Introduction

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Although the six essays that comprise the present collection may differ widely in approach, they are all animated by a shared belief in the possibility and in the importance of a theory of contract law that aims to be comprehensive in scope and normative in character. They are intended as contributions to the ongoing elaboration of such a theory. All the essays have been specifically prepared for this volume and appear now for the first time in print. In keeping with the goals of the Cambridge Law and Philosophy Series, the contributors have been encouraged to present their ideas and arguments in as fully developed and detailed a manner as possible. Each essay stands on its own as a sustained effort to explore a distinct theoretical point of view via an engagement with specific aspects of the law of contract. Before introducing the contents of the individual essays, however, I should say something about prior theoretical discussions that form their immediate intellectual backdrop. The following remarks are necessarily brief and selective.

In the twentieth century, it may be fairly said that theoretical writing about the common law of contract is inaugurated by one piece: Lon L. Fuller’s 1936 article “The Reliance Interest in Contract Damages.” It is only a slight exaggeration to say that all subsequent efforts either take up and elaborate lines of argument suggested by this essay or attempt to forge an alternative approach in response to it. In one way or another, it has dominated the course of theoretical discussion since its publication.

What is the article’s primary theoretical contribution on the basis of which it may be said to have inaugurated common law contract theory in the twentieth

century? It is not, as one might think, Fuller’s well-known specification of the three interests – expectation, reliance, and restitution – which, he argues, constitute the three principal purposes that may be pursued in awarding contract damages. Nor is it his effort to show that courts protect the reliance interest in ways that are not ordinarily recognized or acknowledged. Although these aspects of the article undoubtedly have exercised wide influence, particularly in legal scholarship, they do not go beyond ordinary legal classification and analysis. In themselves, they do not pose a question that goes to the very basis and intelligibility of contractual obligation. The article’s theoretical contribution lies elsewhere.

On the very first page of the article, Fuller refers to the basic, perhaps the most basic, principle of contract law that a plaintiff is entitled to receive as compensation for breach of contract the value of what he or she was promised and that in giving such damages the law aims to protect the “expectation interest,” that is, to put the plaintiff in the position that he or she would have been in had the defendant performed as promised. It is not by chance that Fuller refers here to Samuel Williston’s statement of the principle. Williston’s A Treatise on the Law of Contracts represents the most systematically and carefully worked-out presentation of the legal point of view that culminates several decades of intensive and highly sophisticated efforts by such masters of the common law as Pollock, Holmes, Langdell, Ames, Holdsworth, Salmond, and Leake, to bring order and internal consistency to the law of contract. These writers, and Williston in particular, were remarkably successful in achieving this aim. For all that, however, their work remains untheoretical: They simply presuppose the premise that the expectation remedy is a form of compensation without exploring its normative basis and they stipulate the existence of a deep connection between the expectation principle and the basic doctrines of contract formation without explaining its necessity.

The reason why twentieth-century contract theory begins with Fuller’s article is precisely because it in contrast to the work of these other scholars, does not simply take the expectation principle as the fundamental principle of compensation but clearly and decisively questions it. In doing so, Fuller challenges the coherence of contract on a point that goes to its very core. For the first time in the twentieth century, contract scholarship must ask at a fundamental level what is the normative basis of contract.  

2. This division was already suggested by Fuller’s contemporaries. See, for example, G. Gardner, “An Inquiry into the Principles of the Law of Contract” (1932) 46 Harv. L. Rev. 1.
3. Their writings are collected in one remarkable volume, Selected Readings on the Law of Contracts, The Association of American Law Schools, ed. (New York: The Macmillan Company, 1931). This monumental volume, which is more than one thousand three hundred pages in length, is, in the present writer’s opinion, the single most important collection of essays ever published on the common law of contract.
4. In The Death of Contract, Grant Gilmore sees the work of Fuller, Corbin, and others as causing the “general theory of contract” developed by such jurists as Langdell, Holmes, Pollock, and
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To elaborate a little, Fuller suggests that the expectation remedy “seems on its face a queer kind of compensation”⁵ because it gives the promisee something that he or she never lost. Now if breach of an executory contract does not as such deprive the promisee of anything, it plainly follows that the promisee never had anything to lose in the first place. In other words, an executory contract does not as such give the promisee anything that can count as a legally protected interest against the promisor. This must be Fuller’s underlying premise. Yet, the idea of compensation in private law presupposes just that the defendant has injured something which belongs to the plaintiff by exclusive right as against the defendant. On Fuller’s view, the expectation remedy cannot be a form of compensation because contract is not a mode of acquiring such entitlements. This represents Fuller’s theoretical challenge at its deepest level.

Accordingly, on Fuller’s view, the expectation interest presents a lesser claim in justice to judicial intervention than do the reliance and restitution interests. Whereas protection of the latter interests restores a disturbed equilibrium and so exemplifies corrective justice, enforcement of the former “brings into being a new situation”⁶⁶ and represents an exercise of distributive justice. From the standpoint of corrective justice, Fuller contends, it is by no means clear “why a promise which has not been relied on [should] ever be enforced at all.”⁶⁷ Thus the expectation remedy, the so-called normal measure of recovery for breach of contract, appears anomalous from the standpoint of private law itself. Yet it is precisely the availability of the expectation remedy for breach of a wholly executory contract that is the distinctive hallmark of contract law.

Despite Fuller’s view that the expectation principle is “as a matter of fact no easy thing to explain” and a problem that “throws its shadow across our whole subject,”⁶⁸ he thinks himself obliged to provide a satisfactory rationale for this settled rule of law. Fuller’s answer that expectation damages cure and prevent reliance losses as well as facilitate general reliance on business arrangements would appear to be the only justification available once breach of an

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Williston to “come unstuck.” G. Gilmore, The Death of Contract (Columbus: Ohio State University Press, 1974), p. 102. This assessment is wrong, I think, in at least two respects. First, it mistakenly attributes to these writers a general theory of contract, whereas, as I have already indicated in the text above, these jurists did not so much develop a theory as systematically present the legal point of view by clarifying the definitions of contract principles and doctrines and by exploring, within limits, their implications and their conceptual interconnections. Second, far from coming unstuck, their work still represents to date the most sophisticated and successful effort to present the legal point of view in one integrated compass. Of course, insofar as contract law has developed in certain ways since they wrote – I am thinking here primarily of the full reception of a doctrine of unconscionability – this presentation would have to be revised. Fuller’s challenge does not so much undermine their work as require an elaboration and a defense of the conception of contract that informs it. And what we chiefly lack at present is just such a theory that attempts this. For an instructive and careful discussion of Gilmore’s assessment of the work of these contract scholars, see J. Gordley, Review of Grant Gilmore The Death of Contract, in (1975) 89 Harv. L. Rev. 452, esp. pp. 457 ff.

5. Supra note 1 at p. 53. 6. Ibid. 7. Ibid., at p. 57. 8. Ibid.
unrelied-upon promise is seen as causing no injury to the plaintiff and the expectation remedy is characterized as an exercise of distributive justice. On this rationale, reliance becomes the Archimedean point in the understanding of contractual liability and the instrumental relation between contract and economic efficiency becomes a central consideration.

The first major wave of theorizing after Fuller, which takes place during the late 1970s and early 1980s, consists of writers who, almost without exception, either elaborate one or more facets of his answer or, where they propose an alternative vision of contract, do so in ways that attempt to answer his challenge. Thus, the idea that protection of the reliance and restitution interests provides a more secure normative foundation for contractual liability is developed with subtlety and richness in the work of Patrick Atiyah. Anthony Kronman, among others, takes seriously Fuller’s suggestion that the normal remedy for breach of contract comes under distributive justice and proposes that contract law as a whole, including its core notion of consent, can only be understood in terms of distributive justice; if contract rules are to have any moral acceptability, they must be framed, Kronman argues, so as to promote a fair division of wealth and power among citizens. Already during this first wave, the most detailed and comprehensive theoretical approach is the economic theory of contract. With the appearance in 1979 of *The Economics of Contract Law*, a collection of previously published essays edited by Kronman and Richard Posner, the economic approach takes up Fuller’s embryonic thesis that contract law is explicable as a means of facilitating and supporting efficient economic relations and demonstrates that it can be developed with sophistication to illuminate an unprecedented range of substantive issues in contract law. With certain notable exceptions, economic analysis during this period focuses exclusively on the question of the efficiency of carrying out the promises that form an agreement. Contract


11. A. Kronman and R. Posner, eds. *The Economics of Contract Law* (Boston: Little, Brown and Company, 1979). I should add here that, throughout the first and second waves of contract theory and even at present, the economic analysis of contract is the dominant theoretical approach and economic writing is by far the most prolific, although much of this writing is “normal science” rather than inquiry self-consciously engaged in exploring and reshaping the theoretical premises and claims of the economic approach. I will not even attempt here to give an exhaustive list of the articles and works that are of special theoretical interest. That being said, in addition to the economic writing to which I refer in the text, two recent collections might be noted: *They are Foundations of Contract Law*, R. Craswell and A. Schwartz, eds. (Oxford: Oxford University Press, 1994) and *The Fall and Rise of Freedom of Contract*, F. H. Buckley, ed. (Durham and London: Duke University Press, 1999).
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law is to be judged in light of the principle that voluntary exchanges move resources toward their most valuable uses.\textsuperscript{12}

Arguably the most important, and certainly the most discussed single work of this first wave of contract theorizing is, however, Charles Fried’s \textit{Contract as Promise}.\textsuperscript{13} It is the only book-length presentation of a theory of contract that systematically explores the normative foundation of contract and that attempts to explain the main contract doctrines on a unified moral basis. Fried challenges all the previously discussed approaches on the ground that they do not provide a normative basis for contract that is morally acceptable and that brings out its unity. Invoking the distinction between the right and the good, Fried argues that if, as is generally supposed, contractual obligation is self-imposed as well as legally enforceable, it must not entail the imposition of a conception of the good, as this would violate individual autonomy. Fried proposes instead the “promise principle,” which he presents as Kantian in inspiration, as the moral basis of contractual obligation. At the same time, he emphasizes that, while central aspects and doctrines of contract law may be understood on this basis, there are others that either require additional and distinct principles or that are flatly in tension with the promise principle and so must be rejected. For instance, in Fried’s view, the law of implied terms and conditions cannot be explained on the basis of the promise principle alone but requires other principles, whether of fairness, risk allocation, or custom. Moreover, endorsement of the promise principle requires, he argues, rejection of the doctrine of consideration and the objective test for contract formation. To date, \textit{Contract as Promise} remains the one systematic effort to explain contract on the basis of a conception of Kantian moral autonomy.

The second wave of contract theory, which dates from the late 1980s, begins with and builds upon a criticism of the principal first wave theories. Neither the autonomy-based nor the economic approach, this criticism maintains, is able by itself to provide a comprehensive theory of contract.

This second wave is firmly established with the appearance of Richard Craswell’s influential piece, “Contract, Default Rules, and the Philosophy of Promising”\textsuperscript{14} which argues that autonomy-based theories, and Fried’s in particular,

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\item \textsuperscript{12} Ibod., pp.1-2.
\item \textsuperscript{14} (1989) 88 Mich. L. Rev. 489. In connection with the start of the second wave, two earlier articles should be mentioned. First, there is Roberto Unger’s essay “The Critical Legal Studies Movement” (1983) 96 Harv. L. Rev. 561, 616–648. Unger challenges globally the claims of first wave theorists – autonomy, reliance, and distributive justice theorists – by arguing that while each of their principles may be at work in contract law, none of them accounts for the whole of it. To the contrary, contract law, he contends, is an unstable conjunction of principle and counter-principle. The second is Randy Barnett’s important article “A Consent Theory of Contract” (1986) 86 Col. L. Rev. 269. Barnett’s piece may be viewed as part of this second
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cannot explain the substance of a party’s contractual obligations. Although the moral duty to keep a promise may be relevant in determining what Craswell calls “agreement rules,” namely, those rules, such as offer and acceptance, that define the kind of voluntary assent that is necessary for contract formation, it has no implications for the content of “background rules” which, among other things, specify the conditions under which nonperformance is excused and determine the legal sanctions applicable in case of breach. Contract as promise, Craswell argues, is indeterminate with respect to these matters. To fill the gap, there must be recourse to substantive values, such as efficiency or distributive justice, in addition to the formal principle of individual autonomy. On this view, the promise principle is not the distinctive or principal normative basis of contract but merely one element – and not necessarily the most important – in the normative account.

James Gordley\textsuperscript{15} takes this challenge to the self-sufficiency of the principle of autonomy one step further: The difficulty, he argues, lies in the fact that this principle seeks to ground obligation in human choice alone. Unless some reason is given other than the mere fact that a promisor has willed to be bound, we cannot explain why the law enforces certain choices or commitments and not others. Although contract is undoubtedly consensual, the promise principle is mistaken in attempting to conceive consent in detachment from the ends that give it point and value. It is only via an examination and a specification of those ends that we can account for the fundamental premise of contract law that only certain acts of consent give rise to a contractual obligation.

Gordley also challenges the economic approach on similar grounds.\textsuperscript{16} The satisfaction of individual preferences, he says, cannot in and of itself be normatively compelling. In any case, the legal enforcement of contracts results in the satisfaction of only some preferences and not others. Preference satisfaction as such is therefore an insufficient normative basis upon which to found a theory of contract. We need to specify a set of purposes that determines which preferences are to be satisfied.

But it is Michael Trebilcock, himself a law and economics scholar, who perhaps poses the most fundamental challenge to the self-sufficiency of the economic theory of contract.\textsuperscript{17} According to Trebilcock, the strongest welfare claim


\textsuperscript{16} Ibid.

\textsuperscript{17} In M. Trebilcock, The Limits of Freedom of Contract (Cambridge, MA: Harvard University Press, 1993). See for example his discussion at pages 244–249. I should add that in this book Trebilcock critically evaluates in detail and in depth a range of theoretical approaches including autonomy theories such as Fried’s and Kronman’s distributive justice approach.
that can be made by the economic approach is that the enforcement of contracts is Pareto efficient. Pareto superiority holds only where a party has given actual consent. But every contract contains within itself the possibility of what Trebilcock calls the “Pareto dilemma,”18 which arises in the following way. Suppose that a party regrets his or her initial decision to enter a transaction because, when the time for performance comes, new opportunities have arisen or for some reason the party’s preferences have changed. Whether the transaction is Pareto superior will depend upon which of the two sets of preferences, the earlier or the later, is taken into account. If anything, it seems more rational to refer to the party’s last revealed preferences. But, in any case, the Pareto criterion does not itself decide between them. On the contrary, it applies only on the premise that a selection has already been made. Trebilcock argues that on an economic approach this determination can only be made on the basis of Kaldor-Hicks efficiency. The latter, however, makes hypothetical not actual consent the relevant consideration and it requires a comprehensive assessment of the costs and benefits of a transaction for both contracting and third parties. In adopting this framework, the economic approach can no longer make a strong welfare claim on behalf of the enforcement of contractual transactions. The conclusions reached, Trebilcock contends, will typically be highly speculative and inconclusive, if not indeterminate. In light of the ever-present possibility of regret, the economic approach does not possess the normative resources to explain the general enforceability of contracts.

In light of this apparent insufficiency of either an autonomy or an economic approach to contract theory, the question becomes whether comprehensive normative theorizing about contract law is still possible. One response might be to try to combine the principles of autonomy and efficiency (or welfare) on the supposition that together they may be able to provide what each by itself cannot: a satisfactory comprehensive account of contract. But this is possible only if the two approaches can be suitably integrated. Whether they can be so combined, or if not, whether there can be an alternative normative framework that explains contract law becomes a central problem for contract theory. Henceforth, writing that does not take this problem seriously cannot hope to advance the theory of contract.

In this respect, the representative comprehensive work of this second wave is Trebilcock’s *The Limits of Freedom of Contract*19 which, after exploring the strengths and limits of autonomy and welfare approaches across a wide range of contract issues, concludes that only a pluralist conception of contract theory –

18. An illuminating earlier critique of the indeterminacy of efficiency, which proceeds on a basis that is similar to the Pareto dilemma but which develops and generalizes the argument so as to show the necessity of supposing the conceptual priority of rights, is provided by Jules Coleman. See J. Coleman, *Markets, Morals, and the Law* (New York: Cambridge University Press, 1988), Chapter 3.

one that makes reference to autonomy, welfare, and distributive justice values – can hope to provide a satisfactory account. According to Trebilcock, the most promising combination is that of welfare-maximizing background rules qualified by a right, rooted in autonomy, to contract around them. But even this, he argues, is an unstable equilibrium. Conclusions dictated by efficiency unavoidably conflict with the implications of autonomy. Trebilcock concludes that on various central normative issues pertaining to freedom of contract the claim of convergence between autonomy and welfare is tenuous. Without attempting to provide a meta-theory that weighs or ranks the different values, he nevertheless proposes what he calls a pragmatic response at a lower level of abstraction that identifies the institutions or mechanisms that are best fitted to vindicate them. In keeping with this conclusion, he outlines an appropriate institutional division of labour for advancing the values of autonomy and efficiency.

The other major work of the second wave, Gordley’s *The Philosophical Origins of Modern Contract Doctrine*[^20], suggests a second kind of response to the apparent insufficiencies of the autonomy and welfare approaches. Gordley argues that what is needed is a differently conceived teleological framework which preserves the insights of the autonomy and efficiency approaches but which at the same time corrects their deficiencies and is able to explain the content of contract law on a morally satisfactory basis. He proposes a pluralist theory that integrates conceptually, and not merely pragmatically, the distinct Aristotelian values of liberality, commutative justice, and distributive justice. Gordley argues that the many aspects of contract doctrine, including the principles of contract formation, implied terms, mistake and frustration, and unconscionability, can be suitably accounted for on this basis. I will leave further discussion of Gordley’s views, however, to my presentation of his essay along with the others that make up this collection – to which I now turn.

These six essays may be viewed as efforts to deepen the kind of contract theorizing that characterizes the second wave. Thus none of the essays assumes the self-sufficiency of the earlier formulations of the autonomy and welfare theories. To the contrary, all take seriously the criticisms of these approaches and, even more important, they attempt constructively to advance theories of contract that are not vulnerable to those criticisms. It is worth noting, finally, that three of the essays (those by Gordley, Thomas Scanlon, and the present writer) expressly take up and try to answer Fuller’s challenge to the expectation principle, in this way coming full circle to the central question that inaugurates modern contract theory.

For the purposes of presentation, I have placed the essays in the following order. First, there are the two essays by Craswell and by Trebilcock and Steven Elliott which explore the economic approach and are consequentialist in character. Following these are the two essays by Scanlon and myself which are

[^20]: *Supra* note 15.
non-consequentialist in character and try to understand contract in terms of what one party owes another as a reasonable implication of their interaction. Finally, there are the two essays by Melvin Eisenberg and Gordley which advance two different pluralist theories that are teleological in character. I will now briefly discuss each essay in turn.

The essays by Craswell and by Trebilcock and Elliott explore the conceptual resources and the explanatory reach of the economic approach. Fully cognizant of the point that efficiency alone may not be able to provide a comprehensive account of contract, they nevertheless wish to bring out its conceptual richness and scope. Whereas Craswell explores the theoretical implications of two different approaches to the efficiency of contract enforcement, Trebilcock and Elliott show that the economic theory of contract can illumine a set of issues ordinarily thought to be particularly inhospitable to this approach.

In “Two Economic Theories of Enforcing Promises,” Richard Craswell argues that it would be a mistake to equate the efficiency of enforcing promises with the efficiency of carrying out promised actions, as is largely presupposed during the first wave of contract theory. In contrast to this first approach, contemporary economic analysis, he notes, recognizes that legal enforceability triggers a much more complex set of effects. For example, enforceability may influence not only whether the promise is carried out, but also whether the promise gets made at all, how carefully the promisor thinks before making it, or how much the promisor spends on precautions to guard against accidents that might leave him or her unable to perform in the future (to list just a few of the possible effects). The efficiency of legal enforceability depends upon the combined or net efficiency of all these consequences. This is the conception of efficiency that underpins the second economic theory. This theory, Craswell contends, fits better with other non-economic approaches and provides a more complete and a more determinate account of contract.

More particularly, Craswell argues that there is a fit between the second economic theory and three other conceptual views of contract that are most often associated with non-economic perspectives. “Relational” contract theorists, for instance, recognize that there is more to most promises than just the eventual acts of performance and that the parties’ actions leading up to that performance may be just as important as the performance itself. In this respect at least, this approach fits better with the second economic theory than with the first. The same is true of the view that contracts are a form of privately enacted regulation. On this view, by entering an enforceable contract, parties subject themselves to an entire set of rules that are provided by both the contract and the legal system and that will govern their relationship into the future. This view supposes, then, that every enforceable contract gives rise to an entire set of legal constraints that alter the parties’ incentives. It calls for a full analysis of these

incentives, which the second economic theory provides, and not an analysis limited just to eventual performance, as the first economic theory gives. Finally, Craswell notes that the second economic approach fits better with the view of contract as a transfer of property, which focuses on the entitlements that parties acquire at contract formation. Under the second economic theory, it is precisely the change in entitlements at the time of formation that gives rise to all of the interim incentives.

Craswell also shows in detail how the adoption of the second economic theory has important implications for a number of issues in contract law, altering the way these issues are viewed and changing the underlying argument of their appropriate analysis. For example, he argues that whereas the first economic theory (which justifies enforcement solely on the basis of the efficiency of performing the promised actions) cannot easily explain the enforcement of contracts in cases where changed circumstances have made performance no longer efficient, this is not true of the second approach: Even if performance itself is no longer efficient, it may still be efficient to hold the promisor liable, because in this way the promisor is given an incentive to decide whether it is still worthwhile to perform. Or take the question of paternalism, whether courts or the parties themselves should decide if enforcement of a promise would be efficient. Many of those who advocate efficiency believe that affected individuals are usually the best judges of their own welfare and that those individual judgments will usually be less imperfect than those of courts or of other third parties. Craswell contends that on the first economic theory, the correctness of this belief is debatable. Once, however, efficiency is taken to mean more than just the efficiency of the actual performance, and once there is the corresponding recognition that many effects must be considered in any assessment of efficiency, the case for judicial second-guessing becomes weaker.

A third set of issues which Craswell thinks is illumined by the second economic theory concerns the significance and role of detrimental reliance. Here, among other things, Craswell discusses the relation between the second economic approach and Atiyah’s theoretical writing, casting interesting and novel light on the latter. Craswell argues that whereas the first economic approach is necessarily at odds with the reliance argument, the gap between reliance theory and the second economic theory, which takes into account the effect of enforceability on the promisee’s incentives to rely, is much narrower. At the same time, he notes that the second economic theory, no less than the first, can answer the challenge that contracts should be enforced only in cases of detrimental reliance.

In “The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements,” Michael Trebilcock and Steven Elliott test the resources of the economic approach to illuminate and to resolve particularly

22. See pages 45–85 of this book.