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Larry Garvin

Peter Linzer

Hila Keren

Randy Barnett

Joseph Perillo

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THEORY AND ANTI-THEORY IN THE WORK OF ALLAN FARNSWORTH

Panelists

Larry Garvin¹
Peter Linzer²
Hila Keren³
Randy Barnett⁴
Joseph Perillo⁵
David Campbell⁶

Edited with an Introduction by
Wayne Barnes⁷

INTRODUCTION

When Allan Farnsworth passed away on January 31, 2005, the world lost a titan in the field of contracts. Immediately following his death, the tributes from fellow contracts scholars came in droves. His one-time Dean at Columbia, Lance Liebman, stated that “Allan Farnsworth was the great contemporary American scholar, and one of a handful of great world scholars, of the law of agreement. . . . [He] was . . . perhaps The Authority, on the law of contracts and much more.”⁸ Professor Joseph Perillo stated: “Every generation seems to produce a leader in our field of contract law. There was Samuel Williston, then

1. Professor of Law, Michael E. Moritz College of Law, The Ohio State University.

2. Professor of Law, University of Houston Law Center. Editorial Reviser, *RESTATEMENT (SECOND) OF CONTRACTS* (1981).

3. Faculty of Law, Hebrew University of Jerusalem. Visiting Scholar, Center for the Study of Law and Society, Boalt Hall School of Law, University of California, Berkeley.

4. Carmack Waterhouse Professor of Law, Georgetown University Law Center.

5. Distinguished Professor of Law, Emeritus, Fordham University School of Law.

6. Professor of Law, Durham University, UK.

7. Associate Professor, Texas Wesleyan University School of Law. I thank Frank Snyder, Professor of Law at Texas Wesleyan University School of Law, for conceiving and organizing the *International Contracts Conference*, which was held at Texas Wesleyan on February 24–25, 2006. Many thanks of course also to the eminently distinguished panel of speakers who participated in the discussion. I also thank Frank for the privilege of writing this introduction and helping to edit the manuscript of the panel discussion included herein. I know I speak for Frank when I gratefully acknowledge the moral and financial support of former Dean Fred Slabach and the Texas Wesleyan University School of Law, who made this panel discussion possible, as well as the entire *International Contracts Conference*. I also wish to thank the Editors of the *Texas Wesleyan Law Review*.

8. Lance Liebman, In Memoriam, *Allan Farnsworth*, *ALI Reporter*, 105 COLUM. L. REV. 1429, 1430–31 (2005).

Arthur Corbin, and in our time, Allan Farnsworth.”⁹ Professor Mark Gergen observed, “Allan truly was the premier figure in American Contracts law scholarship since the passing of Corbin and Dawson. The treatise and his half of the Second Restatement would be quite a contribution if there was nothing else.”¹⁰ Farnsworth’s colleague Carol Sanger correctly observed that “Allan is one of the few among us whose name stands for the field. When judges and lawyers start sentences and answer questions with the phrase ‘Farnsworth says . . .’ the matter is settled and the Contracts gods relax in their heavens.”¹¹

Indeed, it is scarcely necessary to say that, although Professor Farnsworth is gone, he is not really gone, because his contributions to the literature and doctrinal exposition available to all of us are immense, incomparable, and invaluable. Professor Austin Scott once said “that to be great, a law professor must accomplish a casebook, a treatise, and a Restatement.”¹² According to this and any other formula, then, Farnsworth must be considered great. His casebook, *Cases and Materials on Contracts*,¹³ is perennially the most widely adopted Contracts casebook at law schools in the United States, and it has been used by generations of law students. His treatise, *Farnsworth on Contracts*,¹⁴ is an expository marvel of Contracts doctrine and may well be the most-often cited authority on Contracts.¹⁵ He wrote dozens of thoughtful law review articles. He became a leading international voice in the drafting and promulgation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and its Commentary,¹⁶ which have been adopted by over sixty countries.¹⁷ He was also a key figure in drafting the UNIDROIT Princi-

9. Carol Sanger, In Memoriam, *Remarks for Allan Farnsworth Memorial*, 105 COLUM. L. REV. 1432, 1432 (2005).

10. *Id.*

11. *Id.*

12. Liebman, *supra* note 8, at 1430.

13. E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, *CASES AND MATERIALS: CONTRACTS* (6th ed. 2001).

14. E. ALLAN FARNSWORTH, *CONTRACTS* (4th ed. 2004) [hereinafter “CONTRACTS”].

15. Professor Lance Liebman of Columbia Law School, who served as Columbia’s dean from 1991–1996, reported in his memorial remarks that Farnsworth was not one who needed either help or attention from the Dean. However, Liebman observed that “once [Farnsworth] came into my office, a mischievous twinkle in his eye, to share the news that on that day, the recorded number of citations to *Farnsworth on Contracts* had moved into first place among all legal publications, displacing *Williston*.” Liebman, *supra* note 8, at 1429.

16. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980).

17. Michael Joachim Bonell, In Memoriam, *Remembering Allan Farnsworth on the International Scene*, 105 COLUM. L. REV. 1417, 1417–18 (2005) (citing CISG: Participating Countries, <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited Oct. 21, 2006)).

ples of International Commercial Contracts, which has served as “a sort of international restatement of contract law.”¹⁸

And then there is, of course, his role as the second Reporter for the *Restatement (Second) of Contracts*.¹⁹ Samuel Williston had been the Reporter for the First Restatement,²⁰ and Farnsworth ably succeeded in that role. He was appointed as Reporter in 1971 when he succeeded Robert Braucher. He was only 43 years old at the time.²¹ Though Farnsworth ascended to the Reporter position among many of the stalwarts, many of whom were obviously much older, in the academy and the profession at the time, he took immediate command of the proceedings and shaped the Second Restatement according to his vision of precision, consistency, and elegance.²² It is now the twenty-fifth anniversary of the Second Restatement, and it has thus far admirably endured the supervening decades of theoretical flux. Farnsworth is reported to have said to the ALI leadership, “You can’t do another Restatement of Contracts while I’m alive,” which command of course was ultimately followed.²³ It has been suggested by Jean Braucher that “a fitting tribute to Professor Farnsworth would be to leave this elegant version alone for a long, long time.”²⁴

In the year or more since Farnsworth’s death, scholars have had time to begin to reflect on the final body of work that Farnsworth amassed. Inevitably, the role of historians comes into play, and various aspects of Farnsworth’s record have begun to be reexamined in a new light subsequent to his death. Peter Linzer is one such historian and scholar who wondered about Farnsworth’s appreciation for the work of theoretical scholars in the latter half of the twentieth century. Farnsworth, in one dominant sense, was clearly a successor in the line of doctrinal expositors of Contract law of the likes of Williston and Corbin. His rise to prominence, however, also fairly coincided with the rise of numerous modern theoretical approaches to Contracts and other law, such as Critical Legal Studies, law and economics, rela-

18. *Id.* at 1418.

19. RESTATEMENT (SECOND) OF CONTRACTS, at v (1981).

20. *Id.* at vii.

21. Jean Braucher, In Memoriam, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1421 (2005). Jean Braucher is Robert Braucher’s daughter, and in her comments she stated: “Robert Braucher shared with Allan Farnsworth the duty of Reporter for the Restatement, and as I have told Allan’s daughter, Karen, I heard stories of her father around my own family’s dinner table.” *Id.* at 1420.

22. *Id.* at 1421–22.

23. *Id.* at 1425–26. Professor Liebman recounts that when he became a director for the ALI in 1998, Farnsworth “scheduled lunch and presented the arguments why there was no need for a Restatement (Third) of Contracts. I hastened to respond that no expert with whom I had spoken thought there was such a need. All agreed that the Restatement Second, the work first of my own teacher Robert Braucher and then, for ten years, of E. Allan Farnsworth, needed little modernization.” Liebman, *supra* note 8, at 1429 (footnote omitted).

24. Braucher, *supra* note 21, at 1426.

tional theory, promise theory, reliance theory, and feminist theory.²⁵ Celebrated by many as a welcome addition to the legal scholarship, Professor Linzer suspected that perhaps Farnsworth was not as enamored with theory as others. One can certainly see why Professor Linzer believed this might be so. For one thing, quite obviously, Farnsworth appeared to be primarily involved with descriptive works regarding Contract law, especially his treatise and the Restatement.

There are other clues, however, that may corroborate Professor Linzer's contention that Farnsworth may not have held the emerging theoretical approaches to Contract law in the same esteem as some of his colleagues in the academy. Perhaps most famously, as described by Professor Linzer and Professor Randy Barnett in their remarks, Farnsworth purported to reveal several fallacies with Contracts scholarship in a presentation he gave at an AALS Contracts Workshop in 1986, from which the presentation was made into an article in the *Journal of Legal Education*.²⁶ Farnsworth noted that after Grant Gilmore proclaimed the Death of Contract in 1974, all scholars deemed themselves free to create their own theory of Contract, unhindered by prior classic Contract doctrine.²⁷ Indeed, he observed that it became quite fashionable to do so.²⁸ However, Farnsworth disputed the conventional wisdom "that contemporary contracts theories have profoundly transformed the legal profession," intoning simply that "[t]hey have not."²⁹ He then viewed the various "theories" of Contract law as having further increased the gap between scholars and practicing lawyers, and he believed that theorizing had "led to an excessive emphasis by scholars on why promises are enforced."³⁰ In his conclusion, he advised that "future scholars looking for potential topics might look elsewhere."³¹

None of this is to say that Farnsworth was unaware of, or even overtly hostile to, the modern theoretical approaches to Contract law. Indeed, Farnsworth "knew every case, every law review article, every new trend in theoretical scholarship, and every argument that contem-

25. See, e.g., Liebman, *supra* note 8, at 1431 ("Legal Realism, Critical Legal Studies, Law and Economics, other 'Law and' movements" arose since Farnsworth's rise to prominence.); Randy E. Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413, 1418 (1999) [hereinafter "Richness of Contract Theory"] (cataloguing "a variety of theoretical approaches: promise theorists, reliance theorists, feminist theorists, efficiency theorists, relational theorists, and critical legal scholars"); Braucher, *supra* note 21, at 1424 ("The publication of the second Restatement in 1981 coincided with the rise of Critical Legal Studies, a movement hostile to black letter formulations of law.").

26. E. Allan Farnsworth, *A Fable and a Quiz on Contracts*, 37 J. LEGAL EDUC. 206 (1987) [hereinafter "Fable and Quiz"].

27. *Id.* at 206.

28. *Id.* at 208.

29. *Id.*

30. *Id.*

31. *Id.* at 209.

porary values require reconsideration of traditional doctrine.”³² And he may well have been open to recognizing the value of certain theoretical approaches to Contract law. On the issue of whether contract law is a discipline distinct and separate from economics, his answer was “sometimes.”³³ Jean Braucher recounts Farnsworth’s response to a sociological theory presented by Stewart Macaulay at a Contracts conference in Madison: “Does one have to be a total immersion Baptist to please you or would you be satisfied with someone who put his toe in the water?”³⁴ That is to say, perhaps, that while Farnsworth appreciated such modern theoretical approaches to Contracts, his appreciation was only to a certain extent.

And there are many other clues, which Professor Linzer has done a marvelous job of finding and discussing, and perhaps ironically, theorizing about. In his talk at the *International Contracts Conference* held at Texas Wesleyan University School of Law on February 24–25, 2006, Professor Linzer shared his thoughts and theories on the subject of Farnsworth’s appreciation (or lack thereof) for theoretical approaches to Contract law. The members of the panel responded to Professor Linzer’s thoughts with some challenges to Linzer’s theory, including a debate about the meaning of the term “theorist” and whether Farnsworth’s disposition towards theory was or was not favorable, and whether such disposition was a function of his generation.

THE DISCUSSION

LARRY GARVIN: I am delighted to be here to moderate this astonishingly—not astonishingly because Frank [Snyder] put it together—distinguished panel. What we have is a principal working paper from Peter Linzer, who I will note does excellent work in relation to contract areas. The paper is here entitled, “E. Allan Farnsworth’s Theory (Non-Theory?, Anti-Theory?, Meta-Theory?) of Contracts.” And then we have four commentators proceeding from Peter. We have Hila Keren from Boalt and Hebrew University. We have Randy Barnett, for the moment from BU, but presently Georgetown. Yes. That is correct.

RANDY BARNETT: Well, I am back at BU now, but I will be joining the Georgetown faculty next year. That’s the whole story. You don’t want to know any more.

GARVIN: A very fine story. With the wonderful contract casebook³⁵ and even more wonderful teacher’s manual.

PETER LINZER: Had to remind him.

32. Liebman, *supra* note 8, at 1430.

33. Braucher, *supra* note 21, at 1426 (citing E. Allan Farnsworth, *Law Is a Sometimes Autonomous Discipline*, 21 HARV. J.L. & PUB. POL’Y 95, 100 (1997)).

34. *Id.* at 1424 (citing e-mail correspondence with Stewart Macaulay, Professor of Law, University of Wisconsin Law School (Feb. 21–25, 2005)).

35. RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* (3d ed. 2003).

GARVIN: And Joseph Perillo, who needs no introduction—no one here needs an introduction, but I insist on giving them anyway—with a wonderful treatise³⁶ and casebook³⁷ and a scholar. And then we have David Campbell from Durham, whose work in remedies and relational contracts should be familiar to all of us. If it's not, go to your library immediately. With that, Peter will speak for what, 20, 25 minutes or so?

LINZER: Or less.

GARVIN: Some comments from the commentators, then perhaps a little discussion and opening everything up for comments as well. Peter?

LINZER: I call this paper “E. Allan Farnsworth’s Theory (Non-Theory?, Anti-Theory?, Meta-Theory?) of Contracts” because it is awfully hard to figure out what Allan’s attitude was toward contract theory.

I very first met Allan Farnsworth when he was 33 and I was a second year law student at Columbia. He was a tall, incredibly smart young man with movie star good looks—and a casebook already published for a year or two. I later heard that in an earlier class an “older woman,” I assume she was about 30—was heard to say in a stage whisper, “No man should be that handsome.”

From the late 1970s until his death in 2005, Allan was a leading American figure on contracts law. (I say that with no aspersions to anybody here. He was *primus inter pares*. He had many, many colleagues of the same quality, but he led us all.) He was a careful scholar with a wide range of non-legal interests that lent his work the off-hand sophistication that is so typically Allan Farnsworth. For instance, in the first six pages of Chapter 1 of his last book, the *Alleviating Mistakes* book,³⁸ he mentioned the *Marriage of Figaro*, *Romeo and Juliet*, *Macbeth*, *The Pirates of Penzance*, *Oedipus the King*, and legends of Aesop and of Dom Perignon’s invention of champagne. He also cited destiny-changing mistakes involving Columbus, Stonewall Jackson, and the chauffeur of Archduke Francis Ferdinand. That was in six pages.³⁹

In his Introduction, Larry Garvin, whom Allan chose to carry on *Farnsworth On Contracts*, told us of Allan’s immense contributions and his immense influence on the entire subject of the law of contracts. Because of the intrinsic value of Allan Farnsworth’s work and because of my personal involvement with him over the years, I have always used it and have become more and more respectful of it.

36. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (5th ed. 2003).

37. JOHN D. CALAMARI, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS (4th ed. 2004).

38. E. ALLAN FARNSWORTH, ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS (2004) [hereinafter “ALLEVIATING MISTAKES”].

39. See *id.* at 1–6.

Nonetheless, I often came away dissatisfied because Allan always seemed to ignore questions of contract theory. You may be familiar with how he included in his casebook and the treatise little snippets of biographical information about people, like Lord Coke, Benjamin Cardozo and moderns like Judith Kaye, the long-serving Chief Judge of the New York Court of Appeals. He spoke in one of them about Louis Brandeis's futile attempt to interest Oliver Wendell Holmes in economics. Using the same description that Brandeis apparently gave of Holmes's attitude toward economics, I think it could be said that Allan had a "fastidious disrelish" for contract theory and legal theory generally.

Randy Barnett commented on this in his book review of the first edition of the treatise: "As good as it is, though, the book is not without its weaknesses. . . . [Where] doctrines reflect unresolved tensions and conflicts among underlying theories of contractual obligation and liability, the book does little to resolve the disputes."⁴⁰

About the same time, Allan gave a tongue-in-cheek luncheon talk at an AALS Contracts Conference that was later published in the *Journal of Legal Education* as *A Fable and a Quiz on Contracts*.⁴¹ I would like to read to you excerpts from his fable:

Once upon a time a law professor named Christopher, while compiling a casebook on contracts, "somehow stumbled across" the "idea that there was such a thing as a general . . . theory of contract." That he did so was particularly surprising since Christopher "seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all of the tenacity of genius."

After Christopher came his disciple Samuel. . . .

Christopher and Samuel's theory of contract was what we now call "classical." It consisted of "pure" contract doctrine that was an "abstraction" "blind to details of subject matter and person." . . .

Finally, after criticisms by Arthur, attacks by legal realists, and the infusion of some novel ideas by Lon and his student William, contract—at least "classical" contract—just rolled over and died. For the most part it was "reabsorbed into the mainstream of 'tort'"; only its ashes were left. The Death of Contract was celebrated in 1974, and all Right-Thinking People participated in the celebration. (Students were not allowed to participate and still had to take examinations in courses with that name.)

But then a miracle occurred. Contract rose from its ashes like a phoenix. The difference, however, was that now each and every legal scholar could create his or her own new theory of contract, freed

40. Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223, 1238 (1984) [hereinafter "Contract Scholarship"] (reviewing E. ALLAN FARNSWORTH, *CONTRACTS* (1982)). Randy then gave his own "consent" theory for the rest of the book review, see *id.* at 1239–45.

41. *Fable and Quiz*, *supra* note 26, at 206–09.

forever from the teachings of Christopher and Samuel. Most legal scholars did so, and these many new theories of contract profoundly transformed the legal profession.⁴²

That's the fable. Allan then gave the luncheon audience of contracts professors a quiz in which he listed about 20 names to be connected with 15 quotations supporting what he said were the four major fallacies in his fable: that skepticism about the division between tort and contract was something new; that scholars of the "classical" school stubbornly refused to recognize reliance; that Langdell and Williston each believed he had a "theory" of contract law; and that contemporary contract theories have profoundly transformed the legal profession.⁴³ (At this point, Allan added, as an aside, that having a theory did not become fashionable among contract scholars until 1974.) Moreover, Allan specifically denied that the contemporary contracts theories had profoundly transformed the legal profession, concluding "They have not."⁴⁴

The quotations, of course, were precisely from the wrong people: Williston talking about the connection of contract with tort and the importance of reliance, Corbin speaking of the centrality of consideration, and a scholar of the 1890s saying no writer in our jurisprudence is authorized to speak oracularly. Allan went on to say that "[t]he urge to have a 'theory' has tended to increase the distance between contract scholarship and practice. In particular, it has led to an excessive emphasis by scholars on why promises are enforced."⁴⁵ To this last point, he appended two quotations talking about the centrality of enforceability of promises, and these turned out to be from Mel Eisenberg and Randy Barnett.⁴⁶ Allan concluded, "My point is not that these fine articles should not have been written but . . . that in the future scholars looking for potential topics might look elsewhere."⁴⁷

That was his exactly typical, Farnsworthian prose, that understatement with the tongue sticking through the cheek so far that no one could miss the point. Allan was hardly alone in this attitude. He had been taught by the stalwarts of legal realism like Karl Llewellyn, and was typical of both much of his own generation and of the immediately preceding one in distrusting what was disparagingly called the

42. *Id.* at 206 (footnote omitted).

43. *Id.* at 207–08.

44. *Id.* at 208.

45. *Id.*

46. *Id.* at 208–09 (quoting Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 640 (1982)) ("The first great question on contract law . . . is what kinds of promises should be enforced."); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986) [hereinafter "Consent Theory"]. ("Contract theory at present . . . does not provide a satisfactory answer to [the] question . . . which interpersonal commitments the law ought to enforce.")

47. *Fable and Quiz*, *supra* note 26, at 209.

“when I was in law school conceptualization.”⁴⁸ That was an attack on the conservative swing in contract jurisprudence—meaning, among other things, the architectural theories of classical contract and tort law. It’s hard to find much theory, formal or informal, in *Prosser on Torts*⁴⁹ even though Prosser had been the reporter of the Second Restatement of Torts⁵⁰ and was one of the most influential figures in post World War II tort law. Indeed, Prosser wrote a famous article called—I believe the title was *The Borderland of Tort and Contract*,⁵¹ and the astonishing thing about that article is he never discusses how contracts differ from torts. That is, *why* they differ from torts. He talks about statutes of limitations; he talks about causation problems. He talks about all kinds of things like that, but he never talks about what is the difference between a contract and a tort? And why is there a difference?

I thought that was astonishing when I first read it, but it’s really fairly common of that era. These, of course, are people that are older than Allan. Even Corbin, whose revolutionary contract philosophy can be easily discerned from his treatise and from many of his articles, never felt obliged to set it out systematically. In fact, from what I can see, Corbin stated his theory most explicitly, I think, in his very late articles, especially the last article he ever wrote, *Sixty-Eight Years of Law*,⁵² and even there he spent less than ten pages on his theory. And in the original preface to Volume 1 of the treatise, Corbin said that his general theories will generally appear throughout the critical discussion of cases and doctrine found in this treatise, but that a short statement of the most fundamental of these theories and of the type of analysis may be of service. He then made the statement in two-and-a-half pages.⁵³

Yet the generation that followed Allan, and in my case, the half generation, is strongly drawn to theory. I tell my students the issue is simply “why.” Why do we have the rules we have? Why do we have contracts? Why do we have expectation damages, and why do we prefer them to specific relief? Of course, people have been asking these questions forever, and I am certainly not denying Lon Fuller’s role,⁵⁴ Morris Cohen’s role,⁵⁵ and somebody who is not as well known as

48. For a modern example of the use of the term, see Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

49. PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton et al., eds., 5th ed. 1984).

50. RESTATEMENT (SECOND) OF TORTS (1965).

51. William Lloyd Prosser, *Selected Topics on the Law of Torts*, in THE THOMAS M. COOLEY LECTURES 380 (4th series 1953).

52. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 KAN. L. REV. 183 (1964).

53. See JOSEPH M. PERILLO, 1 CORBIN ON CONTRACTS, at vii–x (rev. ed. 1993).

54. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52 (1936), 46 YALE L.J. 373 (1937).

55. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

them, Nathan Isaacs, in his very important but largely forgotten article, *The Standardizing of Contracts* in the *Yale Law Journal* in 1917.⁵⁶ (Predictably, I learned about this article from Allan.)

But with few exceptions, the generation before the Baby Boomers rarely asked those questions explicitly. So it seemed interesting to me to go through some of Allan's writings, particularly his last books and articles—and by that I mean *Changing your Mind*⁵⁷ and *Alleviating Mistakes*⁵⁸ in particular—and the treatise to see what he had to say, to see if he had a theory and what it was, and why he seemed so hostile to theorizing. When I learned that Allan had written a book called *Changing Your Mind*, I thought it would be his *summa*. I was really excited because I thought, this is it. After all, it seems to me that the whole point of contract is that you can't change your mind, that that is the essence of a contract. *Restatement (Second) of Contracts* section 1 defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy.”⁵⁹ And in the comment to that section, it said, “A promise which is a contract is said to be ‘binding.’”⁶⁰ It seemed to me that in writing a book on changing your mind, Allan would really finally be going to the essential question. When I looked at the book, however, it seemed to me that Allan was just cataloguing the legal rules governing a bunch of different fact situations illustrated from familiar cases and obscure, but intriguing incidents from the *Times*.

As I prepared for this talk, however, and read *Changing Your Mind* more closely, I saw Allan had discussed theory to some degree and had applied it to the various situations in an attempt to make coherent the law's reaction to regret. Nonetheless, it was only in the last three or four chapters he seemed to be focusing on “why” as opposed to “when” and “how” you could change your mind. He talked about the distinction between preclusions, relinquishments, and commitment; and he talked about why government could or could not be estopped and how perhaps you could make a distinction between government in business and government dealing with private lands. He gave several examples about government not being held to an estoppel when a criminal deal was made. He put down six principles—reliance, intention, dependence, anti-speculation, public interest, and repose—to be applied to the three categories of preclusion, relinquishment, and commitment. And he said that in this case, it makes more sense to use a given principle than that case, and so forth. So to that extent he was

56. Nathan Isaacs, *The Standardizing of Contracts*, 27 *YALE L.J.* 34 (1917).

57. E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998) [hereinafter “*CHANGING YOUR MIND*”].

58. *ALLEVIATING MISTAKES*, *supra* note 38.

59. *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1981).

60. *Id.* cmt. g.

doing some amount of saying “why,” at any rate, though I still found it not fully to my satisfaction.

Allan wrote an article in the *Fordham Law Review* that was dedicated to our friend Joe Perillo, and the article was entitled *Parables About Promises: Religious Ethics and Contract Enforceability*,⁶¹ a promising source for discussion of contract theory, so I looked at Allan’s contribution in this one.⁶² The article was informative, urbane and witty, as one would expect from Allan, and showed a remarkable familiarity with religious scripture and theological writing, but he offered little assessment of what he discussed, other than asking the fairly obvious question:

Would we want a society in which the dictates of religion were as specific as in the parables from Another Realm or of the virtuous sixteenth-century English merchant? It might be noted that the influence of Christianity on contract law did not vanish entirely with *fidei laesio*. It lived on in laws prohibiting gambling and usury and the making of contracts on Sunday. Whether such laws suggest that a religious influence is appropriate for a diverse and secular society is at least questionable.⁶³

Again, a typical Allan concluding statement.

The introductory chapter of *Farnsworth on Contracts*⁶⁴ was another place I looked. It’s a superb place for contract students to start, and it gives them an excellent overview of history of the enforcement of promises and the sources of contract law. Allan devotes the first seven pages to the meaning and role of contracts, so you might say, well, that sounds pretty theoretical. He printed it out with little glosses in the margin like a medieval manuscript. I am not going to read all of them because it goes on pretty long. The interesting thing was in that seven pages he had about 17 glosses. Thus, he spent less than half a page on each; hardly what you would call rigorous theorizing. (On the other hand, it’s an introduction to a book aimed at first-year law students.) It’s a good quick survey, but again, it tells us very little of what Allan thought of contracts.

One place in his treatise where Allan did seem to take a theoretical stand was in endorsing Fuller and Perdue’s rationale for the enforcement of purely executory promises. A conundrum, one would think, for an article famously devoted to the reliance interest in contract damages. Why should we give any damages, much less the entire ben-

61. E. Allan Farnsworth, *Parables About Promises: Religious Ethics and Contract Enforceability*, 71 *FORDHAM L. REV.* 695 (2002) [hereinafter “Parables”].

62. I never thought of Allan as particularly religious, though I had no reason to have an opinion one way or the other. I do remember he told a group of us that he had an honorary degree from the Catholic University of Louvain, Belgium, and he thought that this might be a get out of jail free card to get him, as a good Unitarian, into heaven.

63. *Parables*, *supra* note 61 at 707.

64. *CONTRACTS*, *supra* note 14, at 9–41.

efit of the bargain to a party who has in no way shown any reliance on the promise now repudiated? Fuller and Perdue wrote that expectation damages were justified as a surrogate for reliance, because reliance is often hard to prove or quantify, especially if it consists of forbearance—a failure to act because the actor expected to get the benefit of the bargain that was not performed. Allan endorsed this in the treatise and repeated the endorsement in *Changing Your Mind*, where he devoted an entire chapter to it, under the title, “A Surrogate for an Enigma,” and wrote, “[f]or me, the most satisfying answer is still the one proposed by Lon Fuller more than 50 years ago: ‘to encourage reliance we must . . . dispense with its proof.’”⁶⁵ This tribute to Fuller appeared several times in Allan’s writing, but that was about as close as I saw him getting to taking much of a stand on these kind of basic sort of things.

Another section of the treatise does a fine job of describing the history of contracts built on Allan’s superb 1969 article, *The Past of Promise*.⁶⁶ In typical Farnsworth fashion, this article began by him quoting the *Lord of the Flies*⁶⁷ and then going through anthropology, history, economics, and Montesquieu’s troglodytes to show how promises and then executory promises came to be deemed legally enforceable. Again, however, he does not seem to be interested in asking why this happened as opposed to how.

But I did find much more of Allan and contract theories in *Alleviating Mistakes* and the *Oops* article. I found that he talked there about the gaps between perception and reality, about Ptolemy’s theory that the sun revolved around the earth.⁶⁸ He talked about the difference between conscious ignorance and mistakes and the difference between conscious and willful ignorance. He then also discussed risk of loss, and based on these concepts proposed a change from our present rule that conscious ignorance does not equal mistake. In place of this, he said, we should simply ask who should bear the risk of loss when there is conscious ignorance. I thought that was a useful thing, and one truly based on a theory of why we do what we do, and what we should do once we know that.

65. See FARNSWORTH, *CHANGING YOUR MIND*, *supra* note 57.

66. E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576 (1969).

67. *Id.* at 576 (citing WILLIAM GOLDING, *LORD OF THE FLIES* (1954)).

68. See FARNSWORTH, *CHANGING YOUR MIND*, *supra* note 57. An interesting point to me, at least, is that this was one of the rare times when I thought that Allan hadn’t shown typical Allan thoroughness. He said Ptolemy was mistaken, but many scientists and philosophers argue that point. Thomas Kuhn has a whole discussion in his famous and profoundly important book, Thomas S. Kuhn, *The Structure of Scientific Revolutions* (3d ed. 1996), about the notion that Newton wasn’t wrong until Einstein came along and changed things, and that the concept of phlogiston wasn’t wrong until Priestly discovered oxygen and so forth. And I am kind of surprised that Allan wasn’t aware of that and didn’t at least discuss that point, given all of the other things that he knew so well. But he didn’t.

He talked about the risk of loss, of course, a lot, in both mistake and impossibility, impracticability. And here I saw him actually doing something a little more along the line of making suggestions that were fairly basic. He spoke about the difference between mistakes and mis-predictions, rationality, and determinism. He spoke very much about the difference between forgiveness and reversal. We forgive the doctor who kills you by giving you mislabeled wrong medicine; at least we don't charge him with manslaughter or murder. But when we can change a result, we do it by reversal, such as in *Sherwood v. Walker*, where a contract for sale is set aside because the cow was not barren. This seems like more than mere categorization; his approach seemed to go to our motivation with respect to mistakes, and from that to how we should deal with them. To me, it was a welcome change.

There is, of course, much more, and there are people in the audience and on this panel who will and do disagree with me.⁶⁹ I think it should be obvious to you that I admired Allan immensely. I wouldn't have written this. He was not oblivious to theory. He knew what it was and that it was important. Yet when I got done, I had the feeling that Allan projected a middle-of-the-road, mildly liberal Corbin point of view without a lot of striking new ideas as far as contract theory is concerned.

I wondered why that should be. I already suggested that some of the answer is generational in my mind, although Ian Macneil was almost exactly Allan's age when he was writing his first stuff on relational contract theory.⁷⁰ If you have ever read his hundred page article, *The Many Futures of Contract*,⁷¹ you will remember that Macneil spent some time on what went on in the world, including such arcane matters as cooperation among bees and other things that didn't really have a lot to do with contract law, but then put forth what I think is one of the most profound theories, certainly one that has influenced me immensely—that modern contracts are much more commonly based on relationships between or among the parties than they are on previously struck bargains. (I must say that Allan at one point told me, "I do not share your fascination with relational contract theory.")

Another factor is what might be called the Columbia effect. In the 1920s, Columbia Law School was the center of legal realism. Karl Llewellyn was there, Robert Hale was there, William O. Douglas was there, Herman Oliphant was there, as well as many others who were or became stars. It was a very important place. But from what I can

69. Keith A. Rowley, *To Err is Human*, 104 MICH. L. REV. 1407 (2006) (examining ALLEVIATING MISTAKES, *supra* note 38 as part of a survey of books related to the law).

70. See THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001).

71. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

gather in reading, legal realists provoked the same kind of hostility that the Critical Legal Studies movement did in the '70s and '80s. After Harlan Fiske Stone left as Columbia's long-time dean, the choice of who would succeed him went against the Realists in a nasty and bloody academic battle, and most of the Realists left.

As a result, Columbia changed its personality. And from then, for close to 50 years, Columbia exuded a point of view of no point of view. Instead, it was mildly liberal, mildly middle of the road, progressive, process-oriented, and filled with brilliant people who tended their own gardens and avoided what they saw as trendy theorizing or too elaborate an application of a particular approach, whether sociological, economic or politico-philosophical. This went on until around 1980, and I think this Columbia-effect affected Allan. Allan was very much a part of this. He was very much middle of the road. He knew what he was doing. He understood it fully, but he wasn't really making waves because he wasn't interested in making waves, probably because he thought that most waves were made for the sake of making waves.

I think Allan's educational background is also relevant. His father was a mathematics professor at Brown. He studied physics as an undergraduate and took a science Master's at Yale. He was married to a scientist. I think Allan functioned as an observer and a classifier rather than a grand theorist. Galileo, after all, didn't invent the theory that the earth revolved around the sun. He also didn't invent the telescope. But he heard about the telescope and he made a better telescope, and he looked at Jupiter and he saw four moons of Jupiter, and he noticed that on different days, they are in different places. And he realized that this meant that they were revolving around Jupiter, and that that proved Copernicus's theory, and he said that, even though he ran a serious risk in saying this. I know he waffled in the face of the inquisition, but it was still Galileo who proved that the earth revolved around the sun. And that's pretty impressive.

In a modern version, it was Arno Penzias and Robert Wilson who noticed there was background noise in their satellite antenna at Bell Labs. At first, they didn't have a clue—they cleaned it to make sure it wasn't pigeon droppings that were causing the noise. But then they heard about theories coming from Princeton, from Robert Dicke and Jim Peebles about lingering temperature from the Big Bang, and they published their observations, making a reference to the Peebles/Dicke article, and the result was that Penzias and Wilson won the Nobel Prize for physics. (I've never understood why the other guys didn't.)

Allan understood theory. He agreed mostly with Corbin, but I think he would rather have been Galileo than Copernicus, though he probably would have justified his choice on the ground of liking the idea of Bertold Brecht writing a play about him.

So I end with what I think about his Meta-theory. The law is based on particular facts and generalizations derived from careful observation of many cases, not a grand theory to be annotated with cases that support the theories. To continue my analogy to observational scientists, he observed how birds flew, and how their muscles and bones and feathers contributed to flight, and then put those parts together to explain what was pretty obvious to him—that birds, in fact, flew. Thank you.

(Applause)

GARVIN: Thank you. Now we will have some comments from our distinguished panel.

HILA KEREN: So you already know that I didn't have a chance to take a serious look at the paper. I did take a look at the one sentence that you didn't say today, and I want to start from that. It's in the paper. Because you didn't have enough time. But you finalized the argument about Allan's education saying, we can see that he was at heart a lawyer and a scientist, and not a philosopher. So this is one sentence that Peter planned to say, but he didn't. And I don't know if deep down Allan was a philosopher or not. I didn't have the chance, as many of you probably had, to know him.

But I do know that sometimes you could find in Allan's writings a call for philosophy in the sense of doubting and questioning, and these sound more like little descriptive comments or remarks, almost confessions about the things that American contract scholars have neglected to do, but one can read them as an invitation to engage in the kinds of contractual philosophy that Allan did not write about. To my mind, it is as if he did think it was an important job to be done regarding contract law but he, himself, preferred to analyze documents, organize, reorganize as a doctrine, leaving the work of doubting and questioning for others to do.

One example, which I will talk about tomorrow in another panel, is Allan's remark that—I am quoting—"the subject of freedom of contract and Constitutional law has provoked little discussion in the United States." Another example is from a talk he gave in Italy where he admitted to little American engagement in comparative law. Allan said to his European listeners, "We of the common law tradition have shown less proficiency at comparative law and have often depended upon Europeans." And then he asked, "To what extent is good faith purely subjective, requiring only that a party honestly believe that he is acting properly, and to what extent is good faith objective, requiring that a party in addition act in a reasonable manner?" So he raises these as questions, but never answered them.

So to comment on Peter's point or the title to your paper of theory, I don't read Allan's works as anti-theoretical at all, but I think of them as non-theoretical. His non-theoretical views, the precise descriptions of doctrines, supply those who are pro-theoretical with specific and 15

helpful invitations to doubt and question. And at the exact places that Allan left as a remark or a description, subjective or objective? Good faith? Yes or no? And now, I am one of the pro-theoretical nuts, and I could not write like Allan for many reasons. Some of them, you can hear.

But the one that is relevant today is that I would not be able to resist the need to question and doubt doctrine, to ask the “why” and “how” questions that you were talking about. The importance of such a critical look at doctrine, which goes beyond the accurate description, is grounded in the doctrine, in the way doctrine is shaped and survives through the years. Doctrine tends to reflect the solutions that make sense for those who crafted doctrine. And what I want to emphasize today is that doctrine seldom reflects the point of view of the marginalized groups, especially when he chooses to adopt an objective perspective. I use this mark, an objective or reasonable standard. This does not have to be the result, the result of bad faith or conspiracy, because it’s very difficult. It’s difficult for a judge, a law professor, or a legislator to enjoy the status quo, the situation that is offered by the doctrine and at the same time, to think that the same norm might really turn as harmful to others.

The best example I know was made years ago by Peter, who pointed to the color of the band-aid that we are using usually, which people accept as a natural band-aid without thinking about how it would look on a darker skin.⁷² So my argument here is that we can’t all be Allan. Some of us need to look at doctrine with a doubting look. However, I am not sure this doubting look is theoretical in the sense that Randy Barnett is going to talk about, and it was mentioned by Peter as something that he wants to find in Allan’s work. As Peter mentioned, Randy’s comment was—about a book of Allan’s—was that as good as it is, the book is not without its weaknesses. Doctrines reflect on results, tensions, and conflicts among underlying theories of contractual obligation and liability. The book does little to resolve the dispute.

To my mind, there is no one grand theory on contract law, and we should not be looking for one unless we really want to miss a lot. I believe that at least one—at least some of us should be in a constant mood of questioning. Who is served by a specific norm or theory and who is going to pay the price for it? This is a mood that does not seek to produce a grand theory at the end of the day and is not going to resolve the result, theoretical tensions, as Randy Barnett expected Allan to do. What such a critical mood can offer is quite modest, I think. It’s very far from one theory that can explain our multi-layered contract law. It can offer better attention to flaws, flaws of the doctrine,

72. Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Bandaid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791 (1991). 16

and little improvements of some of the flaws. I have no doubt that working in such a mood can help members of modern groups who will get a legal solution that better fits their needs, but I also think that it can improve the doctrine itself, making better doctrine, more inclusive and more sophisticated.

I will give one example from my research in how we have the parol evidence rule with us.⁷³ We have had it now for 400 years. The leading text was written by Sir Edward Coke.⁷⁴ Amazingly, this ancient text has been quoted repeatedly through the centuries as constituting the modern parol evidence rule. Exploring the old text and its contents can teach us a lot about the nature of this piece of doctrine, so I will quote the text that was written 400 years ago. “It would be inconvenient,” said Sir Edward Coke, “that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.”⁷⁵

Several characteristics of this code are evident from the wording; just from the code that I read, everything. The rule aspires to separate what is written from what is not written. It aspires to separation as an ideal. It has a hierarchy in it, a nature of hierarchy where the written is above what is unwritten, above the context. The text controls. It has alleged rationality. It prefers being or appearing as rational to being irrational. And it has a strong claim to certainty and very strong pro-market orientation. I skipped this part of the quotation. Well, the quotation goes on and says, “[I]t would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.”⁷⁶

So all of the characteristics that I have mentioned—the hierarchy, separation, the preference for rationality or imagined rationality, and the claim for certainty—are quite consistent with masculine stereotypes, and they are not as associated with femininity or feminine stereotypes. And again, it’s stereotypes, but it’s important.

The one example I want to give is the point of certainty. One reason why scholars consider adhering to the written text as rational or convenient, to use Sir Edward Coke’s words, is because writing entails or even promotes certainty to their mind. According to the text I just quoted, the written document of the contract carries a certain truth. That’s the wording, while the averments consist of uncertain testimony. Positioning certain truth against uncertain testimony, uncertain

73. See Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 AM. U. J. GENDER SOC. POL’Y & L. 251 (2005).

74. *The Countess of Rutland’s Case*, 77 Eng. Rep. 89 (K.B. 1604).

75. *Id.* at 90.

76. *Id.*

testimony not only suggests a preference for what is written, the hierarchy point, but can be seen as a representation of the sincere nature of certainty, as well as a barrier against the deceitful nature of uncertainty. The question will be—if you are willing to question, if you are not looking only at doctrine—the question would be, then, is it truly the case? Assuming that certainty is achievable, which I doubt, is it necessarily better? Is it in fact truthful, has the truth in it?

From some perspective as well as from a post-modern viewpoint, the answer seems quite negative. To assume that certainty is so desirable means to believe that we should struggle to maintain the status quo. But who is most interested in maintaining the status quo? If not the powerful, who are best served by it and feel comfortable with it? For the weaker members of a given society, those who yearn for change, it is the status quo that prevents hopes for such members. Their inferior situation is certain, and they dream of the uncertain transformation to happen. So certainty, in other words, is valuable for some, but not for all. It is valuable not necessarily because it is truthful, but because of the service it provides for some people and the obstacles to others.

As a representation of concrete evidence, certainty is not the truth, but rather a partial version of the truth, namely the part that was well documented in legal written terms. From the standpoint of those with no access or legal access to written texts, there is nothing attractive about the certainty that others gain from adopting the written text. The tone that praises certainty is masculine. It holds no acknowledgment of doubt, and it does not reflect what the English put here, negative capability, which I don't think that Allan put at the front of his working. Negative capability, according to Keats, is the capacity to remain, to stay in uncertainty, mistake, and doubt. Just to finish with this point, it seems essential to view with suspicion.

I will expect this idea and say to view doctrine with suspicion as maybe the possible reflection of habromanic motive in portraying something as universally beneficial when it actually benefits only a few.

(Applause)

BARNETT: Frank, I want to thank you for organizing this. It's wonderful that we're getting this thing off the ground. I look forward to participating in it regularly. It's great to be here.

Before I make the two points that I intend to make, I can't resist by making some comments, some more personal comments about Allan Farnsworth, who was enormously gracious and generous towards me when I was very young. Reading Peter's paper reminded me of this incident in the Dallas AALS Contracts Conference in '86 or '87. Allan's paper was published in '87, so I am not sure whether the conference was in '86 or '87, but I was there. I believe I was in my third or fourth year of teaching at the time. And you can imagine how I felt

when I was listening to the luncheon speaker. I actually remember being in the room. I don't remember anything else about the conference, but I remember being in the room listening to Allan Farnsworth, seeing him for the first time giving his luncheon talk. And he gets to the end of the luncheon talk, and he gives these quotations from Mel Eisenberg and from me, and I was just stunned, I was just floored. Afterwards everybody came up to me, started shaking my hand, congratulating me. "You made it." I just was astonished. And he was always very kind towards me. I will miss him, and we'll all miss him.

It turned out to be a good career move on my part that my first major contract piece was a *Harvard Law Review* book review of Allan's work,⁷⁷ and my first major substantive piece was published in the *Columbia Law Review*,⁷⁸ where Allan taught. I guess I got Allan's attention that way, and then he reciprocated by mentioning me.

Anyway, I just came here to make two basic points. The first point has to do with the distinction between descriptive and normative theory, and the second has to do with the difference between contract law theory and Constitutional theory, something that I have been wrestling with in recent years.

Let me make the first point first. In hindsight, I think it's wrong to say that Allan Farnsworth was not a theorist. He was a theorist, but he was a descriptive theorist, which I think fits Peter's concluding remarks about classifications and biology and that sort of thing. I think that's what Allan did. He became such a towering figure, because he was such an unbelievably insightful descriptive theorist, which means he took the blooming, buzzing confusion of reality or of many, many cases and many, many doctrines, and he systematized them.

That was part of his task in doing the Restatement, but also as a treatise writer. He systematized them so well and so clearly and so transparently, so accurately, that we all better understood this confusing world. The reason why many of us recommend Allan's treatise to our students is because it's so clear. And so it's clearly theoretical in the sense that it makes such wonderful generalizations. So it's wrong to say that Allan Farnsworth was not a theorist. But he was a descriptive theorist. He was not a normative theorist. He was doing the best he could, and he did very well to describe what *is* as opposed to *why* it is and whether it should be changed. I think that there was a generational shift that happened after Allan attained his prominence, which was one of the main points of my book review of his treatise in '84.

This generational shift was provoked by both the law-and-economics movement and critical-legal-studies movement in the 1970s. The dominance of the descriptive approach to legal scholarship, as it existed up until that time, was challenged forcefully by these two differ-

77. *Contract Scholarship*, *supra* note 40.

78. *Consent Theory*, *supra* note 46.

ent approaches, both of which had their roots in different aspects of legal realism. I think the word that the left used to describe this dominance was the “privileging of the status quo.” The problem with being a purely descriptive theorist is that it privileges what it is you are describing, which is the status quo. That’s what a descriptive theorist is purporting to describe. Therefore, a purely descriptive approach takes for granted—literally “for granted”—what *is* and doesn’t question that. And this approach implies that what is, is also what ought to be.

What was missing in contract scholarship—in fact, in all legal scholarship—was a sophisticated normative approach. With the challenge posed first by law and economics, and then perhaps even to a greater extent by critical legal studies, everything got going. Everybody woke up and started debating these things. Of course, you also had “liberal” scholars, in which category I put myself as a classical liberal, responding to the critiques coming from law and economics and critical legal studies, but operating at the same level of normative discourse as law and economics and critical legal studies, but making a different normative case.

So while I do now believe that Allan was a theorist, he was a descriptive theorist, and that type of legal theory came to be challenged, not because it was unhelpful—I’m going to get to why it was helpful in just a moment—but because it was limited. I think Peter is right to say that Allan recognized his limits. I don’t know whether he was somewhat resentful of the shift in attention towards more normative theory or not, but he certainly understood it. I suppose because it wasn’t something he was interested in, he didn’t practice it himself. And Allan’s books that Peter references don’t offer any contributions to that discourse.

Now, I think it helps us to understand the nature of normative contracts scholarship to compare contract law theory with constitutional theory. As some of you know, I have been doing a lot of constitutional theory in recent years. This has given me an opportunity to think about the difference between doing contract law theory and constitutional theory. This difference is rather significant and something that we as contracts professors should be aware of, and it concerns what it is we are theorizing about.

The subject of contract law theory is largely, for better or for worse, contract doctrine or the rules and principles of contract law. What makes contract law so wonderful, what makes it such a marvelous course to be taught, and also so challenging to both law students and theorists is that we in contracts have lots of doctrine, and it’s hard to get a handle on it all. It’s hard to remember it all, it’s hard to understand it all, and it’s certainly hard to rationalize and put it all together even descriptively, which is, again, why we owe a debt to Allan Farns-

worth for having helped us in that. But, to repeat, the subject of our theorizing in contract law is the doctrine.

Now, it's true that if we are normatively theorizing, we need to be questioning some of this doctrine, arguing it's wrong. But we are discussing the doctrine, and we are accepting it as the focus of our normative inquiry, while rejecting it, rationalizing it, whatever. That's not true in constitutional theory. By the way, did you notice a subtle, rhetorical shift? We speak of contract *law* theory because the subject of the theory is contract *law*. In constitution theory, we don't speak of constitutional *law* theory. Nobody talks about that. They call it *constitutional* theory. Why? Because the subject of constitutional theory is either the Constitution or "constitutionalism," but it is not constitutional *law*. No normative Constitutional theorist spends a whole lot of time talking about constitutional law, by which I mean constitutional law doctrine.

And for those of you who do not teach constitutional law, the doctrine of constitutional law doesn't look anything like the doctrine in contract law. The doctrine in constitutional law—and I have to keep this somewhat clean because it's being transcribed, and I assume it's going to be published sometime. But let's just say that Constitutional law doctrine can be vacuous. I am trying to think of nice euphemisms for what I really want to say. And it's ephemeral. That is, it comes, it goes, it's up and down. And it also doesn't dictate results, as the critical legal studies or the indeterminacy theorists said about all of law. Their critique that the doctrine doesn't dictate results is largely true about constitutional law. On this, I can speak from personal experience from having litigated a case to the Supreme Court last year in which we had the law on our side, but that only got us three votes, which was two more votes than anybody thought we were going to get.

I am referring to the medical cannabis case,⁷⁹ for those of you who don't know. By getting three votes, we definitely beat the spread. But we had "the law" on our side. We also, by the way, had sympathetic Plaintiffs, and we had sympathetic public policy on our side. So those of you who are legal realists in the room, I defy you to explain why nobody gave us a chance of winning with the law, sympathy, and policy on our side.

But that just makes my point. You can't rely on the law when you are doing constitutional law, whether engaged in constitutional practice or constitutional theory. And Constitutional law theorists don't make constitutional law doctrine the subject of their inquiry contract. Why not? The answer, I believe, involves the source of the doctrines in these two subjects.

79. *Gonzales v. Raich*, 545 U.S. 1 (2005).

The source of contract law doctrine is the spontaneous evolution of centuries of exposure to individual contract disputes. The contract law doctrine that we have inherited is the repository of the wisdom of centuries of development, of people developing contract law doctrine in the context of deciding between individual contesting parties who are both asserting claims of right. I am not claiming that, simply because it has been inherited, existing contract law doctrine is necessarily wisdom. Rather, given the process in which it evolved, there is reason to think that contract law doctrine contains a genuine starting point of wisdom from which we then deviate. So that's why contract law doctrine is the subject of our normative inquiry and why it is worth studying.

Constitutional law doctrine, however, doesn't come from the same place. It comes from a collective body of nine Justices trying to make law by a committee whose membership is constantly changing. And this ever changing committee is comprised of persons who have different political commitments, who want to come to different results, and who share different political philosophies.

Of course, under its rules, these Justices have to justify what they do. Sometimes they do so in the name of doctrine that they adhere to on Sunday and disregard on Wednesday. Because the source of constitutional law doctrine just isn't the same as contract law doctrine, I believe that is why intuitively it's not considered to be a repository of wisdom, to anywhere near the same degree. That's why it's not the subject of our studies. What we study is *the Constitution*, which I do, by the way, think *is* a repository of wisdom based upon how it came about, who wrote it, and how it has been altered by amendments that corrected some of its original defects. We also study the Constitution because of our underlying normative political theory that justifies having a written Constitution at all.

With all this in mind, here is why I think Allan Farnsworth's work is so valuable, and why normative contract scholars cannot do without it: Allan's descriptive theories of what contract law doctrine truly is provides the grist for the mills of normative contract law theorists. This was Hila's point. Allan provided us with tremendously accessible and refined data about the subject of our theorizing, contract law, from which we can begin our analysis and then proceed from there. Do we like it? We don't like it. Can we explain it? Can we rationalize it or justify it or not?

So Allan's scholarship, and that of all contract doctrinalists who are descriptive theorists as he was, is of enormous value to those of us who are more normative. Being a contract scholar who is more doctrinally oriented, provided you are as descriptive and theoretical as Allan Farnsworth was, provides as essential a service to the development of contract law theory as the more normative theorists, given that the latter group must rely to a large extent on the output of the

former who are identifying that body of contract law we then justify or critique.

The last thing I would just say concerns a form of rhetoric we should dispense with, and that is this notion of a grand theory. The use of the term “grand theory” always signals somebody who doesn’t like normative theory. It’s a not-so-hidden pejorative. It sounds overly ambitious. It sounds egotistical. We are all against grand theories because nobody is smart enough to have a grand theory. I think the better word is “a theory.” It doesn’t have to be grand; it just has to be a theory. That’s all.

Characterizing oneself as anti-*grand* theory rhetorically suggests you are for theory, but you are just against the grand kind. To the extent that those who condemn “grand theory” are really opposed to genuine coherent theories, however, this is not nearly so intuitively appealing position to have as an academic. But those of us who develop theories really don’t purport to have a grand theory. I never purported to have a grand theory, but I did try to have a theory. I hold my theory up against the others, and we will see which survives intellectual discourse.

At any rate, I thank you all and look forward to the next two days getting to know you—especially putting a face to the names of those of you I have seen online on the contract law lists—and having a great time listening to you on your panels. Thanks.

(Applause)

JOSEPH PERILLO: Thank you, Frank, for having me here. Peggy Kniffin, who teaches at St. John’s, called me yesterday morning and mentioned that she had heard Allan, at some conference or other in the ’70s, probably the ’80s, say that economic theories of law, philosophical theories of law are fads. A fad is something that disappears. Unfortunately, these are not disappearing. Don’t take me for a know-nothing. Economists should study law and write about it in the Department of Economics. Philosophers should study law and write about it in the Philosophy Club. But lawyers who teach law students should be teaching law. The grand theory—and let’s think of the theory of evolution. What is that? It’s a grand theory that describes an aspect of reality. That’s what Allan Farnsworth and some others of us try to do.

Now, Randy Barnett—I am going to pick a quarrel with him, I told him a little earlier I would—wrote a book review in 1999 about Hillman’s book on the richness of contract law.⁸⁰ I think that may not be the exact title. And in that book review, Randy says, “Well, there is a generational gap. These guys were born in 1933, like me and Bob

80. *Richness of Contract Theory*, *supra* note 25 (reviewing ROBERT HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997)).

Summers, were taught in a different way than—and think in a different way than the younger folk do.”⁸¹ And he uses the Bob Summers/Steve Burton debate about the definition of “good faith” as an illustration. Burton supposedly giving a theory, and Summers giving a list of factors. The Burton theory essentially is a quotation, actually, from the New York Court of Appeals that if you try to—if a person who is a contracting party attempts to deprive the other of the fruits of the contract, that’s bad faith.⁸² And Summers says, “No, it’s more complicated than that.”⁸³

Earlier this week, I got a series of written questions by the parties to a lawsuit in England, in my role as an expert witness on New York law. And one of the questions ran something like this: Assuming a seller is lied to by the buyer post-contract in order to stall, to try to raise funds, how would New York law regard that? And it struck me, well, post-contract lies that are material affect performance? That’s dishonesty. That’s bad faith. It’s not bad faith in Burton’s generalization. It is in the list of factors that Summers says, which is not complete, so I would add, you know, lying in a material way after contracting. So, Randy treats Burton’s description as theoretical and Summers’s as not. To me, they are both descriptive, and Summers has a better description. I now yield to David Campbell, who will now speak to you.

(Applause)

DAVID CAMPBELL: The substance of my comments has, as I feared might occur, been anticipated by Randy Barnett, but I shall make those comments anyway. I will try to give them some novelty by making reference to the situation in England and Wales.

I am very grateful to Peter Linzer for all that I have learned about Farnsworth by reading his paper, but I found it difficult to accept that Farnsworth wasn’t in some useful sense a theorist. Somebody who was able to take very difficult material and explain it, setting out its principles in an extraordinarily lucid way, seems to me to have a good claim to the title of theorist, and I would like to try to flesh out my case for regarding Farnsworth as a theorist in a way that gives some guidance to our current practice as contract scholars.

81. See *id.* at 1413–17.

82. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 379–80 (1980) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (1933) (“[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.”)).

83. See Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982). Burton responded further to Summers in Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984).

It wasn't only accepting that Farnsworth wasn't a theorist that I found difficult, but also accepting the accuracy of Peter's claim to draw authority from Llewellyn for not taking up theoretical positions. I found this particularly hard to accept as Llewellyn, with Fuller, is one of the two legal theorists I most admire. I think what is going on here is, as Randy says, some confusion between the notion of what I will follow Randy and call "grand theory," and theory as such. What we tend to do, I think even now, is associate not merely grand theory with Langdell, but the very idea of producing theorizations about contract, by which I mean general statements of the principles of contract law, with Langdell.

We are all far too sophisticated now to accept the claims of Langdellian formalism. But the way in which we reject these claims sometimes doesn't serve the interests of those of us who are critical of formalism very well. We seem to some extent accept the idea that, if formalism was possible, it would be very good. But, we go on to observe, contract law, or indeed law, and perhaps life itself, unfortunately is just not of a form to make formalism achievable, and so we concede we have to accept a sort of second-best formalism as the furthest we can take things.

There undoubtedly is an enormous amount of wisdom in this stance, but I don't think this wisdom is expressed very clearly, and I think it important to express that wisdom more clearly. For, at the moment, formalism is by no means a dead letter in the contract law of England and Wales. Rather, it has had a great many extremely influential proponents in the last 25 years, and formalism of a decidedly aggressive type is having a very powerful influence especially on appeal court hearings of contract cases, and the law, particularly of remedies for breach, is facing very substantial change as a result. That law is being changed by the application of abstract principles to cases by appeal courts which are showing little appreciation of the practical effect of what they are doing, and we are experiencing a sort of a revenge of formalism in the current effective revision of the law of remedies for breach of contract along lines prescribed by abstract principle.

This is all being driven by the lure of the promise of a formalism that can actually provide a workable general classification of the law of remedies for breach, and, indeed, of the general law of private obligations. Undoubtedly the most gifted proponent of this position, the late Professor Peter Birks, tended to describe central features of the law of remedies which he didn't like in persuasively pejorative terms, essentially as lacking conceptual coherence and rigor, and put forward as improvements alternatives, certainly derived with an initially most impressive show of coherence and rigor, from the structure of his general classification of obligations. This very aggressive, and, for the moment, still successful, formalist style in England and Wales has gained

considerable support from the U.K.'s membership of the European Union. There now is being identified a large body of general contractual and specialized commercial principles which it is claimed is derived from the national laws of the civilian E.U. countries and from the specific law of the E.U., with which the law of England and Wales is being urged to harmonize. (I should also mention the so-called "horizontal effect" of the European Convention on Human Rights, which is not constrained by a concept of state action, and so its principles have the potential to directly intervene in private commercial relationships, but I shall not dwell on this.)

One can detect the influence of Allan Farnsworth upon the very active steps being taken to promote a harmonized European contract law, particularly upon what's called the "common frame of reference" for the development of that law. The principles of this frame of reference are markedly influenced by the U.N. Convention on the International Sale of Goods⁸⁴ and the UNIDROIT principles.⁸⁵ Via these fruits of his labors, Farnsworth is having an important, if distanced, effect on the emerging E.U. law, and therefore on the law of England and Wales.

But I do not think Farnsworth would entirely approve of what is being done. For what is very striking about the harmonization effort, and about the current adoption in England and Wales of appeal court reasoning based on, as it were, abstract principle, rather than on the precedent-based common law style, is that we are getting argument from general, abstract, principles, or, to put it in the way it is being discussed here, argument that is clearly influenced by the lure of the grand style. And this is not in keeping with what I find so interesting in Farnsworth and, of course, in Llewellyn, which is how to proceed in a principled manner after one rejects formalist ambition. The rejection of what I am following Randy and calling the grand style is not a mainly theoretical point. It is, as Randy told us, expressive of a particular economic and political stance. The law of contract is meant to reflect the intentions of parties who do not have an overall, grand perspective. That is the nature of the market economy. The market is unplanned and proceeds on the basis of spontaneity without an overall perspective being possessed by the parties to the contracts.

As our law of contract is meant to reflect the intentions of these parties, it is inevitable that that law must be based on a rejection of the grand style of argument from general principle, because this is demanded by respect for the nature of the action of the parties to con-

84. The United Nations Convention on Contracts for the International Sale of Goods, *supra* note 16.

85. Int'l Inst. for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts*, reprinted in G. GREGORY LETTERMAN, *UNIDROIT'S RULES IN PRACTICE: STANDARD INTERNATIONAL CONTRACTS AND APPLICABLE RULES* (2001).

tracts. With respect to Randy, I think it's wrong to distinguish so strongly between the normative and descriptive attitudes, because the descriptive attitude is a very strongly normative stance. But the normative implication of the descriptive attitude is that you will accept the intentions of the parties, so that a statement of contract principles will seek merely to describe the law produced by attempts to give effect to those intentions. One can call this endorsing the status quo, and obviously there are profound criticisms that can and should be made about the social, economic and, political framework in which the intentions of the parties are formed. The relational law of contract has gone furthest in showing just how necessary and far reaching this criticism should be. But the law of contract is, in a sense, fundamentally based on positive respect for the status quo, because we are trying to give effect to the intentions of the parties, formed, of course, within the existing social structure.

If all this is the case, and if one finds anything positive in the contractual stance, I think what we should try to do is make explicit the type of theory that informs Farnsworth's practice as a contract scholar, and explicitly do what his practice implicitly articulates. He is articulating the rejection of grand theory, and we should make this rejection explicit and celebrate it. It has its political corollary in our overall positive attitude towards the market sphere and our acceptance of the intentions of the parties within that sphere, and its legal corollary in our rejection of grand arguments from abstract principle, and of formalism as an at-all-plausible goal, expressed in our commitment to the common law attitude.

In essence, I think the right attitude to take is to stress the theoretical importance of Farnsworth's descriptive scholarship as the illustration in contract of Llewellyn's views on reckonability. To attempt to go beyond this proper standard for reasoning in contract law is simply a mistake. If I can try to imitate Peter's learning by making reference to a great figure of the physical sciences, I would like to finish with a paraphrase of Einstein. What I think Farnsworth positively tells us is that our contractual theories should be as coherent as possible, but it's very important that they are not more coherent than is possible.

(Applause)

GARVIN: Just a couple of minutes. If I might take a slight moderator's prerogative, a quick comment and then plea for assistance. The comment is when Allan Farnsworth asked me to join him on his treatise,⁸⁶ he sent me a set of suggestions. And one of the things he said when choosing which articles to refer to in the treatise was this—and I'm paraphrasing it, I regret. Paraphrasing Allan Farnsworth is dangerous. But he said something like he seldom found citation to economic or critical articles fruitful. He said, however, the same thing

86. *CONTRACTS*, *supra* note 14.

about purely descriptive articles—that they, too, should be left out. So I mention that, and it’s curious also because Pat Farnsworth told me he originally wanted to be an economist and had applied to grad school in economics but his father, the mathematician, said, “You might want to give law school a try,” and so he did. And it seems to have stuck reasonably well. But the plea for assistance that I want to make is the fairly obvious one. We have a range of views about the proper role of theory, however denominated. So what am I supposed to do? You are all familiar with his treatise and Hornbook. And so what are my instructions?

BARNETT: Did you want to follow the original intention of the framer? Is that it?

PERILLO: Hold a séance?

GARVIN: There is something slightly more serious, more serious. When the volumes fly off of the presses in 2010, I think that’s an established date, what should be the role of theory, however denominated, in a treatise that served so many audiences, which we must remember, the students, the practitioner, the likes of us? I wonder—does anybody have any “assistance”?

BARNETT: I am just going to grab the time here so I can respond to Joe. I will say that I think the treatise is fine the way it is, notwithstanding my little criticism of it in my review of it.⁸⁷ I am going to be writing a shorter book for Oxford University Press in their new perspectives series. I will be doing the contracts volume.

I am going to use contract theory in mine, but of course I’m going to attempt to be descriptively accurate about contract law doctrine. Therefore, I will be relying on authorities that provide accurate descriptions. Perhaps when Allan said that descriptive articles weren’t helpful, he was referring to more pedestrian doctrinal works. There was nothing at all pedestrian about the descriptive theorizing he did, which was not merely descriptive, but was theorizing or generalizing from the law as it is. That is the theoretical exercise in which I now believe he was engaged. And I cannot believe he would think that comparable efforts to generalize from the particulars in the way he did would not be helpful to treatise writing.

I want to respond to Joe’s comment a little bit. First of all, I am glad that you criticized Burton’s theory and not mine, so I don’t have to be vested in defending it. But if it’s true that Burton’s theory doesn’t accurately describe things that are called “good faith,” then I think that’s something wrong with the theory. That’s a theoretical problem. You have Summers’s theory and Burton’s theory, and the Summers theory is better. That’s a theoretical dispute.

PERILLO: If I could just answer that.

BARNETT: Okay. But I do have a point to make.

87. *Contract Scholarship*, *supra* note 40.

PERILLO: The first book of theory that I read was Fried's book on contract as promise.⁸⁸ I was repelled. He took aspects of contract law that did not fit his theory, like duress, in a footnote where he would cite the proper articles but would not recognize the content of those articles. He shoved everything aside that didn't fit into his theory. And this is the problem with most theorists. I spoke to one theorist I admire greatly, Ian Macneil, many years ago. I said, "Ian, you have come up with a grand theory. Why don't you bring it down to earth so that we know the concrete application?" He said, "I am waiting for somebody to do that."

BARNETT: We have all asked Ian that. Everyone who knows Ian has asked him that. If you could risk it. At any rate, I understand that would be bad. That a theorist fails to provide any clue as to applications is a legitimate substantive criticism. The only other point I was going to make—and we're running so short of time—is that Burton's theory, or any other, is not a substitute for doctrine. To some degree, it is an explanation or rationalization of the doctrine. And he has a normative part of his article which says what the doctrine ought to be. But his theory itself is no substitute for doctrine.

I learned this lesson my first year of contracts teaching when I emphasized theory—abstract theory, normative theory—in my first year of teaching, and then I had to grade the blue books. In their exams, my students tried desperately to apply the theory to the facts of a hypothetical. Their answers were awful, and I could immediately see it wasn't their fault. It was the fault of their professor. From then on I taught doctrine as well as theory. I emphasized doctrine. I was teaching doctrine all along, but because I was emphasizing theory, they thought that's what I wanted to hear on the exam. It taught me a lesson: you can't apply theory directly to the facts without intermediary doctrine. That's why having descriptively accurate renditions of the doctrine is so important.

However, when I was asked to testify as an expert witness in the Shawn Kemp Reebok contract dispute⁸⁹ on the issue of whether he had materially breached his endorsement contract, I did have to familiarize myself with the recor. When I did, I was able to apply Eric Anderson's very Burtonian theory of material breach⁹⁰ to reach a relatively immediate and clear judgment that Reebok had indeed materially breached the contract by unilaterally terminating its agreement with Kemp because Kemp had not himself materially breached. An-

88. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

89. Shawn Kemp was an NBA player who was alleged to have breached a Reebok endorsement contract in 2000 when he reportedly claimed that Nikes were his favorite shoes. See, e.g., *Just d'oh It*, SEATTLE POST-INTELLIGENCER, Oct. 27, 2005.

90. Eric G. Anderson, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073 (1988).

person's theory of material breach was extremely useful to me even before I looked at the doctrine or the cases. In fact, my litigation advice to the lawyers, who didn't follow it, was to go out and consult with Eric Anderson about this question so, if I relied on his theory when I testified, Reebok could not call Eric as its expert. So please go out and consult with him, which will conflict him out of being called by Reebok. They didn't do that, which reflects on their thoroughness as litigators and helps explain why Shawn Kemp ended up having to pay Reebok to settle the case.

GARVIN: Well, thank you very much.