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WILLISTON ON CONTRACTS

REVISED EDITION*

LON L. FULLER**

One who undertakes to review the new edition of this great treatise is faced with no ordinary assignment. His problem is too broad and too special to permit a comfortable accommodation to the usual patterns of reviewing practice. Certainly he will feel little temptation to attempt to compress within the limits of a short review a critical appraisal of the numerous views and theories expounded in the nearly eight thousand pages of this work. Nor does the present revised edition present any marked departure from the method and content of its predecessor which could be reported and appraised in summary fashion. To be sure, the second edition represents a great improvement over the first. The work has been much expanded. Certain sections have been substantially revised. References to relevant sections of the various Restatements have been added. The treatment of law review material has been brought up to date. The volume of forms has been improved and expanded. The index has been reworked and lengthened. The whole work has been enriched by the contributions of able assistants, notably Professor George J. Thompson, whose name appears as co-author. Beyond that, however, there is little to report having specific reference to the revised edition. The general scope of the work, and its basic approach, remain what they were in 1920, when the first edition was published.

Perhaps the most useful service I could perform for the readers of this REVIEW would be to pass on to them certain suggestions concerning the use of this treatise, based on eight years' experience with the first edition. The remarks which follow are grouped under three headings, and deal with the problems: (1) What can the user of the book reasonably expect to find in it? (2) How shall he go about finding what he needs? (3) How shall he appraise what he has found? Under the

* *A Treatise on the Law of Contracts*. By Samuel Williston. Revised Edition. By Samuel Williston and George J. Thompson. New York: Baker, Voorhis & Co., 1936-38. Vol. I, pp. xix, 926; Vol. II, pp. xi, 927-1723; Vol. III, pp. xii, 1725-2579; Vol. IV, pp. xiii, 2581-3669; Vol. V, pp. xiv, 3671-4699; Vol. VI, pp. xiv, 4701-5726; Vol. VII, pp. iv, 5727-6703; Vol. VIII, pp. 6705-7725. \$80.00.

This article represents the somewhat tardy fulfillment of an obligation incurred toward the editor of this REVIEW more than two years ago, when only about half of the volumes of the work under review had appeared. It was substantially ready for the printer last May, but prior commitments of the REVIEW made necessary the postponement of its publication until now.

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third heading I shall attempt to discuss briefly the premises which seem to me to underlie Professor Williston's legal method and their relation to contemporary currents of legal thought in this country.

THE SCOPE OF THE WORK

The work deals with the law of contracts. But the law of contracts, defined and limited how? Certainly not as contracts is defined in a law school catalogue, or in Professor Williston's own casebook. If one were limited by the usual curricular conceptions the book would have to be entitled, *A Treatise on Contracts, Specific Performance in Equity, Sales, Suretyship* (nearly 200 pages), *Infant's and Married Women's Contracts, The Parol Evidence Rule, Bills and Notes* (240 pages), *Reformation and Rescission, and Damages for Breach of Contract, with Numerous Incidental References to the Law of Agency, Quasi-Contract, Tort, Bankruptcy, and the Civil Law of Europe and Rome.*

Though the Table of Contents just summarized reveals a work which cuts freely across curricular boundaries, in another and more subtle sense the book respects these boundaries scrupulously. In my opinion, it respects them too scrupulously, and, in consequence, narrows unduly the scope of contract law. Neat divisions between the various compartments of the law, between contracts and torts, for example, can be preserved only if one does not press too far an inquiry into the underlying bases of legal liability. When one asks why a contract or tort liability is imposed, one discovers that the underlying "why", or rather, the underlying "whys", cut across compartmental divisions of the law. From such a viewpoint, "contract" is merely a convenient description for a set of related problems, possessing no definite boundary, but shading off imperceptibly into the law of tort, property, quasi-contract, and procedure on all sides. Professor Williston has no such conception of contracts. For him a contract liability is something different in kind from all other kinds of liability, as different from a tort liability, let us say, as a covenant was different from assumpsit for seventeenth-century lawyers.

It is this narrow conception of contract, it seems to me, which excludes from the book an adequate discussion of what may be called the periphery of contract law. An inquiry into the bases of contract liability suggests that contract is, in one aspect, a branch of a larger department of the law having to do with the protection of expectancies created by words or meaningful conduct and embracing contract, estoppel in pais, and deceit as well as certain other aspects of the law of tort, property, and quasi-contract. The tentatives of a synthesis along these lines are to be found in Harriman's excellent, if fragmentary, sections on "The

Modern Theory of Simple Contract".¹ Wigmore has recently made valuable suggestions in the same direction in an article which apparently is not cited in Williston's work at all.² The synthesizing efforts of these men, and others like them, apparently have not appealed to Professor Williston, and the consequence is that his book contains no adequate discussion of even such a first cousin of contract law as estoppel in pais.³

If Williston's treatise is narrower in scope than the subject of contracts as a legal philosopher might define it, it is also, in a special and very important sense, narrower than the subject of contracts as the practitioner would like to see it defined. Everyone who has attempted to report case law knows how difficult it is to know what to do with the "wrong" case. One feels an obligation to report what is representative of the judicial process, and only an anecdotal interest can justify spending much time on mere freaks. But it is not easy to draw the line between that which is representative and that which is too aberrational to be worthy of comment. In drawing the line, subtle influences of temperament may be decisive. In the end, the question is almost one of intellectual taste, and scarcely subject to discussion. I can only record my personal reaction, which is that Professor Williston has too strict a sense of what is normal. He seems to me to have rejected as freaks far too many cases which are really significant.

Three years ago, with the assistance of Mr. William Perdue, I attempted a survey of the American and English cases to determine to what extent they had recognized, as an appropriate measure of recovery in suits on contract, the reimbursement of the plaintiff's detrimental reliance on the defendant's promise.⁴ All such cases are, from the standpoint of Professor Williston's system, "freaks", since in his view, the reimbursement of reliance cannot be a legitimate interest of contract law.⁵ While for that reason I had anticipated little assistance from

¹ HARRIMAN, *THE LAW OF CONTRACTS* (2d ed. 1901) §§646-652.

² Wigmore, *The Scientific Rôle of Consideration in Contract* in *LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY* (1935) 641.

³ I do not overlook the sections devoted to estoppel in the chapter on Fraud and Misrepresentation (see esp. §1508). These sections represent the substantially unrevised reprint of an article first published nearly thirty years ago. Williston, *Liability for Honest Misrepresentation* (1911) 24 *HARV. L. REV.* 415. While this article undertakes to trace the relations between estoppel and deceit, it relates neither notion to contract.

In personal conversation I once asked Professor Williston why the *Restatement of Contracts* did not include the subject of estoppel in pais. He replied by pointing out that a tort liability may result from an estoppel, as, for example, where a warehouseman was held for conversion on the basis of a misrepresentation that certain goods were in his possession. This raises the question, what will the American Law Institute do with the notion of estoppel in pais? Are we to have a special *Restatement of Estoppel*, or a *Miscellaneous Restatement*?

⁴ Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936-1937) 46 *YALE L. J.* 52, 373.

⁵ 4 *AMERICAN LAW INSTITUTE, PROCEEDINGS* (app. 1926) 98-99; 103-104. The article cited in note 4, *supra*, is discussed by Professor Williston in §1338, n. 7, of

Williston, it was with some surprise that I discovered how extensive a field of case law had been left unreported in his treatise.⁶ The shorter

the new edition of his treatise. At the risk of seeming to digress from the main purpose of this review, I should like to attempt to answer briefly the arguments which he advances against the position taken by Mr. Perdue and myself; as a matter of fact, the manner in which Professor Williston draws the issue between us is, I think, significant in connection with the problems of method which I shall discuss later and so not foreign to the purposes of this review.

In the note cited he admits that "reasonable reliance" is "doubtless" one "juristic" reason for "the recognition of contractual obligations", but goes on to say that the result of the imposition of a contractual obligation "is a right-duty relation, and the reasons why the relation is created are interesting but practically unimportant". He continues, "It requires little argument to show that the proper norm of damages for breach of a duty to render a certain performance is the value which that performance would have had if rendered at the time it should have been."

The argument assumes the existence of a duty ("the duty to perform") and conceives that this duty determines the measure of recovery. But what is the actual referent of the word "duty" here? The term "duty" and its correlative "right" are used in at least two senses: (1) in the natural law sense, to describe an underlying moral claim and correlative moral obligation which are conceived to "give rise to" the legal remedy; (2) in the positivistic sense made famous by Holmes, to describe a supposed reflex effect of the availability of the remedy. In the first sense, the plaintiff is given a remedy because he has a right; in the second, he has a right because he is given a remedy. Now, it is obvious that Professor Williston cannot be using the term "duty" in this second sense. According to that view of the thing, it is the measure of recovery which defines the duty, and since there are numerous cases limiting recovery on contracts to the reliance interest, these cases will have to be described as cases where the duty involved is a duty to reimburse reliance only. On the other hand, if Professor Williston means to use the term "duty" in the first sense, then he is in effect asserting that if an underlying, casual "duty" is recognized at all, it must be enforced without qualification, and that the scope of the remedy is automatically determined by the nature of the underlying "duty" to which it gives sanction. This assumption is scarcely tenable, even if one is willing to conceive of remedies as "arising out of" underlying "rights" and "duties". It may be considered that I have a duty to tell the truth, yet if I violate that duty by telling a lie, and judicial intervention is thought appropriate, the question remains what the court ought to do to me. Assuming my fraud consisted in selling a gilded brick for a bar of gold, the court may make me give the disappointed purchaser the value of a real bar of gold, or it may feel that it has gone far enough if it compels me to reimburse my victim's out-of-pocket loss. As is well known, there are precedents justifying both procedures in actions for deceit. If the problem exists in the law of deceit, I cannot see why it does not equally exist in the law of contract. Certainly the issue cannot be foreclosed by assuming a moral duty which sets its own legal sanction, or by assuming a legal duty so tenacious of life that it continues to exist even after courts have ceased to enforce it.

⁶ A good deal of the article was devoted to what might be called "contracts of imperfect obligation" where for various reasons courts have refused to protect the "expectation interest" and have limited their intervention to reimbursing reliance. It would take us too far afield to attempt to discuss in detail the various ways in which Williston's treatise deals, and fails to deal, with these cases. However, even in ordinary contracts suffering from no defect of form or substance, courts have frequently granted reimbursement for the promisee's reliance where it is difficult to measure satisfactorily the value of the performance promised by the defendant. These cases receive a limited recognition in §333 of the *Contracts Restatement* and §1363A of the treatise under review. Section 333 of the *Restatement* provides that the plaintiff may recover for such expenditures as are "reasonably made in performance of the contract or in necessary preparation therefor". Mr. Perdue and I found, however, about thirty-five cases (dating from 1664 to 1933) in which the plaintiff was granted reimbursement for acts of reliance which did not take the form of "performance of the contract" or "necessary preparation

texts on contracts and damages are, to be sure, guilty of a similar omission, though the omission in their case may in part be due to a conscious or unconscious acceptance of Professor Williston's ground-laying analysis of the whole subject.

That the failure to take account of these "reliance interest" cases is not an isolated phenomenon is indicated by the fact that Professor Cook calls attention to another extensive body of "freak" cases which have been left largely unreported in Williston's revised edition.⁷ Professor Cook's discussion of the manner in which such omissions come about is worthy of note.⁸

This failure to take account of decisions which do not fit into its systematics constitutes, in my opinion, the most serious defect in Professor Williston's treatise from the standpoint of the practicing attorney. What the author views as an unimportant expression of judicial whimsy may be to the lawyer an isolated judicial insight, on the basis of which he may persuade a court to launch on a new development or give a new construction to an old institution. The stone the builder rejected may become the head of the corner of the brief—if only the brief writer can manage to lay his hands on it.

THE USE OF THE INDEXES

The usefulness of an index is not guaranteed by its length and strict observance of the order of the alphabet. Its effectiveness presupposes a system of concepts shared by compiler and user. If the compiler's and the user's systematics do not quadrate, we have such unfortunate results as that reported by Holmes when he tells of the Vermont justice of the peace who gave judgment for the defendant in a suit for the breaking of a churn because he could find nothing in the statutes under "churn". This miscarriage of legal method is, of course, repeated on a somewhat different level in the early stages of almost every piece of legal research, and will continue to occur until some *Gleichschaltung* of our legal minds has impressed them all with the same conceptual matrix.

Meanwhile, it is necessary for either the user or the compiler of the index to a legal work to follow to some extent the method of the farmer

therefor", as, for example, where a plaintiff is granted reimbursement for expenditures made in anticipation of the arrival of goods delivered to the defendant carrier for shipment. Fuller and Perdue, *supra*, note 4, at 91-93, notes 63-66. Though there is substantially no authority contrary to these cases, they are almost wholly ignored in Williston's treatise. Some of them are cited, but on other points than the measure of recovery applied. A few of the seed-warranty cases are cited as holding that the farmer who is supplied bad seed may recover for his costs of cultivation, but are treated in such a way (in §1393) as to imply that they represent a peculiar quirk of the law of warranties, and are not discussed in connection with §333 of the *Restatement* at all.

⁷ Cook, *Williston on Contracts: Revised Edition* (1939) 33 ILL. L. REV. 497, 514.

⁸ *Ibid.*

who attributed his success in finding strayed mules to his ability to put himself in the place of the mule and imagine where he would go if he were a mule. My principal criticism of the index to Williston's first edition is that he seemed to cast himself in the rôle of the mule and myself in the rôle of the perceptive farmer, where I would much have preferred to see the rôles reversed. Short acquaintance with the revised index makes me think that despite its greater length it involves no redistribution of these rôles.

My client has entered a contract with *X*. *X* has written him a letter repudiating the contract. My client, having made commitments on the basis of the contract, wants to know whether he can safely ignore the repudiation and continue performance with the expectation of charging the price to *X*. If I look in Williston's index under "Repudiation, Effect of", I shall be disappointed, nor shall I be aided by any cross reference which will help me to the heading under which my problem is actually classified: "Mitigation of Damages". This may not be an inappropriate place for it in the text, but why should the taxonomy of the treatise be carried over so rigidly into the index?

Again, an employer promises an employee a bonus, and at the same time stipulates that the promise shall create no legal liability. The employee, in reliance on this promise, foregoes other opportunities of employment. May the employee successfully maintain a suit for the bonus? This has become an important practical question, and several recent cases have held that the employer is legally liable notwithstanding the express stipulation against liability.⁹ Here, surely, is a significant development in contract law which should be made available to lawyers, however difficult it may be to find a pigeonhole for it in the existing legal theory. Three of these decisions are mentioned in Williston's treatise in such a way as to reveal their significance. One of them is, however, obscurely cited in a "but see" footnote¹⁰ to an assertion that "if the parties to an agreement undertake that no legal liability shall be created, their undertaking . . . will be respected by the law". A second case is given an equally inconspicuous treatment in another "but see" footnote,¹¹ this time appended to an assertion that a "provision contained in a bargain that neither party will seek judicial or administrative remedies for violation of its terms will be upheld". Finally,

⁹ *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 Atl. 205 (1933); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N. W. 385 (1936), (1936) 36 Col. L. Rev. 996; *Wellington v. Curran Printing Co.*, 216 Mo. App. 358, 268 S. W. 396 (1925); *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N. E. 697 (1935), (1935) 49 HARV. L. REV. 148. As tending in this direction, see the very interesting decision by Judge Parker, *George A. Fuller Co. v. Brown*, 15 F. (2d) 672 (C. C. A. 4th, 1926).

¹⁰ §21, n. 9.

¹¹ §1722, n. 2.

three of the cases are mentioned in a footnote to a section dealing with a subject matter which does not on its face even remotely suggest the problem of the effect of a stipulation against legal liability.^{11*} The problem is not discussed at all in the section on bonuses,¹² and I have been unable to find any index entry which would lead the reader to these cases. "Stipulations against Legal Liability, Validity and Effect of" is a heading not to be found at all, nor is there anything under "Bonus" which gives a clue to these important cases.

There is, of course, a certain unfairness in illustrations such as I have just given. They are like loaded dice, but, like loaded dice, they may convey a lesson. The lesson in this case is that one cannot get the full use of Williston's treatise without a preliminary acquaintance with its systematics. It is a book to be studied in advance of the occasion for its immediate use. Unfortunately, and less excusably, I think, this is as true of the index as it is of the text itself.

ALLOWING FOR AUTHOR'S PARALLAX

If one wished to determine the truth of a disputed incident which had been witnessed by a friend and a total stranger, one might well feel that a more accurate picture of what occurred could be obtained from the friend's testimony, not because the friend was assumed to be more trustworthy, but simply because one would be familiar with his biases and would have learned to make the proper discount for them. In a similar way, the more familiar one is with a legal treatise, and with the underlying philosophy of its author, the more readily can one appraise the contents of the book. This is obviously true where proposals of reform are involved. It is less obviously and even more importantly true when it is a question of the book's statement of the existing law. A body of case law looks different, depending upon the angle from which it is viewed, and it is important for the reader to know where his author stands as he describes the scene before him. Borrowing a term of physics, we may describe the reader's problem here as that of making proper allowance for the author's parallax.

Obviously, the divergence of two legal philosophies cannot be converted into mathematical terms and described as so many degrees east or west. Furthermore, when I attempt to describe Professor Williston's parallax, the reader will want to know what my parallax is, which I am perhaps incapable of giving him, except unwittingly. Nevertheless,

^{11*} §140, n. 5.

¹² Two of the cases are cited in the section on bonuses, §130B, n. 5, as standing for the proposition that the employee's reliance in staying on the job will furnish consideration for the promise to pay the bonus, but with no intimation that the court disregarded an express stipulation against liability in order to hold the employer.

the reader may by a somewhat hazardous process of triangulation be able to derive some guidance from the following remarks concerning Professor Williston's fundamental approach to legal problems.

One of the most ancient disputes concerning legal method is today ordinarily conceived to turn on the question of the relative importance of "logic" and "policy" in the law. Though this phrasing of the thing points to an important problem, the issue is very carelessly and inadequately drawn, in my opinion, when "logic" and "policy" are opposed as alternative methods of decision.

The issue which underlies the supposed conflict of "logic" and "policy" may, I think, be more accurately phrased as follows: To what extent should the law be shaped by a *direct* recourse to social and ethical desiderata? The layman's answer to this question would probably be "always". But his limited experience with legal reasoning has not taught him to what extent ethics, or policy, is an "unruly horse to ride".¹³ Perhaps we may more accurately say that he has not learned how easily this horse tires. Relatively simple cases (cases usually much too simple, as a matter of fact, to get into litigation) can sometimes be disposed of, in a manner which seems quite conclusive, by a reference to "considerations of policy". The balancing of interests is easy when there is nothing on the light side of the scales. But every bit of complexity added to the case seems to increase, in geometric ratio, the obscurity and the complexly inconclusive character of the interests of society, till a point is soon reached where a *ratio decidendi* phrased directly in terms of these interests seems unattainable. At this juncture the inevitable expedient of the lawyer is to take certain established concepts, themselves supposed to be vaguely congruent with underlying social interests, and to attribute to these concepts the force of independent premises, on the basis of which he can continue his reasoning without further explorations in the quagmire of ethics and policy.¹⁴

The fact that this second phase of legal method involves the use of "logic" does not mean that "logic" is irrelevant in the determination of "the interests of society", or that "logic" and "policy" are in oppo-

¹³ "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you." Burrough, J., in *Richardson v. Mellish*, 2 Bing. 229, 252 (C. P. 1824).

¹⁴ Even so thoroughgoing a utilitarian as Hume regarded this procedure as justifiable under some circumstances. Where the "interests of society" demand that the case be decided, yet fail to dictate *how* it shall be decided, he observes, with apparent approval, that "the slightest *analogies* are laid hold of [by the lawyers and judges], in order to prevent that indifference and ambiguity, which would be the source of perpetual dissension. . . . Many of the reasonings of lawyers are of this analogical nature, and depend on very slight connexions of the imagination." Hume, *An Enquiry Concerning the Principles of Morals*, Section III, Part II, in *ENQUIRIES* (Selby-Bigge, 2d ed. 1902) 195.

sition to one another. The basic problem of when a direct recourse to the interests of society should be abandoned can be satisfactorily described in terms of "logic" and "policy" if we picture the two as moving along together until a point is reached where the terrain becomes too rough for "policy" to go on, so that "logic" is forced to complete the journey alone. With this picture in mind, one may without too great risk of misunderstanding, speak of a decision being primarily determined by "logic" or primarily determined by "policy", meaning, in the second case, to refer to the situation where policy and logic are working together, and where the assistance of logic is more or less taken for granted. But this is a dangerous way of speaking and easily leads to such absurdities as the notion that legal logic can function *in vacuo* without premises shaped by considerations of policy (a belief which legal realists have sometimes been willing to attribute to their opponents), or the notion that in the determination of policy, logic is not involved, and one must here depend wholly upon intuition and hunch (a belief which legal realists have sometimes been willing to attribute to themselves).

Turning to Professor Williston's legal method, if we ask at what point he gives up the attempt to shape the law by direct reference to social interests, I think the answer will have to be, at the very outset. What may be called the bases of contract liability, notions like consideration, the necessity for offer and acceptance, and the like, are nowhere in his work critically examined in the light of the social interests they serve.¹⁵ These things are accepted on faith. This neglect to refer to underlying social desiderata cannot properly be called "logic". It is simply an acceptance of what is conceived to be received legal tradition. It is, if anything, policy, but policy as it is assumed to be crystallized in certain inherited formulae. It is only when one begins to fit these "fundamental conceptions" together to form the premises for further reasoning that the word "logic" becomes appropriate.¹⁶

Does this mean, then, that "policy" and "the interests of society" are wholly disregarded in Williston's treatise? Certainly one cannot say that. Yet if we ask at what point in Professor Williston's method "policy" becomes relevant, it will be found, I think, that in general he admits "policy" only where "logic" has failed, that is, where a syl-

¹⁵ It is symptomatic of this disinclination to examine the bases of contract liability that Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, is cited only once in the treatise, while Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704, is not cited at all.

¹⁶ "I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results." Holmes, *Law in Science and Science in Law* in COLLECTED LEGAL PAPERS (1920) 210, 238.

logistic marshalling of traditional concepts fails to yield a certain answer, or, occasionally (as in the problem of the offer revoked after the offeree has begun performance of the requested act), where the answer yielded seems too unjust to be acceptable. In other words, with Williston the two phases of legal method described a moment ago seem to be reversed. Where we spoke of "logic" carrying the burden alone when "policy" fails, Williston generally invokes "policy" only when "logic", operating on certain inherited "fundamental conceptions", fails to yield a satisfactory answer.

Even in this matter of summoning policy as a kind of trouble shooter for logic, I think it can be said that Professor Williston is not, in comparison with his contemporaries, especially inclined to favor policy. He follows a conservative diagnostic practice, and is slow to declare logic in distress. This disinclination to favor policy shows itself, furthermore, not only in his reluctance to sound the alarm for logic, but also in his refusal to follow the example of those juristic physicians whose fame lies in their ability to administer large remedial doses of policy without being caught at it. He is no ardent practitioner of what Fuchs called "crypto-sociology", that is, the manipulation of legal theory to bring about the result conceived to be socially desirable without making explicit the social interests thus served. He shows none of the eager ingenuity of an Ames,¹⁷ a Cardozo,¹⁸ or a Vance,¹⁹ to perform feats of juristic legerdemain in the interest of justice and the better life. Which is the more admirable attitude is too large a question to be disposed of here. Probably, in any event, little could be added to the arguments made by Ihering and Kohler in their famous controversy concerning

¹⁷ Ames, *Two Theories of Consideration* (1899) 13 HARV. L. REV. 29. A part of Ames' argument here is directed toward effecting a reconciliation between the enforceability of the bilateral contract and a definition of consideration which was developed with reference to unilateral contracts, as Williston remarks in §103.

¹⁸ See, especially, Cardozo's opinions in *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807 (1917); *Allegheny College v. National Bank*, 246 N. Y. 369, 159 N. E. 173 (1927). I must confess that it is difficult for me to know just how seriously Cardozo takes the explanations offered in these two cases. He seems in both of them almost to say, "Of course, everyone knows that the real grounds of our decision lie elsewhere, but since lawyers like technical reasons, and since they conduce to historical continuity, here is how we might construct a legal theory to support our holding."

¹⁹ VANCE, *LAW OF INSURANCE* (2d ed. 1930) §133. Professor Vance here explains why it is that courts uphold a considerationless waiver by an insurance company of an insured's breach of condition. This is because, by a beneficent construction, the breach of condition is viewed, not as destroying the company's duty, but as giving the company the power to terminate its duty. By this construction, the waiving company is viewed not as assuming a new liability, but as surrendering a power to terminate an old liability. "Our law looks with grave disfavor upon transactions purporting . . . to create duties unless they are attended with a prescribed ceremonial. . . . But the law has no great concern for such ephemeral legal relations as mere privileges, or even for a power of defeasance. . . ." *Id.* at 487-488.

the decision in *Shylock's Case*.²⁰ Suffice it to say that Williston is emphatically on the side of Ihering. His concessions to policy, when they are made, are open and above board. What they lack in enthusiasm, they make up in frankness. Where the practitioners of "crypto-sociology" would seek and probably find some palliative for their dilemma, Williston says in effect, "This result is wrong from the standpoint of legal theory, and the attempts which others have made to explain it are specious. Nevertheless, I suppose we shall have to put up with it".²¹

Whatever Williston may do, or fail to do, when logic defaults, it may be argued that my assertion that with him the resort is first to logic, then to policy, is less descriptive of a peculiarity of his method than of the method generally followed by common-law writers and judges. One who feels himself bound by the existing law first determines by a process of "logic" what that law is. If the existing law, thus determined, happens not to cover his case, then, and only then, will he feel free to make an independent examination of considerations of ethics and policy. If this is what Professor Williston does, then, it may seem, he merely follows the example of the good judge, who feels

²⁰ In his *Der Kampf ums Recht* (1872), Ihering criticized the decision in *Shylock's Case*, arguing that although the judge should have declared the bond void as against public policy, having admitted the validity of the bond, he ought not to have deprived *Shylock* of his rights by a piece of judicial chicanery. Kohler, with his usual violence, contended (in *Shakespeare vor dem Forum der Jurisprudenz* (1883)) that this argument revealed Ihering's complete lack of insight into the processes of legal history.

Something of the flavor of Ihering's own approach to problems of legal casuistry may be gathered from the following passage taken from one of his technical articles: "But how can the suit be justified? . . . It is, of course, impossible to regard the death of the offeror as a *fault*. I must concede that my theory has here encountered a stumbling block over which I cannot bring it without the most violent straining. To deny a claim for damages in this situation is a result against which my sense of justice revolts decisively, and I should prefer to believe that in constructing my theory I have committed some error which I have not myself recognized, rather than exclude a claim in this situation. If, however, the claim is to be granted [under my theory as now formulated] there is no way out but to deduce fault in the following manner." There follows a rather apologetic "construction" of the case. Ihering, *Culpa in Contrahendo* in I GESAMMELTE AUFSÄTZE (Deutschland, 1881) 327, 407-408.

²¹ See, for example, the discussion of anticipatory breach in §§1306-1307 and §1314. Occasionally, however, Professor Williston gives the impression of venturing a little himself into the field of legal gymnastics, as in §1255. There is, moreover, a noticeable increase in the use of "crypto-sociology" in the second edition of the treatise. For example, where previously the liability of the revoking offeror after the offeree has done part of the act called for was a result merely tolerated because of its justice, it is now explained. See §§60 and 60A in both editions. Furthermore, where we are dealing not with "doctrines" and "theories", but with what may be called the schematics of the law, with diagrammatic visualizations of the remedy such as are involved in the distinction between void and voidable contracts, or between suits "on the contract" and suits "based on a rescission of the contract", Professor Williston shows no disinclination to take full advantage of the accommodating flexibility of these notions.

himself authorized to legislate only within the interstices of the existing law.²²

Yet the fundamental problem of legal method hidden behind the words "logic" and "policy" (the problem, that is, how persistently and how pervasively the inquiry into underlying social and ethical desiderata shall be pursued), is as acute in the interpretation of "the existing law" as it is in the creation of new law. If the creator of new law, the natural law philosopher, is faced with the problem how obstinately he shall press the inquiry into the interests of society before surrendering to the more pleasant and facile methods of "logic", the interpreter of the existing law is faced with exactly the same problem. He has his choice of taking the precedent at its face value, or of looking behind its face to the complex of motives and interests which gave rise to it. There are, of course, difficulties with either procedure. Strictly speaking, the precedent has no face value, and if the lawyer is to determine *what* the court decided, he will have to inquire, within limits, *why* it decided as it did. On the other hand, if this inquiry be pressed too far, it ends in an imbroglio of conflicting and overlapping motives in which all orientation is lost and from which the case seems to decide everything and nothing at the same time. In the interpretation of existing law it may be necessary for logic to carry the burden after policy has dropped by the wayside, just as in the creation of new law.

There is, of course, no fixed point at which policy may be regarded as having made a sufficiently strenuous effort to be permitted to retire from the field, and the relative tenacity with which the inquiry into the underlying "why" is pursued has been the object of pendular vacillations throughout the history of the common law. During natural-law or creative periods it is pressed with relative vigor, to the accompaniment of a sense of being in intimate contact with what is real and what is important.²³ During such periods the "face value" of precedents and statutes is seen as a deceptive illusion, behind which one must penetrate to underlying realities. When the pendulum swings in the opposite direction, attention is shifted to legal phenomena, to the external manifestations of law. Study is directed toward the "logical" implications of precedent and statute, which means merely that inquiry into underlying motivation is truncated at a relatively early point. During

²² "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting, in *Southern Pacific Company v. Jensen*, 244 U. S. 205, 221, 37 Sup. Ct. 524, 531, 61 L. ed. 1086, 1100 (1917).

²³ Pound points out that movements in legal thought are generally accompanied by a sense of having reestablished contact with what is "real". Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697. This applies as well to trends in the direction of natural law as to those in the opposite, or positivistic, direction.

the down swing of the pendulum in this new, or positivistic, direction, men again enjoy a sense of having been freed from a hampering illusion, of having reestablished contact with what is real, significant, and solid.

It seems reasonably clear that our American law has been going through a positivistic phase during the last seventy-five years, and that it is this positivistic philosophy which has been the predominant influence in shaping Professor Williston's legal method. He believes that there exists in the cases "a law of contract", and that it must be sufficiently simple and consistent with itself to be capable of intelligible statement. Believing this, he fears the intrusion of vague ethical and philosophical considerations, even in the interpretation of existing law, because their corruptive and dissolving influence threatens to make impossible the very task which the positivist sets for himself, that of stating what "the law" is. The force of this point is readily seen if one will imagine the task that would be involved in an attempt to state the existing law of consideration in terms of the social interests it serves.

How deeply imbedded the positivistic approach is in current legal thinking is shown by the fact that most of the criticisms of Professor Williston's work have accepted without cavil the assumption that the textwriter's task is that of stating "the law" which others have made. The controversy between Professor Williston and his critics is, in a sense, intramural, for it remains largely within the limits of the positivistic approach. This is particularly evident in Professor Cook's extended review of Williston's second edition.²⁴ He inquires whether the "broad generalizations" laid down by Williston will account for "the 'law' as it is found in the decisions", for, he says, from the standpoint of the realist, "that is the acid test of the validity of any generalization". Williston's "principles" of contract law are acceptable to Professor Cook if they are "distilled from the decisions of the courts", but only if they are. Professor Cook does not criticize Williston because he suffers from the delusion that there is "an existing law" of contracts to state. He criticizes him because he states that law in outlines too broad, and puts too much of himself into it.

If Pound is right in assuming that we stand on the threshold of a new natural-law or creative period,²⁵ then perhaps we may discern in the criticisms levelled at our leading textbooks, and in their inevitable

²⁴ Cook, *Williston on Contracts: Revised Edition* (1939) 33 ILL. L. REV. 497. Though I quarrel with what seems to me to be an excessively positivistic tendency in Professor Cook's approach, this review, like everything from his pen, is deserving of careful study, and I have profited from it in writing my own.

²⁵ POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938) 28-29.

vulnerability to these criticisms, a closing phase of positivism. By insisting upon judging the textwriter strictly in terms of his avowed purpose, that of stating "the law", we are hard at work to eliminate from the positivistic philosophy all the little covert tolerances and inconsistencies which have made it a workable system in the past. We want the law of the cases stated, but we insist that it be stated *right*. All superfluous judicial rationalization, all personal and subjective valuations of the observer, are to be rigidly excluded. We are to trace the patterns of judicial behavior just as they are. It is the pure, raw, unembellished fact of law that must be stated. When positivism has arrived at the point of demanding this, it has destroyed itself by the process of taking itself too seriously. By stating the task it proposes in impossibly exigent terms, it invites the abandonment of the task.

That the positivistic philosophy is dissolving in its own juices does not necessarily mean that there is occasion for rejoicing. Though I cannot believe that a "scientific" and quixotically exigent positivism, which would be satisfied with nothing less than patterns of judicial behavior, could have any value other than an unintended destructive one, it is arguable that there is a real social value in the unselfconscious positivism which characterized American legal thinking in, say, 1890, and which occasionally still finds such naïve expression in England. Even so keen a philosopher as Radbruch has suggested that the relative stability of political institutions in Anglo-American countries may be due to this positivistic bent, to the beneficent illusion, if you will, that there is an "existing law".²⁶ To be recalled in this connection also is Maine's observation that the Greeks were too philosophic to be good lawyers, and that it took something of the practical and incurious temper of the Romans to build a great legal system.²⁷ But if the positivistic philosophy represents, before it enters its self-destructive phase, a valuable social myth, it can be valuable only so long as it is believed in. There are numerous signs that this faith is crumbling in this country. When it has disappeared, there will be an end of "interstitial legislation" and the beginning, for good or ill, of a new creative effort along the whole front of the law.

To me it seems clear that the future of American law in general, and of the law of contracts in particular, lies not along the lines of an ever more rigidly controlled and "scientifically" accurate statement of the law of the cases, but in a philosophic reëxamination of basic premises. This philosophic inquiry will inevitably distract attention somewhat from the task of stating "the existing law", and will concentrate

²⁶ Radbruch, *La Sécurité en Droit d'après la Théorie Anglaise* (France, 1936) 6 ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE 86.

²⁷ MAINE, *ANCIENT LAW* (Pollock's ed. 1906) 80-83.

attention on the forces which have made law in the past and are making it for the future. In this study of forces which operate across time, the illusory present instant will tend to disappear, and with it, the law that merely "is".

There may be, I confess, a considerable measure of wishful thinking in this hope-expressed-as-prophecy. Whatever the future development of the American common law may be, however,—whether it moves in molar or molecular circles, whether it presses an existing philosophy on to more stringent demands, or proceeds by reformulating its basic approach—there is one prediction which may be ventured with confidence. The influence of Williston will not disappear from the law of contracts. The subject has been too firmly molded by him ever to lose entirely the imprint of his mind. If future generations of lawyers do not move to the measure of his thought, at least their steps will mark a rhythmic counterpart to it.