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## An Offer You Can't Revoke

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# AN OFFER YOU CAN'T REVOKE

CHARLES L. KNAPP\*

*Under what circumstances a power of acceptance should be terminated by these events [offeror revocations], is important in itself. The issue is also important because it brings out both the fault lines between classical and modern contract law and certain difficulties in modern contract law itself.<sup>1</sup>*

In his article, *The Revocation of Offers*, Professor Melvin Eisenberg continues his remarkable exploration of the basic concepts of classical contract law. In a long series of articles, stretching over at least the last twenty-five years,<sup>2</sup> he has attempted to explain and in some respects to justify many of the fundamental rules of traditional contract law, while at the same time suggesting lines of development that would better align those rules with policy goals such as efficiency and fairness. This article can thus be seen as one more chapter in a long and ongoing enterprise, one with major significance to all of us who are concerned with teaching or writing about the law of contracts. To the extent that this new article reflects the concerns about “freedom from contract” that have inspired this Symposium, however, it does so in a somewhat oblique fashion, being mainly concerned with reasons why traditional rules about the presumptive revocability of ordinary offers might be modified in the direction of greater or earlier enforceability. Thus, adoption of his suggested rules would generally decrease freedom from contract.

Weaving a web of analysis through and around classical rules, Restatement of Contracts modifications (both the *Restatement (First) of Contracts* (the “First Restatement”) and the *Restatement (Second) of Contracts* (the “Second Restatement”)), and statutory innovations (principally in Article 2 of the Uniform Commercial Code (the “Code”)), Eisenberg examines the law’s treatment of “firm” offers—a term that in his view includes offers that contain an implicit promise of nonrevocation, as well as those that are expressly irrevocable. Classical contract law steadfastly regarded all offers—whether firm or not—as

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1. Melvin Aron Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271, 272.

2. E.g., Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992). The above list is only illustrative; it is far from exhaustive.

completely (and indeed blamelessly) revocable in the absence of an ancillary “option contract” of nonrevocability, supported by consideration. One by one, Eisenberg dissects the principal inroads on this baseline rule: Section 45 (and to some extent Section 90) of both the First and the Second Restatements, Section 87 of the Second Restatement, and Section 2-205 of the Code.

While agreeing with many of the applications of these rules, Eisenberg concludes by proposing a principle broader and simpler than any of them, either singly or in the aggregate. In his view, until the period of irrevocability terminates for some legally sufficient reason, every firm offer should be deemed by the law to confer on the offeree the power to call into being a full-fledged contract, notwithstanding any attempts by the offeror at premature revocation. And any contract so formed should be entitled to full-fledged enforcement, with expectation-based remedies where feasible. Eisenberg’s suggested rule would go beyond existing law (as exemplified in the restatements and the Code) in a number of respects: unlike Section 45 of both restatements, no performance by the offeree should be required; unlike Section 87(1) of the Second Restatement, no requirement of form should be imposed; unlike Section 87(2) of the Second Restatement, no reliance by the offeree need be demonstrated; unlike Section 2-205 of the Code, neither form nor a “merchant” offeror would be requisites for his rule of irrevocability. His analysis is thus both a simplifying and a unifying one, bringing apparent order out of what can be seen as, if not exactly chaos, at least a multiplicity of sometimes overlapping and sometimes seemingly conflicting more particular rules.

There is much to admire in Eisenberg’s serious and lucid discussion. Like his other writings, it is eminently readable and blessedly free of the kind of jargon that frequently makes theoretical contract writing heavy sledding for the non-interdisciplinary among us. At the substantive level, his analysis makes a strong case in favor of a simpler, unifying rule for enforcement of firm offers. His comparison of Sections 45 and 90 of the restatements quite persuasively argues the essential incoherence of some of the lines that their drafters, perhaps constrained by existing case law, felt impelled to draw. And his discussion of the motives that may lead some offerors to make expressly firm offers seems perceptive and accurate. To be sure, he does argue for a minimization of the importance of traditional consideration doctrine in the offer and acceptance process, but as one who has in the past been publicly skeptical of the importance of consideration, I am hardly about to leap to its defense in this context.<sup>3</sup>

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3. Charles L. Knapp, *The Promise of the Future—and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 947 (1984).

There are two aspects of his article, however, that seem to invite some comment. The first goes to the most basic step in his argument: the definition of a “firm offer.” The other is a question about what we mean when we talk—as Eisenberg repeatedly does—about “modern contract law.” I will address these two questions in that order below.

At the heart of Eisenberg’s analysis is his definition of a firm offer. As I noted earlier, Eisenberg first argues that any “offer” should be considered as a promise “express or implied” to enter into a contract according to its terms in the event of timely acceptance.<sup>4</sup> Obviously, this argument blurs the distinction between express and implied promises, but that troubles him not at all. He notes that many promises are implied rather than express; indeed it is often a matter of interpretation whether an expression is an offer at all.<sup>5</sup> On this score, he is, of course, quite right. As thousands of law students discover every year, it is indeed often hard to tell offers from other things—such as preliminary inquiries—and it is the unusual offer that actually contains *an express promise to enter into a contract*. The implied- and express-promise distinction plays little part at this stage because viewing an offer as a “promise” in the Eisenbergian sense nearly always requires implying a commitment that is not expressed in so many words. The difficult question of interpretation here is typically not whether there is a sufficient commitment to contract-making in general, but whether there is a commitment to be bound without a *further expression of assent* by the (potential) offeror: the issue of *finality*.<sup>6</sup>

However, when Eisenberg goes on to discuss “firm” offers, he continues with the same sort of conflation of express and implied promises. He states that offers that carry an express or implied promise that the offer will be held open for a certain period of time are referred to as “options” if supported by consideration, otherwise they are referred to as “firm offers.”<sup>7</sup> Having thus glossed over the difference between promises expressed and promises implied, he never really returns to address the possible importance of a distinction between them.<sup>8</sup> But that distinction seems to me a potentially crucial one. In the

4. Eisenberg, *supra* note 1, at 276.

5. *Id.*

6. See RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 26 (1981).

7. Eisenberg, *supra* note 1, at 279.

8. At one point in his discussion of offers for unilateral contracts (well after the main thrust of his argument has been developed in the context of bilateral-contract offers), Eisenberg does briefly note the possibility that there might be some difficulty in knowing whether a given offer contained an implicit promise to keep the offer open. *Id.* at 293.

It is possible that in a given case, considering the terms of the offer and the surrounding circumstances, an offer for a unilateral contract would not properly be interpreted to carry in train an implied promise to hold the offer

ordinary case of an “option contract,” there is indeed an express promise to keep the offer open, in exchange for consideration—probably monetary—that is paid or at least “purported” to be paid. That promise might be expressed in different ways, but its essence is the same: the offer *will not be revoked*, at least for some period of time, and the offeror can therefore safely delay her acceptance without fear of revocation, so long as she does not delay past the assured period of “firmness.” Section 2-205 of the Code talks of an offer which contains “assurance that it will be held open,” making the application of that rule turn on (among other things) an express assurance of irrevocability.<sup>9</sup> This assurance is clearly what the Code means here by “firmness.” Section 87(1) of the Second Restatement is more oblique, speaking of an offer that “recites a purported consideration for the making of the offer, and proposes an exchange of fair terms within a reasonable time.”<sup>10</sup> But the effect of that suggested rule is to make the offer binding as an “option contract,” and the comments suggest that the drafters envisioned a “firm offer” or the offer of an “option contract.”<sup>11</sup>

Why does it matter that Eisenberg for the most part ignores the line between express and implied promises? Because the reasons for enforcement are different, and substantially stronger, in the case of an expressly “firm” offer. Both Section 2-205 of the Code and Section 87(1) of the Second Restatement are rules of form as well as substance.<sup>12</sup> When an offer that purports to be irrevocable (or “firm”) is made in a certain form, the offeree should feel confident that the offer is indeed irrevocable, and be encouraged to rely without fearing that it will be snatched away by a surprise revocation. But when an offer—even one

open until the offeree has a reasonable time to begin acting and complete performance.

*Id.* at 293 n.62. But the offer for a “true” unilateral contract is apt to be a good candidate for an implicit promise not to revoke; indeed, Section 45 of the Second Restatement comes close to making such a promise implicit as a matter of law, presumably because once performance has begun the offeror is getting some traditional consideration (in the form of a partial performance) for her offer. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 45. On the other hand, whether an offer for a bilateral contract should be so interpreted is apt to be a much harder question.

9. U.C.C. § 2-205 (2003).

10. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(1)(a).

11. See, e.g., *id.* § 87 cmt. a (discussing a “firm offer or option contract”); *id.* § 87 cmt. b (discussing the “short-time option”); *id.* § 87 cmt. c (discussing the “option agreement”); *id.* § 87 cmt. e (discussing the “offer . . . made expressly irrevocable”). It appears that Section 87 of the Second Restatement has seldom been applied to offers that are not expressly irrevocable, except in the subcontractor-bidding context, and its wisdom outside that area has been sharply questioned. See Margaret N. Kniffin, *Innovation or Aberration: Recovery for Reliance on a Contract Offer, as Permitted by the New Restatement (Second) of Contracts*, 62 U. DET. L. REV. 23, 23–24 (1984).

12. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(1) (discussing binding offers on option contracts); U.C.C. § 2-205 (discussing firm offers).

made in a highly formal writing—contains no assurance of firmness, it is revocable at will, under the existing rules.<sup>13</sup> Indeed, it is not possible to speak of a traditional “option contract” without assuming the presence, in some form, of an express promise of irrevocability. In proposing its rule to make offers potentially irrevocable (or at least to protect pre-acceptance reliance) Section 87(2) imitates Section 90 by protecting offerees only where their reliance is such that justice demands compensation.<sup>14</sup> Eisenberg specifically rejects that requirement of reliance, at one point dismissing the issue of reliance under Section 87(2) as a “tedious inquiry.”<sup>15</sup> But unless the offer in question also contains an assurance that it will be held open, under traditional contract rules it is revocable at will, and the offeree that invests in pre-acceptance reliance ordinarily does so at its peril.

In *Drennan v. Star Paving Co.*, the opinion that spawned Section 87(2), Justice Roger Traynor spelled out the particular aspects of subcontractor bidding that made it appropriate *in that case* to protect the offeror’s pre-acceptance reliance.<sup>16</sup> The *Drennan* decision has been used as precedent over and over, in similar bidding situations, but in each of those cases there has been specific foreseeable reliance, and the implication of a promise by the offeror not to revoke seems reasonable in those circumstances.<sup>17</sup> Outside of the realm of subcontractor bidding, however, Section 87(2) has not found widespread application. Perhaps, as Professor Margaret Kniffin and other commentators have suggested, this limited applicability is because pre-acceptance reliance does not seem to require legal protection unless the offeror has made a promise (express or clearly implied) not to revoke, and *even then* only when there has been substantial reliance in the expectation that the offer will remain available for acceptance.<sup>18</sup>

Eisenberg also places little or no emphasis on the question of form. Most offers are made in writing, of course, but some are not. The principal existing rules that permit legal enforcement of irrevocability in the absence of conventional consideration or reliance do each contain a requirement of form. Section 2-205 of the Code applies only to an offer

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13. This is clearly the case both under Section 2-205 of the Code and, in the absence of reliance, under Section 87(2) of the Second Restatement. U.C.C. § 2-205; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(2). As for Section 87(1) of the Second Restatement, see *supra* note 10 and accompanying text.

14. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 87(2), 90.

15. Eisenberg, *supra* note 1, at 291.

16. 333 P.2d 757, 759 (Cal. 1958).

17. The case law is discussed at length, and the general rule is adopted in *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695–97 (Minn. 1983).

18. See Kniffin, *supra* note 11, at 23–24.

made by a merchant in a signed writing.<sup>19</sup> In addition, by requiring a separate signing for the “firmness” term, Section 2-205 makes at least a modest attempt to allow for the possibility (which Eisenberg does not acknowledge) that an offeror might be manipulated by an offeree into making an unintendedly “firm” offer.<sup>20</sup> Although Section 87(1) of the Second Restatement does not require that the offeror be a “merchant” (in the Code’s definition<sup>21</sup> or any other sense), it does require a writing, one that contains a formal recital of “purported” consideration.<sup>22</sup> And like Section 2-205, Section 87(1) also makes at least a gesture toward protecting the unsophisticated offeror.<sup>23</sup> The Restatement limits its effect to the offer that “proposes an exchange on fair terms within a reasonable time.”<sup>24</sup>

By downplaying consideration, ignoring requirements of form, dismissing reliance, and minimizing the possible distinction between express and implied promises, Eisenberg is able to present us with a proposed bright-line rule for “firm offers”: irrevocability in the teeth of attempted revocation and expectation damages in the event of breach.<sup>25</sup> Do any of those omissions really matter? Or am I just nitpicking here, as we academics are wont to do? To test Eisenberg’s proposed strong and unqualified rule of offer-enforcement, consider the following hypothetical case.

I have a friend who mentions to me that he is in the market for a used car. I tell him I have a low-mileage recent-model Volkswagen Beetle that I’m thinking of replacing. He is familiar with the car and its condition, and he asks what I would want for it. I say I would sell it to him for \$10,000. He replies, I’ll think it over and let you know. Let me know in a week or so, I tell him, because I am thinking of trading it in on a new one. Before I hear from him again, I discover that my granddaughter is in need of a car to take to college with her in the fall, and also that the fair market value of a car like mine is \$12,000. I telephone my friend, who is not at home, and leave on his machine the

19. U.C.C. § 2-205.

20. *See id.*

21. *Id.* § 2-104(1) (“‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”).

22. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87 cmt. c (“[T]he giving and recital of nominal consideration performs a formal function only. The signed writing has vital significance as a formality, while the ceremonial manual delivery of a dollar or a peppercorn is an inconsequential formality.”).

23. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(1)(a); U.C.C. § 2-205.

24. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(1)(a).

25. Eisenberg, *supra* note 1, at 282, 291.

message that I have changed my mind about selling him the car. Some time later he calls me back, and after a little conversation in which I tell him why I changed my mind (I might want to give the car to my granddaughter; if not, I should be able to get more than \$10,000 for it), my friend declares that whether I like it or not he is accepting my offer. Indeed, he says he will sue me for \$2000 if I do not perform. It is less than a week since we had our initial conversation.

Here there is no signed writing, no “record” of my offer. Of course, I am honorable, and in any event not a perjurer, and so I would admit having that conversation with my friend—although maybe my honest recollection of it would differ a little from his. However, because I did not make my offer in writing, Section 2-205 of the Code would not apply here.<sup>26</sup> I am also not a used-car dealer (a dealer in “goods involved in the transaction”), so I am not a “merchant” in the narrow sense of the Code,<sup>27</sup> and even though I do have some knowledge of the law and business practice, this sale still would not be a transaction in a “merchant’s” capacity even in the broader sense of that term. So Section 2-205 would not apply here for that reason as well.

As for the possible application of Section 87(1) of the Second Restatement, again there is no writing here at all, much less one that “recites a purported consideration.”<sup>28</sup> And finally, as for Section 87(2), there are no facts as yet stated (or likely) that would support a finding of any pre-acceptance reliance by my friend, much less reliance that would be deserving of any legal protection.<sup>29</sup> His only injury is a disappointed expectation; he has lost a good bargain. Assuming that the fair market value of the car is indeed that much higher than my offered price of \$10,000, could I be held to my offer, and thus be potentially liable to my (former) friend for \$2000? Under the generally accepted rules of present-day contract law (common law or Article 2 of the Code), the answer appears to be *no*. I could not be held to my offer because it was effectively revoked before its acceptance. Under Eisenberg’s analysis, however, the answer appears to be *yes*. I could be held to my offer, and maybe I should be.

To all of this, Eisenberg might well respond that in the real world oral offers are seldom made, and that when they are made, the Statute of Frauds will often bar their enforcement.<sup>30</sup> Perhaps because contract law generally operates in the area of bargaining between mercantile entities

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26. U.C.C. § 2-205.

27. *Id.* § 2-104(1).

28. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 87(1).

29. *See id.* § 87(2).

30. Note, however, that I will not deny our conversation, so under Section 2-201(3)(b), I could not use that defense. U.C.C. § 2-201. Also, my telephone message might, if regarded as a “record,” be a sufficiently “admitting” one to constitute a memorandum that would satisfy the statute of frauds.

in a commercial context, he might say further that in his analysis he was tacitly assuming merchant-offerors in every case. Nor do I know if he would regard my oral offer above as sufficiently "implying" an assurance of irrevocability merely by stating a time by which acceptance must be made; perhaps he would not.<sup>31</sup> But by fudging all of these issues in his discussion, and categorically rejecting any requirement of demonstrated reliance in favor of a pure expectation-based recovery, he posits a general rule which not only goes well beyond classical contract law but also beyond any generally accepted rule of present-day contract law.

That does not make him wrong, of course. Reasonable observers might well agree with Eisenberg's analysis. Indeed, I might well do so myself, if it were amended or qualified to take account of some of the misgivings voiced above. In its present form, however, it seems to fall somewhat short of exemplifying what I think of as "modern contract law." That is my other point, to which I will now turn.

Along with Professors Nathan M. Crystal and Harry G. Prince, I am—like Professor Eisenberg and many of the other speakers at this conference—one of the coauthors of a casebook designed for use in the basic law school course in contracts.<sup>32</sup> Beginning with the book's second edition in 1987, my colleagues and I have attempted over the years to describe and contrast what we perceive as "classical contract law" on the one hand and "modern contract law" on the other, and to discuss the evolution of twentieth-century American contract law from the former to the latter. For a while, it seemed to us as though "modern contract law" was the direction in which the law was inevitably moving, and that "modern" thus could be seen as roughly synonymous with "present-day."<sup>33</sup> In the 1990s, the flood of law-and-economics analysis

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31. Article 16(2)(a) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) appears to allow for this possibility, providing that an offer cannot be revoked "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable . . . ." U.N. Convention on Contracts for the International Sale of Goods art. 16(2)(a) (1989). However, by its terms, the CISG only applies to commercial contracts. *Id.* art. 2(a) (excluding consumer transactions). Article 16(2)(b) also provides that an offer cannot be revoked if "it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." *Id.* art. 16(2)(b).

32. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW (5th ed. 2003).

33. What is considered "modern" today will not be thought so tomorrow, of course. And indeed, the term "modern" is itself not particularly modern. At least as early as the 1920s, it was being used to mean "up-to-date" or "not stuffy." As the twentieth century progressed, we had "art moderne," the Museum of Modern Art, *Modern Times* (the Charlie Chaplin film), the magazines *Modern Screen* and *Modern Romances*, and, of course, the "Modern Jazz Quartet." By 1967, the movie *Thoroughly Modern Millie* was taking an ironic backward glance at the 1920s; on Broadway today, the stage version of *Thoroughly Modern Millie* adds yet another layer of irony. Being "modern" now seems, well, pretty twentieth century. So that is the sense in which I am

threatened to inundate the domain of contract law (and everything else). That wave appears to have crested, and yet contract law, like American culture in general, seems unable to pull itself together. By the time my colleagues and I were preparing the most recent edition of our casebook in 2003, we concluded that—reluctantly or not—we should face the facts. Contract law at present is hopelessly split, and in some cases splintered, over many different issues and it shows no immediate sign of reconciliation.

From this vantage point, therefore, it seems not only difficult but not even particularly useful to continue to talk about “modern contract law” as though such a thing presently existed as a coherent body of law. Perhaps the label “postmodern contract law” has some appeal, although what its content would be is anyone’s guess. In this state of things, I suggest that the rubric “Modern Contract Law” (“MCL”) could be better employed as a roughly accurate label for the kind of approach to contract law that came to flower over the middle half of the twentieth century. MCL in this sense is particularly identified with certain judges (Benjamin Cardozo and Roger Traynor may be the most prominent examples) and commentators (such as Arthur Corbin and Karl Llewellyn), and to some extent can be seen in both the First and Second Restatements, as well as pervasively in Article 2 of the Code.

As contrasted with what came before it, how might this MCL be described? Some of its characteristics follow.

1. *Realism about law.* First and foremost, MCL does not see itself as consisting of stone tablets handed down from the top of Mount Sinai—or the steps of Langdell Hall, for that matter. It is frankly a series of policy choices made by someone, somewhere; it can and should be justified or attacked on the basis of the soundness of those choices. Neither authority nor logic, separately or together, can be seen as sufficient for the creation and maintenance of a legal system. Or, at least, of a desirable one.

2. *Emphasis on law in context.* Particularly with respect to commercial context, but in other respects as well, the law—whether legislative or judicially created—should be formed and applied with an understanding of the circumstances in which it will do its work. This is congruent with a greater willingness to let cases be decided, often by juries on the basis of facts, rather than by judges “as a matter of law.”

3. *Preference for substance over form.* On this point, the view of Professor Corbin at least was particularly clear, as witness his treatment of the parol evidence rule.<sup>34</sup> Llewellyn’s Uniform Commercial Code is generally in accord by stressing the parties’ “agreement in fact” over

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suggesting we use that word.

34. See generally 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 573–96 (1960).

legal technicalities.<sup>35</sup> In this respect, present-day contract law is notably schizophrenic, with formalism (or “conceptualism”) playing a resurgent role.<sup>36</sup>

4. *More attention to “equitable” factors.* MCL is characterized by a number of ameliorating features: some expansion of defenses not favored by classical contract law; a willingness to explore and apply notions of “fairness” and yes, even “justice”; more attention to reliance and “reasonable expectations.” All these seem to have been much more a part of MCL than they are characteristic of contract law today.<sup>37</sup>

5. *Preference for standards over rules.* Professor Duncan Kennedy years ago explored the ways in which these two approaches differ, and suggested a series of factors that might have led the shapers of MCL to be more at home with balancing-act standards than with bright-line rules.<sup>38</sup> Notions like “good faith” and “commercial reasonableness” are examples here.

6. *Emphasis on the behavior of contracting parties.* This emphasis to some extent duplicates items above, but I am thinking here particularly about an increased appreciation for the role of “relational” contract analysis, as advanced by Professor Ian Macneil and others,<sup>39</sup> as well as an increasing openness to the possibility of the sort of legally enforceable contract to bargain in good faith that I and others have explored.<sup>40</sup>

7. *Sensitivity to imbalances in bargaining power.* If classical contract law was affected by this factor, it was indeed covertly, as Llewellyn suggested.<sup>41</sup> The resurgence of interest in the concept of “unconscionability,” both in the Code and in contract law generally, is characteristic of the heyday of MCL, in the 1960s and 1970s.<sup>42</sup>

35. See U.C.C § 2-202 & cmts.

36. See generally Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

37. See generally E. Allan Farnsworth, *Developments in Contract Law during the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990); Knapp, *supra* note 3.

38. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

39. See generally Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).

40. See *infra* notes 49-51.

41. See Karl Llewellyn, *Book Reviews*, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

42. See generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Unconscionability is enjoying somewhat of a revival at the moment, thanks to the heavy-handed application that the U.S. Supreme Court has given to the Federal Arbitration Act. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 796-97 & n.118-19 (2002).

8. *Recognition of the adhesion contract problem.* This is an area of concern first identified and analyzed in the MCL era. Since the mid-twentieth century, commentators like Professor Friedrich Kessler and others have alerted us to the fact that contracts of adhesion are not only pervasive, but anomalous (with respect to contractual notions of assent) and problematic (in terms of social policy).<sup>43</sup> By now we all know that there is indeed an adhesion-contract elephant in the contract-law corner, but many of the contributors to present-day contract law apparently see this as neither anomalous nor problematic.

There are probably others that could be added to the above list, but hopefully the ones listed above ring true for my readers as being roughly descriptive of the ascendant view of contract law during the middle half of the twentieth century. If this list of attitudes and approaches is fairly descriptive of MCL, how does Eisenberg's analysis fit into that mold?

In one important respect, Eisenberg's discussion is admirably MCL; in its steadfast insistence that a system of legal rules cannot be maintained and justified simply on the basis of axioms and deductions. His words are worth repeating here: "Formal legal reasoning is not defensible. . . . No significant doctrinal proposition can be justified on the ground that it is self-evident. Rather, doctrinal propositions can be ultimately justified only by propositions of morality, policy, and experience."<sup>44</sup>

MCL could not agree more, and many of us would also concur. The problem comes when Eisenberg goes on to practice what he has just preached. He does indeed put forward reasons of policy to justify his conclusions, of course, and often quite tellingly. But in other important respects, his discussion seems to me to be largely oblivious—and in some cases actively resistant—to the MCL perspective. By proposing a simplified rule of legal-irrevocability-plus-expectation-protection, Eisenberg glosses over or actively resists a number of the MCL precepts suggested above.

To begin with, his proposed rule rejects the nuances of both form and substance reflected in the rules of the Second Restatement and the Code. There is no apparent allowance in his scheme for the possibility that a written offer might be treated differently from an oral one, that an offer by a merchant might be viewed (and reacted to) differently than one from a nonmerchant, that in some cases offerors will clearly invite reliance while in others they will have no reason to foresee it, that in some cases offerors may be vulnerable to and overreached by

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43. See generally Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (discussing the scholarship in this area and proposing a new approach of his own).

44. Eisenberg, *supra* note 1, at 281.

sophisticated offerees, or that in some cases an offeror will make an impulsive and ill-considered offer that she later has good reason to regret (and indeed to revoke) with no resulting injury to the offeree other than the loss of a windfall expectation. Eisenberg's analysis thus rejects the kind of concerns about social context and bargaining behavior that are at the heart of the MCL scheme.<sup>45</sup>

By insisting on not merely the primacy but the inevitability of an expectation-based remedy for the disappointed offeree, Eisenberg is also choosing to ignore a mountain of scholarship—law-and-economics and other kinds as well—that explores the relative merits and demerits, and in some cases the possibility or impossibility, of protecting the various remedial “interests” of expectation, reliance, and restitution. Some of this scholarship is largely theoretical, while some is devoted to a painstaking examination of what courts have actually done.<sup>46</sup> Much of it goes well beyond MCL, of course, and not all of it is persuasive, to say the least. But Eisenberg's across-the-board insistence on expectation damages in all cases seems not only too broad-brush, but dangerously close to the kind of reasoning-from-axioms that he elsewhere deplors. At this point in his analysis, I wonder whether some of his contracts-teaching readers were reminded, as I was, of the well-known “Johnny-and-the-car” dialogue, in which Professor Williston stoutly insisted that the remedy for promissory estoppel had to be pure expectation damages, because, dammit, a contract is a contract.<sup>47</sup>

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45. As an example, consider Eisenberg's suggested rule that the published offer of a reward—a “true unilateral” case—should be revocable only as against someone who actually learns of the revocation, as opposed to the traditional rule that revocation can be made by a similar publication. The possibility that his rule might make it difficult or impossible to withdraw such an offer troubles him a little, but not much. Eisenberg states that “[i]f the offeror did not want to get into that position, he could have refrained from making a general offer, or qualified the offer appropriately.” Eisenberg, *supra* note 1, at 303. But again, such an across-the-board rule seems unduly rigid. Reward offers may sometimes be made as an emotional reaction to a violent crime or other traumatic event. For this reason, it seems a bit hard to say that the offeror who has second thoughts about the wisdom of making such an offer should as a practical matter not be able to effectively revoke it.

46. And some of it is by Professor Eisenberg. See, e.g., Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432 (1985); Melvin A. Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741 (1982).

47. Of course he did not actually say dammit. What he did say was “[e]ither the promise is binding or it is not. If the promise is binding it has to be enforced as it is made.” 4 A.L.I. PROC. 103 (1926). The occasion was the American Law Institute's discussion of proposed Section 90 of the First Restatement. Williston was asked his opinion as to the proper measure of damages if an uncle promised his nephew “Johnny” \$1000 to buy a car and Johnny in reliance on the promise did buy a car, but only spent \$500 on it; Williston responded that the uncle should be liable for the full \$1000. See *id.* Professor Williston said a lot more besides the language quoted above; the whole exchange is reprinted in A CONTRACTS ANTHOLOGY 339-49 (Peter Linzer ed., 2d ed.

Another aspect of Eisenberg's discussion that seems quintessentially "classical" in its approach is its narrow view of both contract law and contracting behavior.<sup>48</sup> His description of the contracting process is basically the offer-and-acceptance "tennis game" analogy: the offeror serves one over the net; the offeree returns it; if that stroke was a counteroffer, then the offeror hits it back again, and this continues until the "game" is over.<sup>49</sup> You always know where the ball is, and can follow the play with ease. This is, of course, the classic Langdellian casebook view of contract formation. In the real world, however, the contracting process is often much more complicated, much messier, and much fuzzier, than the tennis-game model can capture: a chess match, a football scrimmage, or even a courtship could furnish equally useful metaphors.

Eisenberg's view of contract creation is also a simplified one, of the "light-switch" variety; one instant it is off, the next instant it is on: "At the instant that a bargain contract is formed by offer and acceptance, a promisor becomes potentially liable for expectation damages, and this is so even if he changes his mind a nanosecond later."<sup>50</sup>

In Section 2-204 of the Code, however, MCL takes a broader approach: "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."<sup>51</sup> And the notion that the formation of a complicated contract often

1995).

48. Equally classical is his extended discussion early in the piece of the question whether an "offer" is a "promise." Not only is the discussion tangential to his general argument, which could be made without it, the whole passage echoes dusty argumentation from a long-lost age of contract scholarship. See George W. Goble, *Is an Offer a Promise?*, 22 ILL. L. REV. 567 (1928); Frederick Green, *Is an Offer Always a Promise?*, 23 ILL. L. REV. 95 (1928); Frederick Green, *Is an Offer Always a Promise?*, 23 ILL. L. REV. 301 (1928); Samuel Williston, *An Offer is a Promise*, 23 ILL. L. REV. 100 (1928); Samuel Williston, *An Offer Is a Promise?*, 22 ILL. L. REV. 788 (1928). All of these articles are reprinted in A.A.L.S., *SELECTED READINGS ON THE LAW OF CONTRACTS* 199-220 (1931).

49. In an earlier version of his article, presented in draft form to the *Freedom from Contract* Symposium, Eisenberg asserted that "many or most contracts are formed by a sequential exchange of offer and acceptance." Whether this is so highly questionable, depends on how you characterize the process of standardized-form mass contracting (and also on whether you view the checkout at the supermarket as being a form of offer and acceptance). In the final version of his article, Eisenberg retreats somewhat from his earlier assertion: contractual liability can indeed attach without an offer and acceptance, or even without a bargain at all, he concedes; nevertheless, even if offer and acceptance is "only one road to contractual liability," it remains "an extremely important road." Eisenberg, *supra* note 1, at 271.

50. *Id.*

51. U.C.C. § 2-204(2). RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 22(2) is to the same effect.

involves stages of agreement is by now not a novel one. Whether one speaks of a "contract to bargain,"<sup>52</sup> an "agreement to negotiate,"<sup>53</sup> or a "binding preliminary commitment,"<sup>54</sup> the lesson is essentially the same: sometimes contracts are formed not by flipping a switch, but by gradually turning up a dimmer.

Of course the classical world of offer and acceptance still exists. People do make offers, counteroffers, acceptances, rejections, and revocations. But the world of present-day contracting for the most part is neither that individualized nor that genteel. Simple exchanges and contracts of adhesion: those are the world of contracting today, for all but the most privileged few. Eisenberg is both a very smart and a very wise man, and his painstaking mapping of the terrain of an ideal law of contract has over the years furnished us all with invaluable guidance as we make our own individual ways along the path. All of my observations above must be seen against that background. In this instance, though, whatever one thinks of his reasoning or its conclusions, it is difficult to escape the feeling that we are being urged once more to reupholster the Victorian sofa in the parlor, where hardly anyone ever sits any more, instead of renovating the family room, bumping out the kitchen, or maybe even looking at the real-estate ads.

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52. See Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 673-74 (1969).

53. See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 263 (1987).

54. *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987).