworkin devoted a whole chapter of *Taking Rights Seriously* to denying the coherence of a "right to liberty," he failed to take any express notice of *Anarchy, State, and Utopia* or its arguments. Instead of analyzing Nozick's property-rights-based conception of liberty, which was then receiving wide attention, Dworkin attacked John Stuart Mill's concept of liberty, which was not the subject of nearly as much attention as was Nozick's at the time Dworkin wrote. See R. DWORKIN, *supra* note 7, at 266.

³⁵ Dworkin's opposition to positivism and realism and his defense of traditional modes of legal analysis had begun in the late 1960's, but it had lacked an explicit rights-based moral theory at that time. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

³⁶ Other participants in the symposium included Michael A. Becker, Neil Kent Komesar, Leonard Liggio, A. Dan Tarlock, Stephen F. Williams, and the author of this Review.

³⁷ See Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth*

O'Driscoll and Rizzo focused mainly on the descriptive flaws of the efficiency approach,³⁸ and Epstein and Fried presented affirmative analyses of traditional legal reasoning based on moral principles and doctrine.³⁹

It was a watershed event for both the powerful law-and-economics movement and the new normative legal philosophy; it may well turn out that the former suffered serious injury at the hands of the latter.⁴⁰ The new normative legal philosophy responded to legal positivism's strict division of "law as it is" from "law as it ought to be" by using principles of justice to justify traditional modes of legal reasoning and doctrinal analysis. In so doing, it undercut the amoralism and pragmatism of both the efficiency approach of law and economics and the views of the legal realists. Although law and economics still survives, it has been sufficiently shaken to make possible a challenge to the orthodoxy of Posnerian efficiency — a challenge such as the one presented by the development of an economic analysis of law in the "Austrian" tradition of Ludwig von Mises and F.A. Hayek.⁴¹

But what is left of legal realism? In the wake of the intellectual developments of recent years, there appears to be only one group that

Maximization as a Normative Principle, 9 J. LEGAL STUD. 227 (1980). For Posner's reply, see Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

³⁸ See O'Driscoll, *Justice, Efficiency and the Economic Analysis of Law: A Comment on Fried*, 9 J. LEGAL STUD. 355 (1980); Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980).

³⁹ See Epstein, *supra* note 7; Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980). The papers presented at the Chicago symposium are reproduced in the ninth volume of the *Journal of Legal Studies*, but the debate was carried over into an issue of the *Hofstra Law Review*. See *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

⁴⁰ *Contra* Priest, *The Rise of Law and Economics* (Yale Law School Program in Civil Liability, Working Paper No. 7, 1982). Although he agrees that the influence of the law-and-economics movement has probably crested, Professor Priest supports this contention by citing the Hofstra symposium, not the symposium in the *Journal of Legal Studies*. He asserts that "no competing theories arose to provide better explanations of the law than Posner's Rather, Posnerism fell of its own weight." *Id.* at 60. This is a doubtful explanation in light of commonsense views and shared experiences about how and why any theory rises or falls in general acceptance or influence. See generally T. KUHN, *supra* note 20 (describing the process by which new explanatory paradigms succeed older ones). Professor Priest was in attendance at the Chicago symposium, but he neither discusses nor acknowledges the roles played by Dworkin, Kronman, Fried, Epstein, Rizzo, and O'Driscoll in bringing the Posnerian version of law and economics into question.

⁴¹ Hayek's analysis of law as a force that facilitates the maintenance and growth of a "spontaneous order" is one example of such an approach. See 1-2 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973-1976). For an introduction to Austrian economics, see *THE FOUNDATIONS OF MODERN AUSTRIAN ECONOMICS* (E. Dolan ed. 1976). Rizzo's and O'Driscoll's writings are in this tradition. See, e.g., G. O'DRISCOLL, *ECONOMICS AS A COORDINATION PROBLEM* (1977); O'Driscoll, *supra* note 38; Rizzo, *supra* note 38. For a brief discussion of the differences between the Austrian and neoclassical approaches to the problem of cost, see J. BUCHANAN, *COST AND CHOICE* (1969).

still elevates the legal realist critique of traditional legal analysis to a central place in their approach: the critical legal studies (CLS) group.⁴² The image that members of the CLS group like to paint is that traditional legal scholarship is in a "crisis" for which they are largely responsible, and that many if not most significant recent developments in traditional legal scholarship are a reaction to this crisis.⁴³ The CLS "movement," however, can be traced only to the late 1970's.⁴⁴ It cannot, therefore, be responsible for the new normative legal philosophy that had already begun to emerge several years earlier.⁴⁵ Moreover, contrary to the assertions of CLS writers, there is less sense of "crisis" in traditional legal scholarship today than in recent memory; in fact, there appears to be a rapidly growing mood of self-confidence.⁴⁶

⁴² Regrettably, I cannot here undertake an adequate commentary on the views of these critics of traditional legal thought and private law. For a more comprehensive critical assessment, see Sunstein, *supra* note 6; Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466 (1983).

⁴³ "The discipline's growing self-consciousness is largely attributable to the critical legal scholars, a small group of academics who emerged as a self-identified school in the late 1970's." Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1669 (1982).

⁴⁴ "The Conference on Critical Legal Studies was founded in 1977." *Id.* n.3. The timing of this movement makes for some interesting speculation. It may be that the founding of the Conference was motivated by the CLS founders' increasing sense of isolation from the mainstream of legal thought, which was, if the thesis advanced here is correct, moving away from the legal realism upon which much of the CLS position is based. Finding themselves increasingly outside the prevailing establishment, CLS proponents might have viewed the founding of a self-conscious "movement" as an attractive and necessary tactic for identifying and recruiting sympathizers. If this account is accurate, the organization of the CLS group was in part a reaction to the development of the new normative legal philosophy.

⁴⁵ For example, Rawls' book, J. RAWLS, *supra* note 24, was published and received wide acclaim in 1971. Nozick drafted his book between 1971 and 1972. R. NOZICK, *supra* note 27, at xv. The sections of Dworkin's book that concerned legal reasoning and adjudication originally appeared in articles, the first of which, Dworkin, *supra* note 35, was published in 1967.

This is not to deny that the writings of some of the more senior of the scholars associated with the CLS group, Duncan Kennedy and Morton Horwitz in particular, have provoked considerable discussion. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), is approaching the status of a "classic." Indeed, the CLS group, like the realists before them, offers insights of value to the new normative legal philosophers. Professor Sunstein notes the following:

The central achievements of the movement consist, it seems to me, in the emphatic reminder that legal questions are often questions of political theory, in the effort to explore the underlying premises of legal doctrine, in the constant attack on the notion of a value-free legal science, and in the emphasis on the historical contingency of legal rules. All of those insights are useful correctives to much of what goes on in the courts and in legal scholarship. The prospect of carrying through the project carries considerable promise of liberating legal scholarship from a narrowing focus on doctrine alone, and from an unwillingness to understand the extent to which doctrine may be a product of highly controversial premises that are often taken for granted.

Sunstein, *supra* note 6, at 129.

⁴⁶ See Shapiro, *supra* note 6, at 1203.

The CLS position borrows heavily from the realist tradition's contention that legal analysis is, and cannot be anything other than, a smokescreen covering other motives for judicial conduct. In place of the now-unfashionable psychoanalyzing performed by the realists,⁴⁷ the CLS analysis substitutes a neo-Marxist, materialist account of judicial behavior. This thesis is defended in two principal ways. The first defense takes the form of an attempt to demonstrate historically that legal doctrines have changed over the years not for reasons of the sort included in appellate court opinions, but because of the class biases of judges and their perceptions of the material needs of a capitalist society. The second defense is the elaboration of logical contradictions or "opposing principles" of private law — particularly in the law of the marketplace, contract law — that supposedly demonstrate the inescapable incoherence of traditional legal reasoning.⁴⁸

The first type of defense can be found in the writings of Morton Horwitz. In *The Transformation of American Law*,⁴⁹ Horwitz contrasts nineteenth century, capitalist-oriented doctrines of private law with the more communitarian, precapitalist doctrines that allegedly preceded them and argues that the class sympathies of the judges and the perceived needs of the time dictated the abandonment of the earlier doctrines. In an article that appeared in 1979, however, A.W.B. Simpson examined in detail Horwitz's historical analysis as applied in the field of contract law, and he demonstrated that no such shift occurred in the law of contracts during the period Horwitz describes.⁵⁰

At the same time, the CLS assertion that traditional legal analysis is incoherent has been undercut by the new normative philosophers' comprehensive defense of legal reasoning based on principles and doctrines. CLS scholars, however, have so far largely avoided any response to these new developments and have continued to direct their fire at nineteenth century legal thought and the law-and-economics approach. The definitive showdown between the CLS group and the new normative philosophers has yet to occur.⁵¹

⁴⁷ See, e.g., J. FRANK, *LAW AND THE MODERN MIND* (1935).

⁴⁸ See, e.g., Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829 (1983); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

⁴⁹ M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977).

⁵⁰ Simpson, *The Horwitz Thesis and the History of Contracts*, 46 *U. CHI. L. REV.* 533 (1979); see also White, *The Intellectual Origins of Torts in America*, 86 *YALE L.J.* 671 (1977) (offering a fundamentally different account of the development of tort theory).

⁵¹ For a recent confrontation, see *Legal Scholarship: Its Nature and Purposes*, 90 *YALE L.J.* 955 (1981). In this exchange, the CLS scholars discussed law and economics (a favorite topic), but largely ignored the analyses of Dworkin, Kronman, Fried, Epstein, and O'Driscoll. But see Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1028 (1981) (citing Rizzo's contribution to the Hofstra symposium, Rizzo, *The Mirage of Efficiency*, 8 *HOFSTRA L. REV.* 641 (1980)); Tushnet, *Legal Scholarship, Its Causes and Cure*, 90 *YALE L.J.* 1205, 1211 (1981) (same). In one of the few instances in which a CLS scholar has briefly considered the analysis

Notwithstanding the claims of the CLS adherents, the new legal philosophers have made the intellectual climate more receptive to the traditional legal analysis of scholars like Professor Farnsworth. Legal positivism, legal realism, and the law-and-economics approach each contain insights that have contributed to a better understanding of law. The new legal philosophers have succeeded, however, in showing that many of the conclusions of the older schools, such as the positivists' rigid severance of law from morals, the pragmatism of the realists, and the empiricism of the efficiency approach, are seriously flawed. By bolstering the jurisprudential foundations of the doctrinal analysis that treatise writers perform and that Farnsworth's book exemplifies, the new normative philosophy has made the intellectual world of the treatise writer a more congenial place. As I suggest in Part II, however, taking justice seriously may require going beyond doctrinal analysis. When a doctrine runs into trouble or when conflicts between doctrines arise, the treatise writer may need to look to more fundamental notions of justice.

II.

In the preface to his treatise, Professor Farnsworth explains that he intends the book to be a general treatment of contract law for law students and practicing lawyers. He envisions "the kind of book that students might find useful in understanding me or one of my colleagues" — a book drawing on "sources befitting education at the university level" (p. xix). These sources include the history of assumpsit, the theoretical underpinnings of its development, the Uniform Commercial Code, both *Restatements*, law review articles, and, of course, appellate court opinions. The first hundred pages of this 984-page book are taken up with history and theory as Farnsworth lays the foundation for understanding consideration doctrine and its

of Epstein, see Gordon, *supra*, at 1045 (discussing Epstein, *supra* note 7), he appears to have missed the main thrust of Epstein's position.

Two other members of the CLS group have also considered the new normative philosophy. In a very brief discussion of the "rights and principles school," Roberto Unger characterizes the approach as "hocus-pocus." See Unger, *supra* note 48, at 575. Because Unger cites none of the works of this "school," it is difficult to be certain of whom he is speaking. But in describing "the development of a theory of legal process, institutional roles, and purposive legal reasoning as a response to legal realism," *id.* at 576, he may very well be referring to the new normative legal philosophers. Unger characterizes such responses to the insights of legal realism as "endless moves of confession and avoidance" and "ramshackle and plausible compromises [that] have been easily mistaken for theoretical insight." *Id.* Similarly, in her *History of Mainstream Legal Thought*, Elizabeth Mensch dismisses both Rawls and Dworkin in a single footnote by characterizing their contribution to jurisprudential thought as "vastly overrated." See Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 18, 18 n.* (D. Kairys ed. 1982). It is unclear whether Mensch means by this remark to question the extent of their influence or the merits of their analysis. See *id.* at 18-19.

modern rationale, the bargain theory. Each section that follows is similarly prefaced.

By adopting this methodology, Farnsworth has indeed succeeded in providing a useful resource for anyone seriously interested in contract law. In a refreshing contrast to the traditional case orientation of first-year courses, Farnsworth exposes students to the myriad sources of contract law. Lawyers and scholars can easily find advanced materials on a given topic. The book's skillful integration of history and theory with cases and statutes permits the reader to rise above doctrinal analysis and see the more important and sometimes conflicting principles that underlie the rules. Knowing the settled doctrine of contracts is useful, but being able to cope with conflicts or gaps among doctrines requires a theoretical and historical framework. This book helps to make such a framework available by exposing the reader to a full range of resources.

The book's organization is theoretically sound: it begins with a treatment of the enforceability of promises (including a brief discussion of restitution); second, it probes the scope and effect of promises; next, it examines the rights of third parties; and it concludes with an analysis of the enforcement of promises (remedies). Recognizing, however, the not inconsiderable advantages of understanding (and therefore teaching) remedies before contract formation, Farnsworth takes a page to set forth the various damage "interests" before he discusses consideration, and he refers the reader to the section on damages for a more elaborate analysis (pp. 39-40).

In addition to being thoughtfully organized, the book is exceedingly well written. It is not only interesting, but actually fun to read. I have recommended this book to my students, and what impressed them most was the clarity of Farnsworth's exposition and the ease with which he made the intricacies of the subject understandable.

A good example of this achievement is Farnsworth's explanation of the differing interests — expectation, reliance, and restitution — that determine the extent of liability, and his account of the limitations on recoverable damages (pp. 814-16). Having introduced his section on remedies with discussions of such topics as the purposes and types of remedies, their "economic aspects," and the historical development of equitable relief and its forms, Farnsworth moves to the tripartite interest analysis made famous by Fuller and Perdue.⁵² In just a few pages he succinctly explains the message and method of their analysis and then supplements this discussion with a series of formulas (and alternative formulas) that illustrate the interests under varying circumstances.⁵³ Although it is desirable that students read the original

⁵² Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 *YALE L.J.* 52, 373 (1936).

⁵³ For example, Farnsworth characterizes the general measure of expectancy recovery as follows: "general measure = loss in value + other loss - loss avoided" (p. 848).

Fuller and Perdue article, at points the piece lacks enough illustrations and exposition to make the distinctions clear to all readers. Students of mine for whom this caused confusion were greatly helped by Farnsworth. And those who *thought* they understood the article and its applications had to make that understanding square with Farnsworth's explanation and formulas — an effort that reinforced the learning process quite nicely.

The book's superb annotations enhance its value to students learning the law of contracts. Virtually every case in the casebook I use⁵⁴ is discussed at some point. The book's comprehensiveness makes it useful even for students whose professors do not employ the same conceptual scheme or terminology that Farnsworth does, for in most cases a student need only turn to the treatise's table of cases to find a discussion that relates to the materials covered in class. If a casebook provides the bricks for the student's understanding of contracts, this richly detailed book provides the mortar and, on some topics, the blueprint as well. The book's thoroughness also makes it useful to practicing attorneys and teachers who are either reviewing or first exploring selected topics.

As an aid to learning and research, Farnsworth's *Contracts* is a masterpiece of style and substance. If contract doctrine has its problems, the careful and systematic analysis that Farnsworth brings to bear upon it greatly reduces them. Being able to turn to this book was like having Professor Farnsworth at my side, patiently pointing out the intellectual lay of the land and suggesting sources of further information. In short, *Contracts* will permit students, professionals, or academic readers to delve as far into the subject of contracts as their needs and curiosity take them.

As good as it is, though, the book is not without its weaknesses. Farnsworth seeks primarily to promote an understanding of existing doctrines and their historical development. But where these doctrines reflect unresolved tensions and conflicts among underlying theories of contractual obligation and liability, the book does little to resolve the disputes. In particular, the book fails to mediate the apparent conflict between the bargain theory of consideration and the classic cases that seem to base contractual obligation on principles of reliance.⁵⁵ This

⁵⁴ M. FREEDMAN, *CASES AND MATERIALS ON CONTRACTS* (1973). Because Freedman includes a number of old or somewhat obscure cases, his casebook is a reasonably rigorous standard by which to measure the treatise's comprehensiveness.

⁵⁵ See, e.g., G. GILMORE, *THE DEATH OF CONTRACT* (1974). A useful repository of these classic cases is F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* (1970). The illustrations and Reporter's notes to *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1979) are also valuable.

Some commentators see a tension between the bargain theory and the notion of unconscionability. See Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982). Although I will not discuss Farnsworth's treatment of unconscionability, it appears to suffer from much the same deficiency that I attribute to his treatment of reliance. See *infra* pp. 1238-44.

conflict cannot be resolved at the doctrinal level; any solution requires an analysis of the philosophy that underlies contractual obligation. It is here that the realms of jurisprudence and the treatise intersect.

The premise that contractual obligation derives from the act of promising, together with the theory that contractual freedom should be maximized, suggests the need for a formal theory of consideration.⁵⁶ If contractual obligation is essentially promissory, courts need some means of distinguishing enforceable promises from unenforceable promises. The protection of contractual freedom seems to require as formal a criterion as possible, for the more formal the criterion, the less courts will be able surreptitiously to substitute the judge's terms for those of the parties.

The bargain theory of consideration handsomely fits the bill. It specifies that consideration is present, and that a promise is therefore enforceable, when the promise is "bargained for." Farnsworth adopts the definition of bargain contained in section 71(2) of the *Restatement (Second) of Contracts*:⁵⁷ "Something is said to be bargained for 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise'" (pp. 41-42). According to the bargain theory, if a promise is really "bargained for," a court has no need to inquire into the substance of what was bargained for and in general will simply enforce the promise. While thus protecting contractual freedom, such a criterion efficiently captures most commercial transactions in which the parties contemplated the possibility of legal enforcement. Strangers do not usually consummate a bargain without intending that it have a legal effect.

As Farnsworth notes, however, a bargain theory of consideration is unavoidably plagued by serious defects. First, although the requirement that a bargain be present may effectively identify most commercial situations in which the parties intend promises to carry legal consequences, some cases will slip through the cracks. Contractual intent may be present in a number of situations in which the element of bargain is absent, both in commercial transactions and in "transactions taking place outside or on the periphery of the marketplace" (p. 42). Farnsworth lists several categories of cases involving "gratuitous" or unbargained-for promises: promises to convey land, promises by bailees, promises to give to charities, and promises made in the family setting (pp. 90-91). Another example would be unbargained-for "firm" offers. In such cases, legal consequences may be intended by both parties or reasonably understood by one party to be

⁵⁶ See A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* (1975); see also Helmholz, *Assumpsit and Fidei Laesio*, 91 *LAW Q. REV.* 406 (1975) (discussing origin of assumpsit). Simpson's account shows that before the rise of assumpsit, the doctrine of consideration, as it is conceived today, did not exist. See A. SIMPSON, *supra*, at 316-26.

⁵⁷ *RESTATEMENT (SECOND) OF CONTRACTS* § 71(2) (1979).

intended; but because there is no bargain, there is no consideration and, therefore, no enforceable promise under a bargain theory. The bargain theory cannot by itself account for the legal enforcement of these promises.

A second, more obscure problem is to define the limits of enforceability when a bargained-for exchange has occurred but the substance of the exchange is objectionable. Under the bargain theory, the mere fact that an exchange is bargained for provides a sufficient basis for contractual enforcement, and a court may not inquire into the substance of the exchange. This approach seeks to facilitate the freedom of individuals to enter into agreements of their choosing. It is always possible, however, to identify instances in which, although a bargain existed, intuitions (and case law) suggest that the resulting agreement should not be enforced. A contract for the performance of an illegal act is one example. A contract for indentured servitude is an extreme but nonetheless theoretically and historically significant example as well.⁵⁸ The bargain theory cannot by itself account for these and other accepted limitations on the parties' right to engage in legally effective bargaining.

Farnsworth responds to the first difficulty with the bargain theory by straddling the fence. The approach he adopts — not surprisingly, given his instrumental role in its formulation — is that of the *Second Restatement*: the formal requirement of bargained-for consideration is retained⁵⁹ and the (comparatively few) cases that are problematic under a formal bargain theory are handled by supplementary (some would say ad hoc) doctrines, such as promissory estoppel, that allow for recovery in the absence of a bargain. The attempt to remedy the problems of the bargain theory with gap fillers like section 90 of the *Restatement*⁶⁰ could reasonably be credited with having saved contract law (and freedom of contract) from the death that some had wished it,⁶¹ but it has not proved entirely satisfactory. This "solution" has codified the tension between, on the one hand, the freedom of individuals to enter or refrain from entering into legally binding agreements and, on the other hand, the postulated right of individuals to

⁵⁸ See Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 660-61 (1943).

⁵⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

⁶⁰

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.

Id. § 90(1).

⁶¹ Farnsworth notes that "[t]he failure of the doctrine of consideration to provide a more satisfactory basis for enforcing such promises might have brought greater pressure to reform the doctrine had it not been for the increasing recognition of reliance as an alternative ground for recovery" (p. 89).

receive legal compensation for injuries that result from reliance on the verbal conduct of others who may have had no intention to be legally bound. The bargain theory of consideration, reflecting the principle of contractual freedom, is thereby placed on a collision course with section-90-type responses, which are based on a principle of reliance that imposes liability despite the absence of manifestations of intent to be legally bound. The exception constantly threatens to swallow the rule.

Farnsworth's justification for reliance-based recovery highlights its extracontractual nature:

The possibility of an answer founded on principles of tort law is inescapable, particularly if recovery is limited to the reliance measure. One person has caused harm to another by making a promise that he should reasonably have expected would cause harm, and he is therefore held liable for the harm caused. (Pp. 97-98).

When Farnsworth alludes to this basis of recovery later in his discussion of *Hoffman v. Red Owl Stores*,⁶² the tension created by such a justification becomes clearer: "[A]lthough the court spoke of promissory estoppel, its decision may fit better into that field of liability for blameworthy conduct that we know as tort, instead of that field of liability based on obligations voluntarily assumed that we call contract" (p. 192). In short, if a court finds a party's verbal conduct to be "blameworthy," it may impose liability even when it is aware that the promisor did not intend to bind himself.

It is a significant deficiency of the book that Farnsworth nowhere attempts to resolve this tension. Instead, he sidesteps the issue by pointing out that because such reliance cases involve the enforcement of a promise, they are contracts cases "within our definition of the term" (p. 98).⁶³ Clearly, a definitional discussion of the tort-contract distinction is inadequate to account for, much less resolve, the apparent tension between freedom of contract and reliance-based liability. Without a substantial treatment of this problem, no comprehensive book on contract law can be considered entirely satisfactory.⁶⁴

It might be more productive and realistic to conceive of contractual obligation in the following way. Parties bring to transactions pre-

⁶² 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

⁶³ At pages 3-6, Farnsworth adopts the *Restatement's* definition of a "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

⁶⁴ For a treatise that does extensively treat the issue, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613-22 (4th ed. 1971). For further discussions of the issue, see, for example, Fridman, *The Interaction of Tort and Contract*, 93 LAW Q. REV. 422 (1977); Hill, *Breach of Contract as Tort*, 74 COLUM. L. REV. 40 (1974); Poulton, *Tort or Contract*, 82 LAW Q. REV. 346 (1966); Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28 (1949).

existing rights to resources in the world; some of these rights are alienable, others are not. Verbal commitments should be enforceable as contracts when the parties effectuate the unilateral or bilateral transfer of alienable rights to resources in the world by manifesting their consent to a legally binding transfer. Thus, in an agreement to transfer a present or future right to property, the consensual transfer of alienable rights is itself the object of the agreement. In an agreement to perform or refrain from performing an act in the future, the object of the agreement is to obtain performance, but legal enforcement of the agreement should be available only if both parties have manifested a commitment to pay damages for breach. Such a commitment is a transfer of rights to the money, conditioned on nonperformance — a transfer that serves the purpose of providing a legal incentive for performance. The manifestation of consent to transfer alienable rights that characterizes both types of agreements may best capture what has traditionally been meant by the phrase “consent to be legally bound.” Similarly, consent to alter ordinary tort duties of care and thereby to alter the presumptive legal distribution of risk of loss is also consent to transfer preexisting rights.

Laying the theoretical foundation for actual application of this approach would require a two-step analysis. The first step would be an inquiry into rights: what rights do we have, which of them are alienable, and by what means are they alienated? Such an analysis would have to establish that one way in which rights may be alienated is by a manifestation of consent on the part of the rightholder.⁶⁵ The second step would be an analysis of what constitutes a manifestation of consent sufficient to indicate the presence of a contract.⁶⁶ Thus, to decide a contracts dispute, a court would occasionally have to carry out the first-level inquiry to determine enforceability; in most cases, however, the court would simply apply the principles and doctrines discerned in the second step — the determination of what constitutes consent — to the facts of the dispute to see if consent was present.

Under such a consent theory of contract, the existence of a bargained-for exchange would be viewed as important *evidence* of consent to transfer rights. But this form of evidence would be neither a necessary nor even always a sufficient condition of recovery. In the absence of a bargain, a court could enforce commitments and still act consistently with the notion of contractual freedom if a party had

⁶⁵ Cf. P. ATIYAH, *supra* note 7, at 177 (“[P]romising may be reducible to a species of consent, for consent is a broader and perhaps more basic source of obligation.”). Of course, acts other than the consent of a rightholder — for example, torts — may transfer rights noncontractually, and a rights theory must specify the nature of these acts as well.

⁶⁶ “Now consent takes many forms, of which the explicit promise is only one; other types of consent may sometimes be regarded as justifying the implication of a promise, but they are often more naturally described without reference to the concept of promises at all.” *Id.* at 179–80.

manifested his consent to a transfer of rights in some other way. For example, the exchange of nominal consideration of one dollar for a promise would signify consent to the legal enforcement of a damage award for nonperformance. By "tak[ing] the trouble to cast their transaction in the form of an exchange,"⁶⁷ the parties would have manifested such consent. By contrast, under a traditional bargain theory, nominal consideration of this sort would be considered a "sham" without legal effect, because the promisor has not bargained for the dollar.⁶⁸

In the same manner, acts undertaken by one party in reliance on the commitment of another might under certain circumstances (usually present in the "hard" cases) provide valid evidence of a manifested consent to the transfer of rights. For example, a promisor's silence in the face of substantial reliance by the promisee might manifest to the promisee a legally binding intention.⁶⁹ Under a consent theory, the enforcement of an obligation because of reliance or formalities would not be an *exception* to a regime of bargained-for exchange. Instead, some instances of reliance, like formalities, would demonstrate that the other party had in fact consented to transfer rights even absent the conclusion of a "bargain."⁷⁰

Stanley D. Henderson has noted that reliance has sometimes been viewed as evidence of a bargain rather than of consent. "Reliance, under this approach, functions not as a substantive ground for enforcement, but as a vehicle for identification of some other ground for enforcement."⁷¹ The problem with this approach is that, "[b]ecause the cases which most clearly warrant the application of Section 90

⁶⁷ Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 820 (1941).

⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 79 comment d (1979). *Id.* § 87(1), however, makes even recitals of purported consideration sufficient to render an offer enforceable as an option contract.

⁶⁹ See, e.g., *Seavey v. Drake*, 62 N.H. 393 (1882); *Roberts-Horsfield v. Gedicks*, 94 N.J. Eq. 82, 118 A. 275 (1922). In each of these cases, the extensive reliance by a promisee on a promise to convey land, coupled with the apparent knowledge of a promisor who remained silent, would seem objectively to indicate consent by the promisor even in the absence of bargained-for consideration or subjective assent. The judge in each case, however, thought that enforcement of the promise required an equitable exception to or modification of the doctrine of consideration.

⁷⁰ Similarly, the law of evidence holds that silence can sometimes be taken as an admission:

If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission. Whether the justification for receiving the evidence is the assumption that the party has *intended to express his assent* and thus has adopted the statement as his own, or the probable state of belief to be inferred from his conduct is probably unimportant.

McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 651-52 (E. Cleary 2d ed. 1972) (emphasis added; citations omitted).

⁷¹ Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 348 (1969).

seldom involve reliance which is beneficial to the promisor, a causal relation between putative bargain and factual reliance is likely to be difficult to find.”⁷² Although reliance would serve a similar function under a consent theory, it is a much better indication of *consent* than of a bargain, because the promisor’s consent can be, and in such cases usually is, manifested by silence in the face of the promisee’s acts of reliance even when the promisor has received no demonstrable benefit.

The source of the problem for Farnsworth and others⁷³ who are not unsympathetic to freedom of contract but are stymied by instances of “reasonable reliance” is their acceptance of a definition of contract that is limited to promises of future performance. This definition excludes from the category of contract all transactions that involve present exchanges of rights — transactions including such obviously bilateral transfers as cash sales. Farnsworth argues that “[b]ecause no promise is given in . . . [such] exchanges, there is no contract” (p. 4). The exclusive focus on future performance in the definition of contract blinds the theorist to the fact that promises to perform in the future are enforceable only when they display the same moral component as do present exchanges of property: a present consent to transfer alienable rights manifested by one person to another.

Finally, a consent theory of contract might also provide a way to alleviate the other failing of the bargain theory: its apparent inconsistency with the courts’ refusal to enforce certain formally valid contracts, such as slavery contracts or contracts to violate the rights of another. If contractual obligation is based on consent to transfer or alienate *rights*, the existence of a contract requires more than consent. Underlying any inquiry into the existence of a contract is an implicit or explicit inquiry into the nature of the rights at stake in a transaction. If a court identifies the rights involved in a particular transaction as inalienable ones, the question whether there has been consent to a transfer becomes simply irrelevant; regardless of consent, no transfer can occur. Under a consent theory, therefore, even a commitment manifested by a bargain or other evidence would not always be enforceable.

Questions regarding the nature of the rights subject to contractual alienation cannot be answered solely in terms of contract theory; their answers require the sort of moral inquiry we associate with political and legal philosophy. But resort to such concerns in a particular instance does not signal the failure of the consent theory. On the contrary, the theory specifies that such concerns should play an integral role in resolving the deeper moral problems that a finding of consent may sometimes raise. Indeed, the moral justification for consent-based enforceability can be provided only by underlying notions

⁷² *Id.*

⁷³ *See, e.g.,* C. FRIED, *supra* note 5, at 24–25 (discussing promises and reliance).

of rights. The two-step analysis under a consent theory — that is, the bifurcated inquiry into rights and consent — shows the proper relationship between contract theory and a more fundamental theory of justice based on rights. The analysis can thus explain the source of many of the extracontractual considerations that courts currently incorporate into contract law under the loose heading of “public policy” but that are completely unaccounted for by either a bargain or a reliance theory of contractual obligation.⁷⁴ The consent theory’s capacity to encompass these extrinsic concerns points the way toward the integration of contract doctrine with more fundamental theories of justice based on rights.⁷⁵

III.

In this otherwise excellent book, Professor Farnsworth makes no attempt to resolve some basic tensions created by contract theory. As a result, he can describe but cannot resolve the conflicting doctrines that have arisen in response. It would be premature to conclude from this deficiency, however, that contract law must be collapsed into torts. What is needed — and, I suggest, possible — is a theory of justice that explains when legal force, whether it is exercised in the realm of contract or of tort, is morally justified. Such a theory must articulate the rights people have and the ways in which these rights may be consensually or nonconsensually alienated. The fact that this is precisely the mission upon which the new moral and legal philosophers have embarked highlights the importance of legal philosophy and the direct role it can play in developing legal doctrines. The treatise writer is not only dependent on the philosopher to demonstrate the legitimacy of his enterprise. He or she is also in need of the philosopher’s theory of justice, without which a completely coherent doctrinal analysis will remain elusive.

⁷⁴ Although I have not specified the defects of a reliance theory of contract, they are both numerous and serious. See, e.g., Cohen, *The Basis of Contract*, 46 HARV. L. REV. 533, 579–80 (1933) (a reliance theory does not specify which types of reliance merit protection and which do not).

⁷⁵ Of course, I can only sketch the rough outlines of a consent theory here. Complete explication of the theory (including, for instance, an elaboration of the important differences between a consent theory and a will theory) is a much broader enterprise, in which I am currently engaged.