

Contract Theory—Who Needs It?

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Reconstructing Contracts

Douglas G. Baird. Harvard, 2013. 170 pages.

Contract Law: Rules, Theory, and Context

Brian H. Bix. Cambridge, 2012. 202 pages.

Foundational Principles of Contract Law

Melvin A. Eisenberg. Oxford, forthcoming.

INTRODUCTION

Philosophy is perfectly right in saying that life must be understood backward. But then one forgets the other clause—that it must be lived forward.

Søren Kierkegaard¹

Both law students and law teachers have traditionally been drawn to conceptual projects that attempt to systematize the field of contract law. The reasons for this are easy to see: the field is doctrinally complex, few beginning students have any substantial experience with the kinds of fact patterns that arise in the cases, and the law is a locus of contestation over fundamental issues of economic liberalism that go to the heart of the capitalist system. Thus, there has long been both an appetite and a market for syntheses of the field that go beyond the usual study aids and hornbooks. A generation ago, Professor Grant Gilmore's *The Death of Contract*, Professor Charles Fried's

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¹ Søren Kierkegaard, *Selected Early Entries from Kierkegaard's Journals and Papers*, in Howard V. Hong and Edna H. Hong, eds, *The Essential Kierkegaard* 3, 12 (Princeton 2000).

Contract as Promise, and, for those with greater stamina, Professor Patrick Atiyah's *The Rise and Fall of Freedom of Contract* addressed this intellectual need, and all three are still unquestionably worth the attention of first-year students and their teachers.² But time passes, new problems arise, case law develops, and the frontiers of political contestation shift; and a new cohort of guidebooks is needed for a new cohort of lawyers.³

This Review considers and compares three new books that offer theoretical syntheses of contract law and theory: Professor Douglas Baird's *Reconstructing Contracts*; Professor Melvin Eisenberg's forthcoming *Foundational Principles of Contract Law*;⁴ and Professor Brian Bix's *Contract Law: Rules, Theory, and Context*. The books' intended audiences overlap to a considerable extent, but each is addressed to a different ideal reader. Baird's book, while providing much of interest to scholars and teachers, is self-consciously aimed at beginning law students (p ix); a number of chapters are based on material originally presented in lecture form at The University of Chicago (p ix). Eisenberg's book, in contrast, integrates material from over two dozen law review articles published over the last twenty-five years and combines it with his own survey and critique of the work of many other leading scholars. It is thus primarily aimed at an audience of contract law scholars, though it will be an extremely valuable companion for any law student who makes the time for it (especially if the student's contracts teacher has assigned Eisenberg's casebook⁵). Bix's book, the most eclectic of the three, aims to bridge the gap between these two audiences and to add a third as well; as an entry in the *Cambridge Introductions to Philosophy and Law* series, it is also intended as a legal primer for students of the philosophy of law and political science (p xi).

Any contemporary scholar offering a synthetic account of the law of contracts necessarily writes in the shadow of the great

² See generally Grant Gilmore, *The Death of Contract* (Ohio State 1974); Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard 1981); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979).

³ Also worth mentioning in this context is what for years has probably been the most popular supplementary reading used and purchased by law students: Marvin A. Chirelstein's *Concepts and Case Analysis in the Law of Contracts* (Foundation 7th ed 2013), which sets the standard for student hornbooks but focuses on doctrine rather than on articulating general theoretical principles.

⁴ Citations in this Review refer to the July 22, 2013, manuscript of the book.

⁵ See generally Lon L. Fuller, Melvin Aron Eisenberg, and Mark P. Gergen, *Basic Contract Law* (West 9th ed 2013).

commentators of the field and of their intellectual debates. For at least the last century, contracts jurisprudence and pedagogy in the United States has been organized around two competing if overlapping intellectual paradigms: formalism and realism. This is not the place for a full account of the relationship between the two, but the main themes are easily summarized.⁶ Formalism emphasizes that, in order to understand the law, one must master a complicated but ultimately coherent framework of principles that can, with practice, be applied in a predictable and intersubjective fashion; on this view, the value of case analysis is that it focuses law students on a representative sample of concrete applications that illustrate the relevant rules and principles. Realism, in contrast, emphasizes that the law is not a logical system but rather a loosely connected set of practices, conventions, traditions, and values that sometimes exhibit regular form but sometimes do not. On this view, case law still merits study not because it illustrates fundamental legal principles, but because it embodies the law as it operates in practice. Black-letter doctrine is accordingly useful as a filing system, helpful in summarizing and referring to a complex body of legal material; but it is always imperfect, full of exceptions and contradictions, and subject to evolution and change. Knowing which doctrine will be applied in a given case, or whether a new category or exception is likely to be created, requires an appreciation of this larger context—what Professor Karl Llewellyn called “situation sense.”⁷

The authors of the three books under review, like all of us who may read them, are heirs of this intellectual contest and thus are both formalists and realists, although in different measures. All the authors direct substantial attention to legal doctrine and, to various extents, attempt to pull it into some coherent order (though Bix is most comfortable with the idea that

⁶ For a classic but tendentious account from one of the most prominent and polemical later Legal Realists, see generally Grant Gilmore, *The Ages of American Law* (Yale 1977). For a more contemporary analysis that focuses on commonalities between the schools and that presents Gilmore’s account as mythical, see Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 44–63 (Princeton 2010).

⁷ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 60–61 (Little, Brown 1960). For an elaboration of what Llewellyn may have meant by the term, and for the classic history of the Legal Realist paradigm, see William Twining, *Karl Llewellyn and the Realist Movement* 217–27 (Cambridge 2d ed 2012).

no complete coherence may be achieved).⁸ But at the same time, all of them take a pragmatic approach to the law of contracts, defining their approaches in opposition to those of classical writers such as Professor Christopher Columbus Langdell and Justice Oliver Wendell Holmes and rejecting any idea that the law can be properly understood without attending to the substance of the activity that it purports to govern.

This Review suggests that all three books have considerable merit and that all have different strengths; but none of the three really addresses what is foundationally distinctive about contract law—that is, what justifies our considering it a separate field of jurisprudence. The key feature of contract law, as opposed to the other standard first-year subjects, is that it affords private parties the power of lawmaking. Contractual obligations are primarily created by decentralized nonstate actors pursuing their own goals and plans, not by state officials making law and policy for society at large. Because they are decentralized and unofficial, contracts can be tailored to the needs of particular parties and particular transactions; because they are decentralized and unofficial, they raise distinctive problems of formality, interpretation, and enforcement.

Unlike tort or criminal law, contract law can operate without the presence or participation of state officials—or even of professional lawyers. As I tell my students on the first day of class, a few of them may become judges or legislators, and some may work at administrative agencies. In so doing, these few may have regular occasion to make law in the form of judgments, statutes, regulations, and rulings. But the bulk of them will not become public officials; rather, they will represent individual clients. And on behalf of those clients, as they write letters, return phone calls, seek to settle cases, and the like, they will be making law every day, and it will be contract law that they are making. To make good law and to help their clients make good law, these lawyers need to understand what they are doing. The insights that are afforded them by these three books are considerable, but they are not as great as they might have been, because the authors' attentions remain focused on official rules of law as they are applied in public institutions.

⁸ See text accompanying notes 54–55.

I. BAIRD'S *RECONSTRUCTING CONTRACTS*

Baird's book is the shortest of the three but, in its own way, the most ambitious. It aims, in the author's words, to "set out a few core ideas that unite the law of contracts" (p ix). And the book does set out a number of basic lessons in its introduction and eight short chapters. These lessons include: ultimately, some form of objective interpretation is the only game in town (pp 1–45); the only choice is which form is most reasonable (pp 9–24); lots of disputes that have little to do with exchange wind up as contracts cases because somebody made a promise along the way (pp 25–45); the most important basis of contractual obligation is bargained-for exchange (passim, but especially pp 9–45); as a practical matter and with occasional exceptions, expectation damages are the best default remedy for breach of contract (pp 46–77); social norms of fair dealing should be relevant to, though not determinative of, legal outcomes (pp 78–95); breaching a contract leads to all kinds of legal and practical consequences, not just an assessment of damages (passim); legal rules should focus on ensuring the smooth operation of the market as a whole, as opposed to trying to reach the correct result in every individual case (passim, but especially pp 96–146); and, perhaps most importantly, clarity in communication and planning is always a good thing, which is why formalism is often a good interpretive approach, so long as one does not take it too far (passim).

The author's promise that all can be understood through the framework of a small set of fundamental principles, however, is in important respects at odds with the deep contextual, historical, and institutional knowledge that he deploys in presenting and analyzing these principles. He draws on insights from the economic analysis of contracts, but far from exclusively. In two chapters, he delves into historical materials to show that the conventional reading of several leading cases is based on a misunderstanding of the actual circumstances that led to those cases (pp 9–45).⁹ In another, he unearths the correspondence between

⁹ The discussion of *Hamer v Sidway*, 27 NE 256 (NY 1891), is based on Baird's own investigation of the historical record, as more fully elaborated in one of his earlier writings. See Douglas G. Baird, *Reconstructing Contracts: Hamer v. Sidway*, in Douglas G. Baird, ed, *Contracts Stories* 160, 160–85 (Foundation 2007). The discussions of *Raffles v Wichelhaus*, 159 Eng Rep 375 (Ex 1864), and *Mills v Wyman*, 20 Mass 207 (1825), are based respectively on the research of A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 Cardozo L Rev 287 (1989), and Geoffrey R. Watson,

Justice Holmes and a now-obscure scholar to compare the advantages and limitations of simple and complex theories and to explore the conceptual connections between the remedies of expectation damages and specific performance (pp 46–56). And in yet another, he takes the reader on a brief excursion into the sociology and economics of the typical con game, followed by another into the economics of reputational signaling, all by way of presenting the contextual background for a larger discussion of the law governing the interpretation of fine print contracts (pp 130–36).

At least for the knowledgeable reader, it is these more contextual discussions, accompanied by the author's many fresh insights into classic cases and doctrinal arguments, that will constitute the primary pleasure of the book. One extended example will have to suffice to illustrate the point. In the first chapter of the book, Baird makes use of Professor Brian Simpson's historical research into nineteenth-century British futures markets to shed new light on an old and familiar argument between Holmes and Professor Gilmore on the relative merits of objective and subjective interpretation. The argument arises over the classic case of *Raffles v Wichelhaus*,¹⁰ in which two Liverpool merchants contracted for the purchase and sale of a load of cotton that was on its way from Bombay on a ship bearing the singular name of "Peerless," only to discover after the fact that there were actually two ships traveling that sea route that bore that name, one of which (the one carrying the cotton) was running two months behind the other.¹¹ It is not reported what happened when the earlier ship arrived in port without the promised cargo, but by the time the second ship arrived, prices had fallen and the buyer was no longer willing to take delivery (p 9). When sued by his aggrieved seller, he claimed that, because there were two ships and each party (allegedly) had in mind a different ship when making the bargain, there was no agreement and hence no contractual obligation.¹² The court accepted this argument, or so the conventional reading goes, and found for the defendant (pp 9–11).

In the Tribunal of Conscience: Mills v. Wyman Reconsidered, 71 Tulane L Rev 1749 (1997), the former of which is also reprinted in Baird's *Contracts Stories*.

¹⁰ 159 Eng Rep 375 (Ex 1864).

¹¹ *Id.*

¹² *Id.* at 376.

The *Raffles* case is an old chestnut that is prominently featured in modern casebooks to this day,¹³ no doubt in part because of its improbable and ironic fact pattern. But Baird is less concerned with its result than with reconstructing and defending an analysis by Holmes that Gilmore, almost eighty years later, characterized as “altogether astonishing” and “an extraordinary tour de force.”¹⁴ Holmes argued, counterintuitively, that *Raffles* provides support for an objective view of interpretation:

It is commonly said that such a contract is void, because of mutual mistake as to the subject-matter, and because therefore the parties did not consent to the same thing. But this way of putting it seems to me misleading. The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. . . . The true ground of the decision was not that each party meant a different thing from the other, as is implied by the explanation which has been mentioned, but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.¹⁵

Gilmore, for his part, presented Holmes's analysis as if it were self-evidently wrong; he viewed *Raffles* as the quintessential instance of the failure of the objective theory of interpretation.¹⁶ How could the parties have said different things, as Holmes would have it, if they used the very same word, “Peerless”? But as Baird explains, it is indeed possible to say different things by use of the same word, depending on what one means by the word “said.” One possible meaning of “said”—evidently the one that Gilmore had in mind—is strictly physical: a person “says” something when he manipulates muscles of the larynx, tongue, palate, and lips to produce a certain set of sound waves in the air that can be detected by another person who has the appropriate aural equipment, whatever the effect on the person who receives the sound waves. More plausibly for the purposes of human communication, however, “said” means rather more

¹³ See, for example, Ian Ayres and Gregory Klass, *Studies in Contract Law* 187 (Foundation 8th ed 2012); John P. Dawson, et al, *Contracts: Cases and Comment* 294 (Foundation 10th ed 2013); John D. Calamari, et al, *Cases and Problems on Contracts* 290 (West 6th ed 2011).

¹⁴ Gilmore, *Death of Contract* at 40–41 (cited in note 2).

¹⁵ Oliver Wendell Holmes Jr, *The Common Law* 279 (Harvard 2009).

¹⁶ See Gilmore, *Death of Contract* at 41 (cited in note 2) (“The magician who could ‘objectify’ *Raffles v Wichelhaus* . . . could, the need arising, objectify anything.”).

than this: it means that there has been a communication, with semantic content, sent from one person and intended to be received by another. (For example, if I go into the streets of a foreign city where no one around me speaks English and create the sound waves that in English correspond to the word “Peerless,” have I said anything? On the physical definition I have; but on the interpersonal definition I plainly have not.)

For purposes of contracts, law, or indeed any aspect of human communication, it is the interpersonal definition that is relevant. In order for words to have communicative effect, the listener and hearer must speak the same language; functionally, they must share the same conventions regarding what sounds are used to refer to what concepts. Such conventions constitute what the literary and legal critic Stanley Fish has labeled an “interpretive communit[y].”¹⁷ Once one recognizes this point about the way that language works, the distinction between subjective and objective interpretation loses much of its bite, because whether two people share the same linguistic convention is a social fact that can be determined by interpersonally objective criteria. (For example, “Peerless” is not a word that Spanish speakers recognize, but it is a word that English speakers recognize; and competent Spanish and English speakers recognize that this is so.) In this regard, Holmes had a better understanding of the way that language works than Gilmore did.¹⁸

¹⁷ See Stanley E. Fish, *Interpreting the “Variorum,”* 2 *Critical Inquiry* 465, 483–85 (Spring 1976) (defining “interpretive communities” as communities “made up of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions”).

¹⁸ The same methodological point was made by Eisenberg’s senior author Lon Fuller more than half a century ago, and it continues to be printed in the current version of his contracts casebook:

It is sometimes concluded that what a party objectively means is not a question of intent at all. This conclusion rests on a confusion of thought concerning the meaning of intent, as is shown by the analogy of legislation. . . . Th[e] constitutional relation between courts and statutes is commonly expressed by saying that the intent of the legislature governs the interpretation of a statute. Yet it is generally recognized that the intent that the court must respect is a formalized thing, and not the actual inner intent of particular legislators. A statute becomes law only after it has been enacted in accordance with certain rules; when these rules have been followed the statute stands as law even though Senator Sorghum confides to his dinner partner that he was asleep when the bill was read and did not know what he was voting for.

Fuller, Eisenberg, and Gergen, *Basic Contract Law* at 418 (cited in note 5). For the original publication, see Lon L. Fuller, *Basic Contract Law* 295–96 (West 1947) (using slightly different language).

Applying this conception to *Raffles* in order to determine whether the parties said the same thing, we must ask whether they followed the same linguistic conventions when they used the word “Peerless” in their contract. If not, we must then ask whether one party’s convention was demonstrably more authoritative than the other’s. The seller’s barrister argued that the parties did follow the same convention: in particular, he argued that the language “to arrive ex Peerless” was understood in the local mercantile community to refer solely to the allocation of shipwreck risk; if the ship “Peerless” were to fail to reach port, parties who had contracted “ex Peerless” would be excused from their contractual obligations, while parties who had contracted without such limitation would not.¹⁹ Gilmore readily accepted this argument, but the judges did not; they immediately began badgering the hapless barrister with a variety of hypotheticals relating to identically named pairs of warehouses and wineries.²⁰

Baird, drawing on Simpson’s historical research on the origins of futures markets, suggests that Gilmore was wrong and the judges were right. If the Peerless contract was indeed a futures contract, as Baird finds likely, then the time of sailing is obviously material. For a community of futures traders, cotton on a ship that departs in October is just not the same commodity as cotton on a ship that departs in December. Similarly, the *Raffles* case did not turn (as Gilmore would have it) on a conflict between two subjective interpretations: the one that the seller had in mind and the one that the buyer had in mind. Instead, it turned (as Holmes would have it) on a conflict between two objective interpretations: the shipwreck-risk interpretation advanced by the seller, and the futures-market interpretation advanced by Simpson, Baird, and perhaps the judges as well. But, as Baird points out, none of this matters because of the particular procedural posture of the case. As it happens, *Raffles* came to the Court of Exchequer on a demurrer to a plea; the buyer had defended on the ground that the parties had referred to different ships, and the seller demurred, that is, asserted that the buyer’s defense should be struck down as legally irrelevant (p 10).²¹ Because the case was up on a demurrer, the buyer did not need to show that his interpretation was the better one in

¹⁹ See *Raffles*, 159 Eng Rep at 375.

²⁰ See Gilmore, *Death of Contract* at 37–38 (cited in note 2). See also *Raffles*, 159 Eng Rep at 375–76.

²¹ See *Raffles*, 159 Eng Rep at 375.

order to win the case; he only needed to show that it was plausible. The seller, in contrast, needed to show that no plausible set of facts could make the difference between the two ships legally material; and given the possibility of futures trading, such a showing could not be made (pp 11–13).

By combining historical analysis, interpretive theory, and attention to the niceties of legal procedure, Baird solves the puzzle. *Raffles* is not a hard case; it is an easy case and it comes out the right way. The judges understood it and so did Holmes; the only ones who did not were Gilmore and generations of law teachers and their students. I myself have taught this case for twenty-five years under the influence of Gilmore's view. But next time, it will be different.

This discussion of *Raffles* appears early in the book (pp 9–20), and it whets the reader's appetite for what follows. In the ensuing chapters, Baird offers similarly fresh and thoughtful insights into many other classic cases, hypotheticals, and arguments. By the end, one may not mind much that the book's initial promise that contract law can be satisfactorily explained by a small set of ideas is not fully realized (though it comes closer to delivering on that promise in the earlier chapters on intent, bargain, and the expectation measure of damages). After all, the author himself concedes the claim in the final pages of the book, which he appropriately styles an epilogue rather than a conclusion.²²

The book, accordingly, should not be viewed as a mere primer or introduction to the field, even if the blurbs on its jacket label it as such. Any student who reads it will surely get a lot out of it; and it is short and well written enough that many will be motivated to do so. But it is also a lively and thoughtful tour through many of the great cases and controversies of the field, from which anyone who teaches contracts will profit.

²² Baird explains:

Regardless of the tools that we use, we cannot expect pat answers. The law of contracts and the world in which it operates are both too rich and too subtle to be reduced to a single metric. We must continue to reconstruct the law of contracts, remembering that the test of new organizing ideas or formal rules is whether they are useful. (pp 150–51)

II. EISENBERG'S *FOUNDATIONAL PRINCIPLES OF CONTRACT LAW*

Eisenberg's book project (not yet in print and still subject to final revisions, but which has been circulating in a sort of samizdat format among contract law scholars for the last year) differs from Baird's both in approach and scope. Eisenberg assuredly does not believe that the law of contracts can be understood by mastering a few simple ideas; while he offers a variety of frameworks for understanding individual doctrines or clusters of doctrines, he instead emphasizes the field's complexity and richness. His project is similarly magisterial, incorporating and integrating materials from twenty-five years' worth of legal scholarship, including numerous law review articles²³ as well as his own widely used contracts casebook.²⁴ (The first chapter, which

²³ For the original articles, not all of which are formally cited in the July 22 draft of Eisenberg's book, see generally Melvin Aron Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv L Rev 637 (1976); Melvin Aron Eisenberg, *Donative Promises*, 47 U Chi L Rev 1 (1979); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv L Rev 741 (1982); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 Cornell L Rev 640 (1982); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 Stan L Rev 1107 (1984); Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 Cal L Rev 563 (1992); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum L Rev 1358 (1992); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 Cal L Rev 1127 (1994); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan L Rev 211 (1995); Melvin Aron Eisenberg, *Strict Textualism*, 29 Loyola LA L Rev 13 (1995); Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L Rev 1005 (1998); Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 Cal L Rev 821 (1997); Melvin Aron Eisenberg, *Why There Is No Law of Relational Contracts*, 94 Nw U L Rev 805 (2000); Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 Cal L Rev 1743 (2000); Melvin Aron Eisenberg, *The Duty to Rescue in Contract Law*, 71 Fordham L Rev 647 (2002); Melvin Aron Eisenberg and Brett H. McDonnell, *Expectation Damages and the Theory of Overreliance*, 54 Hastings L J 1335 (2003); Melvin Aron Eisenberg, *Disclosure in Contract Law*, 91 Cal L Rev 1645 (2003); Melvin Aron Eisenberg, *Mistake in Contract Law*, 91 Cal L Rev 1573 (2003); Melvin Aron Eisenberg, *The Revocation of Offers*, 2004 Wis L Rev 271; Melvin Aron Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 Cal L Rev 975 (2005); Melvin Aron Eisenberg, *The Disgorgement Interest in Contract Law*, 105 Mich L Rev 559 (2006); Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 Mich L Rev 1413 (2009); Melvin Aron Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J Legal Analysis 207 (2009); Shawn J. Bayern and Melvin Aron Eisenberg, *The Expectation Measure and Its Discontents*, 2013 Mich St L Rev 1; Melvin Aron Eisenberg, *Conflicting Formulas for Measuring Expectation Damages*, 45 Ariz St L J 369 (2013).

²⁴ See generally Fuller, Eisenberg, and Gergen, *Basic Contract Law* (cited in note 5).

sets out the author's general methodological commitments, also draws on his classic work on the common law process.)²⁵

Following this first chapter, the project follows the organization of the casebook, as well as (for better or worse) its emphasis. The latest version of the manuscript includes seventeen chapters on remedies for breach of contract but devotes comparatively little attention to seven short chapters on what the casebook calls "problems of performance":²⁶ good faith, material breach, substantial performance,²⁷ conditions, anticipatory repudiation, insecurity, and cure. There are three chapters on consideration and freedom of contract; twelve on interpretation (including interpretation rules relating to offer and acceptance); seven on mistake, impracticability and frustration, and related problems of disclosure; one on third-party beneficiaries (though none on assignment); and one on the Statute of Frauds. There are also four chapters that respond primarily to developments in the academic literature as opposed to legal doctrine; these focus on the topics of efficient breach, overreliance, behavioral economics, and relational contracts. (The latest manuscript contains no chapter on public policy or the limits of contractual alienability, even though the author's casebook chapter on these topics has been the subject of regular revision over the last few editions.²⁸ For this reason, one may expect the published version of the book to include some substantial discussion of this issue.)

In part because of this consistency in organization, contracts scholars who have taught out of the author's casebook (as I have done for over twenty years, through its last six editions) will find this project especially valuable. Many of the discussions expand and elaborate on case and jurisprudential notes that are only briefly covered in the casebook; others make explicit a theoretical framework that the casebook only indirectly implies by its organization of cases and materials. For example, chapter 3 (on

²⁵ See generally Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard 1988).

²⁶ Fuller, Eisenberg, and Gergen, *Basic Contract Law* at 1011 (cited in note 5).

²⁷ Much of the discussion of material breach and substantial performance, furthermore, focuses on the tensions between restitution and expectation damages and between market and individualized measures of material defect.

²⁸ Compare Fuller, Eisenberg, and Gergen, *Basic Contract Law* 989–1010 (West 9th ed 2013), with Lon L. Fuller and Melvin Aron Eisenberg, *Basic Contract Law* 853–84 (West 8th ed 2006), Lon L. Fuller and Melvin Aron Eisenberg, *Basic Contract Law* 834–66 (West 7th ed 2001), Lon L. Fuller and Melvin Aron Eisenberg, *Basic Contract Law* 795–846 (West 5th ed 1990).

the bargain principle) unifies the topics of reliance, consideration, modifications, and requirements and option contracts in a way that is rather clearer and more coherent than the corresponding casebook discussion; similarly, chapters 26 and 27 (on expression rules and offers) substantially tighten the connection between the doctrines of contract interpretation and formation. A few chapters draw together material that appears in a different order (and sometimes in completely different sections) in earlier versions of the casebook. For example, chapter 2 (on donative promises) integrates cases on moral consideration, and chapter 4 (on unconscionability) brings in material on standard-form contracts that does not appear in the casebook until well after the chapters on interpretation, hundreds of pages (and multiple weeks in the semester) later.²⁹ Perhaps most helpfully, the author's discussion of the tension between text and context is brought forward and discussed at the outset of the materials on interpretation, instead of after a discussion of the rules of offer and acceptance (ch 24 § A).³⁰ For these reasons, I will surely recommend this book to my students once it is published, even though it is rather longer than the supplementary materials that they are currently assigned.

In contrast to Baird, who draws predominantly though not exclusively on ideas from the economic analysis of law, Eisenberg is methodologically pluralistic and eclectic. He explicitly rejects any single-valued normative theory, whether motivated by efficiency, distributional justice, or communal solidarity, and prizes pragmatism over theoretical consistency (ch 1 § A). Similarly, he trusts commonsense folk morality (in his terminology, "social morality") over analytic or academic arguments (in his terminology, "critical morality"):

Monistic theories fail because they deny the complexity of life. In contract law, as in life, all applicable meritorious moral values and policy goals should be taken into account, even if those values and goals may sometimes conflict, even

²⁹ See Fuller, Eisenberg, and Gergen, *Basic Contract Law* at 417, 753 (cited in note 5).

³⁰ A few organizational choices are more questionable. For example, I am not sure that I see the value of discussing doctrines of trade usage, course of dealing, and course of performance before the basic dichotomy between text and context has been introduced. And the parol evidence rule, which in the casebook is tightly (and in my view properly) connected to the text/context distinction, is in the book manuscript left isolated in the last sections of the interpretation materials, after the chapter on the indefiniteness doctrine and before the (at this point unfinished) chapter on form contracts (see ch 33). The chapter discussing the parol evidence rule is also, as of now, unwritten.

if one value or goal trumps another in a given type of case, and even at the expense of complete determinacy.

...
[W]hen social propositions conflict in establishing a rule, good judgment must be used concerning the weight and role to be given to each proposition—just as when values or goals conflict in life, actors must use good judgment concerning the weight and role to be given to each value or goal that is relevant to the issue at hand. However, the requirement of good judgment does not confer unrestricted discretion. When conflicting social propositions are relevant to establishing a given rule, the rule should be adopted that takes appropriate account of each proposition. (ch 1 §§ A–B)

Despite his impatience with what he regards as excessive academic theorizing, Eisenberg is a friendly critic of the economic approach to contract law, and he regularly makes use of economic ideas in his own work. For example, he is willing to use the absence of market competition as a factor in determining unconscionability (ch 4 §§ B–C); counts it as a point in favor of expectation damages that they provide incentives for efficient precaution and performance (ch 5 § B); defends the mitigation principle on grounds of efficiency as well as fairness and causation (ch 11); and ably surveys and assesses several competing economic accounts of information production as part of his policy analysis of disclosure regimes (ch 40). When he rejects the use of economics, he generally does so on one of two grounds: value pluralism (ch 1 § A) or skepticism of the standard behavioral model of neoclassical economics (ch 19).

Eisenberg's commitment to methodological and normative pluralism does not prevent him from subscribing to a number of fairly consistent jurisprudential and policy positions. He believes that contract interpretation should be organized primarily around the contracting parties' intentions, although he is wary of any attempt to evade principles that he considers fundamental to fairness, such as full disclosure of information or the duty to mitigate losses following breach (see, for example, ch 40 § A; ch 11). He favors flexible standards over bright-line rules, believes that courts should inquire deeply into contextual details before making decisions, and in general approves of the loosening of formal doctrine that has characterized the last sixty years

of doctrinal development in American contract law.³¹ He approves of expectation damages and believes that they should be generously measured,³² although in cases in which consumers or workers breach obligations to large business entities, he thinks that the former should not be liable for the latter's lost profits because it does not make sense for the smaller party to act as insurer when the larger party has superior ability to spread risk over the run of transactions (ch 9).

While Eisenberg is highly confident in judges' capacity to exercise wise judgment under conditions of complexity and uncertainty, he is skeptical that ordinary contracting parties can do the same. Throughout his manuscript, he appeals to bounded rationality (ch 19 § 1), cognitive heuristics (chs 19, 42), and limits on the availability of information (chs 19, 39 § A) as reasons to distrust parties' ex ante decisionmaking. For instance, he argues against liberal enforcement of stipulated damages clauses on the grounds that contracting parties may underestimate the likelihood of contractual nonperformance or the losses that may ensue from it (see chs 18–19),³³ and he argues in favor of liberal reconstruction of relational contracts on the ground that the parties lack the capacity to choose appropriate long-term plans before the fact (ch 42).

One might wish for a greater degree of balance in these discussions. While cognitive biases and excess optimism are well-documented empirical phenomena, there is no reason to think

³¹ Eisenberg writes:

[C]lassical contract law is a collection of mostly bad rules, such as the rule that reliance does not make a donative promise enforceable, the rule that if a form offer and a responsive form that purports to be an acceptance conflict in even the slightest way no contract is formed, and the rule that an offer for a unilateral contract can be revoked even after the offeree had begun performance. It would be easy to make classical contract law intelligible, but the only result would be to make a bad body of law even worse. (ch 1 § A)

³² See ch 5 § B (making clear that expectation damages naturally follow from the bargain basis of liability); ch 12 (arguing that the principle of *Hadley v Baxendale* should be replaced by a less restrictive model that allows for greater recovery by unsophisticated parties); ch 13 (arguing that the goal of compensation should take priority over concerns relating to uncertainty in assessing damages); ch 18 (arguing that alternatives to expectation damages are unadministrable and offer only miniscule practical advantages while reducing the consideration given to fairness).

³³ Chapter 18 criticizes efforts to develop damage measures that take into account the value of secrecy, imperfect deterrence, and the costs of contractual search, and chapter 19 justifies close regulation of liquidated damages generally.

that judges and other public officials are immune to them.³⁴ Eisenberg suggests at various points that ex post decisionmaking is better than its ex ante counterpart, because it is based on more information and because more information is necessarily better than less (ch 25 § B).³⁵ But just because more information is available does not necessarily mean that it will be used appropriately. According to the very same psychological models of behavior that Eisenberg highlights, new information may be overweighted because of its salience, its enhanced accessibility in memory, or its consonance with strongly held prior beliefs. For instance, judges who spend their days hearing those unusual cases that make it to trial (and scholars who devote their attention to those especially unusual cases that result in a published appellate decision) may forget that these are a select and stratified subset of the universe of potential disputes, the great majority of which are settled without disruption to the parties' relationship. A jurisprudential approach that would be appropriate for this unusual subset of tried cases could be completely dysfunctional for the larger set that the judge never sees.³⁶

³⁴ See generally, for example, Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U Chi L Rev 571 (1998) (acknowledging the role of hindsight bias in judicial decisionmaking and demonstrating techniques that courts use to minimize its effect); W. Kip Viscusi, *How Do Judges Think about Risk?*, 1 Am L & Econ Rev 26 (1999) (discussing an empirical study of almost one hundred judges revealing systematic errors in risk assessment); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J Legal Stud 107 (2001) (comparing biased risk assessments of judges and potential jurors); Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L Rev 777 (2001) (arguing that judges are not necessarily any less affected by cognitive biases than juries); Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L Rev 1 (2007) (discussing different models of judicial decisionmaking bias, and their implications for the justice system).

³⁵ Eisenberg writes:

Here is a simple proposition: interpretation cannot possibly be more accurate with less information and less accurate with more information. Accordingly, if literalism is to be supported, it cannot be on the ground that it leads to more accurate interpretation. Instead, it must be supported, if at all, on other grounds. (ch 25 § B)

³⁶ See Frederick Schauer, *Easy Cases*, 58 S Cal L Rev 399, 400–03 (1985) (pointing out the divide between constitutional provisions that are frequently litigated and other important provisions that are not). See also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U Pa L Rev 1765, 1796–98 (1996) (drawing a distinction between “relationship-preserving norms,” which are used for contractual arrangements that are still in operation, and “end-game norms,” which are used when relationships break down).

Thus, while the picture of judicial decisionmaking presented in Eisenberg's pages may be inspiring, one would need a rather more focused analysis of its context to assess its accuracy than he provides. Whether ex post judging or ex ante contracting leads to better outcomes depends, among other things, on the institutional frameworks in which those respective modalities are embedded. Judicial biases might be corrected (or exacerbated) by the rules of evidence, the incentives of the adversarial system, or the appellate process. Contracting-party bias might be corrected (or exacerbated) by market competition, organizational procedures, or the participation of experienced specialists. And even in situations in which ex post decisionmaking is more accurate, such accuracy is not necessarily valuable to contracting parties if the outcome of the investigation cannot be predicted at the time that relevant decisions must be made.³⁷

Eisenberg's preference for extensive judicial fact-finding thus leads him to reject approaches that, while unworkable at the level of legal doctrine or ex post judicial decisionmaking, might well be productive when applied to ex ante transactional design. For example, he is skeptical of attempts to depart from expectation damages, dismissing alternative measures as being both of limited value (because, for the majority of contracting parties, they would be irrelevant) and unadministrable (because it would be too difficult for courts to determine the situations in which they would in fact be appropriate).³⁸ But such dismissals miss the point that these alternatives do not have to be applied as a default rule in every case. Instead, their scope could be limited to that subset of cases in which the individual parties have determined up front that the expectation measure is suboptimal as applied to their exchange.

The main limitation of Eisenberg's approach is that he does not acknowledge that sometimes private parties have better

³⁷ See Louis Kaplow and Steven Shavell, *Accuracy in the Determination of Liability*, 37 J L & Econ 1, 12 (1994) (noting that the "trade-off between cost and accuracy" is relevant to contractual formation); Louis Kaplow and Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J L & Econ 191, 202 (1996) (showing that the instrumental benefits of accuracy, as measured by its ability to improve decisions taken under uncertainty, may often be less than the costs of acquiring it).

³⁸ See ch 12 § B (rejecting Professors Ian Ayres and Robert Gertner's theory of information-forcing damage limits); ch 17 § B (expressing doubt about the possibility that parties could be better off with limited damages that reduce the incentive for wasteful overreliance); ch 18 § B (rejecting damage measures designed to protect the parties' interests in secret information, and in scaling up damages to compensate for the risk that breach will not be detected and to compensate for lost costs of search).

information than judges do. In such cases, it is wasteful to insist on ignoring that information. Indeed, the existence of decentralized information that is costly for centralized authorities to acquire is the major instrumental reason for facilitating private exchange in the first place.³⁹

Despite this important limitation, Eisenberg's book will be essential reading for contracts scholars and teachers as soon as it is published. Even as he underestimates the practical value of formalism and overestimates the capacity of the court system, his pragmatic and pluralistic methodology provides the best account of how contract doctrine has developed over the past half century and of how it is applied in most appellate tribunals. All of us who read and write about contracts should look forward to its appearance.

III. BIX'S *CONTRACT LAW: RULES, THEORY, AND CONTEXT*

Of the three authors whose works are under review here, Bix sets himself the most ambitious task, which, considering the goals of the first two books, is saying something. His book aims to present a philosophical introduction to contract law for a non-legal audience, but he states at the outset (quite sensibly) that, for the effort to be worth it, the audience needs a strong grounding in actual doctrine (p xi). Accordingly, he endeavors to summarize the law of contracts for the educated outsider and then to offer a conceptual analysis of what has been summarized—all in the course of just over 160 pages, including extensive footnotes. As a result, he is obliged to proceed at breakneck speed in the middle five chapters (totaling 110 pages) that are devoted to doctrinal analysis. Whether this swift survey serves its purpose for the intended audience should probably be left to a nonlawyer to assess, but I would not recommend it to beginning law students except as review; and experienced law teachers will not find it the most interesting part of the book.⁴⁰ (There is one important exception to this last assessment—the extremely well-chosen

³⁹ See F.A. Hayek, *The Use of Knowledge in Society*, 35 *Am Econ Rev* 519, 524 (1945).

⁴⁰ There are also some arguable choices of organization and emphasis: for example, discussing contract formation (pp 18–53) before basic issues of interpretation have been introduced (pp 18, 54), giving the objective/subjective distinction no greater space than less fundamental topics like the battle of the forms (pp 54–55, 25–28), and treating consideration under the rubric of formation rather than analyzing it in the context of a separate discussion of the purposes and limits of contractual freedom (pp 32–37).

suggestions for further reading at the end of each chapter, where Bix provides a short list of books and articles that explore the topic under discussion from an unusually catholic set of conceptual perspectives (see, for example, pp 16–17). One could easily base a reading list in an advanced seminar on these suggestions; and I periodically found myself stepping away from the book in order to address a gap in my scholarly background that Bix’s recommendations enabled me to fill.)⁴¹

The sections of the book that will be the most valuable to legally trained readers are the first two and last two chapters. In the former, Bix briefly sets out his methodological approach to the topic (pp 1–3) and presents background on the historical sources of US contract law, which in his account include not just what contracts teachers usually present as the traditional common law, but Roman law and the English writ system as well (pp 4–16). Like Baird and Eisenberg, he is a pragmatist; he emphasizes that no universal theory of contract is possible and so the only sensible course for the scholar is to focus closely on the details of specific legal systems, topic by topic (pp 148–52).⁴² But his pragmatism is more thoroughgoing than that of the other two authors. In contrast to Baird, he rejects the goal of any “grand narrative,” however flexible.⁴³ And in contrast to Eisenberg, he appreciates that the value of predictability and simplicity may sometimes outweigh the goal of reaching the conceptually correct result in every individual case.⁴⁴

Bix’s discussion of historical and comparative sources (which, notably, includes international sources such as the UN

⁴¹ The twenty-two-page bibliography at the end of the book is also terrific: judiciously chosen and substantially more inclusive than the lists of sources typically found at the end of introductory texts. Assuming that Bix has read all these sources cover to cover, I am extremely impressed.

⁴² The point is underscored by his decision to conclude the doctrinal parts of the book with a chapter surveying specific categories of contracts that he argues are governed by particularly distinctive principles: employment (pp 119–21), insurance (pp 121–22), real estate and landlord-tenant (pp 122–23), franchise (pp 123–24), premarital agreements (pp 124–25), and government (p 125).

⁴³ Bix writes:

There is an obvious attraction to finding the essence of contract law (perhaps of contract law everywhere, and in all possible legal systems). Part of the argument of this book . . . is that this is not the right—or at least not the best—focus. . . . [A]pproaches to promises and agreements vary too greatly . . . from one jurisdiction to another, and over time, for any universal theory to be justifiable. (p 1)

⁴⁴ “A persistent theme in this text . . . is that government regulation . . . of individual contracting[] is hampered to some extent by its need to be general and predictable” (p 2).

Convention for the Sale of International Goods) is abbreviated to the point that legal historians or comparativists might view it as wildly cursory. But it is rare to find even this brief a survey in an introductory US text or casebook; and its presence underscores Bix's larger point that our law of contracts takes its shape for historically contingent reasons (how else, for instance, can we understand the organizing function of the doctrine of consideration?). I would recommend this chapter to students and perhaps even assign it as required reading.

The heart of the analysis, however, is set out in chapters 8 and 9, in which Bix offers his views of the theory of contracts and of the gaps between theory and practice. Chapter 8 offers a thoughtful critique of many of the major accounts of contractual obligation that have attracted the attention of the contemporary academy: these include autonomy-based theories such as that set out in Professor Fried's *Contract as Promise*,⁴⁵ economic theories of contract law, and theories based on consent,⁴⁶ reliance,⁴⁷ and property rights⁴⁸ (pp 132–36). (For reasons that are unclear, however, Professor Ian Macneil's widely influential relational-contract theory⁴⁹ has been omitted from this survey, as have the law-and-society theory arising out of work by scholars at the University of Wisconsin⁵⁰ and solidarity- and virtue-based theories of the sort associated in the previous generation with some

⁴⁵ See Fried, *Contract as Promise* at 2 (cited in note 2) (“The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights.”).

⁴⁶ See, for example, Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum L Rev 269, 319 (1986) (“A consent theory of contractual obligation views certain agreements as legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights.”).

⁴⁷ See, for example, Atiyah, *Rise and Fall of Freedom of Contract* at 184–89 (cited in note 2).

⁴⁸ See, for example, Richard Craswell, *Two Economic Theories of Enforcing Promises*, in Peter Benson, ed, *The Theory of Contract Law: New Essays* 19, 33–34 (Cambridge 2001).

⁴⁹ See Ian R. Macneil, *The Many Futures of Contracts*, 47 S Cal L Rev 691, 720–25 (1974) (arguing that the fundamental unit of contract law analysis should not be the individual transaction, but rather the parties' long-term relationship).

⁵⁰ For a casebook based on the law-and-society approach, see generally Stewart Macaulay, John Kidwell, and William Whitford, *Contracts: Law in Action: The Concise Course* (LexisNexis 2d ed 2003). For an anthology of law-and-society scholarship, see generally Stewart Macaulay, Lawrence M. Friedman, and Elizabeth Mertz, *Law in Action: A Socio-legal Reader* (Foundation 2007).

participants in the Critical Legal Studies movement, and with more communitarian-oriented scholars today.⁵¹)

In this discussion, Bix is centrally concerned with exposing what he sees as the gap between theory and reality, particularly with respect to the ideal of freedom of contract. For him (as for many other commentators who have written in the years since mass-produced contract terms have come to be widely used), the fact that most contracts are no longer individually negotiated presents a fundamental challenge to all the major academic theories of contract law (pp 136–38), although he thinks that consequentialist theories such as law and economics may be better placed to address the challenge than nonconsequentialist theories such as Fried's (p 140):

[C]onventional discussions of “meeting of the minds,” “assent,” and “freedom of contract” have unclear application (if they have any application at all) when a large proportion of the transactions entered into are based on agreements presented on standardized forms with large amounts of obscure language, and with terms not subject to negotiation, and sometimes involving terms sent in the mail after purchase or placed on a separate Web site. (When software companies that want less regulation of their efforts to impose terms on consumers speak about protecting the freedom of contract, they unintentionally display how far current contracting practices are from true mutual assent.) (p 137)

Unlike many modern critics of standard-form contracting, Bix is less interested in arguing that standardized terms should be policed by judicial or legislative oversight, or in designing the appropriate public policy for addressing them, than in exploring their implications for legal and moral theory.⁵² (His discussion of

⁵¹ See generally, for example, Duncan M. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 (1976) (giving a Critical Legal Studies account); Daniel Markovits, *Contract and Collaboration*, 113 Yale L J 1417 (2004) (providing a communitarian account); Ethan J. Leib, *Contracts and Friendships*, 59 Emory L J 649 (2010) (same); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 Iowa L Rev 183 (2012) (setting out a contemporary, virtue-based account).

⁵² Compare Bix, *Contract Law* at 128–46, with W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv L Rev 529, 533–36 (1971) (criticizing interpretive approaches that defer to standardized terms as undemocratic), Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv L Rev 1173, 1242 (1983) (arguing that standard terms should be considered presumptively unenforceable because they redistribute power from individuals to commercial organizations), Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the*

whether there is a moral obligation to keep promises that appear in standardized forms (pp 141–44), for instance, is more than twice as long as his discussion of the appropriate government response to their use (pp 144–45); both discussions conclude with more questions than answers.) Ultimately, he concludes that current theories are not up to the task of explaining the system of contract law that we actually have and strongly suggests that the whole theoretical project may need to be torn down and rebuilt (p 138). Despite (or perhaps because of) his skepticism, however, he provides what may be the most incisive short introduction to the conceptual problems raised by standard-form contracting of which I am aware. Anyone who wishes to make progress in solving these problems will need to delve further into the literature, but Bix's chapter 8 is an excellent place to start.⁵³

In his ninth and final chapter, Bix returns to and elaborates on the thesis with which he began the book: that no single principle can explain the law of contracts (p 152). The approach that he recommends in place of unitary theory, however, is rather different from that propounded by Eisenberg. Instead of celebrating pluralism, he embraces particularism. He points out that legal doctrines have varied substantially over time and space, and that many of our legal institutions are with us for no other reason than historical accident (pp 149–51). He also stresses the very different features of the agreements that arise

Electronic Age, 77 NYU L Rev 429, 492–93 (2002) (arguing that electronic mass contracts should be regulated according to the same principles as traditional paper mass contracts), Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1244–45 (2003) (arguing that standard forms should be carefully supervised to guard against irrational consumer decisionmaking), Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 123–248 (Princeton 2013) (casting judicial oversight of standardized terms as a matter of the rule of law).

⁵³ Baird (pp 123–46) and Eisenberg (ch 34) also devote substantial space to the issue of standardized contracts, reflecting the importance of the practice to contemporary exchange as well as doctrine. But their assessments of the issue differ significantly from Bix's. Eisenberg believes that the problem of assent in form contracts can be adequately addressed by applying existing principles of contract interpretation, in particular the principle of the Restatement (Second) of Contracts § 211 (1981) that, when the party providing the form has reason to believe that her counterparty would not have manifested assent if he knew that the form contained a given term, the term is not part of the contract (ch 4 § D.5). Baird, for his part, acknowledges the risk of overreaching in standard-form contracts to be a serious one, but in his view the problem is not with the negotiation process but rather with the substantive terms contained within the agreement. In his view, regulators should not focus on the negotiation process, but on the operation of the market as a whole (pp 133–46).

out of various social settings. Commercial transactions, consumer purchases, employment relationships, and interfamilial property settlements present widely divergent functional concerns and moral choices. Why should they all be governed by a single theory? It might be more helpful, or more enlightening, to have one theory for commercial contracts and another for personal contracts, as Karl Llewellyn had in mind when he first began work on the Uniform Commercial Code.⁵⁴ Or it might be appropriate (and fairer) to have one account of how and why we enforce agreements that arise out of individualized negotiations, and another that explains our treatment of standard forms. Bix goes so far as to hint that we might even want to have different theories to explain business contracts with different subject matters—such as construction, franchise, and insurance agreements—before wisely retreating from the brink of a paralyzing nominalism (pp 152–53).⁵⁵

Most readers will have considerable sympathy for Bix's argument that it is a fool's errand to try to bring all of contract law, even the law of a single jurisdiction at a single moment in history, into a single theoretical framework. So long as cases are brought by individual litigants and heard by individual judges and juries, the diversity and messiness of the real world will remain essential features of the legal universe. But most readers will likely also resist his more radical speculations that we might be better off with a panoply of theories tailored to the parties' social status, lines of business, or mode of contracting for every different doctrinal setting (pp 159–61), or even his more modest claim that we need different theories for agreements that give rise to different legal remedies (pp 156–58). Even apart from the limitations of human memory and the pedagogical imperative

⁵⁴ See Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 *Georgetown L J* 1141, 1141, 1146–48 (1985). Llewellyn's vision has been periodically revived over the years. See, for example, Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L J* 541, 593–94 & n 105 (2003).

⁵⁵ Bix cites Judge Frank Easterbrook's dismissal of cyberlaw as a modern-day "law of the horse" and Justice Holmes's folktale of the justice of the peace who could find no rules relating to torts involving churns as cautionary examples in this regard (p 153 n 25), but a more apt illustration might be Borges's *Celestial Emporium of Benevolent Knowledge*, which classifies animals into categories that include those that belong to the emperor, those that are trained, those drawn with a very fine camel hair brush, those that have just broken the flower vase, and those that, at a distance, resemble flies. See Jorge Luis Borges, *The Analytical Language of John Wilkins*, in Jorge Luis Borges, *Other Inquisitions 1937–1952* 101, 103 (Texas 1964) (Ruth L.C. Simms, trans).

to simplify lessons for novices being exposed to a complex reality for the first time, the analogies between the various applications of contract law are just too productive, and the themes that run through the disparate cases are too important. Both mercantile and consumer agreements, for instance, are subject to ambiguities of language and unaddressed contingencies that need to be filled in after the fact. Both commercial and familial relationships depend on a web of tacit knowledge and soft information that the parties can perceive for themselves, but not necessarily explain (let alone prove) to a third-party fact finder. Construction, employment, franchise, pension, and insurance contracts all entail irreversible commitments that leave the party who undertakes them vulnerable to the vagaries of chance or the calculating opportunism of a counterparty. And virtually all contractual arrangements, even between strangers who have never before met and who will never see each other again, depend on social and cultural ties as well as legal sanctions for their successful operation. For these reasons, it is not just possible, but productive, for us to draw conceptual lessons from one contractual setting and apply them to another very different one. Such connections provide the pragmatic content to Professor F.W. Maitland's maxim that the history of the law is a "seamless web."⁵⁶

Bix recognizes and effectively concedes these valuable aspects of general theory in the final chapter of his book, which, consistent with his philosophical expertise and interests, concludes with some useful remarks on what theories are ultimately for. And here too, he remains a pragmatist: theories exist to be used and to guide our behavior.⁵⁷ Defective legal theories will not just cause us to make inaccurate predictions; they may lull us into accepting unjust practices that we ought to remedy and deceive the citizenry about the terms on which they are governed. For these reasons:

Perhaps universal and/or general theories and local theories each offer partial perspectives, portions of the complex overall truth. Under this view, it is not that general and/or universal theories are entirely false but that they hide aspects of reality. And in a world of private law theory, where

⁵⁶ F.W. Maitland, *A Prologue to a History of English Law*, 14 L Q Rev 13, 13 (1898).

⁵⁷ Bix writes: "The larger question remains as before: whether focusing on what is common among all these different forms of transactions, while downplaying what is distinct, creates more insight than distortion" (p 152).

general and/or universal theories of contract law dominate, it is important that the arguments for local theories be heard as well. (p 160)

For Bix, as for Baird and Eisenberg, contract theory matters. Most teachers of the subject, if not most practicing lawyers, would agree—as do I. But these authors miss an opportunity to show that contract theory is relevant for practitioners as well, and, importantly, for law students who aspire to be practitioners. The next Part of this Review sketches out how this might be done.

IV. CONTRACT THEORY FOR TRANSACTIONAL LAWYERS

To recapitulate the foregoing discussion: All three of the books under review—Baird's, Eisenberg's, and Bix's—present valuable syntheses of contract law and theory. The authors have chosen different priorities and different emphases: Baird aims to provide coherence, Eisenberg to be balanced and complete, Bix to deploy analytic rigor. All three navigate the competing demands of formalism and realism; all care deeply about both doctrine and context; and, notwithstanding their theoretical commitments, all subscribe to the pragmatic view of the law embodied in Justice Holmes's classic observation that "[t]he life of the law has not been logic: it has been experience."⁵⁸ Each discusses the most important modern controversies of the field, including those relating to standard-form contracts, the choice between money damages and specific relief, and the proper scope of the duty of good faith. And all intend that law students, including first-year students, will constitute an important part of their audience.

This Part argues, however, that all three books omit one critical perspective on contract law: the transactional perspective that these students will need to implement in the work that they are asked to do for their future clients. Private lawyers do not just litigate contractual disputes, advise clients on the likely legal consequences of choosing one term or method of contracting over another, or participate in the process of law reform. They also need to use contract law as a tool to create the structures of agreement that will enable their clients to pursue their

⁵⁸ Holmes, *The Common Law* at 3 (cited in note 15).

respective goals and activities with effectiveness. To that end, they need to know what contract law is actually for.

To understand the point of contract law and its doctrines, one needs to appreciate how it is different from other bodies of law. We can concede that some theorists have argued that it is not so distinctive, and that there is some value in these arguments.⁵⁹ But for it to make sense to talk about the law of contracts at all, as the books under review all do, we need to attend to the distinctions.

One standard view of how contract law is distinctive holds that contract liability is voluntary or optional in a way that other forms of civil or criminal liability are not.⁶⁰ But there are obvious problems with this view. Tort and criminal liability also depend on voluntary action; to be liable for battery, I must have intentionally acted.⁶¹ Even in the case of strict liability (for example, if I am sued for keeping a vicious dog that injured a neighbor's child), I must have voluntarily undertaken the harm-causing actions to be held responsible.⁶² And conversely, much of contract liability (classic contract liability, not liability for promissory estoppel or restitution) is not voluntary. For the reasons discussed in Part I of this Review, such liability is imposed at least in part based on objective interpretation. And as a practical matter, there are always circumstantial limitations on our choices. If I live in a neighborhood where there is only one overpriced grocery that sells mostly junk food and a few overripe fruits and vegetables, and I cannot afford the bus fare and time to travel to a better store, I am stuck. More generally, my freedom to enter into a contract is limited by the terms to which my counterparty is willing to agree; that is, by her freedom not to contract with me.

A better account is the one foreshadowed at the outset of this Review: in contrast to tort law, which is largely created by

⁵⁹ See, for example, Gilmore, *The Death of Contract* at 87–103 (cited in note 2) (predicting that contract and tort are in the process of merging into a larger system of civil liability, in which distinctions between voluntary and involuntary liability will be diminished). See also generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 *Polit Sci Q* 470 (1923) (arguing that the so-called private law fields of contract and property are properly understood as forms of public law).

⁶⁰ See, for example, Fried, *Contract as Promise* at 4 (cited in note 2) (characterizing tort as generally concerned with “involuntary transactions,” while one view of contract is “based on promise, on obligations that the parties have themselves assumed”).

⁶¹ See Restatement (Second) of Torts § 13 (1965).

⁶² See *id.* at § 509.

courts and legislatures and which aims to regulate the community at large, contractual liability is largely created in decentralized fashion by individual actors for the purpose of pursuing their own private goals. The state plays an important role in supporting contractual exchange, to be sure, but its role is to supply an overall framework; it is left to the individual contracting parties to fill in specific details.

As a result, contract law focuses on problems of cooperation: primarily (though not exclusively) cooperation in exchange. Managing cooperation is a distinctively different task from managing harmful activities; it requires minimizing conflicts of interest, avoiding misunderstanding, and establishing structures that provide parties with incentives to stick with the deal when unforeseen events arise, as they inevitably do. Taking such a perspective does not imply that every contracting problem can be solved by cooperation alone, but it does imply that more can be accomplished by cooperation than most people—and significantly, most lawyers—are initially inclined to think.

This perspective on contract law has important implications for reforming legal education—a topic that has received much attention in both academic and professional circles in recent years. If students are to be effectively prepared to facilitate cooperation, they need training in transactional skills, not just legal analysis and argumentation; and they need to learn the difference between argument and advice. But this requires that they master the principles of what makes some advice good and other advice bad. A lawyer who is asked to draft or mark up a lease, but who knows nothing about the standard economic problems that arise in leasing transactions, will not do a very effective job. (In the same way that, if a group of human rights lawyers are asked to draft a new constitution for a transitional government, and they haven't studied basic lessons of history or political science, they're unlikely to do an effective job of it.)

For these reasons, private lawmakers need legal theory to guide their actions just as much as public lawmakers do. Contract theory can help private lawyers to make better design choices so that their transactional arrangements will better serve their clients' goals. And it can help contracts teachers as well, because we are charged with training the private lawyers who will be asked to undertake these tasks.

It is from just this perspective that economic theories of contract are particularly helpful. Two examples will serve to illustrate

the point; one is drawn from the doctrines governing contract formation, and the other from the academic literature on remedies.

Traditional contracts scholarship on offer and acceptance emphasizes how doctrinal rules operate as communicative conventions.⁶³ In this prevailing view, formation rules serve a coordinating function in much the same way that traffic laws coordinate the flow of vehicles by directing drivers to keep to their side of the road. But while the rules of offer and acceptance do indeed serve this function, this does not mean that their substantive content is irrelevant from a planning perspective. Different legal rules establish different institutional structures for negotiation that may call forth different aspects of strategic behavior. As a result, such rules can have important consequences for the outcome and efficiency of exchange.

For instance, the common law of contracts typically requires an offeree to respond affirmatively in order to create a binding obligation; silence or inaction operates as an acceptance only in special and limited circumstances.⁶⁴ The usual explanation for these exceptions is that the circumstances indicate that the offeree has consented or intended to be bound,⁶⁵ but this is less a justification of the conclusion than a statement of fact that there exists a social convention in which those circumstances are taken to imply consent. The convention could be otherwise; and in order to justify the default rule rather than merely describe it, it is necessary to offer functional explanations that can distinguish between alternate conventions.

A straightforward economic analysis helps explain why silent acceptance should be the exception and not the rule. From an efficiency perspective, communicating offers and acceptances is costly, but so is communicating rejections. If we knew that the parties would want to agree on an exchange based on the terms of the initial offer, it would surely be cheaper to establish this exchange using one message rather than two. But if there is a

⁶³ For the basis of the following discussion, see generally Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 *Mich L Rev* 215 (1990); Avery Katz, *Transaction Costs and the Legal Mechanics of Exchange: When Should Silence in the Face of an Offer Be Construed as Acceptance*, 9 *J L, Econ & Org* 77 (1993); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 *Yale L J* 1249 (1996).

⁶⁴ See Restatement (Second) of Contracts § 69(1) (1981) (setting out those limited cases).

⁶⁵ See, for example, E. Allan Farnsworth, 1 *Contracts* § 3.14 at 259 (Aspen 2d ed 1998).

significant chance that the initial offer will be unwelcome, a silent-acceptance regime will require offerees to expend extra resources just to avoid being bound to a bad deal. The efficiency of the common-law rule compared to a rule of silent acceptance depends on the distribution of possible valuations across the populations of potential offerors and offerees, as well as on the informational and market structure in which negotiation takes place.⁶⁶

Even when a silent-acceptance regime is more efficient than the traditional common-law rule, however, not everyone benefits from its imposition. The gains from silent acceptance are enjoyed primarily by offerees who attach a high value to exchange. Offerees who attach a low value to an exchange, in contrast, are made worse off by such a rule; either they must expend resources sending rejections, or they will be stuck with bargains in which their costs are higher than their benefits. Offerors also do relatively better under silent acceptance than do offerees, since it is rational to offer less favorable terms when it is costly to reject than when it is costly to accept.

For both efficiency and distributional reasons, accordingly, silent acceptance does not make sense as a default rule in most contexts. But from the viewpoint of transactional planning, silent acceptance is an option that the parties might well benefit from choosing if they expect to deal with each other on a series of occasions and if they have the opportunity to enter into a master agreement that governs the process by which individual orders will be posted. For example, merchants such as the Book-of-the-Month Club commonly offer their customers significant up-front benefits in exchange for the customer's consent to participate in the merchant's negative-option plan. The up-front benefits are needed to compensate the member for the anticipated risk that the Club will take advantage of the situation *ex post* by offering unwanted or overpriced books in a manner that it

⁶⁶ See Katz, 9 J L, Econ & Org at 78 (cited in note 63):

[I]f the costs of sending acceptances and rejections are the same and if the chance of an acceptance is at least one-half, then a silent-acceptance rule would be more efficient. Conversely, if the expected probability of acceptance is low, [or] if the cost of rejecting an offer is substantially higher than the cost of accepting . . . [then] construing silence as rejection is more efficient.

will not be worth the member's time and trouble to reject in a timely fashion.⁶⁷

Opportunities to bargain over rules of contract formation are widespread, even in the consumer setting. For example, Amazon customers who opt into the "1-Click" ordering feature agree that their action of clicking on a button will operate as an agreement to purchase, while those who do not must proceed through multiple screens before their order is finalized.⁶⁸ This feature allows customers who want to avoid the time and inconvenience of multiple screens to obtain their order more quickly, albeit with an increased risk that they will order an unwanted item by accident or on a momentary impulse.⁶⁹ Customers who view the transaction costs of the traditional method as more costly than the risk of unwanted acceptances can sign up for the feature, while those who are more concerned about avoiding impulse shopping can choose not to.

The popular Amazon Prime program, which allows customers to purchase a year's worth of free shipping (and free streaming of a defined library of movies, TV shows, and music) for an up-front, lump-sum price,⁷⁰ has analogous effects. In fact, the transactional structure of the Amazon Prime arrangement is symmetric to the Book-of-the-Month Club arrangement; instead of the seller paying the buyer up front for the right to push subsequent purchases, the buyer pays the seller for the right to buy more expeditiously.

A second illustration of how contract theory can improve transactional design can be found in the concept of "efficient breach"—the idea that a contracting party should be encouraged to breach a contract and pay damages if doing so would be more

⁶⁷ The Club's incentives to engage in this kind of opportunistic behavior are also mitigated by concerns for its reputation with other potential members and by its desire to have the member renew the relationship after the required quantity of books has been purchased.

⁶⁸ See *About 1-Click Ordering*, online at <http://www.amazon.com/gp/help/customer/display.html?nodeId=468482> (visited Nov 3, 2014).

⁶⁹ Under the official 1-Click rules, it is possible for the customer to cancel a shipment by navigating to the pending orders page and countermanding the original order, but the countermand must be issued before the purchase has shipped. See *Cancel Items or Orders*, online at http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=595034&qid=1395880384&sr=1-1 (visited Nov 3, 2014). The upshot, however, is essentially the same: it becomes cheaper to enter into any given purchase agreement, and more expensive to avoid engaging in a purchase.

⁷⁰ See *About Amazon Prime*, online at http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=200444160&qid=1395877662&sr=1-2 (visited Nov 3, 2014).

efficient than performance. Efficient breach is probably the most well-known concept arising out of the economic analysis of contract law, and probably the most controversial as well. All three of the books under review devote significant attention to it, with varying degrees of approval.⁷¹

These authors' discussions of efficient breach, however, focus entirely on whether it provides adequate justification for what courts do when measuring damages ex post. What all three authors miss about the efficient breach concept, however, is that it provides not just a policy argument in favor of expectation damages across the board, but an account of how parties might better design the remedial provisions of their contracts in specific transactions.⁷²

In principle, when entering into an agreement, parties could agree that failed performance would entitle the disappointed promisee to collect an amount of money equal to estimated expectation damages, something more, or something less.⁷³ They might also choose to stipulate their ex ante assent to specific performance, even though doing so cannot bind an equity court to award that remedy.⁷⁴ In any well-functioning market, however, a contract that provides for supracompensatory damages (or that is enforceable by specific performance) will be accompanied by a higher price, because the actuarial value of any anticipated damage payment (or of having to perform, whatever the difficulty)

⁷¹ See Baird, *Reconstructing Contracts* at 58–61 (showing that efficient breach implies that expectation damages are an efficient default rule, but only when the value of expectation is easily measured); Eisenberg, *Foundational Principles of Contract Law* at ch 15 (arguing that efficient breach will generally be inefficient, and in addition that it weakens important social norms of promise-keeping); Bix, *Contract Law* at 115–16 (indicating that efficient breach illustrates tension between consequentialist and nonconsequentialist accounts of contractual obligation).

⁷² Here the analysis follows the argument of Avery Katz, *Virtue Ethics and Efficient Breach*, 45 *Suffolk U L Rev* 777, 780–85 (2012).

⁷³ The qualification “in principle” is important because traditional legal doctrine strongly disfavors agreements under which the parties agree to pay damages in excess of expectation. See UCC § 2-718(1); Restatement (Second) of Contracts § 356 (providing that a contract “term fixing unreasonably large liquidated damages” “in the light of the anticipated or actual loss” from breach, or a “term in a bond” that provides for payment due for “non-occurrence of [a] condition” in an amount that exceeds the loss caused by such nonoccurrence, “is unenforceable on grounds of public policy as a penalty”). But it will often be possible to achieve the equivalent result through the creation of a bonus for timely performance or a buyout option.

⁷⁴ See, for example, *Stokes v Moore*, 77 S2d 331, 333, 335 (Ala 1955) (stating that private parties cannot oust a court’s “inherent jurisdiction” to determine whether an injunction is appropriate, but that their expressed intent may properly influence the court’s decision whether to exercise its discretionary power).

will enter into the promisor's cost. Promising to finish a job, no matter what, is more costly than promising to finish or pay expectation, whichever is less; similarly, promising to finish or pay expectation is more costly than promising to finish or pay something less than expectation.

Of course, a contract that provides for supracompensatory damages (or that is enforceable by specific performance) might have greater benefits for the promisee than one that does not. This will be the case if damages are difficult to measure or if they are constrained to fall below true expectation by some independent principle of law (such as the traditional rule that parties must pay their own litigation costs). It will also be the case if the promisor is potentially insolvent or judgment-proof—in which case a promise to pay expectation damages must be substantially discounted—or if the promisee attaches some significant noninstrumental value to having the promise performed for its own sake.

The standard analysis of efficient breach assumes that the promisee's interest in performance is strictly instrumental, that promisors are solvent and have reachable assets, and that damages are in practice equivalent to the promisee's lost expectation. Given these assumptions, it follows that both parties are better off under a regime that awards expectation damages as a default rule. But in cases in which these assumptions do not hold, the contracting parties can—and should—do better by contracting around the default if the law allows them to. Only if one understands the theory of efficient breach, however, is it possible to determine whether contracting around the default makes sense.

Most of the academic discussion of efficient breach has focused on the normative question whether courts ought to award specific performance or disgorgement damages more liberally than they currently do,⁷⁵ and whether they should be more willing to enforce supracompensatory liquidated-damages provisions if it appears that the parties really knew what they were doing.⁷⁶ There has been almost no scholarly discussion of when private parties should try to commit themselves to specific performance ex ante (through arbitration provisions, surety bonds, or otherwise)

⁷⁵ See, for example, Bix, *Contract Law* at 115–16; Eisenberg, *Foundational Principles of Contract Law* at ch 15.

⁷⁶ See, for example, Baird, *Restructuring Contracts* at 76–77; Eisenberg, *Foundational Principles of Contract Law* at ch 19; Bix, *Contract Law* at 107–10.

or how to better design liquidated-damage clauses to serve their individual purposes. The legal profession, and the teaching of contracts, would be better served if there were.

CONCLUSION

Contracts scholars, as well as legal scholars more generally, often use the distinction between *ex ante* and *ex post* perspectives to contrast consequentialist and deontological normative theories of law.⁷⁷ The *ex ante* perspective is forward looking and invites us to consider how the actions that we take now will affect the future (for example: If silence is taken as acceptance, how will that affect people's willingness to make and entertain offers of contract? If damages are measured with reference to the expectation interest, how will that affect future promisors' decisions to perform or breach?). The *ex post* perspective is backward looking and invites us to consider whether we approve of the way that past decisions have turned out and whether we wish to do anything to rectify the situation (for example: Should a person who has accepted the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation now be allowed to enjoy them without paying? Should a person who has deliberately failed to keep an important promise, but who is prepared to reimburse the promisee for resultant losses, suffer any moral disapprobation?). Traditionally, common-law courts justified their exercise of power over defendants in primarily *ex post* terms, but ever since the rise of the Legal Realists, most American legal theorists have come to accept at least some role for an *ex ante* perspective in judicial decisionmaking, in both private and public law.

This shift toward a forward-looking perspective, however, has been incomplete in that the majority of theorists still conceive of contracting parties in primarily reactive terms. In the prevailing mode of analysis, legislatures and courts set the rules of the game; and the parties adapt. Government institutions still play the primary planning role; the only difference is that courts get to play it as well.

⁷⁷ See, for example, Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv L Rev 4, 10–12 (1984); Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in Jody S. Kraus and Steven D. Walt, eds, *The Jurisprudential Foundations of Corporate and Commercial Law* 54, 57–58 (Cambridge 2000).

In a sense, contemporary theorists have overlearned the Legal Realists' lesson that private contract law is just another form of public economic regulation. The overlearning resides in the word "just": certainly our collective decision to enforce private contractual arrangements in the official courts, and to use governmentally raised resources to do so, is an affirmative choice that must be judged by the standards of political morality. But this insight should not blind us to the fact that most of the detailed decisions actually to be made in the contractual arena are made by private parties, or that lawyers and legal scholars can aid in the exercise of such self-governance.

The three books discussed in this Review focus largely on legal doctrine and its development in the courts (and to a lesser extent, in the statute books, hornbooks, and treatises). As a result, they will surely help readers better understand what public officials have done in the past and what they are likely to do in the future. These books may even offer useful normative advice for what those officials should do when they have leeway to interpret or amend the law, for lawyers attempting to persuade those officials, and for citizens in the role of choosing their government leaders. But none of the books grapples with the fact that most law students and lawyers will ultimately play a different professional role with respect to the law of contracts; and as a result, none gives any significant thought to concepts or principles that might guide the wise exercise of that role. Private lawmakers need contract theory as much as anyone else, if not more so, but these needs are largely overlooked by these three distinguished authors.