1. Introduction

After I had submitted the manuscript, the editor asked whether I would consider including the book in the new “Rethinking Law” series. This struck me as fortuitous on two grounds. First, when I first began thinking about and teaching contract law nearly two decades ago, I came to it with the mindset of many of my colleagues who share a law and economics perspective, namely that contract doctrine is efficient. However, it now seems to me that in many instances contract doctrine is terribly inefficient; doctrine is a hurdle that good lawyers must overcome. Second, I have come to think about contract law differently. My approach now is to focus on how parties design their contractual relations and to glean from that insights into both doctrinal reform and contract interpretation.

Contract law allows parties to set their own rules within constraints. It provides a set of default rules and if the parties do not like them, they can change them. Some of the rules, however, are mandatory, and others are, to varying degrees, sticky. That stickiness is in part due to the costs of tailoring a transaction. A more subtle source of stickiness is the beliefs of judges, scholars, and lawyers about the nature of contracts and contractual duties. The notion that a breach is a wrong and that victims of a breach of contract should be made whole is a powerful one.

My concern, I must emphasize, is with the contracts of sophisticated parties. I am not concerned with consumer contracts or agreements between amateurs – for example, uncle’s promise of cash to pay for nephew’s car, which was featured in the debate over the adoption of Section 90. There can, of course, be some dispute over whether a particular contract falls in that category. For my purposes, the category is defined by agreements for which both parties could be expected to have access to counsel.

A generation ago, Judge Posner bemoaned the mismatch of the facts as presented in judicial opinions with the actual facts, and argued that this had adverse consequences for the development of doctrine:

If factual uncertainty is disproportionately characteristic of litigated cases … then, given the difficulty of dispelling such uncertainty by the methods of
litigation, we can expect the factual recitals in published judicial opinions to be wrong much of the time . . .

And especially in cases where there is no published dissent, judicial opinions exemplify “winners’ history.” The appellate court will usually state the facts as favorably to its conclusions as the record allows, and often more favorably. . . . The tendency I have described is abetted by the reluctance of academic commentators to expand their study of cases beyond judicial opinions. Rarely will the commentator get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.

. . . One of the distinctive features of judges as policy makers – and it should be clear by now that judges in our system are, to a significant degree, policy-making officials – is that they obtain much of their knowledge of how the world works from materials that are systematically unreliable sources of information. (1990, 210–11)

By and large, the academic commentators of the Contracts wing of the profession have remained reluctant. In my previous book (Goldberg (2006)) I analysed a number of cases in which the court’s presentation of the facts was seriously deficient. In this book I will add a few more pieces to the “data base.” I do hope others will be encouraged to engage in more such studies, although the response to my earlier book does not inspire much confidence.

Not all the chapters in this book are detailed analyses of specific cases. Others concern broader questions, for example, the role of the “tacit assumption” in claims for consequential damages and the role of restitution when performance is excused because of impracticability. The common theme running throughout the book is the focus on contract design – the economic problems confronting contracting parties and the tools for coping with them.

The first two sections of the book deal with remedies. Part I concerns direct claims. The standard contract law rhetoric emphasizes the notion that victims of a breach should be compensated to make them as well off as they would have been had the contract been performed. The notion seems so obvious that it usually goes unquestioned by courts and commentators. However, as Scott and Triantis (2004, 1446) point out, that is at least in part a historical accident: “The dominance of the compensation principle is now unquestioned, but [an] inquiry into its historical roots suggests that the elevation of compensation to a universally applicable norm results more from mistaken path dependence than from a sustained and systematic appreciation of the merits of the rules governing contract damages.” Once we get beyond the contract/market differential, the case for the “make-the-victim-whole” remedy is pretty
weak. The decision to breach can be viewed as the exercise of an option to abandon with the remedy being the implicit price of that option. By looking at the pricing of explicit termination options, we can get some insight into how the implicit option could be priced. The evidence from the explicit pricing of the termination option indicates that the price need bear no relation to the amount of money that would fully compensate the counterparty if the option were exercised.

If the damage remedy should be the contract/market differential, there remains a timing question. Should the differential be reckoned at the time of the repudiation or breach? Or should it be reckoned at the time of the trial, or at any other date? I explore this question looking at cases from American and foreign (England and Israel) jurisdictions.

The UCC allows for the recovery of profits to a lost-volume seller. In earlier work (Goldberg (1984 and 2006, ch. 12)), I have argued that this made no sense when the question is framed as pricing the buyer’s termination option. I reprise that argument here and then consider a recent case in which a court was confronted with the question of whether Michael Jordan was a lost-volume seller.

Two cases in which a book publisher accepted a manuscript but then refused to publish it came to very different remedies. In both instances the contract was the standard publisher’s form. Also in both instances the court concluded that measuring damages would be too speculative. One court concluded that the author should receive only nominal damages (six cents); the other that the author should receive restitution for the time spent writing the manuscript (over $300,000). The remedy, I argue, should be viewed as pricing of the publisher’s option to abandon if new information on the marketability of the book were to become available.

The final chapter in Part I concerns the dividing line between a penalty clause and a liquidated damages clause. Judge Posner, who is uncomfortable with the notion that a clause agreed to by sophisticated parties should be unenforceable, nonetheless held in Lake River Corp. v. Carborundum Co. that a minimum quantity clause was a penalty and therefore unenforceable. Properly framed, the clause was neither a liquidated damage nor a penalty clause. The defendant wanted the flexibility to adapt as new information became available. Providing that flexibility was costly to the plaintiff and the minimum quantity clause determined the implicit price of that flexibility.

In Part II, I try to rehabilitate the much-maligned “tacit assumption” approach to the question of whether consequential damages should be recoverable. In these cases the option characterization of breach is inapposite. If, for example, a carrier were to fail to deliver goods on time, usually the reason would not be because the carrier chose to delay. The
failure might result in substantial losses for the shipper and the issue would be whether the carrier should be responsible for those losses. When parties do take this into account, the contracts generally disclaim responsibility for consequential damages. The ubiquity of disclaimers casts doubt on the default remedy which is much more likely to find the loss compensable. I will examine two significant cases adopting the tacit assumption approach. In the United States, New York is one of the few jurisdictions in which the tacit agreement approach is still alive; in *Kenford Company v. Erie County* the Court of Appeals rejected claims to recover consequential damages following the decision by the County not to build a domed stadium. In England, the House of Lords limited recovery for the late redelivery of a time-chartered vessel in *The Achilleas*.

Part III considers the excuse doctrines from a number of angles. The first chapter criticizes an approach to excuse doctrine proposed by Professor Eisenberg that would expand the scope of excuses. The next chapter considers what should happen once the performance has been excused. Should there be any restitution of money paid? Should there be compensation for expenditures that had been made in reliance upon the now-excused contract? In England until 1943, the law had been that we leave the parties where they were at the time of the excusing event. There would be neither restitution nor compensation for reliance. A decision by the House of Lords and subsequent legislation changed the law so that there would be restitution and there might be compensation for reliance. The UCC rules are similar. I argue in that chapter that the earlier rule of leaving the parties where we found them is the better default rule.

The final chapter in Part III concerns a different problem. After the parties have entered into a contract, one of them might become concerned about the ability of the counterparty to perform. If it were to continue to perform, it would run the risk that the other party would breach and would not be able to compensate for expenses incurred. If, on the other hand, it did not continue its performance it would run the risk that a court might find it to be the breacher. It could avoid this choice if it had a right to demand assurance that the other party would perform. Prior to passage of the UCC, American law did not provide a right to demand assurance, although the parties could contract for such a right. The UCC provides for the right (2-609) and the Restatement (Second) has adopted a similar position. In *NorCon v. Niagara Mohawk*, the New York Court of Appeals purported to take a cautious path finding only a limited right to demand assurance in non-goods cases. However, they chose a poor vehicle. The rationale for a default rule that recognizes a right to demand assurance is that parties haven’t bothered to think about
the problem when designing their agreement. In this instance, however, the assurance issue had been fought over for years; the agreement provided for as much assurance as the public utility regulators would allow.

Part IV deals with the problem of the enforceability of something that is not quite a contract. I will pass on the problem that receives the most attention on this front – promissory estoppel. That is not because it is unimportant; rather it is because I have nothing interesting to add to the conversation. Instead I will consider two other issues. The first is the enforceability of agreements to agree or memoranda of understanding (MOU), in particular the treatment of what Judge Leval labeled a “Type II” agreement – an agreement to negotiate in good faith. In *Brown v. Cara*, the Second Circuit found that the parties had created a Type II agreement and remanded to determine whether the defendant’s failure to complete the transaction had been in good faith. My intention in digging into this case was twofold. First, I wanted to see how parties would argue a Type II case. Unfortunately, there was virtually no argument on the issue at all. Second, I wanted to see how hard it would have been to write a clearly enforceable contract. In fact, it would not have been difficult.

The second issue is the revocability of an offer. The issue arises in Contracts casebooks in the context of a subcontractor attempting to revoke an erroneous bid after the general contractor has won the job, but before the general and sub have agreed. Generations of law students have been confronted with the conflicting views of Judges Hand and Traynor. While Traynor’s decision was perceived as a significant innovation, even providing the basis for a new section of the Restatement, it turns out to have had virtually no impact beyond the scope of bidding for public construction projects. Even in those, the cornerstone of Traynor’s analysis – reliance – proved problematic.

Reliance-talk permeates contract law and scholarship. One party relies on the other’s promised performance, or its statements, or its anticipated entry into a formal agreement. It is the centerpiece of the Fuller-Perdue (1936) triumvirate of interests to protect. Reliance, they argued persuasively, is tremendously important. And many scholars were persuaded. Saying that reliance is important, however, says nothing about what we should do about it. The leap from the proposition to implications for doctrine – a leap made by Fuller-Perdue and many followers – does not follow. The Fuller-Perdue framework does nothing to resolve the Goldilocks problem: is the protection of reliance too much, too little, or just right?

Too often court decisions or scholarship forward arguments of this form: people want to be able to rely upon X and if the law does not take that reliance into account then something bad (inefficiency for some,
injustice for others) will occur. Principles of contract doctrine can then be invoked, rejiggered, or even amended, so that the reliance is properly accounted for. The discussion, I believe, typically fails to ask the most basic questions: what do parties do and why do they do it? Much of this book concerns how parties choose to protect their reliance and the implications for both contract doctrine and interpretation.