Philosophy and Contract Law

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University of Toronto Law Journal, Volume 54, Number 1, Winter 2004, pp. 75-108 (Review)

Published by University of Toronto Press
DOI: *https://doi.org/10.1353/tlj.2004.0003*

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PHILOSOPHY AND CONTRACT LAW†

1 *Introduction*

In *The Theory of Contract Law: New Essays*, Peter Benson has gathered together an impressive collection of essays that, as the dust jacket claims, are original and, one might add, stimulating and important. However, a complaint might be made about another dust-jacket claim, namely, that these essays approach contract law from a variety of theoretical perspectives. The degree of variety is not as great as might be imagined, for, as a matter of intellectual tenor or orientation, all the essays here are the same: they are examples of analytical legal philosophy. This credo is recognizable by its commitment to argumentative clarity and rigour, even when drawing upon or reviving philosophical work that seems to lack both, and by a commitment to conceptual or linguistic analysis, an often diversely interpreted intellectual practice.[1] These commitments are certainly not egregious, but they exclude from the outset much involvement with a range of theoretical perspectives or approaches to law in general and contract law in particular. What could be classed as empirical or socio-legal, as well as cultural or historical, studies of contract law are left by the wayside.[2] These approaches rarely take the form of neat (or even

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† Review of Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001). Subsequent references appear parenthetically in the text.

1 See H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon, 1994), at vi–vii, 13–7, 239–44; and J. Coleman, *The Practice of Principle* (Oxford: Clarendon, 2001), lectures 1 and 12. Some who embrace the credo also purportedly eschew normative argument in the sense that they offer analyses of concepts (law in general, tort or contract law in particular) that do not depend upon arguments demonstrating the moral or political value of those concepts. Others doubt that this is possible or, if possible, worthwhile: the most elegant and ambitious statement is R. Dworkin, *Law's Empire* (Oxford: Hart Publishing 1998) at chs. 1–3.

2 *E.g.,* S. Macaulay, [1985] 'An Empirical View of Contract' Wis.L.Rev. 465; H. Collins, *Regulating Contracts* (Oxford: Clarendon, 1999); T. Daintith & G. Teubner, eds., *Contract and Organisation* (Berlin: de Gruyter, 1986); A. Hunt & G. Wickham, *Foucault and the Law* (London: Pluto Press, 1994), the insights of which are ripe for application to private law. For interesting thoughts on analytical legal philosophy's tendency toward insularity see R. Dworkin, 'Thirty Years On' (2002) 115 Harv.L.Rev. 1655 at 1677–81.

untidy) philosophical arguments. They are instead concerned to chart the influence – usually minimal – of the law upon transacting behaviour, or of the ideology of contract and cognate notions upon both the formal law and our non-legal thought. It may be that the story of contract law 'in action' is already well known and cannot be interestingly supplemented. But it would have been useful – particularly to those in jurisdictions where contracting is now a key public sector tool as a well as a form of private regulation[3] – to be reminded of this. Similarly, a historical study of contract law and contracting as disciplinary devices, binding those in their maw to specific standards of behaviour and modes of thought, might be fruitless, but some demonstration of this would be helpful.

These alternative approaches might well be insufficiently 'philosophical' to merit inclusion here, since the book is one of the Cambridge Studies in Philosophy and Law. Yet if analytical *philosophy* is the guiding star of analytical *legal* philosophy, then at least two of the essays included here have dubious philosophical antecedents. For, beyond espousing conceptual or linguistic analysis, argumentative clarity, and rigour – and perhaps even as a consequence of them – Anglo-American analytical philosophy of the second half of the twentieth century nourished scepticism toward grandiose philosophical projects and their ambitious metaphysical and epistemological commitments.[4] Hence, the work of certain philosophers (Plato, Thomas Aquinas, G.W.F. Hegel, and Martin Heidegger chief among them) was neglected for years, but two of them make an appearance in this volume, one to the fore, the other lurking in the background. Their inclusion is welcome and may be a consequence of analytical philosophy's recent *glasnost*. In that spirit of openness, analytical philosophy has become more permissive in its attitude toward what work counts as philosophically significant, and more indulgent

3 Fine accounts of this process are I. Harden, *The Contracting State* (Buckingham, UK: Open University Press, 1992); K. Walsh *et. al.*, *Contracting for Change* (Oxford: Clarendon, 1997); and A. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford: Clarendon, 2001).

4 This view of the nature of analytical philosophy is close to those espoused by R. Monk, 'Was Russell an Analytical Philosopher?' in H.-J. Glock, ed., *The Rise of Analytic Philosophy* (Oxford: Blackwell, 1997) 35 and P.M.S. Hacker, 'The Rise of Twentieth Century Analytic Philosophy' ibid. at 51. It is different from the famous characterization offered in M. Dummett, *Truth and Other Enigmas* (London: Duckworth, 1978) at ch. 25, and M. Dummett, *The Origins of Analytical Philosophy* (London: Duckworth, 1993) at chs. 2, 3, and 14. Useful treatments of some aspects of 'Continental' philosophy include D. Follesdal, 'Analytic Philosophy: What Is It and Why Should One Engage in It?' in Glock, ibid. at 1; R. Bubner, *Modern German Philosophy* (Cambridge: Cambridge University Press, 1981); V. Descombes, *Modern French Philosophy* (Cambridge: Cambridge University Press, 1980); and G. Gutting, *French Philosophy in the Twentieth Century* (Cambridge: Cambridge University Press, 2001).

toward philosophical, metaphysical, and epistemological grandeur, than it once was. This openness is, however, still somewhat limited. For, although it is now receptive to philosophies once ignored, the disciplines upon which analytical philosophy models itself, or by which it is most impressed, are those of the natural and not the human or social sciences. And, if legal philosophy is but the light of analytical philosophy directed upon law, then the marginalization of approaches more obviously rooted in the human and cultural sciences might be expected. This may explain why feminist thought is not one of the theoretical perspectives represented in this volume, having had relatively little impact within analytical philosophy and being primarily a product of the human and cultural sciences.[5]

The theoretical perspectives displayed in this volume are filtered through the grid of analytical philosophy, and the essays that result are excellent examples of contemporary analytical legal philosophy. The philosophical content of the essays is undoubtedly diverse. They draw upon and analyse a wide range of positions, including positive law and economics (which counts as a philosophical position because of its capacity for rigour and formalization), ancient and medieval philosophical thought, and contemporary moral philosophy. But even this variety of philosophical content can mislead slightly, for all the essays in the volume discharge one or the other of two tasks. The first task is that of amelioration, consisting of the attempt to mitigate the apparent crudities of law and economics, thereby ensuring that this body of thought provides a more useful contribution to standard doctrinal problems. Contract law is often regarded as a promising site for both illustrating the shortcomings and testing some amendments to 'crude' law and economics. The second task is informative and curative. It involves either readjusting the ambitions of philosophers and scholars of contract law or drawing attention to styles or bodies of thought in our intellectual tradition that the legal academy is in danger of overlooking. The scaling down or building up of ambition, or the revival of neglected bodies of thought, supposedly has the following pay-off: either strategy serves to cure longstanding and difficult problems in our understanding of contract law. These two tasks, and the essays that tackle them, are examined in Parts II and III below. Part IV is a brief endnote, raising a few general issues about the theory of contract law and philosophy's contribution to it.

5 To explain is not, as more than one analytical philosopher has noted, to excuse. An important feminist analysis of contract law is M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992) at chs. 4–7. See also C. Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 Yale L.J. 997.

II *Amelioration*

Learning to live with law and economics, especially the crude version, has been difficult for many lawyers and jurists. The crude version has at least three tenets, all of them manifest in the literature, perhaps all now superseded or amended, but all nevertheless still vivid in the (non-economically inclined) legal imagination. One tenet is that the details of legal doctrine are so much surface froth: the arguments judges use in arriving at their decisions more often than not disguise the logic actually articulating their decisions. The second tenet makes a claim about this logic: the logic of the law is neither pure reason nor unrefined experience but efficiency. That is to say, some or other version of efficiency is the guiding thread of legal doctrinal development. Just as Molière's M. Jourdain had been speaking prose for decades without knowing it, so common law judges have, on the whole, unwittingly adhered to the ukases of efficiency in doctrinal fields as apparently diverse as contract, crime, competition, and tax law. The third tenet, initially painfully and hesitantly articulated, consists of reasons why the embodiment of efficiency in the law might be considered a good thing.[6]

A standard critical response to the three tenets was that they presented a crudely reductive picture of the law and its constitutive values. This criticism was, indeed, the starting point of much sophisticated law and economics scholarship, which took legal doctrine seriously, in its own terms, and in so doing came to the conclusion that not all legal doctrines can be understood in terms of the somewhat Procrustean value of efficiency. The tasks of putting efficiency and the other legal values in their proper place, of exploring through doctrine the possible conflict between them, and of developing means of accommodating or resolving it, are hallmarks of sophisticated law and economics.[7] So, too, is the willingness to interrogate the key concepts of law and economics, to highlight and attempt to resolve their ambiguities.

One such key concept of law and economics, when applied to contract law, is the notion of efficient enforcement. If the question 'Why should promises be (legally) enforced?' is answered by invoking the notion of efficiency, then the following ambiguity arises. What is it that legal enforce-

6 See R. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen, 1998) at chs. 1, 2 (especially at 27–9), and 8, as well as R. Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981) at chs. 3, 4. Posner's views on these matters have developed: see R. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990) at ch. 13, and R. Posner, *Frontiers of Legal Theory* (Cambridge, MA: Harvard University Press, 2001) at ch. 3.

7 The tendency of sophisticated law and economics toward value pluralism is now apparently under threat from a zealous welfare economics: see L. Kaplow & S. Shavell, 'Fairness Versus Welfare' (2001) 114 Harv.L.Rev. 961.

ment should focus on: the efficiency of the eventual performance of the promised action or the efficiency of the incentives the law, via the threat of enforcement, provides the contracting parties? It is just this ambiguity that Richard Craswell's essay highlights. The first theory of efficient enforcement 'derives the efficiency of enforcing a promise from the efficiency of the promised behaviour' (21), whereas the second does not assume that enforcing the promise entails carrying out the promised actions. Rather, on the second theory, 'enforcing' a promise 'can take the form of inflicting a monetary penalty, whose main significance is that it represents a threat that alters the promisor's incentives in various ways' (26–7). Furthermore, '[o]nce it is recognized that the threat of having to pay damages can alter the promisor's incentive to perform or breach, it is a short step to realize that the threat of having to pay damages can also alter a good many other incentives' (28). Hence, on the second theory of efficient enforcement, 'enforcing the promise is efficient just in case the [resulting] new set of incentives is, on balance, efficient' (19).

Craswell makes a tentative case for adopting the second theory of efficient enforcement. The case is tentative because, as he concedes (34), there are a number of issues on which both theories of enforcement will generate the same answers. However, his view is that the second theory is altogether more sophisticated and deals with issues in a way similar to many non-economic accounts of contract law. The latter he assumes to be an advantage, presumably on the grounds that the more closely economic 'explanations' of contract doctrine resemble non-economic explanations, in form if not in content, the better. The sophistication of the second theory of enforcement is apparent in the range of questions it raises about contracting behaviour, making salient, in Craswell's admittedly brief analysis, at least seven different incentive effects of the decision to enforce and its form (26–32). The form of the enforcement decision is more or less ignored by the first theory, yet, as the second theory makes evident, different types of enforcement options – monetary damages, or specific performance, for example – can have very different effects upon the incentives promisors have to perform.

Craswell's case is difficult to fault. His scrupulous and even-handed analysis is likely to get law and economics a good name even among those lawyers least susceptible to its claims. If there is any difficulty at all, it is no more than the threat of a snag, a possible black cloud on the horizon. Moreover, this potential difficulty resides within the core of the second theory, reducing its principal advantage. That advantage, remember, is its sophistication, the fact that it highlights a range of incentive effects that the first theory misses. Yet the second theory's identification of such a wide range of potentially salient factors may be its weakness. For, to exaggerate, if every aspect of the decision to enforce, including its timing, the form of enforcement (damages or another remedy), and, if

damages, the level and types of damages available, can in principle affect the incentives promisors have to perform, then making the enforcement decision is a very difficult task. And without some way of weighing the various factors to be taken into account, or, at least, of avoiding ties between them, the decision-making process could well become indeterminate. Since Craswell is unlikely to deny that the second theory is intended as an aid to legal decision making,[8] the difficulty of avoiding the devil of reductionist simplicity, embodied in the first theory of enforcement, as well as the deep blue sea of indeterminate complexity, threatened by the second theory, is genuine. As Craswell's case currently stands, it is not obvious that he is securely bound for the middle way.

A number of middle ways, of a quite different kind to that which must be negotiated by Craswell, are hallmarks of the essay by Michael Trebilcock and Steven Elliot. The first is unsurprising, given Trebilcock's status in the vanguard of sophisticated law and economics: the essay 'largely adopt[s] a law and economics perspective on legal paternalism, while attempting to be sensitive to the implications of other normative perspectives' (50). The second goes to the substance of Trebilcock and Elliot's recommendations in their essay. They are concerned with the role of legal paternalism, and the role of other factors, in the judicial response to undue influence or unconscionability in third-party surety cases. A standard scenario here, at least on the basis of the English cases,[9] is one in which a lender lends money to a husband and wife, taking the family home as security. The money is squandered by (more often than not) the husband, as a result of either incompetence or *male fides*, and the lender seeks to possess and sell the family home. The issues English courts have grappled with are, *inter alia*, the extent to which the wife in such cases is aware of the consequences of the contract with the lender and the stringency of the lender's duty to take precautions against undue influence between husband and wife. Trebilcock and Elliot's middle way insists on a response to these issues that, on the one hand, protects the interests of those most likely to be unwittingly disadvantaged by these transactions while respecting their autonomy and, on the other, does so at a cost not so high as to inhibit either family members or lenders from entering into contracts that use the family home as security.

Trebilcock and Elliot's response has two steps, both of which only come into play once the spectre of undue influence has been raised.

8 While Craswell does not expressly say that it is so intended, he thinks that the first theory is (25 n. 11), and there is no obvious reason to treat them differently.

9 See *Royal Bank of Scotland* v. *Etridge,* [2001] 4 All E.R. 449 (H.L.). On the basis of the many Canadian and Australian cases referred to by Trebilcock and Elliot, the scenario is common elsewhere. The cases serve as a baleful reminder that I.A. Richard's remark about history – a series of things that ought not to have happened – applies *a fortiori* to law.

They suggest that lenders can determine whether or not there is a chance of undue of influence by asking two questions: Is a substantial portion of the surety's wealth committed to the transaction, and does she have significant control over the business for which finance is sought (73)? If the answer to the first question is affirmative and the second negative, the lender is on notice of undue influence. The first step of Trebilcock and Elliot's response to the spectre of undue influence is to insist upon 'a requirement of independent legal advice but not that it be followed' (78). That is to say, in the standard scenario, the wife must receive advice from a lawyer not directly engaged with the transaction. If she has done so, then the lender's security interest is protected in subsequent legal action, even if the wife has chosen to ignore the advice, provided (presumably) that this was done in the absence of duress, undue influence, or unconscionability. The presumption is necessary if undue influence or other vitiating factors are just as likely to be present at the later stage of deciding whether or not to act on advice as at the earlier stage of deciding whether or not to go along with the proposed transaction. Incorrect advice should not imperil the lender's security, since the obvious remedy for this, as Trebilcock and Elliot are right to note, is against the advisor. However, not any old independent advice will function as protection for the lender's interest. The second step of their response sets out six fairly demanding criteria that independent advice must satisfy in order to be efficacious in this context (79–81).

Note that both steps of Trebilcock and Elliot's response operate within the constraints of the gatekeeper strategy employed by the courts. 'The essence of a gate-keeper strategy is to impose liability on a party who is not the cause of misconduct nor a primary beneficiary, but who is in a position to prevent wrong-doing by refusing co-operation or support' (67). Hence, in the surety cases, lenders are pressed into service to protect the interests of the vulnerable. Now, although the law is undoubtedly committed to a gatekeeper strategy here, under Trebilcock and Elliot's response and that of the House of Lords in *Etridge*,[10] the gatekeeper might, in practice, become the independent legal advisor and not the lender. This is more than likely if lenders, under *Etridge*, simply insist as a matter of course on borrowers providing evidence formally negating any possibility of undue influence. Lenders may require borrowers to provide a statement, from an independent advisor, that they (the borrowers) have been legally advised on all the significant aspects of the transaction. This would still qualify as a gatekeeper strategy, since lenders must, on threat of invalidity, insist that borrowers comply with the requirement, but the whole burden of the strategy falls upon the advisor. Furthermore, on the basis of the guidance offered in *Etridge*, lenders might insist on

10 Ibid.

such a requirement in all surety transactions (the costs to lenders would, after all, be minimal), regardless of whether the spectre of undue influence has been raised. This would also allow lenders to short-circuit the process of determining whether or not there is indeed a threat of undue influence. For Trebilcock and Elliot, that process consists of asking the two questions noted above, while for the House of Lords in *Etridge* it is a matter of using Lord Browne-Wilkinson's test in *Barclays Bank Plc.* v. *O'Brien*.[11] It is unfortunate that the House of Lords decision in *Etridge* arrived after Trebilcock and Elliot's essay, for their view of the possible practical consequences of their own as compared with the House of Lords' response to undue influence would undoubtedly be worth knowing.

In the course of developing their response to the surety cases, Trebilcock and Elliot tackle a rich variety of issues. They provide an excellent account of the varieties of contract failure that arise in transactions of this sort, post a significant reminder to proponents of law and economics, and offer an interesting but problematic account of autonomy. The first two of these three points are linked, since the account of contract failure in the family context that Trebilcock and Elliot provide underscores the point that individuals' expressed preferences do not necessarily maximize their welfare. This is most likely where preferences are arrived at under the burden of various cognitive incapacities, coercion, or information failure. Trebilcock and Elliot provide good reasons to think that these conditions can flourish within the family context (56–64).

The account of autonomy Trebilcock and Elliot offer makes salient many instances of contract failure and has two dimensions, one internal, the other external. The former 'involves constraints on free action internal to the person ... [and includes] [c]ognitive capacities such as immaturity and mental incompetence ... A lack of internal autonomy might be described as an inability to act in a fully purposive manner' (55). By contrast, '[e]xternal autonomy is the freedom of the actor to do things in the world without impediment' (56), these impediments taking three principal forms: the 'first ... is lack of resources[,] ... [the] second ... is laws backed by the coercive power of the state that curtail free action ... [and the] third ... is private coercion which limits choice by imposing undesirable consequences on actions that would otherwise be preference satisfying' (55).

This account of autonomy is complex, going far beyond a conceivable but minimalist account that would hold autonomy to be simply the

11 The test in *O'Brien*, [1993] 4 All E.R. 417 at 429, was approved in *Etridge*, with a few caveats, by Lord Nicholls at paras. 44–9; Lord Clyde at para. 94; Lord Hobhouse at paras. 108–10; and Lord Scott at paras. 147 and 191.

opposite of heteronomy. To be heteronomous is to be, in Harry Frankfurt's phrase, a wanton, a being in the maw of one's immediate or first-order desires and wants. The autonomous being, by contrast, puts some distance between itself and its immediate desires and wants. The autonomous being is able to decide which of its immediate, first-order desires are worth desiring, and it does so by reference to second-order desires, desires about desires. Yet to have second-order desires, desires about which first-order desires are worth having, is not in itself to be autonomous. Something more is needed, according to Frankfurt, and this is the process of ensuring that some second-order desires constitute or correspond with one's will. When some second-order *desires* correspond with one's will they are, for Frankfurt, *volitions,* and these are the hallmark of autonomous beings. To be autonomous is to identify with some second-order volitions, to have these volitions resonate throughout one's life and personality.[12] A minimalist account of autonomy such as this has a number of advantages. It makes something salient – the contrast with heteronomy – that might otherwise be missed, thereby giving the notion of autonomy a clear role in our conceptual cartography. This account also avoids eliding too many *prima facie* different but related issues.

By contrast, the expansive nature of Trebilcock and Elliot's account of autonomy can create confusion by blurring a number of quite different issues. For example, the second and third impediments upon external autonomy are the fulcrum, if and only if they make certain conduct *impossible*, of accounts of 'pure' negative liberty.[13] One might have very little or even no negative liberty and yet still be autonomous in the internal or minimalist sense: it might be impossible for one to act in any way at all, the first-order desire to refrain from action corresponding with one's (only) second-order volition. Having freedom of the will, on the internal or minimalist account of autonomy, is therefore a matter of being able to ensure an identity between some of one's first-order desires and some of one's second-order volitions. This need not require any action. External autonomy, in Trebilcock and Elliot's hands, is about the deeds of other agents and their impact upon what one can do. It takes us into the realm of political freedom. But the deeds of others can affect one in at least two ways: by making some of one's actions impossible and by making some of one's actions more difficult. We have, with a caveat, interpreted the second and third impediments to external autonomy as making actions impossible and thus falling with the realm of negative liberty. The first impediment, by contrast, is unlikely to make a large

12 H. Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988) at chs. 2, 12.

13 A robust example of this is provided by H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994) at ch. 2.

number of actions impossible unless the lack of resources is so complete as to amount to utter and debilitating destitution. Rather, a not strictly equal distribution of resources (broadly conceived) makes the realization of some goals more difficult for some than for others. But to determine whether or not this inequality is baleful surely requires, at the very least, an account of which goals are and which are not worth pursuing. This inquiry is the departure point of a journey into the realm of positive liberty, understood in part as an account of what is truly good for human beings.

The risk in utilizing an expansive account of autonomy is that of eliding the separate notions of freedom of the will, negative liberty, and positive liberty. If it is true that each notion generates its own distinctive set of concerns and problems, then Trebilcock and Elliot should perhaps separate them. Doing so would mean assigning the concept of autonomy a more circumscribed role than it has in their and a number of other discussions.[14] This will not undermine Trebilcock and Elliot's general argument, since the law must still deal with the issues subsumed under their expansive account of autonomy.

III *Treatment and cure*

A. AMBITION: FOR AND AGAINST

The principal candidate for the role of doubting Thomas in this volume is Melvin Eisenberg; his counterpoint, quirkily enough, is the undoubting Thomas Scanlon. The theme their essays share is the range and limits of what might be called unitary and external accounts of contract law. 'Unitary' because such accounts aim to derive the substance and legitimacy of contract law from a general account of the morality of promise keeping; 'external' because, obviously, the primary conditions for the intelligibility and legitimacy of contract law are found outside contract law, in the domain of morality. While Eisenberg's essay aims to undermine some unitary and external accounts of contract law, Scanlon's essay contains the germ of an exemplary instance of such an account.

Scanlon's scrupulous essay has two main goals. First, he hopes to provide an alternative to an influential account of the morality of promise keeping that founds promissory obligation upon conventions or practices of agreement making. Scanlon's account of the morality of promising is one in which such conventions or 'practices play no essential role' (87). This part of the essay recapitulates some of Scanlon's

14 In particular, discussions of 'relational' autonomy. A classic statement is J. Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' Yale J. Law & Feminism 1 (1989) 7; see also C. Mackenzie & N. Stoljar, eds., *Relational Autonomy* (New York: Oxford University Press, 2000).

earlier work.[15] Scanlon's second goal is twofold: to warn us that even a compelling account of the morality of promising should not be assumed to provide an argument for the legal enforcement of promises through contract law; and to articulate principles upon which the legal enforcement of some promises could be based. His principal targets are therefore (i) accounts of promissory obligation that may be labelled 'Humean';[16] (ii) theories of the basis of contract law that hastily extrapolate from an allegedly coherent and defensible account of the morality of promising to the substance and legitimacy of contract law; and (iii) arguments denying that contractual remedies have a principled basis. Do not assume that Scanlon's attack on the second target undermines his ambition to provide a unitary and external account of contract law. He simply warns against hasty extrapolation; he does not claim that extrapolation is always inappropriate (99–100).

Scanlon's account of wrongness of promise breaking begins by locating the wrong involved in making a lying promise in a general prohibition upon manipulative conduct. The underlying principle ('Principle *M*') does not depend for its plausibility upon any convention or practice of agreement making (90). Rather, its power is derived entirely from the method employed by Scanlon in his earliest work. That is, the principle's plausibility arises from the fact no person could reasonably reject it, being motivated 'to find principles for the general regulation of behavior that others, similarly motivated, also could not reasonably reject' (89). Considerations similar to those that reasonable, properly motivated people take to support Principle *M* also support Principle *D*, a requirement that one take due care not to lead others to reasonably form false expectations about what one will do, and Principle *L*, a requirement to take reasonable steps to prevent loss occasioned by breach of Principle *D*. Reasonable steps, under Principle *L*, include actually doing what others have assumed one will do, warning them that one will not be acting in the way they have assumed, or compensating them if they have suffered losses as a result of relying upon one's words or conduct. So far, perhaps, so good. But where do (non-lying) promises fit into this framework?

Promises, for Scanlon, are primarily undertakings to do what is promised, not simply undertakings to either do what is promised or compensate the promisee (92). Promises function to give assurance that

15 See T. Scanlon, 'Promises and Practices' (1990) 19 Phil.& Publ.Aff. 199; T. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998) at ch. 7.

16 By this I mean to refer primarily to the account in D. Hume, *A Treatise of Human Nature*, 2d ed. (Oxford: Clarendon, 1978) at Book III, Part II, s. V, and one or two of its recent defenders, *e.g.*, J. Deigh, 'Promises under Fire' (2002) 112 Ethics 483. I therefore hope the appellation is nowhere near as slippery as its contemporary moral-philosophical relative, 'Kantian.'

one will do as one says, and there are reasons for wishing for such assurance, and for wanting to give it, that go beyond the requirements in Principles *M*, *D,* and *L* (94–5). These reasons lead Scanlon to the conclusion that properly motivated, reasonable people have good grounds for endorsing Principle *F*. It holds that one who acts so as to create an expectation in another that they will act in a specific way unless that other allows them not to, knowing the other wants them to so act, and then knowingly giving assurance that they will so act, must act in the way indicated. Principle *F* 'goes beyond Principle *L* in requiring performance rather than compensation or warning' (96). Furthermore, Principle *F*, just like Principles *M*, *D,* and *L*, does not depend for its validity upon the existence of a background practice or conventions of promise making and keeping: '[t]he moral force of undertakings of the kind described by Principle *F* depend only on the expectations, intentions and knowledge of the parties involved, and these can be created *ad hoc*, without the help of standing background expectations of the kind that would constitute an institution' (98).

Almost all the difficulties for this part of Scanlon's argument concern the distance he manages to put between convention-based, Humean accounts of promise keeping and his own. It must be noted that Scanlon does not dismiss background conventions and practices entirely, holding that their existence provides an opportunity in which the wrongs identified by Principles *M*, *D, L,* and *F* can be brought about. His point is that reference to such conventions and practices is not essential to identify the wrong in question. Yet there is a risk, which can be noted but not explored here, that conventions and practices of promising might well intrude into Scanlon's argument despite his best endeavours. The guise under which they might enter is that of reasonableness and similar standards, which play a role in all of the principles Scanlon articulates. In Principle *M*, the loss has to be 'reasonably' foreseeable; in Principle *F* reference is made to 'objectionable constraint' and 'special justification,' and, presumably, the expectations agents entertain must be reasonable. Now, one very tempting way in which to fill out these notions of what is reasonable, special, or objectionable is by reference to the conventions and practices in which they are already at work: our conventions and practices of agreement and promise making and keeping. Of course, to say this is a *tempting* strategy is not to say it is *essential*; what is surely essential, though, is that notions such as reasonableness are inter-subjective, necessarily based on shared standards and expectations. And this, perforce, is the territory in which conventions and practices are found.

Focusing specifically on Principle *F* and the relation between promises and the notion of assurance raises an additional question of Scanlon's account. For Scanlon, promises are a means of creating assurances, and it

is assurance that provides the basis of the obligation.[17] Why should I do as I promised? Because, by promising, I knowingly provided an assurance to the promisee that I would act in a certain way, knowing the promisee wanted such an assurance, and knowing also that the promisee will rely and formulate expectations on the basis of my assurance. If I now fail to act in accordance with my assurance (promise), I deny all the reasons that, as a reasonable and properly motivated person, I accept support Principle *F*. On something like a Humean account, by contrast, promises also provide assurance, but they do so only by virtue of being in accord with some set of background conventions or practices. The existence of such conventions or practices provides the grounds upon which promises are recognized as a means of creating obligations, the basis of the obligation to act in accordance with one's promise being, in part, those very conventions. Once a promisor has used these signs, and thus shown himself willing to undertake an obligation, the promisee can be assured of the promisor's seriousness and *bona fides*. The question, then, is this: Since both Scanlon's and the Humean account accommodate all the notions we take to be significant in this domain, but arrange them slightly differently, how are we to choose between them? There is no easy answer to this. There are well-known difficulties with Humean accounts of promising, the primary one being the justificatory gap between the argument establishing the value of the general convention or practice of promising and the claim that it is wrong in specific circumstances *c*, at time *t*, for X to break his promise to Y. Yet it also seems that there are instances of promissory conduct that Scanlon's account cannot handle,[18] so the balance of advantage does not obviously favour one account over the other.

Only a slight quibble arises over Scanlon's attempt to achieve his second goal. His argument certainly succeeds in providing an account of the circumstances in which promissory obligations can be legally enforced that avoids full-blown legal moralism. Furthermore, he also provides a principled basis for the measures of damages traditionally used in contract law. In this context, legal moralism might espouse at least two related tenets. The first holds that moral requirements are also *prima facie* legal requirements, the second that the moral grounds for acting in accord with one's promises translate directly into the law: where promises ought morally to be honoured, then they should also be legally enforced. Scanlon's initial riposte to the first tenet is that 'the fact that some action is morally required is not, in general, a sufficient justification for legal intervention to force people to do it' (99), but he provides little else by

17 The point is well put by Deigh, ibid. at 503.
18 Ibid. at 504–5.

way of argument on this admittedly well-worked point. He does, however, find a justification, by deploying the method that yielded Principles *M*, *D*, *L*, and *F*, for the legal enforcement of some promises, thereby embracing something like legal moralism's second tenet. Properly motivated, reasonable people will, Scanlon thinks, have no reasonable grounds for rejecting Principles *EL* and *EF*. These hold, *inter alia*, that it is legally permissible to enforce remedies for breach of contract covering reliance and expectation losses where an agent has intentionally and voluntarily provided an assurance to another that he would act in a specific way, knowing that the other wanted such assurance, and both intended this assurance to have legal effect.

Scanlon's argument here avoids legal moralism's first tenet because it does not entail 'a general conclusion about the legal enforcement of morality' (102): it takes no position, for example, on the question of whether victimless moral wrongs should be legally prohibited (102). But this is not terribly interesting. The more pressing question concerns the difference between legal moralism's position on the enforcement of promises (the second tenet) and Scanlon's position. The difference might be located in the fact that the kinds of consideration that weigh with agents when considering whether Principles *EL* and *EF* are reasonably rejectable include what legal moralists would regard as impermissible factors. Rather than simply affirming that the moral requirement about promise keeping should be promptly embodied in the law, Scanlon allows considerations about the compliance and error costs of legal enforcement (101, 108) to feature in the decision about the permissibility of enforcement. Now, Scanlon may think that legal moralists should disregard such considerations, but it is not clear why: there is no obvious reason why legal moralists should be blind to questions about the efficacy and enforcement of the law. That being so, a legal moralist might find no difficulty in calling for the law to embody Principles *EL* and *EF*, and on exactly the same grounds as do Scanlon's properly motivated, reasonable people. The general point here is that the second tenet of legal moralism, or something very close to it, is perhaps the only viable position for one offering a unitary and external account of contract law.

The considerations that lead to the adoption of Principles *EL* and *EF* also provide a starting point for rebutting arguments, the most famous of which belongs to Lon Fuller and William Perdue,[19] aiming to undermine the rationale of the expectation measure in contract. The factors Scanlon rightly thinks are in play in deliberations about the standing of *EL* and *EF* identify different but significant interests and concerns. The losses

19 L. Fuller & W. Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 Yale L.J. 52; L. Fuller & W. Perdue, 'The Reliance Interest in Contract Damages: 2' (1936) 46 Yale L.J. 373.

covered by *EF*, which supports the expectation measure, are clearly no less real and of no less concern than the reliance losses covered by *EL*. The argument to the contrary attains much of its plausibility by relying on an initially intuitive but imprecise assumption about property (thoroughly analysed by Peter Benson in his essay in this volume). By contrast, the considerations Scanlon invokes to support *EF* do not depend on any equally dubious assumption and are, overall, far weightier than any previously adduced argument denying the propriety of the expectation measure.

The final move in Scanlon's essay is a defence of a particular conception of the moral significance of choice. The notion of voluntariness is vital to Scanlon, since it apparently underpins a number of the principles he develops and, in particular, principles *F* and *EF*. He does not directly offer an account of voluntariness, though,[20] opting instead to delineate the value of choice. The basic idea here is 'the value for an agent of having what happens (including what obligations are incurred) depend on how he or she responds when presented with a set of alternatives under certain conditions' (112). How does this throw light on the notion of voluntariness? Only obliquely, for, as Scanlon points out, a choice is voluntary under, for example, principles *F* and *EF* 'just in case the circumstances under which it was made are ones such that no one could reasonably reject a principle that took choices made under those conditions to create binding (or enforceable) obligations' (114). Thus voluntariness, for Scanlon's purposes, is entirely a product of the argument for the principles in question and not, therefore, an independent notion. This is an intriguing and original suggestion that, if successfully carried out, would replace the standard but problematic procedure here. That procedure involves developing a general conception of voluntariness that embodies as parsimonious a range of normative commitments as possible and which is then put to work in a number of different contexts. The problem is that the more contexts differ, the greater the pressure on the generality of the conception of voluntariness. Scanlon's approach allows us to escape this difficulty, which is certainly a point in its favour. Whether or not it creates other difficulties in its stead cannot be determined here.

Eisenberg's wide-ranging essay offers a theory of contract law, that task being understood as the search for and development of 'a principle for establishing what the content of contract law should be' (206). Before outlining that principle, the first half of the essay offers a taxonomy of legal theories – axiomatic, deductive, interpretive, and normative – and

20 He does and he doesn't: readers of page 112 might expect him to ('[t]he account ... I am offering ... of choice and voluntariness'), but page 113 clears matters up: '[t]he value of choice is not a conception of voluntariness.'

argues that the first three are, for diverse reasons, unsatisfactory. Some of Eisenberg's points against these types of legal theory are well made, but a slight concern is that not all of these types are, or have been, well represented in legal scholarship. For example, although some legal scholars have insisted upon ostensibly rigorous canons of legal argument, including often rhetorical references to the importance of 'deduction,' it is questionable whether any scholar has seriously maintained what Eisenberg says axiomatic theorists must, namely, 'that fundamental [legal] doctrinal propositions can be established on the ground that they are self-evident' (208). This is certainly not true of the classical common law jurists, nor is Eisenberg able to ascribe this particular view to that demon of some American law schools, C.C. Langdell (see 208–9).[21]

Normative theories are the most intellectually respectable, in Eisenberg's view, and are distinguishable from the other three by a core commitment: normative theories hold that legal 'doctrinal propositions are generated by moral norms and policies that are utilized because they are meritorious, independent of their relation to existing decisions' (207). A somewhat different version of this commitment appears later in the essay, and it is probably this one Eisenberg thinks actually distinguishes normative from other theories:

> Legal rules can ultimately be justified only by social propositions, and a satisfactory theory of the best content of law, or of any given area of law, like contracts, must be based on all policies, moral norms, and empirical propositions that are relevant and meritorious, not just moral values that are connected in some way to prior institutional decisions[.] I will call theories of the best content of law that are based on all relevant and meritorious social propositions *normative theories*. (222–3)

Social propositions, for Eisenberg, include 'moral norms, policies and ... propositions that describe the way the world works, such as statements about individual behavior and institutional design' (207).

How might one go about developing a normative theory of contract law? One option is to construct a body of contract law in the image of some existing moral or political theory, leavened with such plausible empirical assumptions as one needs. On this view, contract law could be regarded as a legal manifestation of the moral or political doctrine contained in one's adopted text: the *Philosophy of Right*, perhaps, or the *Nicomachean Ethics* or *A Theory of Justice*. Eisenberg's tack is not exactly the same as this, since he does not simply co-opt existing moral and political–

21 An excellent treatment of the former is Part I of G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986); see also G. Postema, 'Philosophy of the Common Law' in J. Coleman & S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Clarendon, 2002) 588.

philosophical arguments in the service of his goal. Rather, he provides a method to yield what he hopes is a normatively compelling and empirically plausible contract law. The method is labelled the 'basic contracts principle' (hereinafter BCP), and it has two branches. The first insists that contract law 'should effectuate the objectives of the parties to a promissory transaction' (241), subject to certain conditions. The second branch of the principle lays down the way in which those conditions are to be determined. The conditions should be those that 'would be made by a non-self seeking and fully informed legislator who seeks to make the best possible rules of contract law by taking into account all relevant moral, policy, and empirical propositions (the *Legislator*)' (241). By contrast with some normative theories of contract law, Eisenberg's embodies a number of possibly conflicting values and considerations. When these take the form of propositions relevant to the Legislator, she must use good judgement to either subordinate one proposition to another or 'craft a rule that is the best vector of the propositions, considering their relative weights and the extent to which an accommodation can be fashioned' (241). Clearly, the BCP is a fascinating proposal; it raises at least two questions.

The first question begins by noting that the BCP is pluralistic, promising a contract law founded upon all relevant moral, policy, and empirical propositions. Eisenberg recommends it only after discrediting what he calls single-value normative theories of contract law. The question concerns the adequacy of Eisenberg's treatment of one type of single-value theory of contract law, namely, autonomy theories. These hold that 'allowing an individual to freely own and dispose of property and freely exercise his will to make choices concerning his person, labor, and property is a value that is paramount ... in contract law' (223). The problem is that this hat is forced somewhat uncomfortably onto a particular head. Eisenberg's prime specimen of an autonomy theorist is Charles Fried, but Fried's work neither fits that bill very well nor suffers all the ills that beset single-value autonomy theories.[22] There are four such ailments, according to Eisenberg, of which three will be considered here.[23]

The first is that '[a]utonomy theories of contract [mistakenly] argue that the law of contracts can be promise-based and morality-based *only* if it is grounded in a moral obligation that arises as a result of the promis-

22 Given my lament, above, about the over-expansion of the notion of autonomy, I would prefer that most of the discussion in this section be in terms of 'agency,' its conditions and value. Unfortunately, this is not the language used by either Eisenberg or Fried.

23 The fourth ailment has two parts (see 232–34). The first is indeed displayed by Fried's account. The second, however, is foisted upon Fried with only perfunctory consideration of his actual arguments (which, of course, is not to say that those arguments are compelling) and on the basis of the weak argument Eisenberg employs in discussing the first ailment.

or's exercise of his will' (226 [emphasis added]). 'Only' is a problem here, since Eisenberg's objection might be either to the promisor's exercise of will being a necessary condition for obligation or to it being the only single (necessary and sufficient) condition. If Eisenberg's objection is to the latter, then it is misplaced, since Fried's view is certainly that the promisor's exercise of will is a necessary but not sufficient condition for contractual (and therefore analogous promissory) obligation. This is to say, without the promisor's exercise of will, there can be no question of a contract and of an analogous promissory obligation arising; and, even with it, there is no guarantee that a contract and analogous promissory obligation will come into being. There can be no contract, and hence no analogous *promissory* moral obligation, only as a result of what the promisor does, if the promisee does nothing. Fried is quite clear on this, specifying that 'a further necessary condition of promissory obligation [is] *that the promise be accepted.*'[24] The requirement of acceptance recognizes the promisee's autonomy, highlighting the fact that in order to come into being a contractual and promissory obligation depends also on the promisee's will.

That the autonomy of the promisee is a factor as important as the promisor's exercise of will is also clear from Fried's remarks about the wrongness of promise breaking:

> An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds – moral grounds – for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that trust now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. A liar and a promise-breaker each *use* another person.[25]

The most obvious way to understand the wrongfulness of the promisor's use of the promisee, of showing what makes this use *abuse*, is that the lying promise deliberately ignores, accords no value to, the promisee's autonomy. It is an invitation to trust, and thereby apparently respectful of the promisee's autonomy, that subsequent and deliberately subverts that trust. Since the autonomy of both promisor and promisee is vital for Fried, Eisenberg's objection that 'it can be argued ... that the moral obligation to keep a promise is based not on the promisor's will, but on the legitimate expectation that the objective meaning of the promisor's expression arouses in the promisee' (226) appears redundant. The expectations of the promisee, and their expression, are vital for Fried: they are the only things capable of constituting the promisee's

24 C. Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981) at 43.
25 Ibid. at 16 [footnotes omitted].

response to the promise and form part of the argument about the wrongness of promise breaking. Yet the redundancy might be illusory after all, if Eisenberg's objection is to the promisor's act of will being even a necessary condition of contractual and promissory obligation. However, it is unlikely that this is Eisenberg's view, since his rebuttal – the argument that obligation can plausibly be based on the promisee's legitimate expectations – invokes that very condition. That is, the promisee forms expectations only as a result of the promisor's act of will. As Eisenberg notes elsewhere, 'contract law cannot get off the ground unless a promise has been made' (225); where is this promise to come from, if not from the promisor's act of will?

The second and third ailments suffered by autonomy theories are closely related. The second is that '[a]utonomy theories of contract cannot alone generate complete and desirable rules of contract law' (227), while the third maintains that '[a]lthough respect for autonomy ... is an important moral value, that value is too narrow to provide an exclusive basis for the morality of promising and contract law' (229). As to the second, Fried accepts the point, and Eisenberg notes this (228).[26] It is therefore odd to regard this as an objection to Fried's argument, but Eisenberg has a more general point here: it is not about the limited nature of the value of autonomy but, rather, concerns the limitations of all moral or political values in this context. This will be considered shortly. Part of the third ailment follows from the truth of the second. As Fried accepts that the notion of autonomy does not generate complete and desirable rules of contract law, he must also accept that autonomy is 'too narrow a value to provide an exclusive basis for the morality of contract law.' Again, it is odd to regard this as an objection to Fried's case rather than a statement of it, although in this instance Eisenberg has two fairly specific points to make against Fried.

The first is certainly not merely a restatement of Fried's position, but the second seems to be. The first point takes issue with Fried's autonomy-based argument in favour of the legal enforceability of donative promises, offering a moral case against enforceability. Eisenberg's argument is interesting and plausible, not obviously trumped by Fried's alternative. Whatever the merits of the arguments either way, their success or failure is unlikely to completely undermine or to make utterly unimpeachable the conception of contract as promise. Eisenberg's second point is that

26 'I never argued that promise is the only basis of reliance or that contract is the only basis of responsibility for harms to others'; 'contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles'; 'nothing about the promise principle ... entails that all disputes between people who have tried but failed to make a contract or who have broken a contract must be decided solely according to that principle' (ibid. at 24, 25, 27; see also at 56 and chs. 5–7).

autonomy-based theories of contract have difficulty with some instances of contracting under pressure (231–2). Fried accepts this, and, although his treatment of similar cases is not the same as that offered by Eisenberg, the mere fact that it is different is not an argument against it.[27]

The general point within Eisenberg's treatment of the alleged second ailment of autonomy theories is clear. Eisenberg thinks that all the rules and doctrines of contract cannot be derived from one moral value or set of moral values or another without reference to policies. It is likely that many will share this view. This view might be interestingly mistaken, though, and, if it is, it raises the second question for the BCP. Part of the reason that Eisenberg thinks recourse to policy is necessary when seeking to determine what the best set of contract law rules are is, perhaps, a suspicion that moral and political values are frequently indeterminate. The value of autonomy may often fall short of providing guidance on some particular issue, and, when it does, it seems obvious to turn to a domain of considerations that are seemingly both more plentiful and more practical. Furthermore, values in general and autonomy in particular, as Eisenberg notes in a discussion of donative promises, may provide guidance at odds with evidential or administrative considerations (228–9). This plentiful domain of practical considerations Eisenberg calls 'policy,' and it is incorporated in the second principle of the BCP.

The doubt about recourse to policy, though, is exactly the same as that which arises when lawyers turn to values to provide guidance as to the content, interpretation, or application of propositions of law. It can be put in the form of a question: What reasons are there to think that the realms of values or of policy are more determinate than law itself? Suppose there is a standard legal doctrinal question to answer: Is doing what one is already contractually bound to do good consideration for a subsequent promise to pay more? The English courts have given different answers to this question over time, but that is not the significant point.[28] The point is this: Can any determinate guidance be provided on this question by one or other moral value, or set of moral values, or by policy factors? The question seems so technical, yet is of a type so familiar to lawyers, as to make one wonder whether any factor – moral, political, or policy – will provide a clearly salient single answer. It is perhaps true that this legal question is one of a significant class of legal questions that are matters of *determinatio*.[29] That is to say, there are a number of equally salient answers to them, but no obviously and pre-eminently salient single

27 Ibid. at ch. 7.

28 *Williams* v. *Roffey Bros and Nicholls (Contractors) Ltd.*, [1990] 1 All E.R. 512.

29 J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980) at 284–6. A related thought is that legal doctrine is often 'blunt' as between different underpinning moral or political values: see N.E. Simmonds, 'Bluntness and Bricolage' in H. Gross & R. Harrison, eds., *Jurisprudence: Cambridge Essays* (Oxford: Clarendon, 1992) 1 at 12.

answer. That being so, the important issue from the legal perspective is that an answer is settled upon, and this is most likely a matter of picking rather than choosing.[30]

The snag this raises for the BCP is clear. Although its second principle requires reference to a large range of factors to determine the content of contract law, it may be that those factors still do not provide the wherewithal to answer many questions of content. Both moral values and policy factors might be equally inert in the face of some such questions. Finally, it is worth noting that the difference between moral values, on the one hand, and policy factors, on the other, is not as great as Eisenberg might wish. This is because policy factors are rarely completely without moral or political components or undertones (see, *e.g.*, Eisenberg's point about the policy of 'generally leaving affective issues within the private domain' (228); this is surely a policy issue with moral-*cum*-political dimensions).

What, now, of ambition in contract law scholarship? The happy conclusion is that Eisenberg's doubt and Scanlon's ambition are both well founded. Eisenberg is right to doubt the power of some theories to generate a complete and desirable body of contract law. It is unlikely that any one value or set of values or policy considerations could ever provide this. Yet it is also uncertain that many theories of contract law have attempted that task. What they often aim for is to provide the broad contours of a morally and politically respectable contract law, recognizing that many issues are often matters of convention or *determinatio*. This does indeed seem to be the shape of Scanlon's essay: he aims to determine whether broad principles – which can provide the basis for swathes of doctrine but are unlikely to determine specific, detailed doctrinal choices – are justifiable. Scanlon's account is nevertheless still rightly regarded as 'external,' founding as it does large chunks of contract law upon a set of morally respectable principles. The remaining *apparent* difference between Scanlon and Eisenberg is over the role of these principles. Scanlon's theory deserves the label 'unitary' because the *primary* considerations informing his discussion of contract law are the moral principles reasonable people have no grounds to reject. By contrast, Eisenberg's BCP makes room for non-moral policy considerations in the deliberations that yield contract law's content. But even here there is no great disagreement, simply a difference of emphasis. For Scanlon, too, allows a role for policy considerations in discussions about the permissibility of principles *EL* and *EF* (how else are error and compliance costs of enforcement (101, 108) to be understood?). Scanlon's modest ambition and Eisenberg's limited scepticism might, after all, be a perfect match.

30 The distinction is formulated in E. Ullman-Margalit & S. Morgenbesser, 'Picking and Choosing' (1977) 44 Soc.Research 44 757.

B. WHAT WE HAVE LOST

The job of unearthing what has been lost or overlooked in the intellectual tradition of contract scholarship is, from the evidence of the essays by Peter Benson and James Gordley, particularly demanding. These two essays are the longest in the volume, taking up just less than half of its 333 pages. It is not possible here to address more than a smattering of the issues these densely packed, complicated, and bold essays raise.

The first goal of James Gordley's essay is to demonstrate the inadequacy of will theories of contract, which, he says, came to prominence in the nineteenth century. These theories, for Gordley, have at least three constitutive claims. The first is 'that the will of the parties should be respected' (266), the second 'that the parties' promises or expressions of will are the source of their obligations' (267), while the third holds that the 'reason the promisor is bound is simply that he willed to be bound' (267). Taken together, these claims embody a view of contract that is 'voluntaristic: [it] ... place[s] a value on choice that is independent of the value of what the parties have chosen' (268). Each of these claims fails, according to Gordley, because they cannot be adequately extended so as to answer three important questions. He argues that will theories have no adequate account of why contracts should be enforced or of what determines the content of the parties' obligations; nor can they 'explain what the consequences should be when a contract is breached' (267). The second goal of Gordley's essay is to show that the Aristotelian tradition of contract law scholarship provides better solutions to each of these difficulties.[31] The moral of this rich and informative story is obvious: the problems that beset much contemporary contract scholarship would be resolved if only there were a greater awareness and understanding of what has gone before, however unfashionable or *outré* it may seem.

The first question Gordley attempts to answer is 'Why should contracts be enforced?' It is worth spending some time on this issue, since the analysis certainly adds to Gordley's corpus of work, whereas other sections of the essay only repeat or finesse earlier arguments. He approaches the question indirectly, by examining the reasons that can be given for legally recognizing and legally overruling parties' choices. The negative part of his case consists of a demonstration that two responses to the problem, each broadly sympathetic to will theories of contract, fail. One response is based upon preference satisfaction, the other upon individual autonomy; neither, Gordley argues, can adequately explain why and when the law should and should not respect the parties' choices. Gordley's treatment of theories based upon preference satisfaction repeats some of the standard problems these accounts have, all of which are related to

31 One of his earlier excellent contributions was *Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1991).

the snag of adequately defining and valuing relevant preferences (272–4). Gordley makes such quick work of dispatching these accounts as to raise the suspicion that they cannot be so ham-fisted; that suspicion is confirmed when his treatment of autonomy-based theories is examined.

On the issue of when and why parties should be held to their promissory commitments, Immanuel Kant's account says roughly this: one is bound to keep one's promises because one cannot will as a universal maxim that one sometimes respects and sometimes ignores these commitments.[32] Were one to do so, promising would, in time, be completely undermined, since one could have no confidence in others doing as they have promised, knowing that they sometimes might and sometimes might not honour their commitment. The tension in willing as a universal maxim that one sometimes will and sometimes will not respect one's promissory commitments has been described as a form of contradiction, either pragmatic and/or conceptual and/or teleological. Gordley notes this (276–7), but his efforts to show that there is no actual contradiction here, however it is understood, are unconvincing.

The possible pragmatic contradiction involved in willing as a universal maxim that one sometimes will and sometimes will not honour one's promissory commitments arises, as Gordley notes, thus: one's 'own end [of being able to commit oneself and others through promise] would be thwarted if everyone played by the same rules' (276). Gordley's reply to this, which would allow a lying promisor to achieve his ends and avoid the contradiction, is the maxim that only astute people be allowed to break their promises. But there are two profound difficulties here. First, there is a genuine doubt as to whether this maxim could be universally willed, since, unless all in the moral community are astute, all could not will this. Second, the maxim that astute people be allowed to break promises does not seem to be founded, as Kant thought universal maxims should be, on reason rather than want and inclination. Indeed, Gordley's maxim appears to be founded precisely upon inclination, namely, the desire for self-preference that flows from the knowledge that one is astute.

The possible teleological contradiction arising from willing the maxim that promises sometimes should and sometimes should not be honoured is simply this: promise-breaking is incompatible with promising. Because this contradiction is labelled teleological, Gordley assumes (277) that the purpose involved must be the particular purposes of specific agents: Y's purpose (to dupe X by promising to commit himself and then failing to act as promised) conflicts with the purpose or point of the practice of promising (to allow good faith commitment). If this were true, there

32 I. Kant, *Groundwork of The Metaphysics of Morals* in I. Kant, *Practical Philosophy*, transl. & ed. M.J. Gregor (Cambridge: Cambridge University Press,. 1996) at paras. 402–3, 422–4.

would indeed be a problem, since, for Kant, here-and-now purposes and inclinations lack moral weight. There is, however, a plausible alternative account of purpose in this context, better because it avoids such an obvious snag. It holds that the purpose in play is any purpose of any properly rational being. On the assumption that a rational being will have purposes, it is conceivable that some of those purposes could be accomplished only in conjunction with other rational beings and over a period of time. A rational being might will a means, available to all, for committing itself (since it knows circumstances and inclinations change) to act in specific way in the future, and for committing others. One such means would be the practice of promising. The purpose of promising, at this abstract level, is the extension of agents' freedom. A rational being cannot consistently will such a means and also will not to be bound by his promises. This argument also supplies a reply to Gordley's gripe about the second, conceptual contradiction, which, he says, 'does not explain why ... promises should exist at all' (276).[33]

On the issue of why and when parties' preferences should not be legally respected, Gordley again seeks to undermine theories based on preference satisfaction and autonomy and, presumably, thereby undermine will theories. In seeking to determine when an agent's choices should not be legally respected, Gordley notes, these theories 'typically discuss the process by which a person chooses. The process may or may not lead a person to choose what he truly prefers or enable him to make a genuinely free decision' (283). Yet he thinks these theories are faced with an uncomfortable dilemma, elucidated by the following questions: 'Is the process supposed to be better only because it helps a person to choose what he truly prefers (or to choose more freely)? Or is the process better because it leads to choices that are better – better because they have a normative value that is not due entirely to the fact that they are preferred or freely chosen?' (283). If the theories under discussion answer the first question affirmatively, they stand convicted of voluntarism, of placing a value on choice independent of what is chosen. If they answer the second question affirmatively, Gordley thinks they become altogether too Aristotelian for their own comfort (283; 285).

This dilemma, however, is too crude: what Gordley seemingly regards as mutually incompatible alternatives need not be so. That is, both of his questions can be answered in the affirmative without contradiction. It can be maintained that a choice process yielding choices in accord with agents' preferences and a process generating choices that accord with what is morally right or good are both morally significant and, hence, potentially morally valuable. The only chance of contradiction here is if it is maintained that both options are equally morally valuable, but what

33 This argument does not appear in *Groundwork*, ibid., but is consistent therewith.

reason is there to think that? The charge of voluntarism has only a little purchase here, and, even where it has, it can be happily accepted. Answering the first question affirmatively does indeed commit one to saying that there is something morally significant, and thus potentially morally valuable, here, namely, choice in accordance with preference. For choice, insofar as it accords with the agent's preference structure, is morally significant if and when it tracks preferences that express an agent's character or self-conception. Such choices thus allow a degree of 'authenticity,' understood as correspondence between character and action. That choice in accordance with preference is morally significant does not, of course, guarantee that the choices made accord with what is morally required or good. Furthermore, it is quite possible to maintain that the existence of choice itself, even where it corresponds neither with an agent's preferences nor with what is morally required or good, is of moral significance. Simply choosing is a morally pregnant situation, requiring deliberation on one's own (and sometimes others') ends; it is therefore also potentially educational. This minimum quotient of moral *significance* is, of course, likely to be transformed into increasing degrees of moral *value* as one moves from sheer choices to choices reflecting preferences and choices reflecting the morally right or good.

Now, if the two positions Gordley regards as incompatible can be consistently affirmed, and even held in conjunction with a more minimal and basic claim about the moral significance of sheer choice, what becomes of his argument? Clearly the charge of voluntarism is too quickly and too easily made and, perhaps, the choice between non-Aristotelian and Aristotelian accounts of these issues too starkly drawn. A more specific issue is whether Gordley is right to spend time on tackling voluntarism at all. For, while not disputing that there have actually been strong voluntarists – those who believe that the *only* morally significant and valuable thing about a choice is that it is a choice (it involves the consideration of alternatives and deciding between them) – the position seems so implausible as to be unworthy of attention. One can think that choice *qua* choice is morally significant without being a strong voluntarist.[34]

On the issue of why contracts should be enforced, and the subsidiary questions of when the parties' choices should and should not be legally respected, Gordley's positive case has two parts. The first is fairly brief and gains power if the negative part succeeds, for the structure of his argument seems to be this: once the detritus of the will theory is cleared away, the revived Aristotelian account will hold sway. The doubts I have just expressed about some aspects of Gordley's negative argument will therefore slow this process down, but do not undermine the interest or

34 As John Stuart Mill did: see J.S. Mill, *On Liberty and Other Writings*, ed. S. Collini (Cambridge: Cambridge University Press, 1989) at 76–8.

viability of the positive argument. The first part of the positive argument turns upon the virtues of prudence, temperance, and courage (269). Whether or not parties' choices should be legally respected depends upon whether those choices contribute to living a good life; choosing the path to that life involves the trio of aforementioned virtues. It follows from this that when choices do not track what is necessary for a good life, or when they manifest a lack of prudence, temperance, or courage, they are suspect. That is not to say such choices will never be given legal effect, since in the Aristotelian tradition there are a number of reasons why agents should be bound by bad choices. One is that agents have to learn to make good choices and that this is undoubtedly a process of trial and error, another that democracy requires agents to make their own choices even if mistaken (281–2).

The second part of the positive argument maintains that contracts should be enforced if and when they accord with distributive justice (286–97). The Aristotelian principle of distributive justice most appropriate for a democracy is that 'every person ideally should have the same amount' (286). The key qualification here is 'ideal,' for, as Gordley maintains, Aristotelians allow departures from that principle in the name of efficiency and stability: 'the ideal must be compromised to provide an incentive for people to work or to manage property effectively' (288). It is a mistake, therefore, to assume that any contract that upsets a strictly equal distribution of resources, or which is made in a situation of inequality, should be set aside. For, since any actual distribution of resources is presumably an amalgam of the demands of justice and these other factors, it will be exceptionally difficult to determine whether or not a particular contractual transaction conflicts with distributive justice. Just as the Aristotelian claim that choices are legally respected only if they are in accord with virtue and the good is modified so as to have very little effect upon the legal recognition of parties' choices, so too the claim about correspondence with distributive justice is diluted. Since these two requirements for the enforcement of contracts are ideals that seem respected only in the breach, one may wonder what difference the Aristotelian account would make to actual doctrinal choices. It seems a reasonable supposition that it will generate doctrinal choices just as messy and awkward when dealing with questions of justice or respect for choice as those generated by its competitors, and just as awkward and messy as those in existing systems of contract law. And, since the Aristotelian account is not, in its treatment of the question 'Why should contracts be enforced?,' obviously better than the alternatives, we might wonder whether its appeal is chimerical.

A proper response to that thought could come only after full consideration of the answers the Aristotelian tradition offers to the two other questions Gordley tackles. As to the question of the content of contrac-

tual obligations, the Aristotelian tradition (in Gordley's hand, at least) offers a challenging answer. It is 'that the rules that govern the parties' obligations should depend on which sort of agreement they entered into. The rules should ensure, so far as practicable, in the case of an exchange, that each party receives an equivalent, and in the case of a gratuitous contract, that the donor behaves sensibly' (298). The Aristotelian claim that each party to an exchange should receive an equivalent has Gordley revisiting and defending some of his earlier arguments and also involves tackling the much-contested issue of the relation between commutative and distributive justice.[35] The positions on this issue seem well entrenched and divide between those who apparently think that commutative justice is entirely independent of distributive justice and those who think that the two are linked. Gordley maintains that the latter view is properly Aristotelian (307–10). He is surely right to try to maintain a connection between the two while avoiding the consequence that critics of this position claim is inevitable, namely, that commutative justice becomes indistinguishable from distributive justice. The view that commutative justice must be either entirely independent of distributive justice or completely reducible to it seems altogether too simple, and Gordley's effort to chart a middle path is commendable.

On the question of the appropriate remedy for breach of contract, the Aristotelian position is less clear, and Gordley's treatment of it is brief. Aristotelian scholars 'saw two possibilities. [The defendant] ... might only be liable for any harm the promisee had suffered by changing his position in reliance on the promise. Or [the defendant] ... might be liable for the full value of the promised performance' (327). Gordley concludes that both possibilities should be embodied in contract law and does so on grounds not dissimilar to those used by scholars not obviously part of the Aristotelian tradition. This point returns us to the question of whether or not this tradition, with all its apparent differences from work not obviously part of it, actually yields distinctive answers to the three questions and thus distinct recommendations for contract law. The evidence of Gordley's essay, despite his vigorous and fascinating efforts, is that, on the whole, it does not. That the implications of work in this tradition are not too different from those of its competitors raises a suspicion that the contrast between work within and without the tradition is being too heavily laboured. It may well be that, despite many differences in genesis, context, and language, some philosophies agree on the nature of certain problems and their responses to them can therefore be combined. This possibility requires no Whiggish assumption about intellectual progress in order to be plausible.

35 The earlier arguments are contained in J. Gordley, 'Equality in Exchange' (1981) 69 Cal.L.Rev. 1587.

Of the many intriguing claims and arguments packed into Peter Benson's essay, at least three stand out. The first is the unusual claim that contracts are to be understood as transfers of property. The second might be considered boring by many of the more self-consciously 'theoretical' members of the legal academy, but this would surely be a mistake. It charts a middle ground for legal doctrinal scholarship between the intellectual ignominy of unreflective chronicling of the law and the embarrassment of a complete takeover by disciplines such as economics or moral and political philosophy (125). This claim is Benson's effort to retrieve and reform a type of legal scholarship that has fallen from favour in the academy. His essay 'attempts to complete as well as articulate at a higher level of abstraction the analysis of modern contract law ... elaborated ... in the writings of Langdell, Pollock, Holmes, Leake, and ... Williston' (126). The third claim is that, properly understood, this newly revived and partially reformed doctrinal legal scholarship gives an account of doctrine that is 'implicit in the public legal and political culture' (123–4). That is to say,

> [i]n the particular case of a public justification of contract, the relevant public legal culture is the domain of private law principally constituted by the doctrines, principles, and rules that are articulated in authoritative judicial opinions and that are analysed and interpreted in certain widely accepted works of legal scholarship. First and foremost, a public justification of contract tries to show that there is a conception of contractual obligation that is implied by, and that in turn holds together in one whole, the basic doctrines of contract law. Which doctrines are basic, and what the definition of their content is, will be provisionally suggested by the law itself. Ideally, the selection of these doctrines and the specification of their content should be as uncontroversial as possible, at least from *the legal point of view.* (124 [emphasis added])

These three claims are made and defended in the course of tackling three difficult questions that Benson takes to represent the core problems of contract law and, hence, contract theory. The 'first question asks why expectation damages and specific performance ... should be given for breach of a wholly executory and unrelied-upon agreement' (119), while the second 'concerns the necessity for and centrality of the doctrine of consideration' (121). The third question concerns 'the relation between contractual liberty and contractual fairness' (122). Benson's responses to each of these questions are ambitious and wide-ranging, but only the first will be examined in detail here, since it consists of the first claim noted above. The remaining two claims structure the whole of Benson's essay.

The analysis of contract as a property transfer is Benson's compelling response to the first question. There are three conditions for a simple physical transfer of property – consensual alienation by the owner,

consensual appropriation by the purchaser, alienation and appropriation being simultaneous – that Benson shows are satisfied by a contract (128–38). At first glance many lawyers will regard this as an unpromising strategy, since there are at least three apparently important differences between a present transfer of property and a contract. None of them, argues Benson, is sufficiently significant to prevent contract being conceived as a transfer of property.

The first allegedly significant difference is that '[i]n contract ... entitlement is transferred at the moment of agreement and therefore prior to and independent of delivery, whereas in the case of present transfer, there is no such temporal separation ... between the moment when ownership is transferred and performance' (132). Benson's response to this is compelling: since most legal systems allow for ownership or acquisition without physical detention, there can be no objection to contracts transferring ownership without transferring possession. The second difference is that the right created by a transfer of property vests at the time of delivery, whereas in contract it exists from formation. While this is true, Benson does not think it important, since, 'in a present transfer, it is not the physical delivery as such that confers ownership. Unless delivery expresses the requisite assents of the parties, no change in ownership can take place' (133). Contract law explicitly emphasizes the significance of such assents, since they are the basis of the obligation. In both contract and transfer of property, the assent of the parties is equally crucial.

The third supposed difference between transfer of property and contract raises this question: Does 'the fact that the right acquired at contract formation is a right *in personam* make [...] the logic of a transfer inapplicable to contract? It might be assumed that ... a personal right is not a property right at all' (134). Benson's reply is again compelling and has three steps. The wrong in breach of contract, he notes, is depriving the promisee 'of the thing promised, including its value and use' (134). That thing is either some object or a service, and 'the right to performance consists just in a right to have exclusive possession of the thing promised' (135). This right, he adds, is 'proprietary in character. When performance is due, the promisee *already* has the right to possess the promised thing in accordance with the contractual terms and the promisor *already* has no such right[;] ... it is axiomatic that one who has exclusive ownership of some thing has the right to possess it' (135). This is, again, a powerful reply that even the most conservative lawyer will find difficult to resist. While the latter might feel 'in their bones' that transfers of property and contracts just are different, Benson shows by argument that in all significant respects they are the same. Furthermore, this argument is drawn from and sensitive to the legal materials and cannot be dismissed as legally irrelevant. Within the legal context, the argument's only likely weakness is its originality.

The argument showing the similarity between contracts and transfers of property provides Benson with a candidate for the organizing idea of contract law. The main body of his essay (138–201) is a detailed exploration of the law, showing that it actually embodies this organizing idea; during the journey Benson also provides fuller answers to the three questions with which he began. The journey is significant not just for its destination but for the manner in which it is conducted: it is a vivid illustration of Benson's second and third claims at work. The second, remember, holds that there is a style of scholarship available to lawyers that involves neither unreflective chronicling of the law nor unquestioning adoption of other disciplinary frameworks. While unreflective chronicling of the law still exists today,[36] the best instances of this type of scholarship (often dubbed 'black-letter' legal scholarship) were always, to some degree, theoretically informed. Classic textbook and article statements of the law were works of synthesis and organization, being driven by a more or less explicit commitment to generic rule of law values and some conception of the rationale of the area of legal doctrine in question. Were such values and rationales not in play, doctrinal legal scholarship could never be critical of legal developments, and classic instances of this scholarship were indeed critical. The critique offered, though, was one from within the law, most often made by reference to the generic rule of law values or to the point of some doctrine. It therefore differs from many contemporary critiques of the law, which are from without, from the insights of economics or philosophy or gender studies (to name but three).[37]

It is important, given the confusion and conflict about the nature of the academic legal enterprise, that this middle path be explored, and Benson must be commended for so doing, especially in such an ambitious and demanding way. The difficulty he faces, though, centres upon the form that he thinks scholarship of this kind must take. His view of that issue is found in the third claim: legal scholarship should give an account of doctrine that is implicit in the public legal culture and accords with the legal point of view.

36 In England, recent changes in the law school curriculum have probably contributed to the increase in bite-sized legal textbooks that offer little other than a statement of the law. For fascinating discussion of some high (or perhaps low) points of unreflective chronicling see A.W.B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 U.Chicago L.Rev. 632.

37 Moral-*cum*-political philosophical versions of this type of work often read or reinterpret the law in light of some or other normative vision, while chroniclers try to ignore the normative content and implications of the law altogether. For more on this theme see W. Lucy, 'Private Law: Between Visionaries and Bricoleurs' in P. Cane & J. Gardner, eds., *Relating to Responsibility* (Oxford: Hart Publishing, 2001) 187.

A problem with this position has already been hinted at: in discussing Benson's argument that contracts be conceived as transfers, we noted that this might cause many lawyers difficulty. It may well be controversial. Benson also notes, prior to his attempt to defend and make coherent the doctrine of consideration in contract law, that Charles Fried (undoubtedly a lawyer) finds the doctrine almost completely indefensible. Fried is not alone in having doubts about the doctrine, although his are distinctive in that they extend to almost every one of its components. Many, many lawyers, however – including academics, judges, and law commissioners – have found some aspect or other of it unsatisfactory, and some of them have been able to act upon this view.[38] Controversy about the doctrine of consideration in English law exists at both 'theoretical' and 'practical' levels, and, indeed, each is informed by the other.[39] Both levels of controversy coexist and cross-fertilize on other key doctrinal issues as well: take, for instance, the example of the reform of the privity rule in English contract law or the current discussion about remedial inadequacy.[40]

Why might these areas of controversy matter to Benson? There are two reasons. First, it might be the case that a public justification of contract law is possible only when its doctrines are 'settled and unconstested' (138). Indeed, Benson is of the view, which fits ill with those areas of English contract law just noted, that contract doctrine is an almost completely developed and static island in a sea of theoretical controversy (18; 118). Secondly, a public justification of contract law takes seriously the legal point of view: '[i]t does so by making explicit the conception of contract that informs this standpoint' (124). The question these areas of controversy raise is obvious: What is 'the legal point of view' here? If the answer is 'the point of view of lawyers,' then when lawyers disagree there is (obviously) no unitary legal point of view. This is a problem only if it is

38 See Law Reform Committee, Sixth Interim Report, Cm. 5449 (1937); *Williams*, supra note 28 at 524b–d (Russell L.J.) and 526–7 (Purchas L.J.); J. Beatson, *Anson's Law of Contract,* 27th ed. (Oxford: Clarendon, 1998) at 123–4. Interestingly, Samuel Williston, by whose doctrinal work Benson is particularly impressed (126), had rather radical and controversial ideas (to English and Australian contract lawyers, at least) not about consideration but about the doctrine of intention to create legal relations: see S. Williston, *A Treatise on the Law of Contracts*, 3rd ed. (New York: Baker Voorhis, 1957) at s. 21.

39 See, *e.g.*, *Re Selectmove Ltd*, [1995] 2 All E.R. 531 at 538f–g, where Peter Gibson L.J. saw 'the force of the argument' of J. Adams & R. Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 Mod.L.Rev. 536.

40 See *Contracts (Rights of Third Parties) Act 1999* (U.K.), 1999, c. 31, and *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Commission Report No. 242, Cm. 3329 (1996). On remedial inadequacy, see C. Mitchell, 'Remedial Inadequacy and the Role of Restitutionary Damages' (1999) 15 J. Contract L. 133, and *A-G* v. *Blake*, [2000] 4 All E.R. 385.

assumed that 'the legal point of view' must be unitary, yet that assumption is a difficult one to support. To maintain it in the face of controversy and dispute among lawyers, something odd must be done: the legal point of view must be shifted from being the view of lawyers to being the view of some lawyers, or perhaps even the view of an abstract, ideal lawyer. Such a move is necessary to support theorists' judgements like the one Benson arrives at of *Williams* v. *Roffey*:[41] it is 'incompatible with the common law conception of contract' (155 note 40). This is, on its face, a bold claim for one who takes the legal point of view seriously, but it is perfectly intelligible once restrictions on that point of view are made explicit.

The difficulty Benson faces, though, is that these restrictions are not made explicit. Such restrictions as are hinted at in Benson's text make matters worse rather than better. While *Williams* v. *Roffey* is undoubtedly part of the public legal record, it does not register in the legal point of view because, we may suppose, the relevant viewers think it wrong. Now, although it would be a mistake to say that all English contract lawyers think *Williams* is rightly decided, many undoubtedly do consider it correct. Moreover, even those who regard *Williams* as mistaken do not think it wrong for the reason Benson gives, namely, that it does not correspond with the common law conception of contract, which, fortunately, is his contract as transfer conception.[42] Yet there is a problem here if the common law conception of contract purports to be both a public justification and a result of taking the legal point of view seriously. It does not take the legal point of view seriously if, in fact, it determines what is to count as the legal point of view.

Benson's commitment to capturing the legal point of view does not commit him to giving an account of contract that fits exactly with that in the legal record. The legal record may be jumbled and contain mistakes, but it is crucial to determine how the theorist arrives at this judgement. Benson says his 'conception of contract, like the doctrines it informs, [is] ... thoroughly juridical in character, even where it is presented in abstract terms and *does not coincide with* the explicit formulations in judicial decisions' (125 [emphasis added]). But the grounds that allow him to ignore or override the formulations of judicial decisions, while according precedence to the legal point of view, are unclear. It is of course true that much talk about accommodating the legal point of view in philosophy of

41 Supra note 28.

42 For some standard objections to *Williams*, see M. Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J. Beatson & D. Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995) 123. It has received support from some interesting sources: see Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 L.Q.Rev.433at 437–8; G. Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford: Clarendon, 2002) at 23–46.

private law is a reaction to crude law and economics. Proponents of that view, remember, thought that judicial decisions were so much surface froth disguising the true logic of decision, which was driven by some conception of efficiency. An important critical response to this was the claim that the participants themselves did not see matters in this way and that adequate theories should at least capture and attempt to make sense of participants' views. However, if theories that purport to do this end up generating accounts of private law that ignore much, or even some, of what participants take to be relevant, or that use language and concepts that participants certainly do not, one may wonder how different they are, in methodological terms at least, from that against which they react.

IV *Endnote*

This is a stimulating and informative collection that, in addition to the issues already noted, generates some intriguing questions either not addressed at all or raised only implicitly by the authors. A primary question of the first kind is that of the future direction of 'theoretical' contract law scholarship. This volume stands as a testament to the vigour and interest of what at the beginning of this essay was labelled analytical legal philosophy. When applied to particular areas of the law such as contract and tort, this type of work seems always to generate insights while identifying and clarifying key issues. Yet it might be even more helpful were it combined with legal scholarship of the socio-legal or 'empirical' kind. There seems no reason of principle why this marriage cannot take place, although even an engagement might be dashed on the rocks of sub-disciplinary imperialism or arrogance. A perfect but unlikely way to test this possibility would be to brief the essayists in this collection to address it. One could be confident of an interesting collection of responses.

A question raised only implicitly by many contributors to this collection is that of method. This bald formulation conceals a range of awkward questions, two of which are, What is the object of our study in the theory of contract law? and, How are we to access it? The answers seem obvious: contract law, and the way contract lawyers do. Yet this simplicity is deceptive. First, there is genuine disagreement about both the proper contours of contract law and its central components; second, it is by no means certain that those whose actions and beliefs constitute a practice and related institutions are in the best position either to understand or to explain it. Furthermore, disagreement about the contours and central components of contract law exists among those who, on any plausible view of 'participant,' are participants in that practice and cognate institutions. As it is, a methodological consensus exists in analytical legal philosophy holding that the starting point in any effort to understand

and explain any social practice and set of related institutions is the view of the participants in the practice and related institutions.[43] This consensus validates the two obvious answers just noted but often overlooks the possibility that a plurality of views as to the contours and central components of a practice may exist among the participants in it. Many essays in this volume explicitly or implicitly take up the legal point of view and, in generating quite different accounts of how the law is best understood, illustrate this very plurality. It would be fascinating to allow this crop of essayists time and space to explicitly address matters of method, to determine whether and what methodological protocols they share. Indeed, the existence or absence of such protocols would give some indication as to whether or not matters of method are any more tractable than matters of substance.

A question related to that about method involves the relation between philosophical reflection about a practice and moves by participants within the practice. Again, almost all the essays in this volume address this issue, either implicitly or explicitly, but a more sustained treatment of it would surely be informative. Some systematic attention to the often vast chasm between theory and practice in this domain is long overdue. It may well be a mistake to expect 'theories' of contract law to determine doctrinal choices, but the basis of the mistake is not always clear. Moreover, articulating this basis will undoubtedly clarify and refine our expectations of theory, allowing us to determine whether it is redundant or vital or something in between.

The questions explicitly addressed in this volume are fascinating, and the treatment of them is of a uniformly high standard. That the questions only hinted at by the essays are also equally fascinating and significant, laying down clear paths for future work, is a testament to the importance and value of this collection.

43 I have explored this methodological consensus as it exists in philosophy of private law in W. Lucy, 'The Crises of Private Law' in T. Wilhelmsson & S. Hurri, eds., *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot, UK: Dartmouth, 1999) 177; for its role in some standard works of analytical legal philosophy see W. Lucy, *Understanding and Explaining Adjudication* (Oxford: Clarendon, 1999) at chs. 2–3. A good recent treatment of some questions of method as they arise in philosophy of contract law is provided by J. Kraus, 'Philosophy of Contract Law' in J. Coleman & S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Clarendon, 2002) 687.