

# Contract Law and Theory: Three Views of the Cathedral

*Eyal Zamir*<sup>†</sup>

*Reconstructing Contracts*

Douglas G. Baird. Harvard, 2013. 151 pages.

*Contract Law: Rules, Theory, and Context*

Brian H. Bix. Cambridge, 2012. 184 pages.

*Foundational Principles of Contract Law*

Melvin A. Eisenberg. Oxford, forthcoming.

## INTRODUCTION

Quite a few monographs on US contract law have been published in recent years by leading legal scholars. Excluding new editions of books published long ago, these include, in chronological order, books by Professors Randy Barnett,<sup>1</sup> Eric Posner,<sup>2</sup> Gregory Klass,<sup>3</sup> Brian Bix,<sup>4</sup> and Douglas Baird.<sup>5</sup> Professor Melvin Eisenberg's forthcoming volume will soon join the list.<sup>6</sup> This Review discusses the last three books and adds some brief comments on US contract law as reflected in their pages.

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<sup>1</sup> Randy E. Barnett, *Contracts* (Oxford 2010). The book is part of the Oxford Introductions to US Law.

<sup>2</sup> Eric A. Posner, *Contract Law and Theory* (Wolters Kluwer 2011). The book is part of the Aspen Student Treatise Series.

<sup>3</sup> Gregory Klass, *Contract Law in the United States* (Wolters Kluwer 2d ed 2012). The book was originally published as a monograph in the *International Encyclopaedia of Laws*.

<sup>4</sup> Brian H. Bix, *Contract Law: Rules, Theory, and Context* (Cambridge 2012). The book appears in the Cambridge Introductions to Philosophy and Law series.

<sup>5</sup> Douglas G. Baird, *Reconstructing Contracts* (Harvard 2013).

<sup>6</sup> Melvin A. Eisenberg, *Foundational Principles of Contract Law* (Oxford forthcoming 2014). This Review refers to the July 22, 2013, draft of the book.

Writing this Review posed three major challenges. The first challenge is common to any book review. Book reviewers sometimes tend, consciously or unconsciously, to compare the reviewed book to the one that they would have written on the subject rather than evaluating the book on its own terms. Cognizant of this tendency, this Review evaluates each book in light of its declared goals. The second challenge stems from the fact that this Review refers to three books rather than only one. As will become evident, Bix's, Baird's, and Eisenberg's books differ markedly from one another in their scope, goals, and intended audiences. Any attempt to compare the three books' qualities and contributions would thus be futile. Recognizing this futility, this Review assesses each book on its own merits. The third challenge has to do with me. While I am reasonably well versed in US contract law and scholarship, I do not regularly teach or practice American contract law; hence, my perspective is to some extent that of an outsider. Hopefully, this disadvantage also has some positive aspects.

Each of Parts I, II, and III of this Review focuses on one of the books (in the chronological order of their publication). These parts begin with an overview of each author's approach and then look critically at some of the author's arguments that appear incomplete or problematic. Part IV concludes with a few general observations about US contract law as it emerges from these texts.

## I. BRIAN BIX'S *CONTRACT LAW: RULES, THEORY, AND CONTEXT*

### A. An Overview

In his book, Bix provides a general introduction to American contract law and theory. The book is an exemplar of scholarly erudition. Its intellectual horizons range from Roman and medieval English law (pp 5–10) to the intricacies of electronic contracting (pp 28–30). Frequent references to other legal systems significantly enrich the discussion. Bix's command of legal philosophy is second to none, and the book also displays his keen interest in, and familiarity with, economic analysis, behavioral studies, and other interdisciplinary approaches to contract law. The book offers a multifaceted survey of American contract law and provides numerous references to additional sources for the interested reader. The analysis of both the doctrine and the various theories is balanced. Bix accurately depicts the doctrine and

paints an unbiased picture of the main theories of US contract law. Even in chapter 9, in which the author advocates a particular way of theorizing about contract law, he carefully discusses possible counterarguments.

Bix's book is ambitious and modest at the same time. It is ambitious in that it strives to summarize all of US contract law (including pertinent differences among states and between the common law and the Uniform Commercial Code (UCC)), outline the main characteristics of several types of transactions such as insurance and franchise agreements, describe the theories underlying contract law, and defend the claim that any workable theory of contract law must be pluralistic—all in a rather short book. Moreover, the book is intended for use by various audiences, ranging from first-year law students seeking a concise overview of the basic doctrine, to “academics already well established in the field,” who are more interested in contract law's theoretical and historical aspects (p xiii). At the same time, the book—or at least its first eight (out of nine) chapters—is modest in the sense that it is largely descriptive. It gives an evenhanded overview of the doctrine and theory of contract law, including some ongoing debates, while generally declining to endorse any particular normative position, criticize the current doctrine or theory, or propose legal reforms. This combination of ambitiousness and modesty is a major source of the book's strength but also of its limitations, as I discuss below.

The book contains nine chapters. Chapter 1 provides a brief introduction to the philosophical problems of contract law. Chapter 2 concisely presents the history and sources of US contract law. Chapters 3 through 6 succinctly analyze a vast number of general contract law doctrines including contract formation, interpretation, performance, third-party rights, and remedies. The order of the chapters follows the chronological life of a contract, from formation to remedies for breach.<sup>7</sup> Chapter 7 discusses some salient features of specific contracts: employment, insurance, landlord-tenant, real estate, franchise, pre-nuptial, and government contracts. Chapters 3 through 7 focus on

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<sup>7</sup> It seems, however, that chapter 6 (“Enforcement and Remedies”) includes topics that should have been discussed separately, including doctrines pertaining to the validity of contracts and contract terms such as unconscionability and public policy (§ 6.A.2–3), third-party beneficiaries (§ 6.G.1), and assignment of rights (§ 6.G.2). The discussion of third-party rights and duties follows the discussion of damages (§§ 6.B–D), specific performance (§ 6.E), and liquidated damages (§ 6.F), and precedes the discussion of efficient breach (§ 6.I).

the legal doctrine, with a short section on the theoretical implications of the discussion concluding each chapter. Chapter 8 points to the gap between contract law on the books and in practice, provides a bird's-eye view of several contract theories, and discusses the implications of the gap between the paradigms of contract law and actual practices. Chapter 9 discusses metatheoretical questions in some detail: Should theorizing about contract law be based on a single theory or on a multitude of theories? Should it relate to specific legal systems or be general in scope? And should it treat contract law as a whole or tailor different theories to particular transactions? The book contains a comprehensive, twenty-two-page bibliography (pp 163–84).<sup>8</sup>

An introduction to such a vast and complex subject as American contract law inevitably entails a trade-off between depth and breadth. One can choose to focus on relatively few topics, discussing them in some detail and leaving others aside. Or, one can cover a great number of topics and discuss each briefly. Bix clearly opts for the latter approach. The book discusses very many issues, ranging from the English writ system (pp 6–10) to the battle of the forms (pp 25–28). Consequently, the discussion is often terse. For instance, contracts contrary to public policy are discussed in less than one page (p 92), disgorgement remedies are treated in one paragraph (p 100), and the implied warranty of habitability is addressed in just one sentence (p 122). In the theoretical discussion, nonpromissory (reliance and restitution) theories of the type proposed by Professors Lon Fuller, Grant Gilmore, and Patrick Atiyah receive a single paragraph (p 134), as do transfer theories of contract (p 134).

One may wonder whether a book attempting to cover (almost) all of contract law, history, and theory, as well as some metatheoretical issues, can be useful for first-year law students. For didactic purposes, it might have been preferable to discuss fewer topics in greater depth.<sup>9</sup> This would have been especially appropriate in the theoretical part of the book, for which the intended audience is legal scholars (p xiii). As mentioned, chapter 9 is an essay about the adequate level of generality of legal theories (more on this shortly); hence, only chapter 8 systematically discusses contemporary contract theories, but it does so in

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<sup>8</sup> Interestingly, 70 percent of the books and articles on Bix's list (365 out of 519) were published after 1990.

<sup>9</sup> Consider Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* (Foundation 7th ed 2013).

summary fashion.<sup>10</sup> Thus, readers interested in philosophy and law (the title of the series in which the book is published) and in contract theory (mentioned in the book's subtitle) may be disappointed.

Due to lack of space, and because I usually find myself in full agreement with Bix's analyses, I will not discuss most of the book's insightful observations and propositions. Rather, the remainder of this Part focuses on two issues that merit special attention: the measure of damages for breach of contract and the appropriate scope of theories of contract law.

### B. Measuring Damages

Among other things, chapter 6 of Bix's book discusses the possible goals of contract damages (pp 99–102). It states that the injured party must choose between three available measures of damages: expectation, reliance, and restitution (p 99). It then defines expectation damages as meant to put the injured party in the same position that she would have occupied had there been full performance, reliance damages as aimed at putting the injured party in the position that she would have been in had no contract been made, and restitution as designed to put the breaching party in the position that she would have occupied had the contract not been made (p 99). The next three subsections describe each of these measures in turn. In the subsection on expectation damages, Bix mentions disgorgement—"the idea that the breaching party should have to surrender any gains it obtained because of its breach" (p 100). In the subsequent subsection, reliance damages are redefined as "the nonbreaching party's out-of-pocket expenses" (p 100). Bix states that reliance damages are subject to the same constraints as expectation damages—causation, certainty, foreseeability, and mitigation—and that if the breaching party proves that full performance would have resulted in the nonbreaching party losing money, the damages will be reduced by the amount of that loss (p 101). The justification for the last rule is that "one should not do better from litigation than one would from performance" (p 101). Finally, in the subsection on restitution, Bix describes these damages as having "the purpose and effect of putting the breaching party in the same position it would have been in had

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<sup>10</sup> The "Theoretical Implications" sections concluding each of the doctrinal chapters are similarly too short to substantially illuminate the pertinent theoretical issues.

the breach not occurred” (p 101). He further states that this “is in a sense a mirror image of reliance damages, which puts the nonbreaching party in the same position it would have been in had the breach not occurred” (p 101 n 66). Bix characterizes the rule that, unlike reliance damages, restitution in losing contracts is not limited by the injured party’s expectation as an “odd (but widely accepted) doctrine” (p 101).

This analysis calls for a few comments. While Lon Fuller and William Perdue are not mentioned in this context, the threefold classification obviously follows their suggestion.<sup>11</sup> Numerous studies have criticized this classification,<sup>12</sup> pointed to its incompleteness,<sup>13</sup> and even suggested replacing it with alternative classifications.<sup>14</sup> Given its centrality to US contract law, a more thorough analysis of this classification might have been useful. Specifically, some twenty-five years ago, Professor Avery Katz rightly pointed out that if the criteria for classification are (1) whether a measure of damages is forward- or backward-looking, and (2) whether it focuses on the breaching or on the nonbreaching party, then there are analytically four, rather than three, possible goals of contract remedies.<sup>15</sup> The missing goal is to place the breaching party in the same (monetary) position that she would have been in had she fully performed the contract—what has come to be labeled “disgorgement.”<sup>16</sup> As Bix

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<sup>11</sup> See generally L.L. Fuller and William R. Perdue Jr, *The Reliance Interest in Contract Damages: 1*, 46 Yale L J 52 (1936); L.L. Fuller and William R. Perdue Jr, *The Reliance Interest in Contract Damages: 2*, 46 Yale L J 373 (1937). These articles are included in the bibliographical list at the end of Bix’s book (p 170).

<sup>12</sup> See generally, for example, Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 Wis L Rev 1755; David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 Emory L J 1137 (1999).

<sup>13</sup> See generally Avery Katz, *Reflections on Fuller and Perdue’s The Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U Mich J L Ref 541 (1988); Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 Va L Rev 59 (2007).

<sup>14</sup> See generally Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 Md L Rev 1 (1994). See also Richard Craswell, *Against Fuller and Perdue*, 67 U Chi L Rev 99, 154–61 (2000).

<sup>15</sup> See Katz, 21 U Mich J L Ref at 542–47 (cited in note 13).

<sup>16</sup> Katz denoted the fourth interest “liquidated specific performance.” Id at 547, citing *Groves v John Wunder Co*, 286 NW 235 (Minn 1939). For further discussion of disgorgement remedies, see James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* 150–72 (Hart 2002); Eisenberg, *Foundational Principles* at ch 22 (cited in note 6); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 Chi Kent L Rev 55, 70–84 (2003). See also generally Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 Mich L Rev 559 (2006). This will be discussed further in Part III.C.

points out, the status of disgorgement remedies within US (and other) contract law systems is unclear (p 100). Nevertheless, since § 39 of the Restatement (Third) of Restitution and Unjust Enrichment has recognized the availability of disgorgement for deliberate breaches of contract, a more substantive discussion is called for.

More specific concerns arise with some of the descriptions that Bix uses in the present section. Describing reliance as referring to “out-of-pocket expenses” (p 100) is underinclusive. Conceptually (and possibly also doctrinally), reliance also includes forgone opportunities: the profits that the injured party would have made and the losses that she would have avoided had she entered into an alternative contract.<sup>17</sup>

More troubling statements (plausibly mere slips of the pen) are found in the paragraphs on restitution (pp 101–02). Contrary to the assertion that restitution aims at putting the “breaching party in the same position it would have been in had the breach not occurred” (p 101), restitution is conventionally understood, and previously described by Bix (p 99), as backward-looking. That is, it aims to put the breaching party in the position that she would have occupied had the contract not been made in the first place rather than the position that she would have been in had the contract been fully performed (which is the conventional description of disgorgement). A comparable error appears in the clarifying footnote (p 101 n 66), which states that reliance aims at putting the injured party in the position that she would have been in had the breach not occurred. This is the description of the forward-looking expectation interest, not the backward-looking reliance interest.

A more subtle point has to do with the relationship between expectation and reliance. Bix implies that, while the injured party cannot sue for expectation and reliance damages at the same time, she can freely choose between the two, subject to only one constraint: if the breaching party proves that the injured party made a losing contract, the latter’s reliance damages cannot exceed her expectation interest (pp 99, 101). A preferable description seems to be that the major goal of damages for breach of contract under US law is to protect the expectation interest. Since establishing one’s expectation interest with sufficient

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<sup>17</sup> See Fuller and Perdue, 46 Yale L J at 55 (cited in note 11); E. Allan Farnsworth, 3 *Farnsworth on Contracts* § 12.1 at 154 (Aspen 3d ed 2004); Robert Cooter and Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 Cal L Rev 1432, 1440–41 (1985).

certainty may be difficult (one's profits had the contract not been breached are hypothetical and sometimes speculative), the injured party may rely on the assumptions that people enter into contracts in order to make profits, and that contracts are usually profitable. These assumptions imply that one's reliance interest can serve as a minimal approximation of one's expectation interest. The reliance measure—which is often easier to prove and quantify—may thus be used as a means to protect the expectation interest. This explains why, when the assumption that the contract would have been profitable is refuted by the breaching party, reliance damages are capped by the expectation interest.<sup>18</sup> Had the reliance interest played an independent role as a goal of contract damages—putting the injured party in her precontractual position—there would be no convincing reason to cap reliance at expectation.<sup>19</sup>

Finally, there is Bix's characterization of the doctrine that allows the injured party to sue for restitution in excess of expectation as "odd" (p 101). To get a sense of the issue, imagine the following scenario: An owner pays a contractor \$10,000 to perform certain work. The contractor does not perform, and the owner sues for restitution of the sum paid. The contractor proves that the current market price of the work is \$8,000. Assuming no further losses due to the breach, putting the owner in the monetary position that she would have been in had the contract been performed requires awarding her only \$8,000. With this sum she would be able to hire another contractor to do the same work. The alleged oddity is that, in this case, uncapped restitution puts the owner in a better position than she would have been in had the contract been fully performed, which is arguably unfair and inefficient.

Without getting into the details of the debate and the different scenarios in which this question arises, the prevalent doctrine of not capping restitution by expectation seems sound to

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<sup>18</sup> See, for example, Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 21–22 (Harvard 1981); Klass, *Contract Law* at 227–28 (cited in note 3).

<sup>19</sup> See Kelly, 1992 *Wis L Rev* at 1761–73 (cited in note 12) (critiquing Fuller and Perdue's analysis). One could come up with an instrumental justification for capping reliance by expectation—namely, discouraging losing contracts. However, once one moves from corrective justice (Fuller and Perdue's justification for the reliance measure of damages) to instrumental considerations (such as economic efficiency), the latter are unlikely to support the reliance measure of damages in the first place.

me.<sup>20</sup> Indeed, one of the roles of any contract is to allocate risks and prospects between the parties, including the possibility that the object's market price will increase or decrease. This is why, save for extreme cases, each party bears the contractual risks and prospects as allocated. By suing for full restitution—so the argument goes—the owner fails to respect the agreed-on allocation. A possible response to this claim may be that once the contractor reneges on her contractual obligations, she can no longer rely on the contract to deny the injured party's claim for restitution. In this scenario, it is the contractor rather than the owner who has failed to respect the agreement. Allowing the breaching party to keep some of the benefits that she received from the other party while reneging on her own promise is unjust, at least in some circumstances. Contracts are not exclusively about risk allocation; they are also a platform for cooperation.<sup>21</sup> At any rate, this very brief and fragmentary discussion exemplifies the difficulty of squeezing a large debate into few words.

Following Bix's multifaceted approach, the next Section of this Review moves from specific doctrinal issues to a very general theoretical question.

### C. How Many Contract Law Theories?

The last chapter of Bix's book discusses a basic question alluded to throughout: Should one strive for a theory of contract law that rests on a single principle (such as promise, reliance, or efficiency) and aims to explain all of contract law in any legal system at any time? Or, rather—as Bix professes—should one adopt a cautious view that focuses on the rules of a particular legal system at a particular time and resorts to various principles and values to explain and evaluate this body of doctrine? While chapter 9 opens with the statement that “an abundance of books and articles” adopt the former, unitary approach (p 147), Bix later points out that many theoreticians in recent years

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<sup>20</sup> For arguments in support of capping restitution by expectation (under at least some circumstances), see Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S Cal L Rev 1465, 1468–84 (1994); Hanoeh Dagan, *The Law and Ethics of Restitution* 282–89 (Cambridge 2004); Eisenberg, *Foundational Principles* at ch 21 (cited in note 6). For arguments against such capping, see George E. Palmer, 1 *The Law of Restitution* § 4.4 at 389–96 (Little, Brown 1978); Andrew Skelton, *Restitution and Contract* 33–41, 63 (Mansfield 1998). For the claim that, at least in the case of divisible contracts, current doctrine can best be explained as aimed at restoring contractual equivalence, rather than at protecting the restitution interest, see Zamir, 93 Va L Rev at 79–85 (cited in note 13).

<sup>21</sup> See Zamir, 93 Va L Rev at 129–31 (cited in note 13).

actually share his skepticism about the tenability of a single, general, or universal theory of contract law (p 161 & n 67).

I think, however, that this analysis could have benefited from a clearer distinction between several questions that the analysis largely conflates. The three main questions are: (1) Can a unitary theory satisfactorily explain and serve as a yardstick for assessing contract law, or should a more pluralistic view be adopted? (2) Can one theory explain contract law in different legal systems and at different times, or should each system—along dimensions of time and place—call for the formulation of its own underlying theory? And, (3) should a theory of contract law apply equally to all contractual transactions, regardless of the identity of the contracting parties (for example, merchants versus consumers), the contracting process (for example, whether a standard form is used), and the contract's object (for example, goods versus spousal relationships), or should different theories apply to different contracts based on one or more of these variables?

Bix not only implicitly assumes that these are all different facets of the same debate; he also links this debate to the choice between rights and remedies as the organizing concepts of contract law, in which the remedies conception is more compatible with the pluralistic position (pp 156–58).

While I share the pluralistic outlook,<sup>22</sup> I believe that the very exposition of the different questions shows that lumping them together is problematic, because each one may deserve a different answer. Specifically, one may adhere to a pluralistic theory of contract law without committing to the view that different transactions, or different legal systems, require different theories. Notions such as respect for private will, maximization of aggregate social welfare, rectification of reliance losses and undoing of unjust enrichment, redistribution of power and wealth, fairness and equivalence of exchange, and paternalism—to name but some of the key concepts in a pluralistic contract law theory—are applicable to any modern, Western system

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<sup>22</sup> See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum L Rev 1710, 1768–1802 (1997) (justifying a particular conception of contract interpretation on the basis of realization of the parties' intentions, fairness and equivalence of exchange, redistribution of power and wealth, paternalism, economic efficiency, and behavioral studies). See also generally Eyal Zamir, *Towards an Integrative Legal Scholarship*, 4 Din U'Dvarim (Haifa L Rev) 131 (2008) (Isr) (calling for integration of different interdisciplinary studies and of interdisciplinary studies and traditional doctrinal analysis in legal scholarship, based on a pluralistic normative perspective).

of contract law. Even if their significance and implications vary from one type of transaction to another and from one legal system to another, these notions are potentially relevant to any transaction in a great variety of systems. True, notions of autonomy play a different role in individual as opposed to corporate transactions, and the challenges of bounded rationality may be greater in consumer than in commercial transactions. However, the view that, for instance, individualistic or efficiency-based analyses can, in and of themselves, explain and justify all aspects of commercial contracts between presumably sophisticated firms is wrong to my mind. Bounded rationality often characterizes professional decisionmaking, while notions of good faith, cooperation, and fairness play a significant role in commercial transactions, as they should. From a normative perspective, the law should not disregard, for example, the deontological constraint against lying or distributive concerns even in purely commercial transactions. From an interpretative perspective, a unitary, one-dimensional theory can hardly explain even the law that applies to a single type of transaction in a specific legal system. This is not to say that the same rules should apply to all sorts of contracts, but it does mean that a pluralistic perspective is in principle applicable to a great variety of contracts, doctrines, and legal systems even if the relative weight and relationships between the particular approaches vary.<sup>23</sup> At any rate, distinguishing among the different questions seems essential.

## II. DOUGLAS BAIRD'S *RECONSTRUCTING CONTRACTS*

### A. An Overview

Baird's book is very different from Bix's in its scope, goals, methodology, and style. At the outset, Baird clarifies that his book "does not set out the essential doctrines of contract law" (p ix). Instead, its goal is "to reflect on the fundamental principles of contracts" (p ix). Baird believes that the Anglo-American

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<sup>23</sup> Another question is whether such a pluralistic outlook necessitates the construction of "an overarching theory that contains some basis for reconciling or balancing multiple values," as Bix argues (p 148). I am not sure that such a theory is essential or that it can be constructed. See Shelly Kagan, *Normative Ethics* 294–99 (Westview 1998). Bix mentions in this context the notion of "vertical integration," which allocates different roles to different moral theories (p 148 n 6). See generally Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *Phil Issues* 420 (2001). For a more ambitious attempt at such integration, see generally Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (Oxford 2010).

law of contract organizes itself around “a handful of straightforward ideas” (p ix). Whereas Bix strives to provide a comprehensive and impartial portrayal of contract law and theory, Baird presents his own point of view. While Bix’s analysis ranges from specific doctrinal issues to abstract, general theories of contract law, Baird seldom discusses the intricacies of the doctrine, nor does he engage in abstract theoretical discussions. Rather, he outlines a limited number of doctrines, describes their historical origins, and analyzes some of their underlying policies. For instance, the chapter on expectation damages (pp 57–77) does not purport to systematically analyze all the arguments for and against expectation and other measures of damages, even from an economic perspective (not to mention doctrinal details). Yet it nicely elucidates some of the familiar economic insights and adds interesting new ones.

Baird’s book draws on his earlier work—articles, lectures, and book chapters—and on other scholars’ historical studies of canonical cases. It nevertheless conveys a feeling of a unified whole rather than merely a collection of essays, with several common threads woven throughout the book. One such thread is a keen interest in legal history. Baird describes the social, commercial, and legal background of canonical cases, and sometimes the intellectual perspectives of the judges writing them as well. The factual backgrounds of cases like *Raffles v Wichelhaus*<sup>24</sup> (pp 9–13), *Hadley v Baxendale*<sup>25</sup> (pp 70–74), and *Hamer v Sidway*<sup>26</sup> (pp 25–31, 36–45) are depicted in detail. The descriptions are often *Rashomon*-like, demonstrating how the facts could have been presented in different ways. Baird is a great storyteller. In addition to the historical accounts of seminal cases, he uses many hypotheticals and anecdotes from movies (pp 78, 79), advertisements (pp 79, 89), a vaudeville joke (p 89), and his own experience (pp 128–30) to illuminate his arguments in a most engaging way.<sup>27</sup>

A common thread also unites the normative and policy analyses throughout the book. Although Baird is well versed in different contract theories, and his analyses sometimes take

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<sup>24</sup> 159 Eng Rep 375 (Ex 1864).

<sup>25</sup> 156 Eng Rep 145 (Ex 1854).

<sup>26</sup> 27 NE 256 (NY 1891).

<sup>27</sup> Baird’s interest in cases’ narratives and histories is also reflected in Douglas G. Baird, ed, *Contracts Stories* (Foundation 2007), an anthology of studies of the underlying facts and the legal, social, and political context of canonical contract cases.

different perspectives into account, his primary methodological tool is economic analysis, and his normative perspective is for the most part individualistic, efficiency oriented, and even formalistic. Baird's economic analysis is nontechnical. He presents sophisticated economic insights in an accessible and lucid way. Moreover, sometimes "when microeconomics begins to describe, organize, and explain law, it is a curiously dead law—a law devoid of interpretive possibilities. It is quite literally object-like: thing-like, self-contained, unambiguous, etc."<sup>28</sup> This clearly does not apply to Baird's economic analysis, which is generally attentive to the nuances of the legal doctrine.<sup>29</sup> Particularly noteworthy are the critical discussions of the view of contract as an option to perform or pay damages (pp 46–56), the analysis of expectation damages for anticipatory breach (pp 61–64), the problem of overreliance (pp 67–74), and the effect of expectation damages on the parties' incentives to look for alternative bargains (pp 74–77).

Baird's overall normative stance is particularly evident in chapters 7 and 8, which deal with duress and standard-form contracts, respectively. But his individualistic and formalistic inclinations are not limited to these chapters. In Baird's view, "Contract law is essentially an empty vessel that allows parties to organize their affairs in a way that makes them better off" (p 6). Accordingly, contract law "consists largely of default rules" (p 7). Today, he believes, "We share the view of the legal realists that some rules are arbitrary, but we no longer see such formality as a vice. There is a virtue in having a realm of contract . . . that is demarcated by clear rules" (p 5; see also p 21).

Baird's viewpoint is reflected more subtly in his choice of cases and the doctrines that he discusses. Of the sixty-five or so court opinions cited in the book, 42 percent were delivered prior

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<sup>28</sup> Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 *Cardozo L Rev* 1631, 1651–52 (1990).

<sup>29</sup> At times, however, the analysis could have benefitted from greater attention to the complexity of the legal doctrine. For instance, the analysis of expectation damages in chapter 4 disregards the gap between expectation damages in the world of models—that is, a monetary remedy that puts the injured party in the position that she would have occupied absent the breach—and expectation damages in the real world, in which, due to various obstacles, expectation damages almost never put the injured party in that position. See, for example, Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 *Cal L Rev* 975, 989–97 (2005); Stewart Macaulay, *The Reliance Interest and the World outside the Law Schools' Doors*, 1991 *Wis L Rev* 247, 249–53; John A. Sebort Jr, *Punitive and Non-pecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 *UCLA L Rev* 1565, 1565–71 (1986).

to 1930, and only 20 percent came after 1990 (compared to 27 percent and 31 percent, respectively, in Bix's Table of Cases). Baird's analyses revolve around an uncle's promise to give his nephew a sum of money if the young man would refrain from smoking and drinking (pp 25–31, 35–36),<sup>30</sup> a father who promises to repay an innkeeper his expenses for taking care of his ill son (pp 33–36),<sup>31</sup> a banker who buys a cow (pp 96–100),<sup>32</sup> a contract for the sale of cotton “to arrive ex ‘Peerless’ from Bombay” (pp 9–13),<sup>33</sup> and a contract for the sale of coke made in 1880 (pp 61–64).<sup>34</sup> In a world in which the great majority of transactions are made through standard-form contracts, and a few years after the subprime-mortgage crisis arguably exposed some of the deficiencies of American law and regulation—including contract law broadly conceived—this choice of cases carries normative implications. At the very least, it reveals the author's notion of what contract law is about.<sup>35</sup>

Baird's theoretical and normative perspective is also reflected in his choice of heroes to play the key roles in his story of American contract law: Justice Oliver Wendell Holmes and Judge Richard Posner. Of Holmes's contributions, Baird emphasizes the belief “that one could identify a relatively simple set of patterns that could explain how judges behaved” (p 3), the possibility of describing contract law as revolving around three central ideas (p 3), the view that contract formation is controlled by objective criteria rather than by a subjective meeting of minds (pp 14–24), the rule that consideration exists only if there is a bargained-for exchange (pp 26–30), the moral skepticism reflected in the image of the law as directed at the “bad man” (pp 46–56), and the related notion of contract as an option to perform or pay damages (pp 46–56). Of Posner's contributions, Baird discusses Posner's overall agenda of basing the entire common law on a few basic principles (p 58), his clarification of the role of expectation damages (p 58), the limits of advantage taking between contract parties (pp 91–95), and the idea that unavailability of a legal remedy should be the major criterion in analyzing

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<sup>30</sup> *Hamer*, 27 NE 256.

<sup>31</sup> *Mills v Wyman*, 20 Mass (3 Pick) 207 (1825).

<sup>32</sup> *Sherwood v Walker*, 66 Mich 568 (1887).

<sup>33</sup> *Raffles*, 159 Eng Rep 375.

<sup>34</sup> *Missouri Furnace Co v Cochran*, 8 F 463 (WD Pa 1881).

<sup>35</sup> See P.S. Atiyah, Book Review, *Contract as Promise: A Theory of Contractual Obligation*. By Charles Fried, 95 Harv L Rev 509, 516–20 (1981) (making a similar observation about Fried's book).

claims of duress (pp 111–22). More generally, Baird affirms that Posner’s “influence permeates every essay” in the book (p ix). While Baird frequently questions Holmes’s and Posner’s specific claims, he clearly admires their contributions to US contract law and shares their overall attitudes.

A detailed discussion of the book’s numerous analyses and insights exceeds the scope of this Review. Hence, I comment on only two issues. The first is good faith, disclosure duties, and misrepresentations; the second is standard-form contracts.

## B. Good Faith, Disclosure Duties, and Misrepresentations

Chapter 5, entitled “Terms of Engagement,” opens with a discussion of good faith, focusing on whether good faith merely entails honesty in fact or, rather, a more demanding requirement to make inquiries when there is some basis for suspicion. The examples and discussion refer to various scenarios: misrepresentation regarding one’s reservation price (pp 78–79), mere puffery (p 79), turning a blind eye to a transaction’s illegality (p 79), and the good faith necessary to enjoy the status of a holder in due course of a negotiable instrument (pp 79–81). Baird further discusses the scope of a bank’s duty when serving as the prime broker of a hedge fund; specifically, whether its manager, after casually hearing from an investor about the great success of the latter’s investment in that fund while knowing that the fund was actually suffering losses, is required to conduct inquiries and warn the investor of possible fraud (pp 81–84). The chapter moves on to discuss precontractual disclosure duties following the famous *Laidlaw v Organ*<sup>36</sup> case (pp 84–89), misrepresentation (pp 89–90), the dependence of disclosure duties on the parties’ characteristics and relationships (pp 90–91), and the scope of postcontractual disclosure duties (pp 91–95).<sup>37</sup>

The discussion mixes doctrinal, historical, and economic analysis. While rich and insightful, it also raises several concerns. One concern relates to the diversity of rules and situations jointly

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<sup>36</sup> 15 US (2 Wheat) 178 (1817).

<sup>37</sup> Chapter 6 goes on to discuss, among other things, the related doctrine of mutual mistake (pp 96–100). I will not comment on this discussion other than making the following outsider’s observation: The common-law notion that the uninformed party may be in a better position if both parties were mistaken than if she were the only one who was mistaken—the other party possessing the relevant information—seems rather peculiar. Whether focusing on incentivizing the other party to share the pertinent information or on the two parties’ relative fault, one could expect the law to favor the uninformed party to a greater extent when the other party knew of her mistake.

discussed under the heading of good faith. The factual paradigms, the applicable legal rules, and the pertinent policy considerations appear to vary from one context to another, which renders the joint analysis problematic. Thus, the doctrine of holder in due course, like the rules governing the defrauded investor's case, belongs to a family of doctrines that deal with conflicts between remote parties and set the conditions under which a good-faith purchaser (usually, for value) overcomes the rights of previous owners (or other creditors of the insolvent debtor). In such cases, the law has to resolve a conflict between two innocent people while taking into account considerations such as the identity of the least-cost avoider, the deterrence of rights violations (by the person who unlawfully deprived the original owner of her rights), the remote parties' relative fault, the availability of insurance, and the facilitation of trade.<sup>38</sup> These considerations differ from those bearing on the duty of a person negotiating a contract to tell the truth to the other party. In the latter case, the law has to delineate the prohibition on lying and the duty to share information in light of considerations such as the moral constraint against deception, the effect of a disclosure duty on the incentive to acquire the information in the first place, and the alternative ways in which information infiltrates the market.<sup>39</sup> All these considerations differ in turn from those informing the rules that determine the enforceability of a contract that one party makes for an illegal purpose while the other party turns a blind eye to its illegality (factors to be considered might be deterrence, including the fear of overdeterrence; fairness between the parties; elimination of unjust enrichment; and institutional concerns pertaining to court involvement in enforcing illegal transactions).<sup>40</sup>

While Baird could be praised for discussing a question that is common to all these doctrines, it seems that the analytical and policy dissimilarities between the doctrines are too great to

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<sup>38</sup> See generally, for example, Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich L Rev 95 (1991); Barak Medina, *Augmenting the Value of Ownership by Protecting It Only Partially: The "Market-Overt" Rule Revisited*, 19 J L, Econ & Org 343 (2003); Alan Schwartz and Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 Colum L Rev 1332 (2011).

<sup>39</sup> See Zamir and Medina, *Law, Economics, and Morality* at 267–91 (cited in note 23); Eisenberg, *Foundational Principles* at ch 40 (cited in note 6).

<sup>40</sup> See generally, for example, Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 Iowa L Rev 115 (1998). See also E. Allan Farnsworth, 2 *Farnsworth on Contracts* §§ 5.1–5.9 at 1–100 (Aspen 3d ed 2004).

make such a discussion fruitful. At the very least, the discussion should have noted the differences rather than treating the separate issues as if they were one.

Another concern pertains to Baird's discussion of precontractual disclosure duties (pp 84–90). Based on the rulings in *Laidlaw* and *Harris v Tyson*,<sup>41</sup> Baird asserts that, under US law, a buyer who possesses information about events likely to have an imminent effect on the market price (as in *Laidlaw*),<sup>42</sup> or on the true value of the sale's object (for example, the fact that the seller's land contains a vast mineral deposit, as in *Harris*),<sup>43</sup> is under no duty to share this information with the seller (pp 84–89, 97). Baird not only posits that this is the law; he also claims that, by and large, this law is justified.

Baird's positive claim is incompatible with the descriptive analyses of the doctrine by other commentators, such as Professors Allan Farnsworth and Melvin Eisenberg.<sup>44</sup> Baird's claim is also inconsistent with the quantitative analysis of the case law conducted by Professors Kimberly Krawiec and Kathryn Zeiler.<sup>45</sup> Krawiec and Zeiler found that, while courts are more likely to impose a disclosure duty on sellers than on buyers, courts often subject the latter to such a duty as well.<sup>46</sup> Baird concedes that “[s]ome jurisdictions in recent years” have followed the rule laid down in § 161(b) of the Restatement (Second) of Contracts, which requires disclosure when the informed party knows that disclosure “would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing” (p 89). Baird's recurring assumption that *Laidlaw* is, well, the laid law is thus somewhat surprising.

As for the normative justification for a limited disclosure duty, Baird focuses on two arguments: the adverse effect of disclosure duties on the incentive to acquire information in the first

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<sup>41</sup> 24 Pa 347 (1855).

<sup>42</sup> *Laidlaw*, 15 US at 193.

<sup>43</sup> *Harris*, 24 Pa at 348.

<sup>44</sup> See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.11 at 472–78 (Aspen 3d ed 2004); Eisenberg, *Foundational Principles* at ch 40 (cited in note 6).

<sup>45</sup> See generally Kimberly D. Krawiec and Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories*, 91 Va L Rev 1795 (2005).

<sup>46</sup> See id at 1839.

place (following Professor Anthony Kronman's seminal article<sup>47</sup>) (pp 84–88), and the idea (drawn from the insider-trading literature) that, in a sufficiently liquid market, disclosure duties are unnecessary (and may even be harmful) since the respective information quickly becomes embedded in the market price even without disclosure (pp 86–87). Baird is aware of the critique leveled against Kronman's argument—namely, that it fails to distinguish between socially beneficial information that enhances aggregate utility and purely distributive information that enables its holder to obtain a greater share of the contractual surplus without contributing to total welfare (such as foreknowledge) (pp 84–85). According to this economic critique, while the law should be careful not to discourage acquisition of productive information (arguably the result of broad disclosure duties), such discouragement is desirable in the case of purely distributive information. In the latter case, absent a disclosure duty, people would have a private incentive to acquire information even if the costs of its acquisition were socially wasteful.<sup>48</sup> In Baird's view, drawing such fine distinctions is not a good idea: "We do not want judges or juries engaged in the business of determining after the fact whether the knowledge gained was socially valuable or not" (p 85).

Many readers would not find this response persuasive. More fundamentally, it seems that, following Kronman, Baird puts too much stress on the rare cases of deliberately acquired information when the great majority of precontractual mistake and misrepresentation cases in fact refer to casually acquired information.<sup>49</sup>

Baird's choice to discuss precontractual disclosure duties and misrepresentation from a purely economic perspective, as well as his choice to confine himself to some of the pertinent

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<sup>47</sup> Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J Legal Stud 1 (1978).

<sup>48</sup> See Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 Am Econ Rev 561, 563–66 (1971); Robert Cooter and Thomas Ulen, *Law & Economics* 356–59 (Pearson 6th ed 2012); Steven Shavell, *Acquisition and Disclosure of Information prior to Sale*, 25 RAND J Econ 20, 28 (1994).

<sup>49</sup> See Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va L Rev 565, 568 (2006) (stating that cases in which "one side makes a costly investment to acquire information . . . are relatively rare"); Zamir and Medina, *Law, Economics, and Morality* at 289 (cited in note 23). It may also be noted that Krawiec and Zeiler found no empirical support for the claim that courts are less likely to require disclosure of deliberately acquired information than casually acquired information—the central implication of Kronman's analysis. See Krawiec and Zeiler, 91 Va L Rev at 1842, 1856–61 (cited in note 45).

economic arguments rather than discussing all of them, are of course legitimate.<sup>50</sup> As it stands, the economic discussion is perceptive, and even seasoned academics will learn from it. There is, however, a puzzle. In discussing the duty to disclose and the prohibition on misrepresentation, Baird seems to uncritically embrace the “sharp distinction” drawn by black-letter contract law between “the buyer who possesses knowledge and remains silent and the buyer who possesses knowledge and who engages in deliberate misrepresentations” (p 85). Accordingly, he discusses the circumstances under which half-truths, misleading actions, and failures to correct past representations count as misrepresentations (pp 89–90).

The distinction between active or intentional deception and mere nondisclosure is indeed central to the deontological constraint against deception—which in my mind is crucial to understanding the legal doctrine.<sup>51</sup> However, as several commentators have noted, from a purely economic perspective there should be no distinction between deceptive words, acts, and omissions.<sup>52</sup> To eliminate the disincentive for information gathering, sellers should not be allowed to ask prospective buyers whether they possess any information that might increase the value of the sale’s object. Because silence in response to such a question inevitably signals that the buyer has such information, efficiency requires that buyers be allowed to lie in such circumstances.

One could reply that Baird’s discussion of the distinction between nondisclosure and misrepresentation is purely descriptive rather than normative. In that case, however, one would expect a clearer demarcation of the boundaries between the two types of discussion.

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<sup>50</sup> For a concise survey of additional economic arguments, including the infeasibility of concealing some types of information and the relevance of the distinction between homogeneous and heterogeneous assets to the claim that market transactions ipso facto disseminate information, see Zamir and Medina, *Law, Economics, and Morality* at 269–74 (cited in note 23).

<sup>51</sup> For a general description of the deontological constraint against deception and a proposal to integrate it with economic analysis of precontractual mistake and misrepresentation, see *id* at 274–91.

<sup>52</sup> See, for example, Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 Va L Rev 117, 137–42 (1982); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 Harv J L & Pub Pol 783, 794–801 (1992).

### C. Standard-Form Contracts

#### 1. General.

Few topics in recent decades have attracted more attention in contract scholarship than standard-form contracts, and rightly so.<sup>53</sup> Given that, according to some estimations, more than 99 percent of the contracts currently entered into, whether consumer or commercial, are standard-form contracts,<sup>54</sup> and given the documented one-sidedness of these contracts,<sup>55</sup> there is hardly a more pressing challenge facing contract law. Whereas legal systems across the globe have long developed specific tools to cope with the challenge,<sup>56</sup> US contract law largely keeps using traditional tools such as unconscionability, interpretation against the drafter, and misrepresentation to adjudicate issues arising out of standard-form contracts.<sup>57</sup> The lack of tailored, effective tools to deal with one-sided terms in standard-form contracts is of course not coincidental. It reflects the fundamentally individualistic ethos of American society, the entrenched suspiciousness of—and even hostility to—governmental regulation, and the great influence of right-wing, Chicago-style economic analysis of private and commercial law in the past decades. Baird dedicates chapter 8 to this issue. The chapter does not

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<sup>53</sup> For recent contributions, see generally Omri Ben-Shahar, ed, *Boilerplate: The Foundation of Market Contracts* (Cambridge 2007), previously published as a symposium in 104 Mich L Rev 821 (2006); Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2013); Nancy S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford 2013). See also notes 54–58, 65–66, 68, 70–71, 73, 76–83, 91.

<sup>54</sup> See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv L Rev 529, 529 (1971); Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 NYU L Rev 429, 431 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1203–04 (2003).

<sup>55</sup> See Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J Empirical Legal Stud 677, 680 (2007) (offering a quantitative analysis of 647 end-user license agreements of software sold over the Internet).

<sup>56</sup> See, for example, Bürgerliches Gesetzbuch [BGB] (the German Civil Code, as amended Jan 2, 2002) §§ 305–10 (replacing the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, AGB-Gesetz, 1976); Unfair Contract Terms Act, 1977, ch 50 (UK); Standard Contracts Law, 5743-1982 (1982) (Isr), in 37 *Laws of the State of Israel* 6 (Ministry of Justice, trans) (replacing the Standard Contracts Law, 1964—the first of its kind in the world).

<sup>57</sup> See, for example, *Brown v Genesis Healthcare Corp.*, 729 SE2d 217, 226–29 (W Va 2012); *In re Katrina Canal Breaches Litigation*, 495 F3d 191, 208 (5th Cir 2007); *Civillo v Slomin's Inc.*, 768 NYS2d 759, 765 (NY Sup 2003).

(and could not) systematically analyze all or even most of the doctrinal and policy aspects of the subject, nor will I. Instead, in what follows I critically examine Baird's discussion.

As Baird writes elsewhere in the book (pp 90–91), academic debates sometimes arise from differing conceptions of the paradigmatic issues that the law should resolve. In the present context, many people believe that practically no one reads standard-form contracts; that while suppliers may compete over the quality of their products, they do not compete over the quality of their unread boilerplates; and that standard-form contracts do not reflect customers' true will, expectations, and interests in any meaningful sense. These people are also concerned that one-sided clauses leave customers at the mercy of the supplier, and that, in employing their discretion, suppliers are likely to harm those who are most vulnerable: the poor, unsophisticated, one-time purchasers of goods or services. People who share these concerns likewise tend to believe that customers compromise their interests due to a host of cognitive biases that suppliers systematically exploit; that the government may know better than customers what is in the latter's best interest; that regulators are not necessarily captured by small interest groups; that courts are generally able to understand market realities; and that most customers are unable to protect their interests in the absence of clear, specific legal norms that render certain clauses unenforceable.

Baird clearly does not share most of these beliefs. To his way of thinking, contract terms are no different than other product attributes, which may be more or less visible (pp 124–27, 133–34). Seemingly unfair exemption clauses, such as denial of liability for consequential damages, may well be efficient and mutually beneficial (pp 135–36). Even if most buyers do not read standard-form contracts, as Professors Alan Schwartz and Louis Wilde have long argued,<sup>58</sup> nonreaders stand to benefit from the presence of the more-sophisticated buyers who do read contracts because sellers often cannot distinguish between the two groups (pp 126, 133, 143). Hence, the law's focus "should be on what channels are available for buyers with the skill and the inclination to become informed about the product and whether the law makes this process easier or harder" (p 126; see also p 144).

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<sup>58</sup> See generally Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U Pa L Rev 630 (1979).

Baird focuses much of his discussion on “swindler(s),” “con artists” who play “con game[s]” and are involved in “deception,” sellers who engage in “less-than-honorable transaction[s],” suppliers who act out of “bad motives,” sellers who are “inclined to mischief” and look for “ways of shortchanging buyers,” and “unscrupulous” sellers (pp 130–33). Since fine print “is not playing a role in any of this” (p 131), he contends that the handling of such sellers should be left to other branches of the law, such as criminal law (pp 129–30). He further argues that fine print is relevant only when it comes to a seller who does repeated business in a certain market, and who therefore cares about her reputation (pp 127–29). When it comes to such a seller, however, disclaimer clauses are irrelevant as long as reputational forces ensure that the seller treats her customers reasonably and fairly (p 129).

Baird believes that the law should ban certain types of clauses, not for the general reasons alluded to above, but rather for special reasons that apply to specific types of clauses. These include clauses that facilitate anticompetitive behavior (pp 134–36) or that undercut process rights designed to safeguard the customer’s autonomy and privacy (pp 139–40). Similarly, there should be a paternalistic ban on cross-collateralization clauses that effectively allow the unpaid seller to get around the laws that keep household goods beyond the reach of creditors (pp 136–39).

Beyond these special cases, however, Baird is concerned that, should contract law focus too much on the problems of standard-form contracts, it would lose its ability to advance other objectives: “Fighting against every form of abuse, real and imagined, may compromise our ability to reach other goals,” and a “vision of commercial law that worries excessively about the ability of parties to sneak terms past each other distracts us from the things that matter” (p 124). Baird is particularly critical of the type of reasoning in *Henningsen v Bloomfield Motors, Inc.*<sup>59</sup> and *Williams v Walker-Thomas Furniture Co.*,<sup>60</sup> which rests on the lack of bargaining over the terms of the contract and the parties’ unequal bargaining power. He describes this reasoning as “dated and economically naive” (p 133). He nevertheless finds it “explicable” since “[a]t the time these judges went to law

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<sup>59</sup> 161 A2d 69 (NJ 1960).

<sup>60</sup> 350 F2d 445 (DC Cir 1965).

school, Arthur Corbin's and Fritz Kessler's efforts to understand how the law worked in mass markets, as primitive as they seem today, were state of the art" (p 145).

While the judges writing in the 1960s cannot be faulted for disregarding subsequent studies, Baird's discussion can be criticized for ignoring previous literature. I will comment on three issues: the primary targets of boilerplate regulation, reputational forces as a substitute to regulation, and the informed-minority hypothesis.

## 2. On locksmiths and legal policymakers.

As described above, Baird implies that a main—perhaps *the* main—problem in supplier-customer relations is con artists and unscrupulous sellers. He argues that, since regulation of standard-form contracts would not solve this problem, such regulation is unwarranted (pp 130–33). This argument is not very strong because, as we all know—and as dozens of psychological studies in the emerging field of behavioral ethics have demonstrated—good people sometimes do bad things. Much unethical conduct is not the result of a conscious, explicit choice to behave unethically. Rather, it is the product of mostly unconscious and automatic self-interested behavior.<sup>61</sup> While con artists and swindlers may indeed focus on “arenas that promise the most in the way of profits” (p 130), most people are much more likely to “behave dishonestly enough to profit but honestly enough to delude themselves of their own integrity. A little bit of dishonesty gives a taste of profit without spoiling a positive self-view.”<sup>62</sup>

Professor Dan Ariely cites a locksmith who explains that some people will never steal, and that some people will steal even if one puts a lock on one's door. Locks are for the remaining, great majority of people who are mostly honest but may be tempted to try a door if it has no lock.<sup>63</sup> The same is plausibly true of boilerplate regulation.

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<sup>61</sup> For an illuminating survey of the literature, see generally Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, in Eyal Zamir and Doron Teichman, eds, *The Oxford Handbook of Behavioral Economics and the Law* 213 (Oxford 2014).

<sup>62</sup> Nina Mazar, On Amir, and Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 *J Mktg Rsrch* 633, 633 (2008).

<sup>63</sup> See Dan Ariely, *The (Honest) Truth about Dishonesty: How We Lie to Everyone—Especially Ourselves* 38 (Harper Collins 2012).

3. The market will do it.<sup>64</sup>

My second comment relates to Baird's faith in reputational forces—that is, the notion that disclaimers are irrelevant as long as reputational forces ensure that sellers treat their customers reasonably and fairly (pp 127–30).<sup>65</sup> While this faith is very often warranted, it does not seem to constitute a compelling reason against regulating standard-form contracts for several reasons.<sup>66</sup> One reason has to do with the role of law. It has become a truism that, for most people most of the time, economic incentives, social norms, and moral convictions loom larger than the threat of legal sanctions.<sup>67</sup> Legal sanctions are typically too little and too late to pose a real threat. It does not follow, however, that economic, social, and moral systems obviate the need for law. Legal norms are crucial for those “pathological” cases in which other systems fail to produce satisfactory outcomes (whether due to the behavior of bad people or of good people). Moreover, even if one draws primarily on economic, social, and moral norms, these three systems are not disconnected from the legal system; rather, they all shape and reshape one another. Legal norms influence both sellers' and buyers' perceptions of fairness and reasonableness. Adequate background legal norms can inculcate trade usages and commercial norms that would then be self-imposed thanks to reputational forces.

Another difficulty with drawing too much on reputational forces is that they are much more likely to work in favor of large, recurring, and sophisticated customers—whose goodwill the supplier values highly—than in favor of the weak, occasional, and unsophisticated customers, whose goodwill is valued less.<sup>68</sup>

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<sup>64</sup> Q: How many economists does it take to change a light bulb? A: None. The market will do it.

<sup>65</sup> For further development and refinement of this argument, see generally Lucian A. Bebchuk and Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich L Rev 827 (2006). See also generally Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 Mich L Rev 857 (2006).

<sup>66</sup> See Radin, *Boilerplate: The Fine Print* at 190–92 (cited in note 53).

<sup>67</sup> See generally John Kidwell, *A Caveat*, 1985 Wis L Rev 615 (summarizing basic insights of relational-contract studies).

<sup>68</sup> See Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 Mich L Rev 1223, 1228 (2006); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that Is Yet to Be Met*, 45 Am Bus L J 723, 747–48 (2008).

For those who care about equality and distributive justice in private law,<sup>69</sup> this aspect of reputational forces is troubling.<sup>70</sup>

Finally, even if we put aside all these considerations and assume that firms invariably treat their customers fairly and reasonably, regardless of the one-sided clauses that allow them to do otherwise (or, alternatively, that legal regulation has no effect on the degree to which firms accommodate their customers' interests), a problem still remains. As briefly noted by Professor Todd Rakoff<sup>71</sup> and extensively explored by Professor Alon Harel in the analogous context of constitutional protection of moral and political rights,<sup>72</sup> the problem is that a regime that grants firms unlimited power to treat customers as they please adversely affects the latter's liberty. When customers are "nothing more than supplicants" and firms respect customers' legitimate claims not because they are under a duty to do so but rather at their free discretion, then the former's status as autonomous and free subjects is compromised.<sup>73</sup> This argument assumes that customers have a freestanding, legitimate claim to be treated fairly and reasonably even if the standard-form contract says otherwise. To be sure, one could argue that invalidating one-sided contract terms disrespects the autonomy of customers who assented to those terms. However, it seems that the force-of-reputation argument does share the initial assumption that customers have a legitimate claim to be treated fairly. From a welfare perspective, receiving something as a matter of entitlement is more conducive to one's welfare, whether measured subjectively or objectively, than receiving the same thing as a favor.<sup>74</sup>

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<sup>69</sup> See generally Daphna Lewinsohn-Zamir, *In Defense of Redistribution through Private Law*, 91 Minn L Rev 326 (2006).

<sup>70</sup> Parenthetically, customers' lack of legal expertise is relevant to another claim that Baird makes—namely, that regulating standard-form contracts is relevant only when suppliers are willing to invoke them in open court (p 132). In fact, if unsophisticated customers erroneously believe that exemption clauses are valid, they would be disinclined to sue in the first place. See generally Dennis P. Stolle and Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 Behav Sci & L 83 (1997). This is plausibly why suppliers habitually use boilerplate clauses that have long been declared unenforceable. The only effective way to preclude this practice would seem to be a prohibition on knowingly using invalid clauses, backed by administrative or other sanctions.

<sup>71</sup> See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 Mich L Rev 1235, 1236 (2006).

<sup>72</sup> See Alon Harel, *Why Law Matters* 147–90 (Oxford 2014).

<sup>73</sup> Rakoff, 104 Mich L Rev at 1236 (cited in note 71).

<sup>74</sup> See Lewinsohn-Zamir, 91 Minn L Rev at 358–60, 362–65 (cited in note 69).

## 4. Theory-induced blindness.

In his book *Thinking, Fast and Slow*, Professor Daniel Kahneman describes “a weakness of the scholarly mind” that he has often observed in himself, which he refers to as “theory-induced blindness: once you have accepted a theory and used it as a tool in your thinking, it is extraordinarily difficult to notice its flaws.”<sup>75</sup> Such blindness seems to characterize much of the economic analysis of standard-form contracts since Professors Schwartz and Wilde introduced the “informed minority” hypothesis in 1979.<sup>76</sup> According to this hypothesis, even if the majority of customers do not read the fine print, it suffices that a minority of them do for sellers to provide all consumers with terms that efficiently reflect the true preferences of both sellers and buyers. This idea has repeatedly been advocated as an argument against the need for regulatory supervision of the content of standard-form contracts,<sup>77</sup> which Baird reiterates in his book (pp 126, 133, 143, 144).

The underlying assumptions of the informed-minority theory can be challenged.<sup>78</sup> One obvious limitation of the hypothesis is that it holds only if the costs of discriminating between the informed and uninformed customers are prohibitive, which need not be the case. Most importantly, the hypothesis holds only if the informed minority indeed exists. My hunch is that, outside of the law-and-economics community, most people would quite

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<sup>75</sup> Daniel Kahneman, *Thinking, Fast and Slow* 277 (Farrar, Straus and Giroux 2011).

<sup>76</sup> See generally Schwartz and Wilde, 127 U Pa L Rev 630 (cited in note 58).

<sup>77</sup> See, for example, George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L J 1297, 1347 (1981); Henry N. Butler and Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-contractarians*, 65 Wash L Rev 1, 46 (1990); Michael J. Trebilcock, *The Limits of Freedom of Contract* 119–20 (Harvard 1993); Edward B. Rock, *Foxes and Hen Houses? Personal Trading by Mutual Fund Managers*, 73 Wash U L Q 1601, 1625 (1995); Louis Kaplow and Steven Shavell, *Fairness versus Welfare* 219–20 (Harvard 2002); Clayton P. Gillette, *Pre-approved Contracts for Internet Commerce*, 42 Houston L Rev 975, 976–77 (2005). See also Douglas G. Baird and Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 Va L Rev 1217, 1253–55 (1982) (making a similar argument in the context of the so-called battle of the forms); Charles J. Walsh and Marc S. Klein, *From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims under the Lanham Act*, 22 Seton Hall L Rev 389, 397–98 (1992) (making a similar argument in the context of advertising).

<sup>78</sup> For examples of such challenges, see Russell Korobkin, 70 U Chi L Rev at 1237 n 128 (cited in note 54); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis L Rev 679, 690–97; Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law*, 5 Eur Rev Cont L 1, 19–20 (2009).

confidently say, based on their personal experience and anecdotal knowledge, that hardly a soul reads standard-form contracts. As the references cited above indicate, however, such a picture does not emerge from the literature impressed by the elegance of the informed-minority hypothesis.

It took more than a quarter of a century for compelling empirical data to be brought to bear on this factual question. In a series of large-scale empirical studies of end-user license agreements (EULAs) for software sold over the Internet, as well as of the behavior of customers who shop for software on the same medium, Professor Florencia Marotta-Wurgler and her coauthors show that, even in an environment conducive to reading standard forms—the comfort of one’s home or office—practically no one reads them.<sup>79</sup> This conclusion was first established indirectly by examining a very large sample of 647 EULAs pertaining to both consumer and commercial software, covering a broad range of products and prices. The study showed that while market competition strongly affects prices, it does not affect contracts’ one-sidedness.<sup>80</sup> Neither was there a statistically significant correlation between the overall one-sidedness of contracts and the consumer or commercial nature of the transaction, the accessibility of the terms prior to placing the order, or the product price.<sup>81</sup> These findings—particularly the absence of a significant correlation between the one-sidedness of contract terms and both their accessibility prior to contracting and the product price—strongly imply that with respect to most issues governed

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<sup>79</sup> See Marotta-Wurgler, 4 J Empirical Legal Stud at 703–06 (cited in note 55); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J Empirical Legal Stud 447, 449, 454–55 (2008); Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J Legal Stud 309, 310, 315–16 (2009); Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J Legal Stud 1, 19–22 (2014).

<sup>80</sup> See generally Marotta-Wurgler, 5 J Empirical Legal Stud 447 (cited in note 79). Parenthetically, Eisenberg (in chapter 4) crucially misses this important finding in his discussion of unconscionability (the draft of his book reviewed here does not include the chapter on form contracts). In delimiting the scope of the doctrine, Eisenberg strongly emphasizes market competition: “Contracts made on competitive markets will seldom be unconscionable” (ch 4). In the ensuing discussion, Eisenberg does not distinguish between the price and the contract terms: “For ease of exposition, the term ‘price’ will be used to include all the terms offered by a seller” (ch 4 n 216). If, however, competition strongly affects prices but does not affect the one-sidedness of the contract terms, pooling the two together is unwarranted.

<sup>81</sup> See Marotta-Wurgler, 38 J Legal Stud at 337 (cited in note 79).

by the EULA's terms,<sup>82</sup> customers do not read the standard forms and the forms are not responsive to customers' preferences in any meaningful way.

Whether an informed minority exists—that is, whether there is a substantial minority of people who carefully read standard forms before making their purchase decisions and who thereby create a positive externality for uninformed customers—was directly investigated by Professor Yannis Bakos, Professor Florencia Marotta-Wurgler, and David Trossen.<sup>83</sup> The authors tracked the browsing behavior of tens of thousands of households (including individuals in the workplace) with respect to dozens of online software companies. They found that only about six out of every thousand retail software shoppers accessed the license agreement.<sup>84</sup> The mean amount of time that those very few shoppers spent on the EULA page was about one minute and the median time was thirty-two seconds.<sup>85</sup> Given the average reading speed of American adults (250 to 300 words per minute) and the average number of words in a EULA (2,277 words),<sup>86</sup> even those few shoppers could not have read more than a very small portion of the agreement. One could imagine that people are even less inclined to read standard forms in other environments, such as in banks (when opening a bank account while other people are waiting in line).

As mentioned above, people unfamiliar with the informed-minority hypothesis are unlikely to find these empirical findings particularly remarkable. The truly remarkable thing is that some eight years after Marotta-Wurgler's findings were first posted on the Social Science Research Network and several years after their publication in leading peer-reviewed journals, some people's belief in the informed-minority theory remains unshaken. Perhaps there are ways to challenge these findings and question their generality—and there is certainly a need for additional empirical studies—but ignoring them is hardly

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<sup>82</sup> The sole exception regarding the absence of statistically significant correlation between terms and prices concerned warranties. See *id.* at 338.

<sup>83</sup> See generally Bakos, Marotta-Wurgler, and Trossen, 43 *J Legal Stud* 1 (cited in note 79).

<sup>84</sup> *Id.* at 22. This figure refers to the aggregation of all visits of an individual user during a month. See *id.* at 16–17. The figure for a single visit is less than two out of every one thousand visits. See *id.* at 3, 19–22.

<sup>85</sup> *Id.* at 19.

<sup>86</sup> *Id.* at 22.

explicable.<sup>87</sup> In fact, at least in the context of consumer transactions, even Professor Schwartz does not seem to believe in the existence of an informed minority anymore.<sup>88</sup>

### III. MELVIN EISENBERG'S *FOUNDATIONAL PRINCIPLES OF CONTRACT LAW*

At the outset, I should note that this Part is incomplete because it refers to an unfinished manuscript of Eisenberg's forthcoming book. While it would have been preferable to wait for the manuscript's completion, the editors sensibly decided to include it in the Review in light of the book's great expected impact. Like the previous parts, this Part begins with an overview of the book. It then comments on two more-specific issues: Eisenberg's attitude toward economic analysis of the law and disgorgement remedies.

#### A. An Overview

Eisenberg's book is over one thousand pages long—that is, several times longer than the other books reviewed here. Like Bix's book, it covers almost all of US contract law and addresses a broad range of issues, from metatheory (ch 1) to the doctrinal intricacies of calculating damages in particular transactions (chs 7–9). While its title—*Foundational Principles of Contract Law*—may imply that the book aims to provide an introduction to the principles of contract law or an overview of contract theory, these do not seem to be its goals. Contrary to Bix, who offers a brief outline of several contract theories, Eisenberg moves directly from metatheory to specific doctrinal issues without surveying the landscape of modern contract theories. But for the analysis of metatheoretical questions in chapter 1—particularly the choice between an interpretative and a normative theory of contract law, and that between monistic and pluralistic theories—the book does not examine or even describe most of contract law theories in the abstract. Rather, it applies different theories—primarily liberal theory (something like contract as promise or the will theory) and the economic perspective—to

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<sup>87</sup> See generally Omri Ben-Shahar and Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton 2014) (demonstrating that increasing the availability of information does not improve people's choices).

<sup>88</sup> See generally Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 *Stan L Rev* 545 (2014).

specific doctrinal issues. Two exceptions are chapter 16, which deals with behavioral economics (although even this chapter is largely applicative), and chapter 42, which discusses the implications of relational-contract studies.

The primary audience for Eisenberg's book will likely be comprised of legal scholars, policymakers, and advanced students. While the book's style is very lucid and the frequent use of examples (which are often based on actual cases) illuminates even complex issues, it is not an introduction meant for novices, as its breadth and depth exceed those expected of an introductory textbook.

Parallel to Baird's book and some other American contract law books<sup>89</sup>—and contrary to Bix's book, those of some other American scholars,<sup>90</sup> and *every* non-American contract law book with which I am familiar—the order of chapters in Eisenberg's book does not follow the chronological order of the contract's life cycle. Rather, reflecting the lasting impact of the American legal realists, Eisenberg's book discusses contract remedies (ch 5–22) before addressing such issues as offer and acceptance (ch 27–30), contract interpretation (ch 23–26), and standard-form contracts (ch 34).<sup>91</sup> While US jurists are presumably accustomed to this structure, others would likely find it a bit strange. It would seem that before matching a remedy to a breach of contract, one should determine whether a breach occurred, which first requires one to conclude that an enforceable contract has been made, interpret its content, and resolve issues pertaining to its validity.

Like most of Baird's analysis (and unlike most of Bix's), Eisenberg's discussion is distinctively normative, often representing the author's perspective and challenging—sometimes polemically—competing ones. Eisenberg, again like Baird, draws substantially on his previous writings yet manages to convey the sense of a unified whole rather than a mere anthology of previously published articles. To appreciate the challenge of editing, integrating, updating, and completing (some of) his previous

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<sup>89</sup> See generally, for example, Fried, *Contract as Promise* (cited in note 18); Barnett, *Contracts* (cited in note 1).

<sup>90</sup> See generally, for example, Farnsworth, *Contracts* (cited in note 17); Klass, *Contract Law* (cited in note 3); Posner, *Contract Law* (cited in note 2).

<sup>91</sup> Unconscionability, however, is discussed in chapter 4, prior to remedies for breach of contract.

publications, recall that Eisenberg's scholarly career spans more than forty years!

Eisenberg's book, like his previous scholarship, demonstrates his great intellectual curiosity. Eisenberg completed his legal studies before the emergence of economic analysis of the law; yet, once it appeared, he was quick to grasp its great contribution as well as its limitations. He has carefully integrated fruitful economic insights into his own analyses while simultaneously criticizing its more dogmatic and less fruitful claims with acute precision. Years later, after behavioral research shed new light on the law, he offered pioneering applications of psychological findings to various contract law doctrines.<sup>92</sup> Eisenberg has been similarly interested in other theoretical perspectives on contract law, in legal history, in foreign legal systems, and no less importantly, in careful doctrinal analysis of case law and legislation. He masterfully weaves all these threads into the rich fabric of his scholarship to produce powerful legal arguments.

While Bix largely refrains from taking a firm normative position and Baird's standpoint is mainly economic and formalist, Eisenberg's normative stance is relatively progressive, at least when compared to the prevailing discourse in US contract scholarship. For example, Eisenberg is quick to point out that not every application of the doctrine of substantive unconscionability is paternalistic, and even when it is, this characterization is not "a strike against such a doctrine" since "paternalism is everywhere," inside and outside of contract law (ch 4 § D.7). As he points out, the "real issue is whether a doctrine is *improperly* paternalistic" (ch 4 § D.7).<sup>93</sup> (I return to the prevalent discourse of US contract scholarship in Part IV.)

It is impossible within the boundaries of this Review to do justice to the many original and powerful analyses that appear

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<sup>92</sup> See generally Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan L Rev 211 (1995). Insights from cognitive psychology are discussed in various contexts throughout the book, including chapters 16 (behavioral economics), 19 (liquidated damages), 37 (mechanical errors), 40 (disclosure), 41 (impossibility, impracticability, and frustration), 42 (relational contracts), and 48 (express conditions).

<sup>93</sup> I fully agree with these assertions. See generally Eyal Zamir, *The Efficiency of Paternalism*, 84 Va L Rev 229 (1998). See also Zamir and Medina, *Law, Economics, and Morality* at 313–47 (cited in note 23). A minor point is that Eisenberg tends to think that an intervention aimed at preventing people from taking advantage of other people's misjudgment (ch 4 § D.7)—what Professor Gerald Dworkin describes as "impure" paternalism, because it not only curtails the freedom of the people whom one wishes to protect but also the freedom of others, Gerald Dworkin, *Paternalism*, 56 Monist 64, 67–68 (1972)—is not paternalistic at all. I prefer a more inclusive definition.

in Eisenberg's book. The numerous interesting discussions include analysis of donative promises (ch 2); the critique of the *Hadley v Baxendale* rule (ch 12); the assaults on the efficient-breach theory (ch 15) as well as on the theory of promisees' overreliance (ch 17); the multifaceted, critical yet constructive analysis of disclosure duties (ch 40); and the study of relational contracts (ch 42). In what follows I offer just a few comments on Eisenberg's treatment of the economic analysis of the law and his claims regarding disgorgement remedies.

### B. Taking Economic Analysis (Too) Seriously

Throughout the book, Eisenberg effectively uses economic insights to support his normative arguments.<sup>94</sup> At other times, however, he sharply criticizes economic arguments. One such argument is the concern that fully compensating the injured party for her losses due to a breach would result in inefficient, excessive reliance of the promisee on the contract.<sup>95</sup> In appraising this argument, Eisenberg describes overreliance as "an unlikely problem," contending that it rests on "a flawed tenet" and concluding that its target is "little more than a straw man" (ch 17 §§ E–F). The book also addresses the economic argument that the current law of damages does not adequately take into account the injured party's legitimate preference to keep the information necessary to establish her expectation damages private (ch 18 § B), the so-called secrecy interest.<sup>96</sup> To Eisenberg's mind, the main problem with the proposal to reform damages rules so as to take into account the injured party's secrecy interest

is not lack of administrability, but lack of soundness: the proposed regime would throw out the baby with the bathwater. Like the baby, the remedial doctrines that Ben-Shahar and Bernstein would eliminate or cut back are extremely valuable. Like the bathwater, in the typical case the secrecy interest has little or no value. (ch 18)

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<sup>94</sup> See, for example, chapters 2 (donative promises), 4 (unconscionability), 5 (introduction to expectation damages), 12 (the principle of *Hadley v Baxendale*), and 40 (disclosure).

<sup>95</sup> See Steven Shavell, *Damage Measures for Breach of Contract*, 11 *Bell J Econ* 466, 472 (1980); Cooter and Ulen, *Law & Economics* at 331–34 (cited in note 48).

<sup>96</sup> See generally Omri Ben-Shahar and Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 *Yale L J* 1885 (2000).

Comparable assessments are found elsewhere in the book (see, for example, ch 15, discussing the theory of efficient breach).

Eisenberg's embrace of some economic insights and his rejection of others comport with his overall normative pluralism explicated in chapter 1; they demonstrate a commendable combination of open-mindedness and skepticism. Moreover, I believe that most readers would find Eisenberg's applications and critiques of the economic analyses to be quite persuasive. Regarding his assaults on some economic arguments, however, I fear that they are slightly overstated and perhaps somewhat misguided.

There are fundamental, though sometimes overlooked, differences between high-quality legal analysis and high-quality economic analysis. Legal analysis, being primarily interested in solving complex, real-world problems, is at its best when it takes into account as many variables and considerations as possible. This is true of the diversity of factual circumstances to which a legal norm might apply and of the plurality of normative, pragmatic, policy, and institutional considerations bearing on the issue. In contrast, like much social science, economic analysis (and economic modeling in particular) is at its best when it manages to explain and predict human behavior, including the effect of legal norms, based on as few variables as possible, while assuming away as many real-world complications as possible. Although economic models are more fruitful the more their assumptions are realistic, demonstrating that the assumptions of an economic model are unrealistic does not inflict a deadly blow to the model's fruitfulness. Economic models do not purport to reflect reality; otherwise they would not be models. Models are judged by the extent to which they can explain and predict reality focusing on few variables; yield interesting, testable hypotheses; and challenge the common wisdom.

Similarly, on the normative level, although jurists should not be satisfied with the narrow perspective of economic efficiency (be it Kaldor-Hicks or Pareto), there is considerable value in demonstrating the efficiency—or inefficiency—of any legal arrangement. The fact that economic analysis yields a counterintuitive policy recommendation may well call for close scrutiny of its underlying factual and normative assumptions. Yet, once again, this is not necessarily a sign of its weakness. As Professor Samantha Brennan has observed about consequentialist morality

more generally, “Counter-intuitive results aren’t so bad if you are a consequentialist; they are your stock in trade.”<sup>97</sup>

Sophisticated legal economists readily admit that drawing direct policy recommendations from abstract economic models is often risky or even futile.<sup>98</sup> However, contrary to what one could infer from Eisenberg’s fierce attack on economic arguments such as the efficient-breach doctrine (ch 15 § B), the secrecy interest (ch 18 § B), and the theory of overreliance (ch 17 §§ E–F), these and a host of comparable insights offered by economic analysis of the law are valuable. Their value does not rest in directly providing legal-policy conclusions but rather in drawing attention to intriguing aspects and possible implications of legal norms that traditional legal analysis has failed to notice.<sup>99</sup> This is not to say that exposing the weaknesses of economic arguments—to which Eisenberg devotes much skill and effort—is unnecessary or unimportant. It means only that economic analyses should be assessed both on their own terms and as inputs to integrative, pluralistic analysis of the law.

### C. Disgorgement

In the chapter on disgorgement (ch 22), Eisenberg elaborates on numerous intriguing policy and doctrinal arguments, of which I will focus on three. First, he claims that contrary to common wisdom, disgorgement remedies are available for

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<sup>97</sup> Samantha Brennan, *Moral Lumps*, 9 *Ethical Theory & Moral Prac* 249, 259 (2006). In addition to their contribution to the economic discourse and to legal theory, counterintuitive economic arguments may have a third contribution. As Professors Michael Dorff and Kimberly Ferzan have pointed out, the “startling quality” of suggestions to legalize baby selling, racial discrimination, and insider trading may be their “primary virtue” from a “careerist perspective.” Michael B. Dorff and Kimberly Kessler Ferzan, *Is There a Method to the Madness? Why Creative and Counterintuitive Proposals Are Counterproductive*, in Mark D. White, ed., *Theoretical Foundations of Law and Economics* 21, 21 (Cambridge 2009).

<sup>98</sup> See generally, for example, Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 *San Diego L Rev* 1135 (2003); Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 *Yale L J* 829 (2003). Both authors demonstrate that since each economic model focuses on a few variables and assumes away others, different models yield different recommendations. These conflicts and the unavailability of information necessary to implement the different recommendations make the design of a workable legal regime that would somehow integrate all the economic considerations practically impossible.

<sup>99</sup> See Posner, 112 *Yale L J* at 854–55 (cited in note 98); Ian Ayres, *Valuing Modern Contract Scholarship*, 112 *Yale L J* 881, 885–97 (2003); Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *Yale L J* 903, 923–24 (2003).

breach of contract. In support of this argument, he mentions that there are more than a dozen cases throughout the common-law world in which courts have awarded such remedies (ch 22 § B.1). To this argument one may add § 39 of the recently approved Restatement (Third) of Restitution and Unjust Enrichment, which recognizes this remedy in cases of deliberate, opportunistic breach.<sup>100</sup> My only comment on this part of the argument is that more than a dozen cases of disgorgement remedies still constitute a marginal number when compared to the tens of thousands of cases in which courts have awarded other remedies for breach of contract.

Eisenberg's second claim is that the arguments against the availability of disgorgement are at best questionable, and that there are good normative arguments in support of these remedies. Eisenberg forcefully refutes the argument that there is no causal link between the breach and the breaching party's profits (ch 22 § B.2) and challenges efficiency arguments against disgorgement (ch 22 § B.3). Here I will only reiterate the gist of the last argument and complement it with an additional point.

From an economic perspective, disgorgement remedies arguably eliminate the incentive for an efficient breach; hence they are undesirable. But as Eisenberg points out, disgorgement need not thwart efficient nonperformance (he devotes chapter 15 to a critique of the efficient-breach theory). Take the paradigmatic case of a seller who fails to deliver the goods because a third party offers her a higher price. Even if the third party is more likely to make the higher offer to the seller than to approach the buyer, the seller may still negotiate discharge of the original contract with the first buyer, thereby facilitating its efficient nonperformance. Such negotiations may be costly due to the bilateral-monopoly situation. However, the costs of resolving a dispute that results from a breach of contract and of judicial determination of damages are likely to be much higher.

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<sup>100</sup> Eisenberg mentions this provision and criticizes it for overly limiting the availability of the disgorgement remedy for breach of contract (ch 22 n 41). Others believe that, while "not unprecedented in American law," this remedy is "essentially new to the American scene." Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 *Loyola LA L Rev* 131, 141 (2008). This was also the view of the Restatement's reporter. See Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 *Tex L Rev* 2021, 2031 (2001) (stating that, outside the "narrow category" of cases of "profitable and opportunistic" breach, disgorgement "is essentially unknown").

One could also add the following argument against disgorgement remedies, which rests on the difficulty of enforcing them.<sup>101</sup> The injured party usually possesses the information and evidence necessary to establish her profits had the contract been performed (expectation) and her monetary position had she not made the contract in the first place (reliance). The facts necessary to establish one's restitution interest are also quite observable and verifiable because the injured party knows what she gave the breaching party. In contrast, when the injured party sues for disgorgement, her claim typically refers to the extra profits that the breaching party made, or the losses that she cut, by breaching the contract. The details of these extra profits or avoided losses may be unknown to the injured party. Disgorgement remedies are consequently not something that promisees might ordinarily be willing to pay for ex ante.

This argument is not compelling, however. Even when the injured party sues for her expectation or reliance losses, she must establish that these losses were foreseeable from the breaching party's perspective at the time of contracting (the *Hadley* rule).<sup>102</sup> If the injured party's losses are observable from the breaching party's point of view, and have been so all along, why should the breaching party's gains from the breach necessarily be unobservable or unverifiable from the injured party's perspective? Moreover, if a disgorgement remedy is difficult to enforce, while this difficulty decreases the promisee's willingness to pay for this entitlement ex ante, it concomitantly decreases the price that the promisor would ask for it (knowing that this remedy is unlikely to be enforced against her in any case). Hence, an agreement is feasible.

After rejecting causality and efficiency arguments against disgorgement, Eisenberg proceeds to list affirmative reasons for awarding it (ch 22 § C). Of these reasons, I mention only the notion that a "promise is a morally binding commitment" (ch 22 § C.1). Eisenberg maintains that "a promisor who wishes to not perform owes a moral duty of respect to the promisee. This duty requires the promisor to seek a mutual accommodation rather than to commit a unilateral breach and thereby convert the promisee from a voluntary actor to an involuntary litigant"

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<sup>101</sup> See Farnsworth, *Contracts* § 12.20a at 342–43 (cited in note 17); Hanoch Dagan, *Restitutory Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 *Theoretical Inq L* 115, 142–46 (2000).

<sup>102</sup> See *Hadley*, 156 Eng Rep at 147–48.

(ch 22 § C.1). While I do not disagree, I would concede that the moral obligation to keep one's promise does not unequivocally support the award of disgorgement remedies. If contracting parties typically prefer that the seller be free to breach the contract subject to the payment of expectation damages, then even deontological theories need not object to a default rule denying the buyer's entitlement to disgorgement.<sup>103</sup> Of course, that is a big "if," which Eisenberg contests in chapters 15 and 16.

Moving to the third main claim, Eisenberg offers several reasons why—despite the doctrinal recognition of disgorgement and the justifications for awarding it—disgorgement remedies are rare. These include the fact that the breaching party's gains from the breach often do not exceed the injured party's losses, as well as the fear that disgorgement would be tantamount to specific performance in cases in which there are strong considerations against it (for example, when an employee breaches an employment contract and takes a higher-paying job) (ch 22 § D).

In what follows, I offer another perspective on Eisenberg's third claim, which relies on the notion of loss aversion. Eisenberg mentions the psychological phenomenon of loss aversion several times in other contexts but not in this one.<sup>104</sup> I argue that loss aversion may explain why disgorgement remedies are rarely sought and awarded, and—contrary to Eisenberg's second claim—why this state of affairs is justifiable.<sup>105</sup>

Contrary to rational-choice theory, Professors Kahneman and Tversky have offered a competing, descriptive theory of people's preferences and choices, known as Prospect Theory.<sup>106</sup> The theory posits that people do not ordinarily perceive outcomes as final states of wealth or welfare, but rather as gains and losses. Gains and losses are defined relative to some reference point. The disutility generated by a loss is much greater than the utility produced by a similar gain.<sup>107</sup> Ordinarily, people take the status

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<sup>103</sup> For a deontological objection to disgorgement as a standard remedy for breach, see Weinrib, 78 *Chi Kent L Rev* at 70–84 (cited in note 16) (offering a critical analysis of disgorgement remedies from the standpoint of corrective justice).

<sup>104</sup> Eisenberg considers loss aversion in the contexts of unconscionability (ch 4); behavioral economics (ch 16); mechanical errors (ch 37); shared mistaken factual assumptions (ch 37); and impossibility, impracticability, and frustration (ch 41).

<sup>105</sup> The following discussion draws on Eyal Zamir, *Loss Aversion and the Law*, 65 *Vand L Rev* 829, 856–60, 869–89 (2012).

<sup>106</sup> See generally Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *Econometrica* 263 (1979).

<sup>107</sup> Tversky and Kahneman estimated that monetary losses loom larger than gains by a factor of 2.25. See Amos Tversky and Daniel Kahneman, *Advances in Prospect Theory:*

quo as the reference point and view changes from this point as either gains or losses. When expectations differ from the status quo, taking people's expectations as the pertinent reference point may yield better explanations and predictions of their behavior.<sup>108</sup>

It follows that both expectation and reliance are conceivable points of reference for assessing the injured party's losses due to the breach. A contract changes the promisee's reference point so that nonperformance is more likely to be perceived as a loss than as merely an unobtained gain. In addition to the plausibility of both reliance and expectation as reference points, Prospect Theory also explains the marginal status of the disgorgement interest. It stands to reason that promisees do not ordinarily view promisors' profits from the breach as something that they have lost. Not obtaining these profits is therefore considerably less painful than not getting back what they had given the breaching party (restitution), the costs that they incurred in performing the contract (reliance), or their own losses due to the breach (expectation). Consequently, disgorgement remedies are much less likely to be sought, and legal decisionmakers are much less likely to award them.<sup>109</sup>

The compatibility between loss aversion and the marginality of disgorgement remedies can be explained in two ways. The first explanation is based in part on the "efficiency of the common law" theory advocated by legal economists since the late 1970s.<sup>110</sup> According to this explanation, contract remedies, like many other features of the law, are the product of an evolutionary

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*Cumulative Representation of Uncertainty*, 5 J Risk & Uncertainty 297, 311 (1992). Thus, most people would refuse to participate in a gamble in which they may either win or lose 100 with equal probability, as the loss of 100 looms larger than a gain of the same amount. People might participate in a gamble in which they either lose 100 or win 250 with equal probability.

<sup>108</sup> See generally Johannes Abeler, et al, *Reference Points and Effort Provision*, 101 Am Econ Rev 470 (2011) (providing experimental support for expectation-based reference dependence).

<sup>109</sup> It is unsurprising that the greatest supporters of disgorgement remedies for breach of contract also adhere to the theory of contractual rights as akin to property rights. If the formation of a contract is akin to an instantaneous transfer of property-like entitlements, it would be natural to view the breaching party's gains from appropriating these entitlements as depriving the promisee of something that she already had. See Daniel Friedmann, *Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong*, 80 Colum L Rev 504, 515 & n 54 (1980); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J Legal Stud 1, 4 (1989); Eisenberg, *Foundational Principles* at ch 22 § C.1 (cited in note 6).

<sup>110</sup> For a survey of the literature, see Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 S Ct Econ Rev 19, 19–28 (2005).

process propelled mainly by plaintiffs' behavior. Two fruitful insights in this regard can be drawn from the economic literature. First, it is not solely courts' reasoned decisions that set the direction of the law's evolution. Litigants' behavior is important as well.<sup>111</sup> Second, a precondition for the evolution of judge-made law is the existence of a dispute.<sup>112</sup>

If people perceive losses as much more painful than unobtained gains, then potential plaintiffs should be much more inclined to sue for losses than for unobtained gains. The disutility experienced with unobtained gains is less likely to be large enough to induce people to sue for legal relief given the considerable costs involved in doing so. Far fewer disputes are thus expected to revolve around unobtained gains. As legal norms develop out of disputes, disgorgement remedies are much less developed than remedies protecting the injured party's expectation and reliance interests.

The evolutionary hypothesis is not free of doubt.<sup>113</sup> Another, more powerful explanation concerns the mindset of lawmakers. According to this explanation, the compatibility between the psychological notion of loss aversion and the law rests on an intermediate factor: commonsense morality. Since the law largely conforms to prevailing moral intuitions, and since the latter are closely connected to notions of reference points and loss aversion, these notions are reflected in the law as well. Commonsense morality is deontological. People believe that enhancing good outcomes is subject to moral constraints. The central constraint is against actively or intentionally harming other

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<sup>111</sup> According to Professor George Priest's original argument, inefficient rules generate more litigation. See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J Legal Stud 65, 65 (1977). The more a rule is litigated, the greater the chances that it will be changed. Efficient rules survive simply because they generate less litigation and thus offer fewer opportunities for alteration. In the same spirit, when a rule inefficiently allocates an entitlement to someone who values it less than someone else, the latter is likely to exert greater effort in challenging the rule than the former is in defending it. See John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J Legal Stud 393, 395 (1978). Since litigants who expend more effort are more likely to prevail, courts are more prone to overturn inefficient rules. See *id.*

<sup>112</sup> See Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 Georgetown L J 1447, 1492 (1991) ("[I]f the law places the incentive to avoid the situation leading to the dispute on the party that can more cheaply avoid the situation, the situation will arise less often. . . . [T]he incentive-efficient rule would be in effect longer than the inefficient rule because disputes would not arise as quickly.").

<sup>113</sup> For various critiques and possible replies, see Zamir, 65 Vand L Rev at 875–76 (cited in note 105).

people. It is immoral, for example, to kill one person and harvest her organs to save the lives of three other people.<sup>114</sup>

Deontological morality distinguishes between harming a person and not benefiting her. Were promoting the good as compelling as eliminating the bad, the doing/allowing distinction, which is essential for the deontological prohibition against harming people, would collapse. According to this distinction, whereas it is forbidden to actively inflict pain or loss on people, a considerably less stringent constraint exists against *allowing* people to suffer an injury or a loss. The prohibition against *kill- ing* one person in order to harvest her organs to save the lives of three other people necessarily implies that actively killing one person is worse than *allowing the death* of the three people.

When an agent abides by the prohibition against actively *doing harm* (that is, refrains from killing the one person to save the three), she simultaneously *avoids doing harm* to the *one* and *avoids doing good* to the *three*. This means that the doing/allowing distinction, which is essential to commonsense morality, inevitably entails a doing good/doing bad distinction.<sup>115</sup>

The correspondence between the moral distinction between promoting the good and eliminating the bad, and the psychological notions of reference points and loss aversion, is straightforward. Losses, unhappiness, and disutility loom larger than gains, happiness, and utility.

As a descriptive matter, the evolutionary hypothesis (focusing on plaintiffs' loss aversion) and the mindset-of-lawmakers hypothesis (reflecting deontological morality, whose basic notions correspond with loss aversion) thus explain why contract law has not developed a robust disgorgement remedy. Returning to Eisenberg's second claim, the role of loss aversion in the law carries normative implications as well. Specifically, it may not only explain the marginality of disgorgement; it may also *justify* it. Since a loss generates greater displeasure than an unobtained gain, and since people commonly prefer not losing to gaining, any policy striving to enhance human well-being should take these phenomena into account. This is exactly what contract law does

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<sup>114</sup> See Kagan, *Normative Ethics* at 70–105 (cited in note 23); Zamir and Medina, *Law, Economics, and Morality* at 41–56 (cited in note 23).

<sup>115</sup> The same argument holds if, instead of the doing/allowing distinction, one adopts the intending/foreseeing distinction, meaning that there is a much more stringent prohibition on intending harm than on merely foreseeing it.

when it protects the expectation and reliance interests much more than it protects the disgorgement interest.

#### IV. AMERICAN CONTRACT LAW AND THEORY: TENTATIVE OBSERVATIONS

In addition to assessing the important contributions (and limitations) of Bix's, Baird's, and Eisenberg's books, this Review provides an opportunity to comment on some general characteristics of US contract law and theory as reflected in these books. Since seriously substantiating the following observations would take me far beyond the framework of this Review, I offer them in a cautious and tentative way, using more question marks than exclamation points. The three interrelated observations refer to US contract law's individualistic orientation, fragmentation, and traditionalist inclination.

##### A. Individualistic Orientation

The normative dispositions of the scholars whose books I reviewed vary. Baird seems to occupy a conservative, individualistic, and efficiency-oriented position; Eisenberg represents a more liberal, progressive, and social perspective; and Bix appears to be located somewhere in between. While it may seem almost reckless to draw general conclusions about the normative orientation of US contract law based on such a small sample, it seems to me that this sample is actually representative of much of the literature. Compared to other modern legal systems, the overall orientation of US contract law (as well as US law more generally) is rather conservative and individualistic.<sup>116</sup>

This orientation is reflected in the three books in several ways. For example, they all mention paternalism. However, Bix alludes to it only as a ground for *objection* to regulation based on substantive unfairness (p 130). Baird mentions paternalism only in the context of cross-collateralization clauses in standard-form contracts, legitimizing the ban on such clauses by stating that

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<sup>116</sup> See generally Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 Am J Comp L 479 (2013) (highlighting the centrality of social justice in European law and its marginality in US law). See also Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 Tex Intl L J 223, 266–72 (2006) (comparing consumer-sales law in the United States and in other countries); Bix, *Contract Law* at 119–21 (cited in note 4) (describing the basic tenets of US employment law).

they are meant to bypass the paternalistic laws that protect certain goods from the reach of creditors (pp 136–39). As mentioned in Part III.A, Eisenberg discusses paternalism much more favorably in chapter 4 of his book, when dealing with unconscionability; but even he does not find it relevant to other contract doctrines. While principled antipaternalism is compatible with libertarianism, it is hardly compatible with a consequentialist theory that strives to maximize overall social welfare, the normative theory underlying much of the economic analysis of the law. The strong experimental and empirical evidence attesting to the prevalence of systematic cognitive biases provides ample room for efficient paternalism.<sup>117</sup>

Regarding contract law and distributive justice, Bix's twenty-two-page bibliography includes three seminal articles on this issue: Professor Anthony Kronman's and Professor Duncan Kennedy's articles that were published some thirty years ago, and Professor Richard Craswell's article, published more than twenty years ago.<sup>118</sup> Strikingly, the list includes no subsequent scholarship on this important subject,<sup>119</sup> nor do the three books discuss distributive justice in any meaningful way. More left-wing perspectives on contract law, such as feminist analysis,<sup>120</sup> are not even mentioned, either in Bix's bibliography or elsewhere in the three books.

In sharp contrast, all three books repeatedly refer to traditional economic analyses of contract law. Whereas Baird is clearly sympathetic to the economic perspective and Eisenberg is often

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<sup>117</sup> See Zamir, 84 Va L Rev at 233–54 (cited in note 93). Even legal economists who empirically expose the systematic exploitation of cognitive biases by commercial firms are reluctant to conclude that such exploitation justifies regulation of the content of consumer transactions, opting instead for information regulation. See generally Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford 2012). For a discussion of the futility of information regulation, see generally Ben-Shahar and Schneider, *More than You Wanted to Know* (cited in note 87).

<sup>118</sup> Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 Yale L J 472 (1980); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md L Rev 563 (1982); Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 Stan L Rev 361 (1991).

<sup>119</sup> See generally, for example, Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J Legal Stud 667 (1994); Lewinsohn-Zamir, 91 Minn L Rev 326 (cited in note 69); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 Hastings L J 105 (2008).

<sup>120</sup> See generally, for example, Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 Yale L J 775 (1992); Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 Am U J Gender Soc Pol & L 251 (2005).

critical of it, its pivotal role within mainstream contract law scholarship in the United States is evident. Although the insights of economic analysis gradually infiltrate other legal systems,<sup>121</sup> their impact on those systems is typically much weaker due to, among other things, the central role of deontological morality as well as their greater social and communitarian inclinations.

One might have expected that the subprime crisis of the late 2000s and early 2010s—which was plausibly facilitated by decades of unwavering faith in the free market<sup>122</sup>—as well as recent advances in empirical and experimental behavioral studies that question the assumptions of standard economic analysis,<sup>123</sup> would motivate reconsideration of the conservative, free market orientation of US contract law. Inasmuch as one can learn from these three books, this expectation appears misplaced.

## B. Fragmentation

Anyone interested in US contract law faces the difficulty that no such unified body of law exists.<sup>124</sup> Contracts in the United States are governed by a wide variety of laws and regulations (state and federal) that are inconsistent with one another and that may not even be internally consistent. To begin with, there are differences between the laws of the fifty states. In addition, some transactions are governed by the provisions of the UCC, while others are not. The UCC naturally has had an impact on the development of the common law of contracts, and since the UCC is interpreted and applied by the courts, its interpretation and application are influenced by common-law doctrines. However, nontrivial divergences between the UCC and the common law of contracts are preserved regardless of the lack of rational justifications for these divergences.<sup>125</sup> In addition to the distinctions between transactions governed by the UCC and those governed by

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<sup>121</sup> See generally, for example, the articles in a symposium in 11 *Intl Rev L & Econ* 261 (1991); Roger Van den Bergh, *The Growth of Law and Economics in Europe*, 40 *Eur Econ Rev* 969 (1996); Klaus Mathis, ed, *Law and Economics in Europe: Foundations and Applications* (Springer 2014).

<sup>122</sup> See Joseph E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* 1–26 (Norton 2010).

<sup>123</sup> See generally Zamir and Teichman, eds, *The Oxford Handbook on Behavioral Economics and the Law* (cited in note 61).

<sup>124</sup> See Hein Kötz, *Contract Law in Europe and the United States: Legal Unification in the Civil Law and Common Law*, 27 *Tulane Eur & Civ L F* 1, 1–3 (2012). See also Mathias Reimann, *American Private Law and European Legal Unification—Can the United States Be a Model?*, 3 *Maastricht J Eur & Comp L* 217, 219–22 (1996).

<sup>125</sup> See Bix, *Contract Law* at 105–06 & n 93 (cited in note 4).

the common law, federal and state legislation regulate important aspects of various transactions, ranging from consumer contracts to franchises and residential leases. This legislation exacerbates the fragmentation of contract law, as it often differs from one state to another. To be sure, any attempt to unify US contract law would face formidable political, institutional, and cultural obstacles. While these obstacles may explain the current state of affairs, they neither undermine the descriptive claim regarding its existence nor necessarily justify it.<sup>126</sup>

The fragmentation of US contract law has additional, less obvious roots. The process of crafting a general law of contract—as opposed to specific laws applying to different transactions—has never been completed in US law. For instance, the common law still applies separate rules to transactions in goods and services and to transactions in real property. As Bix explains, “In teaching and scholarship, the topic [of real estate transactions] is usually treated as a special topic within property law or as a topic unto itself” (p 122). While some of the differences between the two legal regimes are perfectly sensible, others are not. For instance, entitling the buyer of goods to expectation damages while limiting the monetary remedy of a buyer of real property to restitution of the payments that she made, as some jurisdictions do (Bix, p 123), seems rather strange.<sup>127</sup>

The doctrinal fragmentation of US contract law may indirectly affect substantive law. The development of judge-made law depends to a considerable extent on the type of disputes adjudicated. For example, a body of contract law developed primarily around consumer-contract disputes would look different from a body of law developed mainly around commercial disputes. To the extent that certain types of transactions are highly represented in contract law cases, their characteristics could shape

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<sup>126</sup> For a comprehensive analysis of the diversity of attempts at unification of private law in the United States, including from historical and institutional perspectives, see generally Whitmore Gray, *E Pluribus Unum? A Bicentennial Report on Unification of Law in the United States*, 50 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Rabel J Comp & Intl Priv L) 111 (1986).

<sup>127</sup> By way of comparison, under Israeli law, not only do the same remedy rules apply to all contracts, whether pertaining to movable or immovable property, but most provisions of the Hire and Loan Law, 5731-1971 (1982) (Isr), in 25 *Laws of the State of Israel* 152 (Ministry of Justice, trans), which determines the rights and obligations of the lessor and the lessee, apply equally to both types of property. In the same vein, the Sale Law, 5728-1968 (1968) (Isr), in 22 *Laws of the State of Israel* 107 (Ministry of Justice, trans), which applies primarily to the sale of goods, also applies, *mutatis mutandis*, to the sale of immovable property.

the doctrines that apply to *all* types of contracts. At the same time, if the study of some transactions, such as real estate contracts, is considered “a topic unto itself” (Bix, p 122), then those transactions are unlikely to affect the development of contract law.

Doctrinal fragmentation likewise carries over to contract scholarship and theory. Scholars who focus their attention on US contract law rather than on federal law or the law of a certain state, naturally tend to exclude from the ambit of their discussion (or only marginally address) state and federal *statutory* material (except for the generally adopted UCC). As a result, the issues dealt with in that legislation are no longer regarded as part of canonical contract law—the general, fundamental, and lasting doctrines that any law student and jurist should be familiar with.

Moreover, the fragmentation of US contract law may adversely affect its substantive norms and may reinforce its individualistic orientation described in Part IV.A. The first concern is demonstrated by Professor Craswell’s discussion of misrepresentation and nondisclosure.<sup>128</sup> Without going into detail, Craswell points out that traditional discussions of these issues in contract law and scholarship—the types of discussions that one finds in the books reviewed here—disregard, among other things, the fact that disclosure can produce costs as well as benefits by distracting parties from other, more important information.<sup>129</sup> Such practical issues have been addressed extensively in federal consumer-protection law (and they are gradually recognized in product-liability cases involving the duty to warn). Separating federal consumer law from the rest of contract law thus hinders contract law’s progress.

The second concern is exemplified by Baird’s discussion of standard-form contracts (pp 123–30). To persuade the reader that contract law need not tackle the problem of one-sided form contracts head on, Baird points to the existence of other bodies of law—rules governing false advertising, payday lending, door-to-door sales, and so forth—that already protect consumers. By excluding consumer issues from the province of contract law, one can more easily advocate a conservative and individualistic contract law.

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<sup>128</sup> See generally Craswell, 92 Va L Rev 565 (cited in note 49).

<sup>129</sup> See *id.* at 604.

### C. Traditionalist Inclination

The third characteristic of US contract law worth mentioning is actually common to many legal systems: its inability to free itself from the historical chains of old doctrines. The fact that much of US contract law is judge-made presumably enhances its flexibility and adaptability.<sup>130</sup> Coming from a rather young, mixed legal system—in which both statutory and judge-made law play key roles, the statutory infrastructure of contract law is a product of functional, broad-ranging comparative law uncommitted to any specific legal tradition, and the courts are distinctively active and innovative<sup>131</sup>—it is striking just how inflexible and traditionalist US contract law actually is. Bix emphasizes the traditionalist inclination of the law by asserting that:

Some of the doctrinal rules reflect the particular path the law took . . . whereas others may reflect the evidence and procedural rules of a certain time. . . . The historical accidents underlying large numbers of rules creates a challenge both for judges and advocates seeking a rational reconstruction of an area of law and for theorists proposing theories of those areas. (p 16)

The traditionalist nature of much of US contract law is all the more conspicuous in Baird's analysis. As mentioned above, 42 percent of the court opinions cited in Baird's book were delivered prior to 1930, and only 20 percent after 1990.

The traditionalist bent of much of the US common law of contracts is connected to its individualistic orientation and to its fragmentation. Regarding the former, since the formative years of many contract law doctrines (from the middle of the nineteenth century until the beginning of the twentieth) also represent the era of classic contract law—commonly perceived as rather

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<sup>130</sup> See Melvin Aron Eisenberg, *The Nature of the Common Law* 4–7 (Harvard 1988); James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 *La L Rev* 1, 5 (1993); Thorsten Beck, Asli Demirgüç-Kunt, and Ross Levine, *Law and Finance: Why Does Legal Origin Matter?*, 31 *J Comp Econ* 653, 655 (2003).

<sup>131</sup> For discussions of the characteristics of Israeli private law, see generally Eyal Zamir, *Private Law Codification in a Mixed Legal System—The Israeli Successful Experience*, in Julio César Rivera, ed, *The Scope and Structure of Civil Codes* 233 (Springer 2013); Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 *Tulane L Rev* 151 (2003); Aharon Barak, *The Tradition and Culture of the Israeli Legal System*, in Alfredo Mordechai Rabello, ed, *European Legal Traditions and Israel* 473 (Sacher Institute 1994).

formalistic and individualistic—these features can hardly be disposed of. Traditionalism contributes to the fragmentation of US contract law when, for example, courts are reluctant to adapt common law to newer rules and concepts as adopted by the UCC and other legislation—an attitude that sustains the disparities between the two.

#### CONCLUSION

An interesting gap between US contract law and US contract-law theory is in evidence. US contract law is often entangled in a myriad of complex and dated doctrines, overly individualistic, and fragmented. At the same time, contract-law theory is often very sophisticated and insightful. Much like in other legal spheres, American contract scholars (and others participating in the discourse) have made peerless contributions to contract theory. The schools of thought involved include American legal realism, relational contracts, critical legal studies, law and economics, and, more recently, empirical legal studies. No less important are the studies that integrate some or all of these divergent insights with doctrinal analysis. Notwithstanding their fundamental differences, Brian Bix's, Douglas Baird's, and Melvin Eisenberg's new books are most welcome and important additions to this scholarship.