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# To Err Is Human

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ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS. By *E. Allan Farnsworth*. Oxford: Oxford University Press. 2004. Pp. xiv, 216. $95.

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*I guess some mistakes you never stop paying for.*[1]

There are many kinds of mistakes. One kind—a rational, well-intended act or decision resulting in unanticipated, negative consequences—was the focus of Allan Farnsworth's previous foray into the realm of legal angst.[2] Another kind—an act or decision prompted by an inaccurate, incomplete, or uninformed mental state and resulting in unanticipated, negative consequences—is the subject of the present book.

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1. THE NATURAL (Tri-Star Pictures 1984).

2. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS (1998).

Like its predecessor, *Alleviating Mistakes* does not confine itself to contract law, Farnsworth's home turf; it explores criminal, tort, restitution, and other areas of substantive law as well. As such, it paints on too large a canvas to capture its entirety in these relatively few pages. I will try to trace the outlines of the discussion, rearrange and synthesize elements to make the tableau easier to comprehend, and enhance certain aspects with supplemental material—all the while understanding that, just as a description of a painting is no substitute for seeing the original, this review is no substitute for reading Farnsworth's book.

## I. DEFINING AND DELINEATING "MISTAKE"

*Sam: About a week ago, I accidentally slept with a prostitute.*
*Toby: I don't understand. Did you trip over something?*[3]

Farnsworth envisions a mistake arising from a "flawed perception of reality" (p. 14). Viewing mistake this way reflects "the gap between . . . the process of perception and . . . the process of decision. During this gap, one acquires beliefs, draws inferences, formulates predictions and opinions, makes judgments, forms intentions, and ultimately arrives at a state of mind that is entirely distinct from initial perceptions" (p. 20). Absent a flawed perception of reality, there is no mistake, only an accident. "An accident occurs when an event causes a consequence that is unexpected and in most cases untoward, but there is generally no flawed perception."[4] In common parlance, accidents *happen*; people *make* mistakes.[5]

Not every flawed perception of reality gives rise to a mistake. Irrational perceptions, particularly those attributable to mental illness or defect, will not relieve a party of liability based on mistake, although the mental illness or defect itself may be a separate defense.[6]

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3. *The West Wing: Post Hoc, Ergo Propter Hoc* (NBC television broadcast Sept. 29, 1999).

4. P. 21 (footnote omitted). Farnsworth appears to pull his punch by describing an accident as "generally" not involving a flawed perception of reality. If flawed perception plus mishap is Farnsworth's formula for a mistake, then allowing that some "accidental" mishaps might be accompanied by flawed perceptions seems equivalent to saying that some accidents are mistakes. That may well comport with everyday usage, *see* p. 21 n.15 ("In common parlance, the word *accident* is often used in a broader sense to include mishaps that result from mistakes, as where a collision resulting from a driver's having mistaken the significance of a traffic light is described as an 'accident.'"), but it undercuts Farnsworth's painstaking effort to define "mistake" and to distinguish mishaps caused by mistake from other mishaps, *see* pp. 19–22.

5. P. 21. Farnsworth offers the example, from Verdi's *La Forza del Destino*, of an unwilling (and unwitting) Don Alvaro, who threw down his dueling pistol, which fired upon hitting the ground, mortally wounding the man with whom he refused to duel in the first place. Farnsworth declares the Marchese di Calatrava's killing to be accidental, rather than mistaken, because Don Alvaro intentionally threw down the pistol but neither intended nor foresaw the untoward consequence that the pistol would discharge, striking the Marchese. *See id.* (discussing GIUSEPPE VERDI, LA FORZA DEL DESTINO act 1). By contrast, what *The West Wing*'s Sam Seaborn described to Toby Ziegler as an accident, *supra* note 3, was actually a mistake. Sam did not accidentally sleep with a prostitute; rather, he slept with a woman whom he perceived to not be a prostitute.

6. *See* pp. 24–25. Thus, Oliver Sacks's titular patient who, despite good eyesight and a high degree of intelligence, routinely perceived what he saw as being something else and could only identify individuals by some unique characteristic of their appearance or personal effects, *see*

### A. *Perception and Reality*

For Farnsworth, the law imagines a mistaken person forming a "sentence in her head" about what she perceives.[7] This sentential approach, while obviously an oversimplified construct, "enables judges to formulate instructions that can be comprehended by jurors and to draft opinions that will be understood by judges in later cases" (p. 25).

Perception may be active or passive. *Active* perception results from "actual contemplation" (p. 25). In *Sherwood v. Walker*,[8] the majority found that a cow's buyer and seller actively perceived her to be barren and worth only $80, instead of fertile and worth between $750 and $1,000. Because the mistake "affected the substance of the whole consideration," the court held that "there was no contract to sell or sale of the cow as she actually was."[9]

*Passive* perception is "a tacit or implied presupposition in the minds of the contracting parties."[10] "It is enough if one can say of a supposed fact, 'I did not have the supposed fact in mind at the time, but I could have called it to mind.' "[11] In *Gould v. Board of Education*,[12] the Board notified Gould that it was denying her tenure but that her file would not reflect the denial if she resigned. Neither she nor the Board realized that she had already achieved tenure-by-estoppel. Gould resigned. Finding that both parties implicitly believed that Gould did not have tenure at the time of the Board's decision, the New York Court of Appeals held that Gould was entitled to rescind her resignation and resume her teaching duties with tenure.[13]

If mistake is a flawed perception of reality, what is "reality" for purposes of determining whether a mistaken party misperceived it? Sometimes *what*

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OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 8–19 (HarperPerennial Edition 1990) (1970), could not avoid, on the basis of mistake, a contract he entered into with Lucy because he misperceived Lucy to be Snoopy. However, he might avoid the contract because the mental defect that caused him to mistake a girl for a beagle deprived him of sufficient capacity to contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a) (1979).

7. P. 25. Farnsworth uses the example of philosopher Friedrich Nietzsche boarding a train that he thought was bound for Turin, only to end up in Genoa instead: "Nietzsche perceives that the train he is boarding is the train for Turin" is taken to mean "Nietzsche perceives 'The train I am boarding is the train for Turin.' " *Id.*

8. 33 N.W. 919 (Mich. 1887).

9. *Id.* at 924; *see also* Alan E. Garfield, *Basic Assumption (A Poem Based on* Sherwood v. Walker), 57 SMU L. REV. 137 (2004) ("The man with a cow .... sold his cow for just chow because he didn't know his cow had a cow. Had his cow had a cow it would have been worth a thou and would not have sold for just chow."). The dissent found the contract to be enforceable because both parties perceived her to be without calf when sold. *See* Sherwood v. Walker, 33 N.W. 919, 925 (Mich. 1887) (Sherwood, J., dissenting).

10. Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 179 N.E. 383, 384 (N.Y. 1932) (Cardozo, J.).

11. P. 26. Thus, when Nietzsche boarded the Genoa train, *supra* note 7, "he could have had a passive perception that the train was bound for Turin .... He could have called to mind the supposed fact that the train was bound for Turin, for his mind was not a complete blank as to its destination." P. 26.

12. 616 N.E.2d 142 (N.Y. 1993).

13. *See id.* at 145–46 ("[T]he resignation was submitted and accepted under a fundamental misassumption as to the position petitioner was relinquishing.").

is really more a matter of *when*: "One can be mistaken as to a fact even though, at the time, the truth or falsity of the fact cannot be determined."[14] That said, "[a]lthough reality need not be knowable at the time of the flawed perception, it must be provable at the time that the effect of the mistake is to be determined."[15]

At other times, reality is a matter of *opinion*. Farnsworth treats all manner of opinion-based mistakes as being akin to mispredictions, rather than factual mistakes, and categorically less worthy of relief. To illustrate, Farnsworth distinguishes between the true identity of the creator of a work of art (*authenticity*) and the opinion of experts as to the creator's identity (*attribution*).[16] Whether Edgar Degas painted a particular canvas is an immutable matter of fact—perhaps an undiscoverable fact or a fact that can only be discovered at a later date, but an immutable fact no less. Whether experts attribute the painting to Edgar Degas is also a matter of fact, but not of immutable fact; ultimately, it is a fact based on an opinion. A mistake as to authenticity—whether based on a party's own observation or on an expert's representation—is a mistake of fact because it represents a flawed perception of reality.[17] A mistaken attribution is not a mistake of fact because it is nothing more than an erroneous opinion.[18] Nor is an accurate perception of who experts consider to be the artist a mistake of fact—even if the experts are wrong—because there is no gap between the perception of who experts consider to be the artist and the reality of who experts consider to be the artist.[19]

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14. P. 27. Farnsworth offers the example of Ptolemy's perception of a geocentric universe, which was neither provable nor disprovable at the time, but which Copernicus later disproved. *See* pp. 27–28. *See generally* NICOLAUS COPERNICUS, ON THE REVOLUTION OF HEAVENLY SPHERES (A.M. Duncan trans., Harper & Row Publishers Inc. 1976) (1543).

15. P. 29. The indeterminacy of a perception's truth or falsity at the time a party perceives it may be because the perception is, or is based on, a prediction of some future event. *See infra* notes 27–32 and accompanying text.

16. *See* pp. 28–29.

17. *See* JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 4:26 (2005) ("Authenticity is often inconclusive and evolutionary. Changes and developments in scholarship, methodologies, and technologies, as well as newly discovered documentary materials, factor into the equation."); *see, e.g.*, Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556 (D. Haw. 1990); Dawson v. G. Malina, Inc., 463 F. Supp. 461 (S.D.N.Y. 1978) (each finding one or more causes of action based on lack of authenticity).

18. *See* DARRABY, *supra* note 17, § 4:26 ("One era's Rembrandt is another's studio attribution; one scholar's premillenia sculpture is another's twentieth century reconstruction. Bands of itinerant authenticators . . . circumnavigate the globe 'de-attributing' works of certain famous artists."). *See generally* Duncan Sheehan, *What is a Mistake?*, 20 LEGAL STUD. 538, 565 (2000) ("Opinions cannot be mistaken, as they relate to matters where there are no definite right and wrong answers. In such cases we can only disagree.").

19. *See, e.g.*, Firestone & Parson, Inc. v. Union League of Phila., 672 F. Supp. 819, 823 (E.D. Pa. 1987) ("If both parties correctly believed at that time that the painting was generally believed to be a Bierstadt, and in fact it was then generally regarded as a Bierstadt, it seems unlikely that plaintiff could show that there was a mutual mistake of fact."), *aff'd per curiam*, 833 F.2d 304 (3d Cir. 1987).

### B. *Modes of Mistake*

Some mistakes are mistaken *expressions*, whereby the parties to an agreement have, or the party making a transfer has, failed to accurately express—typically in writing—the intended terms of the agreement or transfer.[20] Most mistakes are mistaken *assumptions*, whereby the mistaken party has a flawed perception of external reality.[21]

### C. *Mistake versus Misunderstanding*

Farnsworth distinguishes a mistaken assumption from a *misunderstanding* arising from a party's flawed perception of the other party's understanding or intent (p. 14). A misunderstanding is not a mistake, as Farnsworth uses the term, because merely misperceiving another's meaning does not prevent a contract from forming; rather "[a] court will almost invariably . . . find that the meaning of the language accords with the understanding of one or the other of the parties. The perception of that party then prevails" (pp. 14–15).

Three aspects of Farnsworth's explanation and his accompanying discussion of *Raffles v. Wichelhaus*[22] concern me. First, while he certainly may define mistake to exclude misunderstanding—a position supported by the *Restatement (Second) of Contracts*[23]—Farnsworth overgeneralizes in writing that a misunderstanding will not prevent contract formation (pp. 14–15). In fact, a mutual misunderstanding *will* prevent contract formation.[24] Second, he oversimplifies *Raffles* by declaring that, "because there was no flawed perception as to any reality outside the minds of the parties, this was not a case of mistake as I use the term" (p. 15). Excellent historical research that predates this book by fifteen years reports that there were multiple ships named *Peerless* operating in and around England at the time the parties

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20. *See* p. 14; *see, e.g.*, Belk v. Martin, 39 P.3d 592, 598–99 (Idaho 2001) (reforming a written lease agreement mistakenly requiring the lessee to pay the lessor $1,476.80, rather than the $14,768.00 to which they orally agreed).

Despite Farnsworth's (flawed) perception that mistaken expressions are rare, *see* p. 14, *Belk* is only one of hundreds of reported decisions granting reformation or rescission due to a mistake in the parties' written expression of their agreement-in-fact. *See, e.g.*, BrandsMart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc., 901 So. 2d 1004 (Fla. Dist. Ct. App. 2005); Duong v. Salas, 877 So. 2d 269 (La. Ct. App. 2004); Magnuson v. Diekmann, 689 N.W.2d 272 (Minn. Ct. App. 2004); Ribacoff v. Chubb Group of Ins. Cos., 770 N.Y.S.2d 1 (N.Y. App. Div. 2003); Heart River Partners v. Goetzfried, 703 N.W.2d 330 (N.D. 2005); Laredo Med. Group v. Lightner, 153 S.W.3d 70 (Tex. App. 2004); RHN Corp. v. Veibell, 96 P.3d 935 (Utah 2004).

21. P. 14; *e.g.*, Local Mktg. Corp. v. Prudential Ins. Co., 824 N.E.2d 122 (Ohio Ct. App. 2004) (holding that a lessee was entitled to be refunded overpaid rent, plus interest, because the commercial lease mistakenly overstated the square footage covered by the lease and the lessee's monthly rent was calculated per square foot).

22. (1864) 159 Eng. Rep. 375 (Exch. Div.).

23. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 20, 151–53 & ch. 6 intro. note.

24. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 17(1) & 20(1)(a); *see, e.g.*, Merced County Sheriff's Employee's Ass'n v. County of Merced, 233 Cal. Rptr. 519, 528 (Cal. Dist. Ct. App. 1987); Friedman v. Donenfeld, 882 A.2d 1286, 1291 (Conn. App. Ct. 2005).

made their contract for cotton "ex Peerless."[25] Consequently, the parties could very well have misperceived external reality if each mistakenly believed that there was only one ship named *Peerless*. Third, while a contract may form—and, thus, contractual liability arise—despite a party's unilateral misunderstanding of the other party's meaning, what of the other types of liability that Farnsworth discusses throughout the book? For example, suppose that the rightful owner of stolen property confronts the thief, who has the loot in one hand and a pistol in the other. If the owner says, "Let me have it," does the thief's misunderstanding of the owner's meaning affect his criminal or tort liability for shooting the owner rather than handing over the stolen property?[26] Farnsworth provides no insights into the perceived or desired effect of misunderstanding on criminal or tort liability.

### D. *Mistake versus Misprediction*

Suppose that, after the 2005 World Series began but before the end of Game Four, I purchased a ticket for Game Six in Chicago, booked a hotel room, and bought a roundtrip airline ticket. Alas, the World Series did not return to Chicago,[27] so I did not use my game ticket, I forfeited my hotel deposit, and I kept the airline ticket to exchange it for one on a future flight. I inaccurately predicted the course of the World Series; but, using Farnsworth's definition, I was not mistaken because I did not have a flawed perception of reality.[28]

Whether a party may get relief from the effects of a misprediction appears to turn on the type of relief she seeks and the kind of liability from which she seeks it. A party seeking to be excused from criminal or intentional tort liability because her misprediction prevented her from "knowingly" committing the crime or tort typically is excused, provided that she was not aware that it was "practically certain" her act would result in harm to another (p. 54). A party seeking to rescind a contract or to reverse a voluntary transfer due to his misprediction at the time he entered into the

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25. A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 295 (1989) (reporting nine British and two American merchant ships named "Peerless" operating in 1863).

26. This hypothetical is loosely based on a 1952 case that inspired a critically acclaimed movie. Confronted on a rooftop after a botched break-in, nineteen-year-old Derek Bentley, who was already in police custody, purportedly told sixteen-year-old Chris Craig "Let him have it, Chris," after a police officer demanded that Chris hand over his revolver. Chris shot and killed the officer, rather than handing it over as Derek allegedly wanted him to do. Derek was sentenced to death and executed for the officer's murder. LET HIM HAVE IT (Vermillion Pictures 1991).

27. The White Sox swept the Astros in four games in what may have been the most closely contested sweep in World Series history. *See* Rick Morrissey, *After 88 Years, There's Joy in Soxville*, CHI. TRIB., Oct. 27, 2005, at C2; Richard Justice, *No Tricks Left in a Magical Season*, HOUSTON CHRON., Oct. 27, 2005, at A1.

28. *See* p. 49 ("One may foresee the future but one does not perceive it in the way in which one perceives present reality. A prediction is not true or false in the sense in which a perception is true or false.").

contract or made the transfer typically is not able to do so unless he can cast the misprediction as a present mistake.[29]

Although some prominent scholars have called for making relief equally available to a party seeking to undo a contract or transfer because of mistake or misprediction,[30] Farnsworth finds the distinction between the two concepts to be "entrenched in the law" (p. 52), supported by the notion of assumed risk,[31] and consistent with the doctrine of conscious ignorance.[32]

### E. *Ignorance and Mistake*

All mistakes involve some degree of ignorance—otherwise, there would be no gap between a mentally competent party's perception and reality.[33] However, a decision made in complete ignorance of external reality is not a mistake: "One who is ignorant of a fact . . . . can have no perception as to that fact. Sheer ignorance of a fact, so that one cannot call it to mind, cannot be the basis of even a passive perception."[34] Nonetheless, Farnsworth deems an erroneous decision based on ignorance to be as worthy of relief as one based on mistake.[35]

The foremost obstacle to treating sheer ignorance as mistake in the case of a contract is contract law's reliance on objective manifestations of assent,[36]

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29. *See* pp. 49–51. For example, a party seeking to rescind a personal injury settlement agreement is far more likely to prevail if he seeks rescission due to some undiagnosed or incorrectly diagnosed injury than if he seeks rescission because a known injury resulted in more harm than predicted. The incomplete or incorrect diagnosis is a mistaken perception of the facts that exist at the time; the overly optimistic prognosis is a misprediction of the future consequences of the correctly diagnosed injury. *See* pp. 50–51 & nn.14–15 (collecting cases); *compare, e.g.*, Dansby v. Buck, 373 P.2d 1, 6 (Ariz. 1962) (allowing a plaintiff to rescind a release because she and her insurer executed it "under a mutual mistake as to an unknown injury not taken into consideration therein"), *with, e.g.*, Dietz v. Lopez, 879 P.2d 2, 4–5 (Ariz. Ct. App. 1994) (refusing to allow a plaintiff to rescind a release when both parties knew that his wrist was injured but were "unaware of the true nature and extent of his wrist injuries").

30. *See, e.g.*, Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003); James Bradley Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, *in* HARVARD LEGAL ESSAYS 467 (Roscoe Pound ed., 1934).

31. *See* p. 52; *see, e.g.*, *In re* Darrell Creek Assocs., L.P., 187 B.R. 908, 914 (Bankr. D.S.C. 1995); Corcoran v. N.E. Ill. Reg'l Commuter R.R., 803 N.E.2d 87, 91–92 (Ill. App. Ct. 2003).

32. *See* pp. 52–53; *infra* notes 46–54 and accompanying text.

33. *See* p. 31. Nietzsche's misperception that the train he boarded was bound for Turin, *supra* note 7, was arguably due to his ignorance of the train's true destination. *See* pp. 31–32.

34. P. 32; *see also* Sheehan, *supra* note 18, at 565 ("[A] mistake presupposes the existence of some belief, and when we are ignorant we . . . lack[] any belief at all.").

35. P. 31 (advocating that courts adopt a uniformly "straightforward approach under which ignorance generally has the same consequences as mistake").

36. *See* Keith A. Rowley, *You Asked For It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526, 527–35 (2003) (discussing the objective theory of assent and its ascendancy over the subjective theory evident in *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch. Div.)).

which a party need not make knowingly.[37] To get around this cornerstone of contemporary contract law, courts have inferred mistake from ignorance[38]—a practice Farnsworth considers disingenuous at best.[39]

One particularly troublesome case is *Wilkin v. 1st Source Bank*,[40] which concerned the sale of a cluttered house. Ignorant of the presence of valuable works of art amidst the clutter, the seller agreed to let the buyers keep anything they found if they would clean up the house rather than require the seller to hire a third party to do so. The court held that the seller was entitled to recover the art because the seller and buyers "shared a common presupposition" that the house was "cluttered with . . . 'junk,' 'stuff' or 'trash.'" Allowing the buyers to retain the valuable art works would result in a gain to the buyers and a loss to the seller that the parties did not contemplate when the seller agreed that the buyers "could clean the premises and keep such personal property as they wished."[41]

So far, so bad. Now suppose that a party's ignorance is the product of forgotten knowledge, conscious ignorance, or willful ignorance. Courts[42]—and a handful of state legislatures[43]—seem willing to treat a party's forgetfulness as a mistake. This, despite Lord Esher's admonitions that "mere

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37. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 19 & cmt. b.

38. *See, e.g.*, D'Agostino v. Harding, 629 N.Y.S.2d 524, 526 (N.Y. App. Div. 1995) (reinstating counterclaim and reversing an award of summary judgment because the parties to a real property contract inaccurately recited the total acreage and "neither party knew the number of acres involved" when they executed the contract).

In some states, no such judicial gyration is required, thanks to salutary legislation. *See, e.g.*, CAL. CIV. CODE § 1577(1) (West 1982); MONT. CODE ANN. § 28-2-409(1) (2005); N.D. CENT. CODE § 9-03-13(1) (1987); OKLA. STAT. ANN. tit. 15, § 63(1) (West 1996); S.D. CODIFIED LAWS § 53-4-9(1) (1990) (each defining a mistake of fact to include "unconscious ignorance . . . of a fact, past or present, material to the contract").

39. *See* p. 34 (complaining that this "convoluted approach" of inferring mistake from sheer ignorance "bends of out shape" his carefully distilled definition of mistake discussed *supra* text accompanying notes 5–6); *see also* Sheehan, *supra* note 18, at 565 ("[Ignorance] cannot be transformed into a mistaken belief; there is no reason to take a lack of belief in X and make it a belief in not-X . . . .").

40. 548 N.E.2d 170 (Ind. Ct. App. 1990).

41. *Id.* at 171–72. But wait a minute! The seller did not *hire* the buyers to clean out the seller's house, allowing them to keep whatever they could salvage. The buyers purchased the house from the seller and saved the seller the expense of hiring a rubbish removal company by agreeing to clean the clutter themselves *in exchange for* keeping what they could salvage. The only thing that saves this from being a truly awful result is that the buyers apparently did not raise the clutter issue with the seller until after the sale had closed; therefore, the salvage value of the clutter was not part of the consideration for the buyers' purchase of the home, it was only consideration for the buyers' agreement to clear the clutter themselves rather than require the seller to hire someone else to do it.

42. *See, e.g.*, *In re* Estate of Herbert, 979 P.2d 39, 65–66 (Haw. 1999); Bolle, Inc. v. Am. Greetings Corp., 109 S.W.3d 827, 833–34 (Tex. App. 2003). *But see, e.g.*, Andrews v. Blake, 69 P.3d 7, 18 (Ariz. 2003); SDG Macerich Props., L.P. v. Stanek, Inc., 648 N.W.2d 581, 587–88 (Iowa 2002); United Props. Ltd. Co. v. Walgreen Props., Inc., 82 P.3d 535, 540, 543–44 (N.M. Ct. App. 2003) (all holding that a tenant's failure to properly exercise an option due to forgetfulness was not a mistake entitling the tenant to equitable relief).

43. *See* CAL. CIV. CODE § 1577(1) (West 2006); MONT. CODE ANN. § 28-2-409(1) (2005); N.D. CENT. CODE § 9-03-13(1) (2005); OKLA. STAT. ANN. tit. 15, § 63(1) (1996); S.D. CODIFIED LAWS § 53-4-9(1) (2005) (each defining a mistake of fact to include "forgetfulness of a fact past or present, material to the contract").

forgetfulness" is not a mistake and that saying "I forgot" is not the same thing as saying "I am mistaken."[44] Farnsworth seems content with courts' equating forgetfulness with mistake, subject to the other party's and the court's ability to test the merit of the party's claim of forgetfulness.[45]

Sheer ignorance (blissful or otherwise) is one thing; *conscious* ignorance, coupled with a decision to proceed despite knowing that one is ignorant, is something else entirely.[46] Why? Because "one who knows that he is ignorant is not mistaken, since he has no belief as to the existence or non-existence of facts."[47] Or, to use Farnsworth's terminology, a consciously ignorant party has no perception of reality; therefore, his perception cannot be flawed (p. 37).

In *Estate of Nelson v. Rice*,[48] the estate's administrators sold two paintings at a public sale for $60, unaware that they were painted by nineteenth-century American artist, Martin Johnson Heade. The buyers later resold the paintings for more than $1 million. When the estate sued to rescind the original sale, the court held that the estate could not recover the paintings because the administrators decided to sell them despite the estate's appraiser having said that she did not appraise fine art.[49] Why did this case turn out differently than *Wilkin v. 1st Source Bank*?[50] In *Wilkin*, the seller had no knowledge of the house's contents.[51] In *Rice*, the administrators sold the paintings knowing that they were ignorant of the paintings' value.[52]

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44. Barrow v. Isaacs & Son, [1891] Q.B. 417, 420 (C.A. 1890).

45. *See* p. 36.

46. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 154(b) (denying relief to a party who knows "that he has only limited knowledge with respect to the facts . . . but treats his limited knowledge as sufficient"); *see, e.g.*, Yancey v. Hall, 458 S.E.2d 121, 124 (1995).

47. RESTATEMENT OF RESTITUTION § 6 cmt. c (1936); *accord* DAN B. DOBBS, THE LAW OF TORTS § 103 (2000) (writing that a person "who knows she does not know a fact is not mistaken about that fact at all").

48. 12 P.3d 238 (Ariz. Ct. App. 2000).

49. *Id.* at 241–42; *see also* p. 38 n.29 (collecting cases).

50. 548 N.E.2d 170 (Ind. Ct. App. 1990).

51. *See supra* text accompanying notes 40–41.

52. *See Rice*, 12 P.3d at 242 ("[T]he Estate was a victim of its own folly and it was reasonable for the court to allocate to it the burden of its mistake.").
Farnsworth offers a different explanation:

> [C]onscious ignorance confers broad discretion on a court. . . . Much depends on how the court expresses . . . the matter as to which that party . . . "treated his limited knowledge as sufficient." The greater the generality with which the court expresses a party's ignorance, the more convincing the case for the doctrine's application.

P. 40 (quoting RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 154(b)). This explanation works well enough for *Rice*. The court asked whether the administrators assumed the risk that the paintings were by "an artist of repute" by selling them without first ascertaining whether they were by an "artist of repute" and answered "Yes." The court did not ask whether the administrators assumed the risk of mistake because they did not know Heade was the artist. To Farnsworth, doing so would have "strained credulity." P. 40. What about *Wilkin*? While it might have strained credulity for the *Wilkin* court to ask whether the seller assumed the risk that there were valuable art works amidst the clutter in the house, why did the seller not assume the risk that there was *something* of value within? I return to the issue of notice: the *Rice* sellers knew they were selling framed paintings,

Conscious ignorance does not apply when a contracting party or a transferor actively or passively perceives a fact—even when further investigation would have revealed that the perception was flawed.[53] The appropriate resolution of other cases in which passive perception abuts conscious ignorance is less obvious.[54]

Criminal law recognizes another exceptional category of ignorance: *willful* or *deliberate* ignorance, which applies only to crimes that require that the accused act "knowingly" and "assumes that there is reliable and readily available information" about an unknown fact that the accused purposefully does not pursue.[55]

At the end of the day, how do we distinguish ignorance from misperception based on uncertainty when "all perceptions are held in the face of some uncertainty?" (p. 39). Farnsworth does not offer any clear answer. Instead, he proposes an approach that moots the question: acknowledge that ignorance-qua-ignorance can justify relief in appropriate circumstances and treat claims of conscious ignorance as questions of assumed risk.[56]

## II. TAXONOMY OF MISTAKES

*Some of the worst mistakes of my life have been haircuts.*[57]

Throughout most of the book, "alleviating" is not a verb prescribing a response to a party's mistake, it is an adjective describing certain kinds of mistakes. Farnsworth distinguishes between *inculpating* mistakes, which another person asserts against the mistaken party to hold the latter liable for

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whereas the *Wilkin* seller knew nothing more about the clutter in the house than that the buyers complained—*after* they had purchased the house—that there was clutter.

53. For example, in *Riegel v. American Life Ins. Co.*, 25 A. 1070 (1893), Riegel took out a $6,000 life insurance policy on his debtor, Leisenring. After Riegel died, his widow exchanged the policy for a $2,500 paid-up policy, unaware that Leisenring, whose whereabouts neither she nor the insurer knew, had died before the exchange. The court held that she was entitled to cancel the policy swap and to receive payment under the original policy because "both parties acted on the basis that Leisenring was then alive." *Id.* at 1073. Unlike the sellers in *Rice*, Mrs. Riegel did not know that she lacked relevant knowledge and choose to treat her incomplete knowledge as sufficient. "[W]hether Leisenring was then dead or not never entered into the contemplation of either party." *Id.*

54. *See* pp. 39–42.

55. *See* pp. 42–43; MODEL PENAL CODE § 2.02 cmt. 9 (1962); *see, e.g.*, United States v. Sdoulam, 398 F.3d 981, 993 (8th Cir. 2005). *See generally* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351 (1992); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).

56. P. 44. As a consequence of adopting this suggestion, "[t]he availability of relief in disputes arising under agreements and out of dispositions by transfer ... would not turn on ... inferring mistake from ignorance ... [but would be] subject to the important limitation imposed by the doctrine of conscious ignorance." *Id.* Furthermore, the conscious ignorance doctrine "would be significantly improved by replacing the rationale that there is no mistake with a rationale that turns on allocating the risk of the ignorance"—something that the draft *Restatement (Third) of Restitution and Unjust Enrichment* "wisely" advocates. Pp. 44–45; *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b(3) (Tentative Draft No. 1, 2001).

57. THE DOORS (TriStar Pictures 1991).

some act or decision,[58] and *alleviating* mistakes, which a mistaken party asserts to avoid liability for some act or decision.[59] The two classes are not mutually exclusive.[60] Farnsworth focuses his attention on alleviating mistakes, as will I.

Liability that requires "consent, intention, or motive"[61] raises the possibility that a person who might appear to consent, intend, or desire might so appear only due to some mistake on her part. Had she been aware of her mistake before she acted, she would not have agreed to sell a fertile cow for the going price of a barren cow,[62] to contract with a principal who could not be bound by the purported agent with whom she was dealing,[63] or to contract with an imposter;[64] she would not have paid money not owed[65] or excluded a person from among the beneficiaries of her will because she thought him dead;[66] she would not have fired the pistol she thought was not loaded[67] nor operated on the wrong knee.[68] Thinking that the fertile cow was barren, the false agent was authorized, and so on, are all alleviating mistakes, which might entitle the mistaken party to relief.

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58. Pp. 7, 17–18, 65–69. In leaving poisoned wine intended for Hamlet on a common table and failing to prevent Gertrude from drinking it, Claudius made inculpating mistakes. Hamlet seized upon those mistakes, along with Claudius's murder of Hamlet's father and poisoning of Laertes's blade, to hold Claudius liable in a most immediate and final way. *See* WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act V, sc. 2 (Philip Edwards ed., Cambridge Univ. Press 1985).

59. Pp. 1, 9–12. By contrast, when England killed Rosencrantz and Guildenstern instead of Hamlet because Hamlet had replaced his own execution order with one for his companions, England's mistake was an alleviating one, particularly in light of the extent to which England was beholden to Denmark. *See* SHAKESPEARE, *supra* note 58, act V, sc. 2. *See generally* TOM STOPPARD, ROSENCRANTZ & GUILDENSTERN ARE DEAD (1967).

60. P. 18 ("An alleviating mistake is sometimes also an inculpating mistake, entitling one to forgiveness for an intentional wrong but resulting in accountability for carelessness.").

61. P. 2 (quoting Thomas v. R, (1937) 59 C.L.R. 279, 299).

62. *See* Sherwood v. Walker, 33 N.W. 919, 923 (Mich. 1887).

63. *See, e.g.*, Robertson v. C.O.D. Garage Co., 199 P. 356, 358 (Nev. 1921).

64. *See, e.g.*, Kaufman v. Audubon Ford/Audubon Imps., Inc., 903 So. 2d 486, 491 (La. Ct. App. 2005). *See generally* D.W. McLauchlan, *Mistake of Identity and Contract Formation*, 21 J. CONT. L. 1 (2005).

65. *See, e.g.*, Jameson v. Jameson, 700 N.W.2d 638, 644 (Neb. Ct. App. 2005).

66. *See, e.g.*, Stevens v. Torregano (*In re* Estate of Torregano), 352 P.2d 505, 516–17 (Cal. 1960). *See generally* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.6(b)-(c) (2003).

Most states have statutory provisions addressing the inheritance rights of children omitted from a will due to the testator's mistaken belief that the child is dead. *E.g.*, ALA. CODE § 43-8-91(b) (1991); CAL. PROB. CODE § 21622 (West Supp. 2006); IND. CODE ANN. § 29-1-3-8(b) (West 1999); MICH. COMP. LAWS ANN. § 700.2302(3) (West 2002); N.J. STAT. ANN. § 3B:5–16(c) (West Supp. 2005); N.M. STAT. ANN. § 45-2-302(C) (1995); UTAH CODE ANN. § 75-2-302(3) (Supp. 2005).

67. *See, e.g.*, Commonwealth v. Hamilton, 766 A.2d 874, 877–78 (Pa. Super. Ct. 2001). *But see, e.g.*, Dowda v. State, 776 So. 2d 714, 715 (Miss. Ct. App. 2000) (upholding the defendant's 'depraved heart' murder conviction because "a person's pulling the trigger on a weapon that has been placed against another's head, even when the first person believes the gun to be unloaded, can nonetheless be an act that is in utter disregard for life").

68. *See, e.g.*, Valerie v. Foret, 544 So. 2d 737, 738 (La. Ct. App. 1989); Duke v. Wilson, 900 S.W.2d 881, 883 (Tex. App. 1995).

A party may seek relief only for those alleviating mistakes she discovers—not, as Hagi Kenaan has argued, because no mistake exists until someone discovers it;[69] rather, because the mistaken party will have no reason to seek relief from her mistake until she discovers that she made one (p. 13). However, she must not have taken too long to discover her mistake[70] or waited too long after discovery to seek relief.[71] Neither law nor equity refuses to recognize a mistake that goes too long undiscovered or unreported, but law and equity may refuse to excuse such a mistake solely due to the lapse of time.[72]

Nor does a party need relief from all of her seasonably discovered alleviating mistakes; she needs relief only from those mistakes that cause unanticipated, negative consequences (p. 21). Thus, if a party who misperceives another's true identity[73] or another's culpability for some wrongful act[74] learns the truth before acting in reliance on her mistake, she suffers no real harm and needs no more relief than learning the truth. Likewise, a party who purchases a painting at a flea market, garage sale, or secondhand store only to discover later that it was painted by a renowned artist,[75] or that it was painted over a more valuable painting or other document,[76] realizes a windfall and needs no relief at all (except, perhaps, from negative tax consequences that might arise from later reselling or transferring by gift or devise the more valuable painting or document). Here, Farnsworth blurs the

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69. Hagi Kenaan, *Subject to Error: Rethinking Husserl's Phenomenology of Misperception*, 7 INT'L J. PHIL. STUD. 55, 58 (1999). This is, in essence, the classic "If a tree fell in the forest . . . ." conundrum.

70. P. 82; *see, e.g.*, Nat'l Amusements, Inc. v. S. Bronx Dev. Corp., 676 N.Y.S.2d 166, 166 (N.Y. App. Div. 1998); Browning v. Howerton, 966 P.2d 367, 370–71 (Wash. Ct. App. 1998).

71. *See, e.g.*, *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 78 n.191 (Del. Ch. 2001); Cullins v. Foster, 171 S.W.3d 521, 532 (Tex. App. 2005).

72. *But see, e.g.*, Allen v. West Point-Pepperell, Inc., 908 F. Supp. 1209, 1218–20 (S.D.N.Y. 1995) (obviating the need for prompt action to rescind when the mistaken party has nothing of value that it would have to return upon rescission); Lyman D. Robinson Family L.P. v. McWilliams & Thompson, PLLC, 143 S.W.3d 518, 520–21 (Tex. App. 2004) (finding that an action to recover a $15,000 overpayment made under mistake of fact was not barred because the recipients of the overpayment failed to establish that the payor "inexcusably delayed" in seeking to recover the overpayment and that his delay "unduly prejudiced" the recipients).

73. Farnsworth gives an example from Mozart's *The Marriage of Figaro*, in which Marcellina amorously pursues her son, Figaro, but realizes her mistake before it is too late to allow him to marry his true love. Pp. 9–10 (discussing WOLFGANG AMADEUS MOZART, *Le Nozze di Figaro* act III, sc. 5).

74. Farnsworth turns to Rossini's *The Thieving Magpie*, in which Lucia mistakenly charges her servant, Ninetta, with stealing silverware and sees Ninetta sentenced to death; after discovering the truth, she sets Ninetta free to marry Lucia's son Giannetto. P. 10 (discussing GIOACCHINO ROSSINI, *La Gazza Ladra* act II).

75. *See* Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573, 1636 (2003) (citing Peter Maller, *Flower Power: Painting Transcends Garage-Sale Past, Brings $882,500 at Auction*, MILWAUKEE J. SENTINEL, May 27, 1999, at 1 (describing how a $29 estate sale purchase proved to be by renowned painter Martin Johnson Heade)).

76. *See* Jon Waldman, *A Fortune in the Attic: In Your House or at a Garage Sale May Be a Piece of Art Worth Thousands*, WINNIPEG FREE PRESS, July 17, 2005, at F10 (recounting how a woman discovered that a painting she had purchased had a significantly more valuable painting on the reverse side, which had been covered over with whitewash primer).

distinction between verb and adjective: "If no harm results there is no occasion for alleviation."[77] Moreover, even when unanticipated negative consequences do result, a court can only grant relief for an alleviating mistake if relief is within the court's powers. Again Farnsworth blurs the distinction between verb and adjective: "If a court can grant no relief for a mistake, no question of alleviation arises."[78] Thus, a mistake that cannot be alleviated is not an alleviating mistake.

## III. RELIEF FROM ALLEVIATING MISTAKES

> *[T]here comes a point when a reasonable man will swallow his pride and admit he's made a terrible mistake. The truth is I was never a reasonable man.*[79]

The party seeking to avoid liability based on an alleviating mistake bears the burdens of invoking and proving the mistake and establishing his entitlement to relief.

### A. *'Fessing Up*

Unlike an inculpating mistake, the existence or alleged consequences of which a mistaken party will typically try to deny or rationalize,[80] denying an alleviating mistake is counterproductive. The mistaken party should plead "*Mea culpa*. Excuse me, for I did not mean to do it" (p. 69), and should " 'seek to set things right through the process of atonement,' a process that requires repentance, apology, reparation, and penance."[81]

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77. P. 10. And yet, while the mistaken party may have suffered no harm, can we truly say that no harm resulted from either operatic miscue? What of the emotional anguish a real-life Figaro might suffer from the attentions of his misguidedly amorous mother? Imagine a real-life Ninetta's suffering from being wrongly accused, deprived of her freedom, and sentenced to death.

78. P. 12. Farnsworth quotes Lady Macbeth: "Things without all remedy should be without regard." WILLIAM SHAKESPEARE, MACBETH act III, sc. 2 (Nicholas Brooke ed., Clarendon Press 1990). This is a curious choice for a literary reference because the act of which Lady Macbeth speaks—Duncan's murder—was not "without all remedy." Murder cannot be undone, but it certainly can be—and, in Macbeth's case, was—punished. *See id.* act V, sc. 8.

79. BIG FISH (Columbia Pictures 2003).

80. *See* pp. 65–69.

81. P. 69 (quoting Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1813 (1999)). Hamlet's declaration to Laertes on the latter's return to Elsinore fits Farnsworth's formulation. Hamlet had killed Laertes's father, Polonius, by a blow intended for Claudius, which (compounded by Hamlet's renouncing his affections for her, as part of his plan to unveil Claudius's murder of Hamlet's father) had driven Laertes's sister, Ophelia, mad. Hamlet admitted his guilt and begged Laertes's forgiveness for the unintended consequences of his acts. *See* SHAKESPEARE, *supra* note 58, act V, sc. 2 ("Give me your pardon, sir: I have done you wrong. . . . I have shot my arrow o'er the house and hurt my brother.").

### B. *Proving Mistake*

Notwithstanding the moral allure of the sackcloth-and-ashes approach, "tolerance of the mistakes . . . . is not the norm when alleviation is sought, and reactions are often hostile rather than benign."[82]

> Professions of potentially alleviating mistakes are likely to be met with a jaundiced eye . . . . There is something inherently suspect about an assertion that is made in one's self interest and that is based on one's profession of one's own perception. Skepticism is encouraged by the essentially subjective nature of the assertion and the consequent likelihood of fabrication. [M]istakes are . . . "easily concocted after the event to cover a mere change of mind."[83]

Except in criminal cases,[84] the mistaken party must prove that he made an alleviating mistake, on the basis of which the other party or a court should relieve him of liability.[85]

Recalling that Farnsworth defines a mistake as a flawed perception of reality, the challenge for the party seeking relief typically is proving that his perception was flawed at the relevant time, rather than proving what "objective reality" was then or is as of the date of trial.[86] This can be tricky business. "[F]or a legal system that generally favors outward appearances over internal reflections. . . . an inquiry into a party's perception . . . puts both the adversary and the trier of fact at a distinct disadvantage," (p. 75), often compelling them to rely more on circumstantial evidence than they might otherwise.[87]

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82. P. 71. Consider Laertes's reception of Hamlet's aforementioned apology:

> [I]n my terms of honour I stand aloof; and will no reconcilement till by some elder masters, of known honour, I have a voice and precedent of peace to keep my name ungored. But till that time I do receive your offer'd love like love, and will not wrong it.

SHAKESPEARE, *supra* note 58, act V, sc. 2. And yet, as he speaks these words, Laertes knows that his envenomed blade awaits the chance to strike at Hamlet. And strike it does—thus "wronging" Hamlet's proffered love—and then strikes back at Laertes, bringing both protagonists to their end before any "elder masters of known honour" can hear Laertes's dispute and adjudge Hamlet's defense. *Id.*

83. P. 71 (quoting PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 148 (1985)).

84. A criminal defendant "bears the initial burden of producing some evidence to raise a . . . mistake of fact, and once the defense is raised, the State bears the burden of persuasion to disprove the defense." *In re* S.S., 167 S.W.3d 108, 114 (Tex. Crim. App. 2005). The disproof need not be direct but may be implied from affirmatively proving mens rea. *See, e.g.*, United States v. Iron Eyes, 367 F.3d 781, 785 (8th Cir. 2004); Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002).

85. *See, e.g.*, Hess v. Ford Motor Co., 41 P.3d 46, 52 (Cal. 2002); Smith v. First Choice Serv., 580 S.E.2d 743, 748 (N.C. Ct. App. 2003); Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990).

86. P. 75 ("[T]he issue is not usually 'what is the true fact' but rather 'the belief of the parties in the supposed true fact.'" (quoting Kirchgestner v. Denver & R.G. W.R. Co., 218 P.2d 685 (Utah 1950), *vacated on other grounds on rehearing*, 233 P.2d 699 (Utah 1951)).

87. *See* pp. 77–78; *see, e.g.*, Bishop v. Clark, 54 P.3d 804, 812 (Alaska 2002) (relying on evidence that the only property that could have been the subject of the parties' agreement was sold in February 1996 to reform the agreement, which referred to property sold "after June 7, 1976"); Sherwood v. Walker, 33 N.W. 919, 923 (Mich. 1887) (affording great weight to the fair market value of breeding and nonbreeding cows to conclude that the parties must have mistakenly believed the

In light of the skepticism that attends claims of alleviating mistake and the difficulty that adjudicating such claims poses for our judicial system, Farnsworth expresses surprise—and, given that he devotes most of a chapter to considering "solutions," (pp. 76–84), one imagines some degree of dissatisfaction—that courts seem generally unwilling to impose a heavier-than-normal burden of proof on the mistaken party seeking alleviation (p. 75). Indeed, Farnsworth implies a lighter-than-normal burden in cases in which a party seeks restitution of money paid by mistake.[88] The only heightened standard he notes is in cases in which the mistaken party seeks to *reform* one or more terms of an agreement. In those cases, courts "have consistently applied a 'clear and convincing' standard,"[89] rather than the "preponderance of the evidence" standard generally applicable to parties seeking rescission.[90] Farnsworth finds no evidence of courts allowing the prosecution to negate a criminal defendant's claimed alleviating mistake with anything less than proof beyond a reasonable doubt (p. 77).

Although courts have generally been unwilling to demand more exacting proof of mistake, and scholars are divided on whether courts should, Farnsworth finds that courts have exhibited more of an inclination toward "covert" methods of requiring something more than the legal equivalent of "My bad"—particularly when the mistaken party seeks to have a transaction undone. Among the "covert" methods Farnsworth discusses are (1) barring claims of mistake that are not raised in a timely manner[91] or that are couched

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subject cow to be barren because the price they set was a fair price for a nonbreeding cow but approximately one-tenth the value of a breeding cow); Williams v. Glash, 789 S.W.2d 261, 265 (Tex. 1990) (holding that a prior settlement only covered the claimant's property damage, not her personal injuries, because the settlement was for the exact amount of the property damage to her vehicle, neither she nor the insurer knew about her personal injuries, and the insurer used a check code indicating it was payment for property damage only).

88. Farnsworth explains:

> If a debtor can prove . . . that the payment clearly exceeded the debt, surely the debtor must have mistaken the amount of either the debt or the payment. If a debtor can prove that the same debt was paid twice, surely the debtor must have forgotten the first payment and made the second by mistake. Absent some defense, such as detrimental reliance by the recipient, such claims are routinely granted.

P. 75. *But see, e.g.*, Eifler v. Shurgard Capital Mgmt. Corp., 861 P.2d 1071, 1078 (Wash. Ct. App. 1993) (holding that, absent "at least slight evidence" of precisely when the bailor's car disappeared, the bailor could not prove, by a preponderance of the evidence, that he was entitled to a refund of any of the monthly storage payments he made to the bailee prior to discovering the car's disappearance).

89. Pp. 76, 79–80; *e.g.*, Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P., 794 A.2d 1141, 1150 (Del. 2002); Fisher v. State Bank of Annawan, 643 N.E.2d 811, 814 (Ill. 1994); Heart River Partners v. Goetzfried, 703 N.W.2d 330, 337 (N.D. 2005); Easton v. Washington County Ins. Co., 137 A.2d 332, 337 (Pa. 1957).

90. *See, e.g.*, Lanum v. Shellans, 523 F. Supp. 326, 330 (W.D. Va. 1981); Benz v. New York, 266 N.Y.S.2d 684, 684 (N.Y. App. Div. 1966); McGinnis v. Cayton, 312 S.E.2d 765, 770 (W. Va. 1984). *But see, e.g.*, Dennett v. Kuenzli, 936 P.2d 219, 226 (Idaho Ct. App. 1997); Brenco v. S.C. Dep't of Transp., 609 S.E.2d 531, 534–35 (S.C. Ct. App. 2005) (requiring a party seeking to rescind a contract to prove mistake by "clear and satisfactory" and "clear and convincing" evidence, respectively).

91. P. 82; *supra* notes 70–71 and accompanying text.

in "vague and imprecise terms,"[92] (2) limiting relief from unilateral mistakes to cases of mistaken expression[93] (while allowing relief for both mistaken expression and mistaken assumption in cases of mutual mistake), (3) requiring that the mistake be about a "basic" assumption and not just a "material" one,[94] and (4) tending not to excuse mistakes of law.[95] Echoing Karl Llewellyn's admonition that "[c]overt tools are never reliable tools,"[96] Farnsworth finds each of the foregoing to be worth mentioning but none to be a significant impediment to a party who can legitimately claim an alleviating mistake.[97]

### C. *Causation*

Causation in mistake cases involves a three-step inquiry. First, did the mistaken party's flawed perception cause her to make a faulty decision? Second, did her faulty decision prompt her to act or refrain from acting? And third, did her act or failure to act result in a particular untoward consequence? (p. 85). While escaping liability due to an alleviating mistake requires proving—by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt (depending on the context)—that the answer to all three questions is "yes," Farnsworth focuses his inquiry on the first step, as it is uniquely relevant to assessing the legal consequences of an alleviating mistake (p. 86).

Contracts, voluntary transfers, many crimes, and many torts require intent for liability to attach. We test intent at the time of the relevant action. Testing intent at the time of decision ignores the fact that, between decision and action, a party may change her mind—in essence, retracting her decision by not acting upon it. Therefore, a flawed perception can only negate

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92. P. 82; *see, e.g.*, Schaffner v. 514 West Grant Place Condo. Ass'n, 756 N.E.2d 854, 864 (Ill. App. Ct. 2001); Best v. Ford Motor Co., 557 S.E.2d 163, 166 (N.C. Ct. App. 2001), *aff'd*, 562 S.E.2d 419 (N.C. 2002).

Farnsworth cites *Hattiesburg v. Cobb Brothers Construction Co.*, 184 So. 630 (Miss. 1938), in support of this proposition. However, *Cobb Brothers* is, at best, tangentially related—applying, as it does, to a public works bidder's right to rescind its bid prior to the award of the contract, in which context the mistaken bidder has an affirmative duty to inform the public entity of the specific mistake in the bid. *See id.* at 631–32; *accord* A&A Elec., Inc. v. City of King, 126 Cal. Rptr. 585, 590 (Cal. Ct. App. 1976). No such duty to inform applies generally to a party seeking to rescind a contract or voluntary transfer on the basis of mistake.

93. P. 83; *see, e.g.*, Wright v. Sampson, 830 N.E.2d 1022, 1028 (Ind. Ct. App. 2005).

94. P. 83; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 152 cmt. b; *see, e.g.*, United States v. Cieslowski, 410 F.3d 353, 362 (7th Cir. 2005); Hillside Assocs. of Hollis, Inc. v. Maine Bonding & Cas. Co., 605 A.2d 1026, 1030 (N.H. 1992).

95. Pp. 83–84; *see, e.g.*, Mills v. Equicredit Corp., 344 F. Supp. 2d 1071, 1077–78 (E.D. Mich. 2004) (voluntary payment); Foster v. Carolina Marble & Tile Co., 513 S.E.2d 75, 78 (N.C. Ct. App. 1999) (contract); State v. Wallace, 124 P.3d 259, 262–63 (Utah Ct. App. 2005) (unlicensed sale of securities).

96. Karl N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939) (reviewing OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)).

97. *See* p. 84.

intent if the flawed perception persists "until it is too late to retract the faulty decision and not take the action" (p. 87). Furthermore, if the party retains the right and the ability to retract the action for some period of time, then the misperception must persist until the party can no longer retract the action (p. 87).

A flawed perception that negates intent relieves the mistaken party of liability and moots the question of causation (p. 89). "This is true not only when a flawed perception negates the intent required for an intentional offense but also where it negates the intent required for a consensual transaction" (p. 90). Whether a flawed perception negates intent depends on the type of intent required for a particular form of liability. Certain types of liability require *action intent*—the intent to take the action that caused the untoward consequence; other types of liability require *consequence intent*—the intent to cause the untoward consequence.[98] Voluntary transfers require the transferor's intent to pass ownership to the transferee (p. 91); whereas consensual transactions require only the parties' intent to manifest assent.[99]

How do we tell whether a mistaken party's flawed perception divested him of the requisite action or consequence intent? First, the flawed perception must result in a decision (p. 94). Second, the flawed perception must be a discernable cause of the faulty decision.[100] This becomes problematic when the mistaken party acts for more than one reason, only one of which is the flawed perception from which he seeks relief. In such cases, the question is: "Did the flawed perception play a sufficient part in reaching the decision to meet the test of causation?"[101] Farnsworth considers three alternatives for

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98. Pp. 87–89 (distinguishing between, *inter alia*, the tort of trespass to land, which requires only the intent to enter onto the land in question, and criminal trespass, which requires that the trespasser know that he has no legal right to be on someone else's land).

Farnsworth elaborates using Glanville Williams's hypothetical in which a club member takes the last umbrella from the stand, thinking it is his, when in fact it is not, although he would have taken the umbrella even if he had not thought it was his. Suppose he was subsequently arrested and charged with petit larceny, which requires the intent to deprive the true owner of her property without consent. Did he have action intent? Yes, he intended to take the umbrella from the stand and did so. Did he have consequence intent? No, he thought the umbrella was his; therefore, he did not intend to deprive the true owner of her property without consent. Williams agreed that criminal liability ought not attach, even though the accused would have taken the umbrella had he not thought it was his. *See* pp. 89–90 (discussing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 70 (2d ed. 1961)). Nonetheless, the umbrella thief would still be liable for the tort of conversion, which requires only action intent. *See* p. 90.

99. *See* pp. 91–92; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 21. Thus, in *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), discussed *supra* notes 8–9 and 87 and accompanying text, any mistake that one or both parties made regarding the cow's ability to breed did not negate their required intent to buy and sell that particular cow at the agreed price; it "went instead to the underlying assumption that [she] was barren." P. 92.

100. Sometimes, this is fairly obvious. *See id.* ("If the payor's decision to make the payment follows the debtor's flawed perception that there is a debt to be discharged, there is usually little doubt that it was the debtor's flawed perception that caused the decision."). At other times, it is not—as the discussion that follows briefly illustrates.

101. P. 95. Answering this question is made all the more difficult because "the inquiry is purely subjective, for what caused the decision depends on what went on in the mind of the mistaken person." *Id.*

determining causation in these mixed-motive cases:[102] attribution theory, a "but-for" test, and a "substantial factor" test.

According to *attribution theory*, people "infer the cause of an action from what they know of the individual and of the circumstances."[103] Suppose a man has the habit of taking other people's umbrellas from his club. If he does so in a particular instance and, when confronted, protests that he mistakenly believed the umbrella was his, do we attribute his actions to his larcenous tendencies or to his mistaken belief? Attribution theory does not provide a clear answer.

The *but-for test* asks whether the party would have made the same faulty decision but for his flawed perception (pp. 96–97). If the umbrella filch would have taken the other person's umbrella regardless of whether he mistakenly believed it to be his own, then we cannot say that, but for his mistaken belief, he would not have made the faulty decision. Therefore, his flawed perception did not cause his faulty decision.

The *substantial factor test* "asks whether the flawed perception was a substantial factor in reaching the faulty decision" (p. 97). If the umbrella filch took the umbrella thinking it was his own (despite the fact that he likely would have taken it without the misperception), his flawed perception would appear to have contributed substantially to his faulty decision. Applying the variation of the substantial factor test that a plurality of the U.S. Supreme Court used in *Mount Healthy City School District Board of Education v. Doyle*,[104] the umbrella filch need only prove that his mistaken belief was *a* (not *the*) "motivating factor" in his faulty decision to take the other person's umbrella.[105]

Farnsworth decries the substantial factor test as "infuriatingly vague, especially when applied to the link between perception and decision" (p. 95), and clearly favors the but-for test, despite the many criticisms leveled at it.[106] At least in cases in which the claimant need only establish causation by a preponderance of the evidence, the but-for test is not demanding and claimants rarely fail to meet it.[107] As is true when proving mistake,[108] proving

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102. It seems that these tests would be equally useful in ascertaining a party's hidden motive, regardless of whether the hidden motive is the sole or only a contributing one.

103. Pp. 95–96; *see* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 179 (Leonard Berowitz ed. 1977).

104. 429 U.S. 274 (1977).

105. *See id.* at 287.

106. *See* pp. 98–99 (arguing that some of the principal objections to applying the but-for test to the link between action and consequence do not hold when testing the link between perception and decision).

107. P. 99; *see, e.g.*, State *ex rel.* Mathes v. Gilbreath, 181 S.W.2d 755, 757 (Tenn. 1944); Simonson v. Fendell, 675 P.2d 1218, 1221–22 (Wash. 1984). *But see, e.g.*, United States v. First Dakota Nat'l Bank, 963 F. Supp. 855, 859 (D.S.D. 1997) ("There is no evidence, let alone any reasonable evidence, to show that First Dakota would not have assumed the unknown tax obligation under all the circumstances. They would have assumed it and they did assume it."), *aff'd*, 137 F.3d 1077 (8th Cir. 1998).

108. *See supra* note 87 and accompanying text.

causation often turns on circumstantial evidence and on reasonable inferences drawn from circumstantial evidence (p. 100). In some cases, subsequent acts or inaction or the substantiality of a mistake will "reinforce the inference that the flawed perception caused the decision" (pp. 100–01).

### D. *Relevance*

A causal link between a mistake and the untoward consequence is necessary, but not sufficient, to entitle the mistaken party to relief.[109] With certain exceptions, criminal, tort, contractual, and restitutionary liability are not absolute or strict; rather, they are subject to alleviation based upon, among other things, proof of a *relevant* mistake.[110] An alleviating mistake is generally relevant only if the substantive law makes the mistaken party's mental state relevant.[111]

Most crimes and torts require scienter. For an alleviating mistake to be relevant, then, it must negate scienter.[112] The Model Penal Code and the *Restatement (Third) of Torts* distinguish between acting purposefully and knowingly: a party acts *purposefully* by consciously seeking to cause a particular result; a party acts *knowingly* if she is "practically (or substantially) certain" that her conduct will cause a particular result.[113] Either is sufficient for most forms of criminal and tort liability.[114] Curiously, Farnsworth opines that mistake only affects whether conduct is knowing, not whether it is

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109. *See* p. 111. *See generally In re* Jennings, 95 P.3d 906, 920 (Cal. 2004) ("As a general matter, . . . a mistake of fact defense is not available unless the mistake disproves an element of the offense.").

110. *See* pp. 109–10. Why? Perhaps because, as H.L.A. Hart wrote, we "value a system of social control that takes mental conditions into account," H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 35 (1968), or because "if a legal system generally refused to allow" people to avoid liability for contracts formed or transfers made under mistake, "people might be too hesitant in making agreements and dispositions by transfer," p. 110.

111. *But see, e.g.*, *Jennings*, 95 P.3d at 922–23 (holding that, while the prosecution was not required to prove scienter to secure a conviction on the charge of selling alcohol to a minor, the defendant was, nonetheless, entitled to raise as a defense his mistaken belief that the buyer was at least twenty-one years old).

112. P. 112 ("[I]f 'an actor honestly and reasonably, although mistakenly, believed the facts to be other than they were, and if his conduct would not have been criminal had the facts been as he believed them to be, then his mistake is a defense if he is charged with a crime which requires '*mens rea*.'" (quoting JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 756 (1940)). The key is the defendant's state of mind *at the time of the offense*; information learned after the fact is irrelevant to establishing an alleviating mistake. *See, e.g.*, Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981).

113. MODEL PENAL CODE, *supra* note 55, § 2.02(2)(a)-(b); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 1 (Proposed Final Draft No. 1, 2005). The Model Penal Code uses the linguistically unfortunate term "purposely." In common parlance, a person does not act "purposely," she acts "on purpose," "with purpose," or "purposefully." Older editions of *Black's Law Dictionary* favored "purposely" over "purposefully." *See, e.g.*, BLACK'S LAW DICTIONARY 1112 (5th ed. 1979). More recent editions define neither, but define "purpose" and "purposeful" in such a way that suggests "purposefully" is the preferred current usage. *See, e.g.*, BLACK'S LAW DICTIONARY 1271–72 (Bryan A. Garner ed., 8th ed. 2004).

114. P. 113; MODEL PENAL CODE, *supra* note 55 § 2.02(2)(a)-(b).

purposeful.[115] If he is correct, the law would not excuse a mistaken party for a purposeful action. However, Farnsworth's position is at odds with the Model Penal Code, which recognizes a mistake as a defense to criminal liability if it "negatives the *purpose*, knowledge, belief, recklessness or negligence required to establish a material element of the offense."[116] A flawed perception will not excuse the mistaken party if, had the facts been as he perceived them to be, he would still have been guilty of the crime or tort of which he stands accused.[117] Nor will a flawed perception excuse a mistaken party if it relates to a nonmaterial element of the crime or tort (p. 114).

With respect to voluntary transfers and contracts, the question is "whether the mistake . . . impair[ed] the mistaken party's judgment so . . . as to justify relief" (p. 115). The *Restatement (Third) of Restitution and Unjust Enrichment* authorizes rescinding a voluntary transfer if a mistake "frustrates or obstructs the normal exercise of [the transferor's] judgment."[118] Must the transferor's frustrated or obstructed judgment unjustly enrich the transferee (or a third party)? Must any unjust enrichment be at the transferor's expense? Farnsworth answers the first question with a definitive "No." His answer to the second question is more equivocal.[119] A transferor's mistaken belief that she owes the money transferred is sufficient, but not necessary, to justify relief. Provided that the transferor does not bear the risk of mistake, any mistake that causes her to make the transfer gives rise to a *prima facie* right to reverse the transfer,[120] which the transferee must overcome by proving that the transferor did not act based on mistake (p. 121). On the other hand, there is no mistake if, "in a spirit of compromise, one pays a debt in the face of uncertainty as to whether it is owed" (p. 121).

Rescinding a contract or other agreement is more complicated because we must account for the ex ante intent of someone other than the mistaken

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115. P. 113. Thus, "[t]he mistake must negate the doctor's awareness that the action would be practically certain to have the consequence of causing 'the death of another human being.'" *Id.*

116. MODEL PENAL CODE, *supra* note 55 § 2.04(1)(a) (emphasis added); *see also, e.g.*, United States v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995) (holding that the defendant may have lacked criminal intent, despite knowingly participating in the purchase of a large quantity of cocaine, if she genuinely believed the person she was aiding was an undercover government agent).

117. P. 114. Thus, when Hamlet slew Polonius (who was hiding behind an arras), mistakenly believing him to be Claudius, *see* SHAKESPEARE, *supra* note 58, act III, sc. 4 ("Thou wretched, rash, intruding fool, farewell! I took thee for thy better."), Hamlet would not have been excused. Murder is "purposely or knowingly" causing "the death of *another* human being," MODEL PENAL CODE, *supra* note 55 §§ 210.1(1) & 210.2(1)(a) (emphasis added), not any particular human being. On the other hand, had Claudius not perished from his own damned potion, *see* SHAKESPEARE, *supra* note 58, act V, sc. 2, he may have been excused for murdering Gertrude—on the ground of accident, not mistake—when she drank the draught intended for Hamlet. *See* p. 114 n.28.

118. RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5 cmt. c (Tentative Draft No. 1, 2001); *see also* BIRKS, *supra* note 83, at 147 (writing that the relevant inquiry is the extent to which the transferor's "judgment was vitiated").

119. *Compare* p. 118 ("[C]ourts have allowed reversal even though the recipient's gain may not have been at the transferor's expense.") *with* p. 118 ("[A] transferor is not entitled to relief for mistake if the transferor has sustained no loss as a result of the mistake.").

120. Pp. 119–20. In essence, relevance has collapsed into causation. P. 120.

party. Early cases rescinding contracts on the ground of mistake focused on mistakes about the nature of the transaction, the subject matter of the transaction, or identity of the other party to the contract (pp. 124–26). A mistake about some quality of the subject matter generally did not warrant rescission, unless the mistake changed the very nature of the subject matter.[121] Contemporary courts have exhibited greater willingness to consider more types of mistakes than their forebears and significantly relaxed the relevance test to the point that "reversal is available for a mistake 'as to a basic assumption on which the contract was made'" and no longer limited to situations in which the subject of the contract was a "different" thing or the parties did not intend to be bound to contract for what actually transpired.[122] An interesting aspect of courts' shift to a "basic assumption" analysis is its inherently subjective nature.[123]

As a general rule, contemporary courts persist in denying rescission for mistakes of value unless the mistake of value also affects a more fundamental element of consideration.[124] Farnsworth complains: "There is no sound reason why a flawed perception of reality . . . should not be relevant merely because it results in a poor estimate of value. In a case such as [*Sherwood v. Walker*], the significance of a mistake as to 'quality' is that it affects 'value'" (p. 130). While the distinction between "quality" and "value" is largely artificial (one can certainly imagine a case in which quality would be substantially different without affecting value), Farnsworth's suggestion that a mistake is irrelevant "merely because it results in a poor estimate of value" would be better phrased "merely because it *solely* results in a poor estimate of value." A mistake of value is not disqualifying; it is simply not sufficient unless it has "a material effect on the agreed exchange of performances."[125]

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121. *See, e.g.*, Sherwood v. Walker, 33 N.W. 919, 923 (Mich. 1887) ("[T]he mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one.").

122. P. 127 (quoting RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 152).

123. As Farnsworth explains:

> The terminology 'basic assumption on which the contract was made' looks to whether the mistake affected the fundamental expectations of the parties. . . . The inquiry, like that into causation, is one into a purely subjective matter of fact. . . . But while the inquiry as to causation focuses only on the party seeking to avoid for mistake, the inquiry as to relevance focuses on the understandings of both parties.

P. 129.

124. *See, e.g.*, Moratzka v. Loop Corp. (*In re* Health Risk Mgmt., Inc.), 319 B.R. 181, 187 (Bankr. D. Minn. 2005); Gardner v. Tyson (*In re* Gardner), 218 B.R. 338, 348 (Bankr. E.D. Pa. 1998); Gartner v. Eikill, 319 N.W.2d 397, 399 (Minn. 1982); Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, ¶¶ 24–27, 5 P.3d 554, 559.

125. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 152. As the Michigan Supreme Court explained nearly a century after *Sherwood v. Walker*:

> [T]he inexact and confusing distinction between contractual mistakes running to value and those touching the substance of the consideration serves only as an impediment to a clear and helpful analysis for the equitable resolution of cases in which mistake is alleged and proven. . . .

As was the case with mistaken transfers, the party seeking to rescind a contract for mistake need not prove that the other party was unjustly enriched.[126]

Only the party seeking relief from liability for an intentional crime or tort or from a mistaken transfer need have been mistaken at the relevant time. Will a unilateral mistake suffice to relieve a party from liability for a contract or other agreement? Traditionally, unless one party knew or had reason to know of the other's mistake, contract law only afforded relief when both parties were mistaken about the same basic assumption; otherwise, the expectation interest of the unaware, unmistaken party could be upset by a mistake she did not share.[127] More recently, the tide began to turn in favor of excusing unilateral mistakes about a basic assumption that had an adverse material effect on the mistaken party—a development that Corbin endorsed,[128] the *Restatement (Second) of Contracts* canonized,[129] and numerous courts have since adopted.[130] While not unreservedly embracing alleviating unilateral mistakes,[131] Farnsworth defends them in the case of mistaken *expressions*.[132] Unfortunately, other than perhaps implicitly endorsing the lessons of *Restatement (Second) of Contracts*[133] and *Donovan v. RRL*

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> [W]e think the better-reasoned approach is a case-by-case analysis whereby rescission is [only] indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties.

Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 209 (Mich. 1982).

126. Pp. 131–33; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 152 cmt. c.

127. *See* pp. 133–34 and sources cited therein.

128. 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 608 (1960).

129. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 153.

130. JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.27 (5th ed. 2003) (collecting cases).

131. *See* p. 135 ("[A]ll would agree that even if it is not essential that the mistake be shared, it is essential that the other party was aware of the significance attached by the mistaken person to the subject of the mistake."). The *Restatement (Second)* imposes no requirement that the nonmistaken party have been aware how important the subject of the mistake was to the mistaken party, *see* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 153, nor does the considerable body of domestic case law that has applied the *Restatement (Second)*'s test. Those cases that discuss the nonmistaken party's actual or constructive knowledge focus on knowledge *of the mistake*, not of the importance of the subject about which the mistaken party was mistaken.

132. Farnsworth writes:

> Clerical errors are usually discovered sooner than judgmental errors.... [R]eliance is often negligible ... [C]lerical errors are usually relatively easy to verify. There is force to the argument that there is "no need for ... pushing through a contract tarnished by mistake, particularly so long as the promisee has not acted in reliance on its validity.

Pp. 135–36 (footnotes omitted) (quoting Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 429 (1964)).

133. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 153 (affording relief from an innocent unilateral mistake about a basic assumption that would have a material adverse effect on the agreed exchange of performances).

*Corp.*[134] by referring to them, Farnsworth does not expound on the desirability of alleviating unilateral *judgmental* mistakes.

What of mistakes of law? Criminal law pays great deference to the ancient maxim that "Ignorance of the law is no excuse."[135] Courts and commentators have justified criminal law's adherence to this credo on the grounds that (1) everyone should know the law, (2) criminal law "reflects common notions of morality," and (3) allowing criminal defendants to seek refuge in ignorance of the law would invite insincerity, which would be difficult to overcome because of the heightened burden of proof in criminal prosecutions.[136] Farnsworth takes issue with each of these arguments.[137] He finds greater justification for the maxim in tort law.[138]

*Ignorantia juris non excusat* traditionally applied to attempts to rescind an agreement or voluntary transfer based on a mistake of law.[139] Since the 1930s, however, the disparate treatment between mistakes of law and mistakes of fact has been eroding,[140] although many courts still cling to the distinction[141] despite the fact that the *Restatement* and *Restatement (Second)*

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134. 27 P.3d 702, 716–24 (Cal. 2001) (holding that the sales price listed in a newspaper advertisement for a particular automobile was mistaken, due to typographical and proofreading errors made by the newspaper's employees, excusing the seller from liability based on the incorrect price).

135. *See, e.g.*, State v. Surette, 876 A.2d 582, 585 (Conn. App. Ct. 2005); Wien v. State, 882 A.2d 183, 190 (Del. 2005); State v. Jacobson, 697 N.W.2d 610, 615 (Minn. 2005).

136. Pp. 139–42. *See generally* Atlas Realty Corp. v. House, 192 A. 564, 567 (Conn. 1937) ("The familiar legal maxims, that everyone is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the idea [behind] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds.").

137. Pp. 140–41 ("[O]ne cannot possibly know all the law, and the maxim seems particularly arbitrary and harsh when applied to minor regulatory crimes involving conduct that is not inherently immoral . . . . Furthermore, it is not always a simple matter to *find* the relevant criminal law." (emphasis added)). Moreover, "it is as easy . . . to simulate ignorance of facts as of law" and "a man's knowledge of the law is [no] harder to investigate than many questions which are gone into." P. 142 (quoting WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 91 (1893), and OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1881)).

138. P. 142 (quoting KEENER, *supra* note 137, at 91).

139. *See* pp. 141–42.

140. *See* pp. 143–45; *see, e.g.*, *In re* M.D., 42 P.3d 424, 436 (Wash. Ct. App. 2002) ("[M]istakes about a party's 'antecedent rights' which form the basis of an agreement [are] mistakes of fact which . . . constitute grounds for avoidance."); Webb v. Webb, 301 S.E.2d 570, 575 (W. Va. 1983) (acknowledging that a mistake of law does not normally permit the avoidance of an obligation, but recognizing an exception if "the mistake is mutual, or common to all parties to the transaction, and results in a written instrument which does not embody the 'bargained-for' agreement of the parties").

Some states have codified the right to relief from contracts formed or transfers made under a mistake of law. CAL. CIV. CODE §§ 1566–67, 1576, 1578 & 1689(b)(1) (West 1982); GA. CODE ANN. §§ 23-2-21 to -22 (1982); MONT. CODE ANN. §§ 28-2-401(1)(e), -408 & -410 (2005); N.D. CENT. CODE §§ 9-03-01 to -03, -12 & -14 (1987); OKLA. STAT. ANN. tit. 15, §§ 51–53, 64 & 64 (1996); S.D. CODIFIED LAWS §§ 53-4-1, -8 & -10 (1990).

141. *See, e.g.*, Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland, 811 N.E.2d 425, 435 (Ind. Ct. App. 2004) (refusing to recognize a party's right to rescind due to a mistake of law absent fraud, duress, or other untoward conduct); Burggraff v. Baum, 720 A.2d 1167, 1169 (Me.

*of Contracts* and the *Restatement (Third) of Restitution and Unjust Enrichment* repudiate the law–fact distinction.[142] Courts sometimes struggle with law–fact distinction,[143] and even those that have abandoned the distinction in most instances continue to refuse to excuse certain mistakes of law.[144] As a general proposition, however, contemporary courts are more willing to excuse mistakes of law in contractual and quasi-contractual transactions than were their forebears.

### E. *Types of Relief*

Farnsworth distills the relief available for (alleviable) alleviating mistakes into two principal remedies: reversal and forgiveness. *Reversal*—legally undoing the mistaken act or decision—is Farnsworth's preferred remedy for a mistake that causes a party to enter into a consensual transaction, such as a contract or transfer of money by will, trust, or deed (pp. 12–16). Farnsworth prefers *forgiveness*—escaping legal responsibility for one's mistake—for a mistake that causes a party to commit an intentional offense, such as a tort or crime.[145] Farnsworth likens alleviating mistakes that are eligible for reversal or forgiveness to H.L.A. Hart's "invalidating" and "excusing" mistakes, respectively.[146] Farnsworth explains: "Relief in the case of an 'invalidating' mistake involves reversing the effect of the action that caused the untoward consequence. . . . Relief in the case of an 'excusing' mistake consists of forgiveness of the action that caused the untoward consequence" (pp. 12–13).

Reversal is easy enough to understand for one versed in the law of contracts or in equity, in which reversal typically manifests as rescission or reformation.[147] Examples abound of courts rescinding contracts, instruments,

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1998) (same); Foster v. Carolina Marble & Tile Co., 513 S.E.2d 75, 78 (N.C. Ct. App. 1999) (same); Oak Hills Prop. v. Saga Rest., Inc., 940 S.W.2d 243, 246 (Tex. App. 1997) (same).

142. RESTATEMENT OF CONTRACTS § 502 illus. 4 (1932); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6 § 151 cmt. b; RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56 § 5 cmt. g.

143. Pp. 145–46 (discussing courts' disturbing tendency to treat mistaken contract interpretation as a mistake of law).

144. P. 147 (discussing the specific example of time-barred claims for restitution of debts paid and then concluding, more generally, that "[s]uch exceptions remain because of particular considerations, not because of a general distinction between mistakes of fact and those of law").

145. Pp. 12, 16–17. Forgiveness also manifests in contract law and equity when circumstances change after the parties form their agreement or one or both parties begin to perform some act for the benefit of the other. *See* RESTATEMENT (SECOND) OF CONTRACTS , *supra* note 6 §§ 261–65 & 269–72. However, a flawed perception regarding as-yet-unchanged circumstances is a misprediction, not a mistake. *See supra* text accompanying notes 27–32.

146. P. 12 (quoting HART, *supra* note 110, at 29–30, 34).

147. Farnsworth discusses reformation—modifying the parties' rights and obligations to better accord with their (reasonable) ex ante expectations—as a form of reversal rather than as a distinct remedy for an alleviating mistake. Pp. 14, 79–81, 101–03. He explains that reformation is, in essence, undoing the original instrument and then remaking it in accordance with the parties' expectations. P. 14. A party seeking reformation must prove, by clear and convincing evidence, *see supra* note 89, that the agreement or transfer at issue was entered into or undertaken because of a

or transfers because of a mistake.[148] Likewise, courts frequently reform a written contract or other instrument that fails to accurately reflect the parties' or maker's intent.[149] Reversal translates much more poorly into criminal and tort law. A bullet fired into someone—the intended target or not—cannot be unfired. A slip of the surgeon's scalpel cannot be reversed. Malicious words, once publicly uttered, cannot be unspoken. The harm caused by the bullet, the scalpel, or the wicked tongue may be repaired but not avoided. When a mistaken party seeks reversal, Farnsworth contends "the result is generally all or nothing—the law either grants reversal or denies any relief whatsoever" (p. 13). This conclusion seems too cut and dried given the prospect of equitably reforming a contract or other transaction to comport with the parties' actual or reasonable expectations.[150]

Forgiveness is trickier. A party may seek forgiveness because (1) he did not intend to do what he did; (2) his intent to do what he did was based on the mistaken assumption that he had the legal right to do it; or (3) his flawed perception of reality caused his intended act to result in unintended consequences.[151] If a mistaken party seeks forgiveness, Farnsworth again contends that the result "is generally all or nothing—the law either grants forgiveness or denies any relief whatsoever and does not proffer partial relief that mitigates the accountability for an intentional offense" (p. 17). However, unlike cases in which reversal relieves a mistaken party of any liability, forgiveness often leaves open the possibility of liability for a lesser criminal offense or a tort that does not require the same mens rea that the party's mistake negated.[152]

## IV. COUNTERVAILING CONCERNS

> *I'd rather make the mistake of believing her than the bigger one of not.*[153]

Neither reversal nor forgiveness comes without costs. Reversal infringes on finality, which "protect[s] the justified expectations of contracting

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flawed perception of reality *and* that the proposed reformation is the agreement or transfer that it would have undertaken had it not been for the misperception. P. 101.

148. *E.g.*, Pa. Tpk. Comm'n v. K&S Trucking LLC, 362 F. Supp. 2d 598, 604–05 (E.D. Pa. 2005); Barber v. Barber, 878 So. 2d 449, 451 (Fla. Dist. Ct. App. 2004); Villanueva v. Amica Mut. Ins. Co., 864 A.2d 428, 431–32 (N.J. Super. Ct. App. Div. 2005); Millheiser v. Wallace, 21 P.3d 752, 755 (Wyo. 2001).

149. *E.g.*, Peterson v. First State Bank, 737 N.E.2d 1226, 1230 (Ind. Ct. App. 2000); Miller v. Seibt, 788 N.Y.S.2d 126, 127–28 (App. Div. 2004); Laredo Med. Group v. Lightner, 153 S.W.3d 70, 73–74 (Tex. App. 2004).

150. *See, e.g.*, *In re* Owens Corning, 291 B.R. 329, 334 (Bankr. D. Del. 2003) (reforming a contract for sale that could not be rescinded due to the nonmistaken party's use of the goods); Herrmann v. Lindsey, 136 S.W.3d 286 (Tex. App. 2004) (affirming the trial court's reformation of, and refusal to rescind, a deed).

151. *See* p. 16.

152. *See* p. 17.

153. THE INTERPRETER (Universal 2005).

parties" and "assur[es] the resulting property rights" of transfer recipients.[154] Forgiveness infringes on accountability, which protects society from "those whose conduct is deemed culpable" and compensates individuals "for harm inflicted on them or their interests" by another's tortious conduct (p.17). Nonetheless, finality and accountability will yield to a more compelling claim for reversal or forgiveness. How compelling such a claim is may depend on one or more of the following considerations.

### A. *Risk*[155]

A party's ability to reverse, or be forgiven for, a mistake may turn on whether she assumed the risk of mistake (p. 149). Risk counterbalances relevance. Relevance "seeks to protect the parties' *actual* expectations," whereas risk accounts for the parties' *reasonable* expectations (p. 150).

Both the *Restatement (Second) of Contracts* and the *Restatement (Third) of Restitution and Unjust Enrichment* generally deny relief to a party that assumes the risk of mistake.[156] A party may assume the risk of a mistake by the express terms of a contract or transfer,[157] by implication,[158] or as a matter of law.[159] Most contracts and instruments of transfer do not expressly allocate the risk of mistake,[160] and courts are not always receptive to those that try to do so (p. 152). The facts supporting implied risk assumption often resemble those that would also support a finding of no mistake based on conscious ignorance.[161] Fortunately, Farnsworth argues, both Restatements

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154. P. 16. The latter argument makes perfect sense; the former seems suspect. The underlying goal of contract law is to give effect to the intent of the parties *at the time they entered into their agreement*, not to protect the windfall realized or realizable by one party as a result of the other party's mistake at the time they entered into their agreement.

155. Farnsworth uses "risk" to mean *responsibility* for, rather than *probability* of, a mistake. P. 149.

156. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 152(1) & 153; RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5(2)(b).

157. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 154(a); RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5(3)(b); *see, e.g.*, Dickerson v. Williams, 956 P.2d 458, 466 (Alaska 1998); Gloucester Landing Assocs. v. Gloucester Redev. Auth'y, 802 N.E.2d 1046, 1055 (Mass. App. Ct. 2004).

158. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 154(b); RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5(3)(b)-(c); *see, e.g.*, Moratzka v. Loop Corp. (*In re* Health Risk Mgmt., Inc.), 319 B.R. 181, 188 (Bankr. D. Minn. 2005) (holding that a party who reserved the right to perform due diligence prior to being bound assumed the risk of mistake when it elected to proceed without the due diligence); Geodyne Energy Income Prod. P'ship I-E v. Newton Corp., 161 S.W.3d 482, 491 (Tex. 2005) (holding that a purchaser by quitclaim deed assumed the risk that the transferor's interest was not unblemished).

159. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 154(c); RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5(3)(a); *see, e.g.*, Estate of Nelson v. Rice, 12 P.3d 238, 242 (Ariz. Ct. App. 2000) (finding the trial court's decision to allocate the risk of mistake to the appellant reasonable under the circumstances).

160. P. 151 ("[C]ontracting parties rarely focus their thoughts on the possibility of mistake.... In sharp contrast to the frequent use of *force majeure* clauses to allocate the risk of misprediction, provisions specifically allocating the risk of mistake are ... relatively uncommon.").

161. *See* p. 153; *supra* text accompanying notes 46–54.

treat entering into a consensual transaction with conscious ignorance as a mistake, the risk of which the uninformed party generally bears, rather than as a decision from which there is no possibility of relief for mistake.[162] In general, deciding whether a party has assumed the risk of a mistake, rather than whether she has made a mistake at all, encourages a court to ask whether placing the risk on the mistaken party is consistent with the parties' legitimate expectations and requires a court to balance competing interests for which, in cases of conscious ignorance, it otherwise need not account.[163]

In criminal and tort law, "the role of risk is often expressed in the form of a notion that wrongdoers . . . 'take the risk of their conduct turning out worse than they expected.'"[164] Criminal law's "felony murder" rule[165] and tort law's "egg-shell skull" rule[166] are two well-known examples. Farnsworth complains that the *Restatement (Second) of Torts* addresses the latter by making a tortfeasor's knowledge of—and, therefore, mistake about—the injured party's susceptibility to injury *irrelevant*, rather than making it a relevant fact about which the tortfeasor bears the *risk* of mistake, as Richard Epstein and others have suggested.[167] An unabashed (pun intended) rule of risk assumption can be found in defamation law: one who utters a defamatory statement for the purpose of injuring another is tortiously liable even if the defamatory statement proves to be mistaken (p. 160). As for criminal law, while the "felony murder" rule is clearly couched in terms of risk,[168] Farnsworth complains that common law rules of grading offenses disingenuously recast what should be a question of risk assumption as a question of (ir)relevance (pp. 160–61). The Model Penal Code, by contrast, relieves an offender of greater liability than he would incur "had the situation been as he supposed."[169]

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162. *See* p. 153; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, §§ 154(b); RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5(3)(c).

163. *Id.*

164. P. 158 (quoting GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 9.3.3, at 723 (1978)).

165. *See, e.g.*, State v. Griffin, 112 P.3d 862, 870, 877–79 (Kan. 2005); Commonwealth v. Prater, 725 N.E.2d 233, 241–43 (Mass. 2000); State v. Thacker, 164 S.W.3d 208, 223–24 (Tenn. 2005).

166. *See, e.g.*, Bushong v. Park, 837 A.2d 49, 55 (D.C. 2003); Wilkinson v. Lee, 617 N.W.2d 305, 308–10 (Mich. 2000); Ketteler v. Daniel, 556 N.W.2d 623, 630 (Neb. 1996).

167. P. 159; *see* RESTATEMENT (SECOND) OF TORTS § 16 & illus. 1 (1965); RICHARD A. EPSTEIN, TORTS §§ 1.2 & 1.4.2 (1999). Farnsworth's point is well taken. However, section 16 only addresses intentional torts. Section 461 is its negligence counterpart. *See* RESTATEMENT (SECOND) OF TORTS *supra* § 461. While Farnsworth's discussion of the "egg-shell skull" rule is limited to intentional harms, the rule clearly applies to injuries caused by negligence as well. The *Restatement (Third) of Torts* reorients and expands the rule so that the new provision clearly applies to both intentional and negligent harm and extends from unforeseen harm due to an unknown physical condition to unforeseeable harm due to *any* unknown condition. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL HARM, *supra* note 113, § 31 & cmt. a.

168. *E.g.*, MICH. COMP. LAWS ANN. § 750.316 (West 2004); People v. Patterson, 778 P.2d 549, 551 (Cal. 1989) (en banc); Commonwealth v. Garner, 795 N.E.2d 1202, 1210–11 (Mass. App. Ct. 2003).

169. MODEL PENAL CODE, *supra* note 55, § 2.04(2); *see also* p. 161.

### B. *Fault*

While both "commonsense justice" and efficiency-based jurisprudence argue that a party whose mistake is its own fault should not be afforded the same relief as an innocently mistaken party, Farnsworth finds little evidence that courts deny or restrict relief based on a mistaken party's fault (pp. 184–85). In criminal law, Farnsworth sees reasonableness as the obverse of fault (that is, the more reasonable the mistake, the less likely the defendant was at fault in acting on it)—despite the fact that courts and legislatures have defined the intent required for most crimes so that reasonableness is irrelevant (pp. 187–88). The consent defense to rape is a notable exception. Numerous courts have required that the accused have a *reasonable* belief that the victim consented to sexual intercourse.[170] Farnsworth attributes criminal law's general reluctance to excuse only reasonable mistakes to the availability of "fall-back" liability in the form of lesser criminal offenses or tort liability (p. 189). Likewise, he argues, fall-back negligence liability explains courts' reluctance to excuse only reasonable mistakes by those sued for intentional torts (pp. 189–90). Farnsworth finds tort and criminal law to be more attuned to the mistaken party's fault if fall-back liability is either unsatisfactory, as in the case of rape, or unavailable, as in the case of tortious trespass.[171]

The *Restatement (Second) of Contracts* advocates a no-fault approach to mistakes, except when the mistaken party already bore the risk of mistake or where his fault breaches his duty of good faith and fair dealing.[172] Farnsworth finds that courts tend toward this no-fault approach, except in a small number of cases in which a court denies equitable relief based on the fault of the party seeking it.[173] Similarly, the *Restatement (Third) of Restitution and Unjust Enrichment* advocates ignoring fault[174]—despite a raft of law and economics scholarship advocating rules that create incentives for cautious transferors[175]—except in cases in which the party seeking restitution conferred a nonmonetary benefit.[176]

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170. P. 188; *see, e.g.*, Napoka v. State, 996 P.2d 106, 108 (Alaska Ct. App. 2000); People v. Stitely, 108 P.3d 182, 208 (Cal. 2005); State v. Koperski, 578 N.W.2d 837, 846 (Neb. 1998). Statutory rape appears to be an exception to this exception: the reasonableness of the defendant's belief about the victim's age is generally irrelevant. *See, e.g.*, Neal v. State, 590 S.E.2d 168, 172 (Ga. Ct. App. 2003); Commonwealth v. Dennis, 784 A.2d 179, 182 (Pa. Super. Ct. 2001).

171. Pp. 189–91; *see, e.g.*, Alaska Placer Co. v. Lee, 553 P.2d 54, 58 (Alaska 1976); Nichols v. Georgia Television Co., 552 S.E.2d 550, 552 (Ga. Ct. App. 2001). *But see, e.g.*, Baker v. Newcomb, 621 S.W.2d 535, 537 (Mo. Ct. App. 1981) ("A party is liable in trespass even though acting under a mistaken belief of law or fact, however reasonable.").

172. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 6, § 157.

173. P. 192; *see, e.g.*, Bert Allen Toyota, Inc. v. Grasz, 909 So. 2d 763, 769–70 (Miss. Ct. App. 2005) (refusing to rescind a contract due to a computational error by the party seeking rescission, which it could have detected "in the exercise of reasonable care").

174. RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 5 cmt. f.

175. *See* pp. 192–94 (collecting sources).

176. RESTATEMENT (THIRD) OF RESTITUTION, *supra* note 56, § 9(2).

### C. *Other Countervailing Concerns*

While "[c]laims to forgiveness are confined by considerations of relevance, risk, and fault,"[177] a mistaken party's bid to reverse an alleviating mistake may fail because of some unmistaken party's interest. After briefly discussing the public's interests in judicial and fiscal efficiency and finality (pp. 166–67), Farnsworth turns to the private interests of parties to, and those affected by, contracts and transfers. Third parties' interests may be upset by reversing a contract or transfer for mistake,[178] as may the mistaken party's interest in the reputational value of her promises (pp. 167–68). Farnsworth, however, focuses his attention on the effects of reversing a contract or transfer on the unmistaken promisee or grantee.

The parties, like the public, have an interest in finality. But unlike the public's interest, which Farnsworth describes as rooted in avoiding the costs of (re-)litigation, the parties' finality interest derives from the expectations they form based on a contract or transfer and their justifiable reliance on those expectations (pp. 168–78). Proving reliance on a mistaken transfer is generally easier than proving reliance on a contractual mistake because the former more typically involves the transferee *acting* in reliance,[179] while the latter more typically involves the promisee *refraining* from acting.[180]

## V. CONCLUSION

> *I'd like to make an offer on the house. This is what I can pay, minus the work on the place and a rental car to drive off a cliff when this all turns out to have been a terrible mistake.*[181]

Mistakes are ubiquitous in law, as in life, and the excuses offered to relieve a mistaken party from civil or criminal liability are manifold. In what proved to be his final book, Allan Farnsworth turned his formidable analytical skills, encyclopedic knowledge, intellectual curiosity, and sense of humor (including his choice of Edvard Munch's *The Scream* to adorn the book's dust cover) to the task of, to paraphrase his former colleague and

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177. P. 165. Farnsworth elaborates: "[I]f a mistake is relevant, so that one would otherwise be entitled to forgiveness for a tort or a crime, one does not have to contend with the argument that alleviation is precluded by [a countervailing] concern of the victim." P. 168. But, what of victims' rights? *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 840–52.

178. *See* p. 167; *see, e.g.*, United States v. Certain Parcels of Land in Riverside County, Cal., 67 F. Supp. 780, 807–08 (S.D. Cal. 1946).

179. *See* pp. 170–77; *see, e.g.*, Geller v. Prudential Ins. Co. of Am., 237 F. Supp. 2d 210, 223 (E.D.N.Y. 2002); Wachovia Bank of S.C., N.A. v. Thomasko, 529 S.E.2d 554, 556 (S.C. Ct. App. 2000).

180. *See* pp. 176–77. That said, one can find examples of contracting parties avoiding rescission because they justifiably relied to their detriment on their contracting partner's mistake. *See, e.g.*, Talladega City Bd. of Educ. v. Yancy, 682 So. 2d 33, 35–36 (Ala. 1996); Loyalty Life Ins. Co. v. Fredenberg, 632 N.Y.S.2d 901, 902–03 (N.Y. App. Div. 1995).

181. UNDER THE TUSCAN SUN (Touchstone Pictures 2003).

co-author Carol Sanger, exploring the law's relationship to human error and forgiveness.[182] Farnsworth's exploration was unfinished; it is up to us to continue the journey.

182. Carol Sanger, *Remarks for Allan Farnsworth Memorial*, 105 COLUM. L. REV. 1432, 1435 (2005). Professor Sanger also relates a humorous anecdote about Professor Farnsworth's first choice for the title of this book and his characterization of the publisher's response. *Id.* at 1434.