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Article 4

# The Idea of a Public Basis of Justification for Contract

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**Abstract**
The essay has two main objects. The first is to take up and to develop certain of the difficulties that Professor Trebilcock finds with autonomy and welfare-based theories of contract law. The essay reaches the conclusion that efficiency, autonomy, and welfare approaches suffer from fundamental and yet qualitatively different kinds of defects. Moreover, in the course of its critical examination of these theories, the essay introduces and makes explicit an ideal of justification which The Limits of Freedom of Contract only implicitly assumes-an ideal of justification which the essay, following the recent work of Rawls, calls a "public basis of justification." A public basis of justification purports to incorporate only normative ideas and principles that are present, even if just latently, in the public legal or political culture, and it seeks to show how these ideas and principles may be suitably combined into a coherent and reasonable conception. The second main object of the essay is to provide a sketch (rather than a full discussion) of what a public basis of justification of contract might look like, how it might be developed, and in what way it would elucidate particular doctrinal issues, such as the appropriate measure of contract damages and the legal consequences of non-disclosure, mistake, or frustration. A central premise of the essay is that a public justification of contract is the indispensable first step in theorizing about contract law because it alone can provide theory with a shared, pre-theoretical conception of contract that is fully rooted in and internal to the law. However, despite the need for such a justification, one has yet to be developed.

# THE IDEA OF A PUBLIC BASIS OF JUSTIFICATION FOR CONTRACT©

BY PETER BENSON*

The essay has two main objects. The first is to take up and to develop certain of the difficulties that Professor Trebilcock finds with autonomy and welfare-based theories of contract law. The essay reaches the conclusion that efficiency, autonomy, and welfare approaches suffer from fundamental and yet qualitatively different kinds of defects. Moreover, in the course of its critical examination of these theories, the essay introduces and makes explicit an ideal of justification which *The Limits of Freedom of Contract* only implicitly assumes—an ideal of justification which the essay, following the recent work of Rawls, calls a "public basis of justification." A public basis of justification purports to incorporate only normative ideas and principles that are present, even if just latently, in the public legal or political culture, and it seeks to show how these ideas and principles may be suitably combined into a coherent and reasonable conception. The second main object of the essay is to provide a sketch (rather than a full discussion) of what a public basis of justification of contract might look like, how it might be developed, and in what way it would elucidate particular doctrinal issues, such as the appropriate measure of contract damages and the legal consequences of non-disclosure, mistake, or frustration. A central premise of the essay is that a public justification of contract is the indispensable first step in theorizing about contract law because it alone can provide theory with a shared, pre-theoretical conception of contract that is fully rooted in and internal to the law. However, despite the need for such a justification, one has yet to be developed.

Cet essai a deux objets. Premièrement, l'essai considère et développe certaines des difficultés identifiées par le professeur Trebilcock en ce qui concerne des théories contractuelles basées sur l'autonomie et le bien-être. La conclusion de l'essai constate que les approches basées sur l'efficacité, l'autonomie, et le bien-être sont marquées par des défauts différents, aux niveaux fondamentaux et qualitatifs. De plus, en considérant critiquement ces théories, l'essai introduit explicitement un idéal de justification, lequel est présumé implicitement dans le travail *The Limits of Freedom of Contract*—un idéal de justification intitulé, selon l'oeuvre récent de Rawls, une «base publique de justification». Une base publique de justification prétend incorporer seulement des idées et principes normatifs qui existent, même s'ils sont cachés, dans la culture publique, soit légale ou politique, et cette base démontre comment lesdits idées et principes peuvent être associés dans une conception raisonnable et cohérente. Le deuxième objet de cet essai est de présenter un schéma (au lieu d'une discussion détaillée) de la base publique de justification des contrats pour illustrer cette dernière, pour indiquer des développements potentiels, et pour démontrer son effet sur les questions doctrinales, telles que la quantification des dommages-intérêts et les conséquences légales qui résultent des erreurs, des omissions, ou de la frustration. Une supposition centrale dans cet essai est que la base publique de justification des contrats est la première étape essentielle dans le processus de développer une théorie contractuelle, car seulement cette étape peut arriver à une notion de contrat qui est collective et pre-théorique, ainsi qu'inextricablement liée au droit. Néanmoins, malgré le besoin de formuler cette justification, on n'y a pas encore réussi.



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## I. INTRODUCTION

*The Limits of Freedom of Contract*[1] by Michael Trebilcock makes a significant and, in my view, a distinctive contribution to contemporary theorizing about contract. This is so for a number of reasons, but for the purposes of this essay, I wish to focus on just one. I choose it because I believe it goes to the heart of Trebilcock's aims, and because, in my opinion, it represents an indispensable starting-point for future contract scholarship. I am referring to the methodical and systematic comparison of different theoretical approaches to contract which *Limits* undertakes, both with respect to foundational questions, and across a full range of doctrinal issues in the law of contract. Trebilcock pursues this comparison with the aim of testing the validity of what he refers to as the "convergence claim": the claim that the private ordering paradigm simultaneously promotes autonomy and welfare. A major objective of *Limits* is to determine whether autonomy and welfare norms do, in fact, converge in the conditions they imply for voluntary and informed transactions.[2] In keeping with this aim, autonomy- and welfare-based

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[1] M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) [hereinafter *Limits*].

[2] *Ibid.* at 242.

theories of contract are the principal focus of Trebilcock's comparison. I wish to add that what is remarkable and refreshing about this book is the care and impartiality with which it undertakes this comparison: *Limits* engages each theory on its own terms without any trace of dogmatism, and it displays throughout good sense and judgment, in combination with intellectual rigour.

A systematic comparison of the major approaches to contract would seem to be an appropriate point of departure for theorizing about contract law. We should begin with the most carefully developed attempts to provide a comprehensive account of contract's basis and content. In doing so, we can take stock of the strengths and limits of present theorizing. A theory that is unable to incorporate what is valid in, or cannot resolve difficulties raised by, the main accounts of contract must be unsatisfactory as a theory, because it cannot order and rationalize existing considered opinions about the matter at hand. A systematic comparison may also bring out common presuppositions and premises that underlie different approaches, notwithstanding their differences. This can provide important insights into particular difficulties that do not seem to admit of present resolution.

As the reader will soon see, my primary aim in this essay is not to take issue with *Limits* on particular doctrinal questions. This does not mean, however, that I necessarily agree with Trebilcock's own analysis of such doctrinal issues as consideration, non-disclosure, mistake, frustration, and so forth. The theoretical approach which I introduce in the second and third sections of this essay differs fundamentally from his, and we should expect this difference to be reflected in our respective explanations of contract doctrine. To illustrate this point, I briefly analyse in the third section certain doctrinal questions relating to remedies for breach of contract and excuses for non-performance and I contrast my suggested approach with Trebilcock's, among others. Nevertheless, my object is not simply to dispute *Limits* at the level of particular issues. I want to engage it on its own ground, by taking seriously its idea of a systematic comparison of approaches—in particular, the comparison between autonomy- and welfare-based theories—and on this basis to suggest an agenda for future theorizing about contract.

In section II, I briefly set out some main points in Trebilcock's critical analysis of autonomy- and welfare-based approaches. In this section, I want to give the reader an idea of the sorts of conclusions he reaches. As we will see, he finds all the theories examined to be deficient in some way. Their defects, as he presents them, are serious and sometimes decisive. By a different route, he seems to confirm the

conclusion reached by James Gordley that "today we have no generally recognized theory of contract."[3]

In section III, I undertake a critical examination of the main theories discussed in *Limits*. This section shares Trebilcock's theoretical commitment to comparative theoretical inquiry. At certain points, I draw on his objections to particular approaches. My principal aim, however, is to make clear that efficiency, autonomy, and welfare theories suffer from very distinct kinds of defects. It is only by recognizing and understanding these differences that, I believe, we can obtain a clear view of what theorizing must attempt in the future.

A second object of this section is to introduce the notion of a "public basis of justification" of contract, a term and idea which I take from Rawls.[4] *Limits* itself points, even if implicitly, to the need for such a justification. We will see that Trebilcock's criticism of certain welfare-based approaches—notably the distributive conception of Kronman[5] and the reliance theory of Goetz and Scott[6]—implicitly assumes the relevance of a public basis of justification. Moreover, the general outcome of Trebilcock's critical analysis is his conclusion that, at present, there is no widely agreed-upon theoretical framework for understanding contract. I would take a step further and say that, among scholars, there does not seem to be even a shared conception of the very object—contract law—which it is the business of theory to comprehend. It is not surprising then that, as Gordley notes, "many jurists are now pessimistic about the very possibility of discovering general principles or doctrines that can explain the rules of positive law or the results that most people regard as fair."[7] A public basis of justification of contract attempts to meet precisely this challenge by showing how a coherent conception of contract is implicit in the main doctrines and principles of contract law.

In section IV, I discuss in somewhat more detail what a public basis of justification of contract might look like. As I emphasize there, my remarks are in no way intended as a presentation of, nor as an argument for, such a justification. This is not the place to try to do so. I

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[3] *The Philosophical Origins of Modern Contract Doctrine* (New York: Clarendon Press, 1991) at 230.

[4] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[5] A. Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472.

[6] C. Goetz & R. Scott, "Enforcing Promises: An Examination of the Basis of Contract" (1980) 89 Yale L.J. 1261.

[7] *Supra* note 3 at 231.

simply want to give the reader some idea of how a public basis of justification might be elaborated and what some of its main features might be. I also indicate why certain critical conclusions reached by Trebilcock and others about autonomy-based theories, which have definite affinities with the justification I propose, need not apply to it. In particular, I try to show why, on the proposed approach, contract law need not have the kinds of indeterminacies that scholars often ascribe to it as well as to autonomy-based attempts to explain it.

## II. THE ANALYSIS OF AUTONOMY AND WELFARE THEORIES IN *LIMITS*

In this section, I briefly present the main conclusions of Trebilcock's critical analysis of autonomy and welfare theories. My aim is to familiarize the reader with the general tendency of his argument, thereby setting the stage for the closer theoretical analysis of contract theories which I undertake in the following section.

According to Trebilcock, autonomy theories root the moral basis of contract in the voluntary choice or consent of the parties. Contractual obligations are viewed as voluntarily assumed and self-imposed obligations that reflect the convergent intentions of the parties. The distinguishing mark of autonomy theories is that they regard the exercise of consent as intrinsically valuable and as worthy of respect in its own right. For autonomy theorists,

> autonomy is a good itself, and autonomous choices should be respected because they are the legitimate exercise of the right of self-governance or self-determination, regardless of what outside observers may feel about the individual or social virtues of those choices. Individuals have a right to pursue their own conception of the good without interference from others or the imposition of alternative conceptions of the good by others, at least where the interests of the latter are not harmed or jeopardized by the actions or choices of the individual concerned.[8]

While a number of different autonomy theories are discussed in *Limits*, the two which, understandably, are treated as paradigmatic are those of Charles Fried[9] and Randy Barnett.[10] The conclusions Trebilcock reaches concerning the strengths and limits of the autonomy approach largely reflect his evaluation of their work. He characterizes

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[8] *Supra* note 1 at 9.

[9] C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

[10] R. Barnett, "A Consent Theory of Contract" (1986) 86 Col. L. Rev. 269.

these two theories, for all their differences, as non-instrumentalist and internal. They are non-instrumentalist because they accord intrinsic value to the wills of the parties, irrespective of welfare or other consequentialist considerations. They are internal because of their claim that there is no need to go beyond the parties' wills and invoke collective standards or "external" values, such as efficiency or distributive justice, to account for the moral basis of contract. I will not present or evaluate the theories of Fried and Barnett at this point, as I propose to do so in the following section. Rather, I wish simply to note the main conclusions Trebilcock reaches concerning the validity of the internalist claim.

With no exceptions, Trebilcock finds that in every doctrinal area examined the internalist claim fails. While the main target of his criticism is Fried, he presents his overall conclusion as applying to autonomy theories in general. Let me give a few examples. First, in circumstances of information imperfection which bring into play the doctrines governing non-disclosure, misrepresentation, mistake, frustration, and so forth, "it is difficult, if not impossible, to resolve most problems ... within the framework of an internal theory of contract premised on consensually assumed obligations when the contract has not explicitly assigned the risks entailed, that is, it is incomplete."[11] The same is true of internalist attempts to resolve the issue of coercion in transactions. An autonomy-based approach, Trebilcock contends, must first establish a moral base-line set by an individual's rights. Against this base-line, the acts of others can be judged to be coercive or not. But the rights that set the baseline do not arise through contract. Rather, they must be presupposed by contract. Hence, a theory that remains internal to contract law cannot itself generate a satisfactory account of coercion.[12] Finally, the internalist claim fails even with respect to the elementary question of the moral basis for the obligation to keep a promise. Trebilcock concludes that because Fried must refer to social convention to define the practice of promising and its entailments, "his theory appears to entail a resort to external values to specify when promises should or should not be enforced, rather than deriving an internally generated set of implications purely from the premise that contract rests on individual autonomy and consent."[13]

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[11] *Supra* note 1 at 126.

[12] *Ibid.* at 81.

[13] *Ibid.* at 165.

Now, as Trebilcock notes, Fried himself acknowledges that the promise principle, on which he founds contractual obligation, is not suited to resolve a variety of issues that affect the scope and content of contractual duties and rights. For instance, Fried concedes that the principles governing mistake, frustration, and other contractual "gaps" cannot be based on the principle that one is under a moral duty to keep one's promises.[14]

*Limits* takes this concession one step further and reaches the general conclusion that, on all counts, the principle of autonomy fails to provide a self-sufficient justificatory basis for contract law. Trebilcock endorses and develops an argument made by Richard Craswell[15] that not only Fried's theory, but also Barnett's—and in principle any autonomy-based approach—does not have the resources to specify "background rules" for contract law, such as rules governing remedies for breach, excuses for non-performance, or the implication of obligations (e.g. implied warranties). Craswell's contention is that, while theories like Fried's or Barnett's may possibly provide an explanation for the binding character of contracts, they are indeterminate with respect to the question of what background rules should be adopted in the first place. At most, they may require that individuals be free to contract around all or some of the background rules which are adopted on grounds other than autonomy. According to Craswell, this indeterminacy follows from the fact that autonomy theories provide "content-neutral" justifications for the moral obligation to keep one's promise. They are content-neutral because they purport to justify the binding nature of promises and contracts independent of the particular content which has been promised or agreed upon. Thus, he argues, they yield very little in the way of definite implications for the content of contract law. To specify this content one must resort to principles reflecting values other than liberty and autonomy. So, while autonomy theories may exclude considerations of economic efficiency, distributive justice, or value-maximization from the foundation of contractual obligation, they have no basis for ruling out these considerations when it comes to specifying the content and scope of contractual obligations. To provide a complete account of contract, autonomy theories must be supplemented by explanations that invoke the substantive values which they purport to oppose. How these can be suitably integrated is far from evident.

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[14] *Supra* note 9, c. 5.

[15] R. Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 Michigan L. Rev. 489 at 514. I address Craswell's objection below in Section IV.

Welfare-based accounts constitute the second main category of theoretical approaches examined in *Limits*. Like autonomy theories, they also ascribe fundamental significance to voluntary transactions, but they view that significance differently. In contrast to autonomy theories, welfare approaches do not see consent as having intrinsic moral value. Rather, they deem it significant because it allows observers to make inferences about the impact of voluntary transactions on the parties' welfare. Normally one can infer from the fact that two individuals have chosen to enter a given transaction that they both feel that the transaction is likely to make them better off, otherwise they would not have transacted. This inference depends upon the transaction meeting a number of further conditions, the most important being that it is bilaterally voluntary and informed.[16]

Trebilcock suggests that the inference is significant for both epistemological and instrumental reasons.[17] All welfare-based approaches are centrally concerned about the consequences of social arrangements for individuals' welfare. If they are to assess the social desirability of a given arrangement or policy, they need to be able to gauge its impact on individual well-being. But it is often very difficult, if not practically impossible, for a third-party, such as a collective decision-maker, to assess these consequences. This is especially so where a given arrangement produces winners and losers, and where those affected either do not communicate their own assessment of its impact, or cannot be relied upon to do so accurately and honestly. The very fact that parties have chosen to transact tends to support an inference about the transaction's welfare consequences for the parties, hence providing decision-makers with the information they need to endorse or reject private transactions as a form of welfare-promoting social arrangment.

Normative economic analysis, about which *Limits* is centrally concerned, assesses the social desirability of transactions in light of two different concepts of economic efficiency. According to the first, Pareto efficiency or, more strictly, Pareto superiority, the effects of a transaction are efficient relative to another state of affairs if and only if the transaction makes at least one person better off and no one worse off. If one party to a transaction has been disadvantaged by it, enforcement of the transaction will be Pareto superior only if the advantaged party remains better off even after he has fully compensated

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[16] *Supra* note 1 at 7.

[17] *Ibid.* at 7-8.

the disadvantaged party, thereby making the latter indifferent as between his pre- and post-transaction circumstances. The second, Kaldor-Hicks efficiency, judges a transaction to be efficient relative to another state of affairs if and only if the transaction improves the welfare of some individuals sufficiently that they could, hypothetically, make full compensation to those who have lost, with a net welfare gain remaining for themselves. In Kaldor-Hicks efficiency, compensation is only hypothetical, whereas in Pareto superiority it must be actual.

According to Trebilcock, the strongest welfare claim that can be made on behalf of the private ordering paradigm is from the standpoint of Pareto efficiency.[18] If true, the inference that two parties are subjectively better off because they consented to a transaction satisfies the criterion of Pareto superiority. This inference, Trebilcock emphasizes, depends upon the existence of actual consent. For Trebilcock, this marks the point at which autonomy and welfare approaches most closely converge. Both autonomy and Pareto superiority justifications refer to actual consent. It is important, however, to recall that they value actual consent for fundamentally different reasons.

Unfortunately, even this point, Trebilcock argues, is inherently unstable. Here, we must keep in mind that unless parties entered a transaction voluntarily and with complete information about its subject matter, the welfare inference cannot confidently be drawn. But, once we try to assess a transaction in light of these requirements, Trebilcock shows that the perspective of Pareto superiority quickly leads to what he calls the "Paretian dilemma."[19]

The dilemma is this. Suppose that one party regrets her decision to enter a transaction because, as it turns out when performance is due, she has acted on incomplete or faulty information, or because new opportunities have since arisen, leading to a change in her valuation of the contract's subject matter. At the moment of entering the contract, both parties, we suppose, thought they would be made better off. At that point, *ex ante,* the Pareto criterion is satisfied and the fact that one of them subsequently regrets her decision is not at issue. Enforcement of the agreement seems to be justified. But if we adopt an *ex post* perspective, the fact that one party regrets the agreement does become relevant. We can no longer draw the inference that the agreement is Pareto superior. If we stick to revealed preferences for the

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[18] *Ibid.* at 244.

[19] *Ibid.* at 103 and 244.

epistemological reason noted above, we should conclude that the transaction will make one party worse off and that therefore it should not be enforced. If the appropriate standpoint from which to judge transactions is *ex post*, we end up excusing most breaches of contract. The Pareto perspective does not lead to a single coherent conclusion as to enforceability, but on the contrary, to two wholly inconsistent answers.

To avoid this "Paretian dilemma," Trebilcock suggests that welfare analysis has to abandon strict fidelity to revealed preferences and adopt, instead of the Pareto criterion, the Kaldor-Hicks concept of efficiency. But this move, however necessary, brings with it a new set of problems.[20] According to Trebilcock, the central difficulty is this: once hypothetical, not actual, consent is made the basis on which conclusions about welfare are reached, we must engage in a process of balancing the costs and benefits of a transaction for contracting and third parties. In adopting this new framework, however, we have largely abandoned the strong welfare claim made on behalf of the private ordering process. We can no longer confidently make the inference of welfare from the fact of consent. There can be no semblance of convergence between the autonomy and welfare justifications of the private ordering paradigm. When Kaldor-Hicks efficiency is invoked to constrain and to facilitate the contracting process, Trebilcock concludes that the results reached typically will be highly speculative and inconclusive. Like autonomy-based approaches, but for different reasons, efficiency analysis is plagued by serious indeterminacy.

Notwithstanding this conclusion, Trebilcock holds that where a matter has not been expressly settled by the contracting parties, the legal system may have no choice but to establish background rules that assume hypothetical consent to welfare-maximizing arrangements, while preserving the parties' right to contract out of these rules if they so choose. This combination of welfare-maximizing background rules, qualified by a right to contract around them, represents, for Trebilcock, the upper limits of possible congruence between welfare and autonomy approaches.

Yet, even this qualified congruence between welfare and autonomy approaches does not constitute a stable equilibrium. Each side of the union is in tension with the other and, if unchecked, would tend to displace it. The conclusions dictated by efficiency unavoidably conflict with the implications of autonomy.[21] For example, welfare

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[20] *Ibid.* at 245-46.

[21] *Ibid.* at 249.

theories may conclude that certain background rules should be mandatory, thus violating the parties' autonomy. And even if parties can contract around background rules, this is still problematic from the standpoint of autonomy. We should not forget that the rules are elaborated in the context of adjudication. Thus, the rules will be imposed on at least one set of litigants as the proper resolution of their dispute, even though they will have had no opportunity to contract around them. This, however, violates their autonomy, making the tension between welfare and autonomy values inescapable. In this way, Trebilcock is driven to the general conclusion that "[o]n various central normative issues pertaining to the concept of freedom of contract ... the claim of convergence between autonomy and welfare values is much more tenuous than proponents of the private ordering paradigm have conventionally been prepared to acknowledge."[22]

In the next section, I want to retrace the steps that lead to this conclusion, only this time I will examine in some depth and detail the main autonomy and welfare theories considered in *Limits*. I shall discuss and develop certain of Trebilcock's critical arguments, but present them in a new light, based on a different set of explicit theoretical questions and concerns. I reach a general conclusion that is similar to Trebilcock's, although on different grounds. Like Trebilcock, I conclude that the autonomy and welfare approaches examined are fundamentally defective as theories of contract. The question then becomes how to avoid the theoretical pessimism and scepticism which might seem the natural consequence of this failure.[23] As I explain at the end of the next section, while *Limits* confronts this challenge, I am less certain that it provides the kind of answer necessary to meet it. Accordingly, a subsidiary aim of the next section is to introduce an idea of justification which is equipped to do so. The third section takes up this justification in somewhat greater detail.

## III. THE LIMITS OF EFFICIENCY, AUTONOMY AND WELFARE THEORIES OF CONTRACT

In this section I try to show why efficiency concepts, the autonomy theories of Fried and Barnett, and three welfare-based approaches cannot provide a suitable normative basis for contract. This critical analysis paves the way for the positive sketch of an alternative

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22 *Ibid.* at 242.

23 See text accompanying note 7.

approach to contract, one that may not be subject to the sorts of objections made here. The present discussion draws in part on a number of arguments made in *Limits*. In particular, I build on Trebilcock's analysis of the Paretian dilemma, which I have already discussed, as well as his criticism of reliance-based welfare approaches, which I have not. However, my objections are not always the same as Trebilcock's. A major aim of this section is to make clear that efficiency, autonomy, and welfare-based theories are defective in qualitatively different ways and that these defects are decisive, though once again for different reasons. In this connection, I try to highlight the difference between efficiency theories, which do not by themselves provide a normative basis for contract, and teleological theories, such as welfare maximization, which are normative, but fail for another reason. A final object of this section is to introduce the idea of a "public basis of justification" for contract, which I take up in the third and final section. The idea of a public basis of justification is taken from Rawls.

### A. *The Claims of Efficiency*

I want to consider more carefully the central premise of efficiency theories as stated by Trebilcock, namely, the inference that both parties to an economic transaction are better off as a result of it, provided that the transaction is bilaterally voluntary and informed. In the previous section, I summarized some of the main difficulties Trebilcock finds with this claim. Drawing on his discussion, I will now try to show that there is a basic and inescapable indeterminacy in efficiency concepts such that, standing alone, they cannot possibly provide a normative basis for contract.

Recall the basis of the efficiency claim: by actually transacting on a voluntary and informed basis, parties manifest a set of preferences from which one may infer that they view themselves as better off for having transacted. Leaving aside the important qualification that their decisions to transact must have been bilaterally voluntary and informed, the claim depends, then, on the possibility of unambiguously identifying a coherent set of actual preferences manifested through conduct (verbal or non-verbal). The normal case of transaction envisaged here is a completed present transaction—whether gift or exchange—because it is possible to see in such a transaction the expression of a coherent set of preferences. There is a basis for inferring the existence of coherent preferences because the transaction was actually entered into and completed. However, a central feature of contractual relations which

distinguishes them from completed present transfers of property is that in the former, some period of time, however brief, necessarily elapses between the formation of the obligation and its execution by performance. During this period, parties may come to regret their decision to contract: their preferences may have changed in the interim; they may have acquired new information leading them to view the contract terms as unsatisfactory; external circumstances may have rendered the contract less profitable or made performance more onerous; or finally, new and more attractive opportunities for exchange with third parties may have opened up.

This possibility of regret, which is inescapable in contractual relations, has fundamental implications. A theory that purports to be a theory of *contract* must, at a minimum, be able to explain why, notwithstanding the existence of regret, priority should be given, at least in certain circumstances, to the initial set of preferences. The manifestation of preferences at the moment of agreement and the expression of different and even inconsistent preferences later when performance is due cannot be treated on an equal footing. Moreover, given that the object of such a theory is the *law* of contract, a further essential requirement is that the theory explain how it can be legitimate to exercise coercion against a party who fails to comply with the contract terms even though these no longer represent his preferences. For it is in this way that the law expresses the priority of the agreement over subsequent regret.

Why the first set of preferences should ever be given priority is by no means obvious. Viewed simply as expressions of preferences, there is no qualitative difference between the decision to contract and subsequent regret. There is nothing in their origin, formation, or felt significance which distinguishes them. Each is shaped by a similar range of factors and each represents what a party wants at any given point in time. The *only* difference between them is that one happens to come before the other. Given this temporal sequence, the challenge to finding a basis for ascribing priority to the first set of preferences is this: if the aim is just to ascertain preferences and to ensure their satisfaction (as with efficiency theories), the second set of preferences and not the first should have precedence because it represents, so far as one can tell, a party's actual preferences—what he actually wants. The first set has been superseded and replaced by the second.

By way of example, consider the following simple transaction: A agrees to sell her horse to B for $100. At the time of their agreement, A values the horse at $90, whereas B values it at $110. When the time for performance comes, A now values the horse at $120 (because C is

willing and able to buy it for that price), while B's preference for the horse remains unchanged. Clearly, A will regret having made the agreement with B and will view herself as worse off if it is enforced.

From the standpoint of Pareto efficiency, enforcement would arguably be Pareto *inferior*. A sees herself as worse off by a factor of $20 if the agreement is enforced. She would rather keep the horse than sell it for $100. Note that this conclusion rests on comparing the following two states: first, A's well-being as measured by her valuation of the horse at $120, and second, her well-being if the agreement is enforced ($100). Against this, the objection may be made that it is only her initial valuation of the horse at $90 which should serve as the baseline, making enforcement Pareto superior. But, the concept of Pareto efficiency cannot single out any state in particular as the appropriate baseline. All that it can do is compare any two states that represent ascertainable levels of well-being. It does not set a baseline (consisting, in our example, of a certain set of preferences), but must be given one. There is absolutely nothing in this idea to privilege one set of preferences over another for the purpose of establishing the baseline. At most, one may conclude that the concept of Pareto superiority yields two different, and indeed conflicting, conclusions about the efficiency of enforcing the above agreement. The possibility of a Paretian dilemma is inherent to the analysis of contract.

Nor is enforcement, at least in our example, unambiguously Kaldor-Hicks efficient. If B were to receive the horse for $100, he would be better off by $10, but this would not be enough to fully offset A's loss of $20, unless of course we take A's initial valuation at $90 as the relevant baseline. But, as with the idea of Pareto efficiency, the concept of Kaldor-Hicks efficiency provides no basis for doing so.

The simple point that I am suggesting—which has been made by others before[24]—is that while the two concepts of efficiency compare one state relative to another, they do not provide a reason for choosing any state in particular as the relevant baseline for making that comparison. Stated abstractly, both concepts of efficiency are by nature comparative and relative: they can apply only when two states are given. But the question of determining the appropriate baseline cannot ultimately be comparative, or it must lead to an infinite regress. In every case of a regretted contract, there potentially exist at least two candidates for that baseline. Between these, efficiency concepts cannot choose. Hence the inherent indeterminacy and insufficiency of

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24 An illuminating discussion of this and related points is found in J. Coleman, *Markets, Morals, and the Law* (New York: Cambridge University Press, 1988) c. 3.

efficiency analysis with respect to the question of contract enforcement. Efficiency concepts must be supplemented by a principle that at least sometimes singles out, on suitable normative grounds, the first set of preferences as the sole relevant baseline for the purposes of contractual analysis. Only then can efficiency analysis have theoretical significance for the understanding of contract.

Moreover, even if we select one set of preferences over the other—if, say, we give priority to the first set—there is still the further question of which of the two criteria of efficiency to apply. This comes down to whether we should require the better-off party to compensate the one who is disadvantaged by the transaction. In law, the answer depends on whether the first party has violated any of the other's rights. One must show that the disadvantaged party is *entitled* to compensation. If not, the mere fact of regret or disadvantage establishes no claims in justice against the better-off party. But the question of whether to compensate or not cannot be settled by invoking either criterion of efficiency, for each presupposes a definite and indeed contrary answer to this question. This may be called the "compensation dilemma."[25]

The Paretian and compensation dilemmas make clear the need for normative principles to supplement the efficiency criteria. Without these principles, we lack reasonable grounds for applying them in a determinate way or for choosing between them. By themselves, efficiency criteria cannot possibly constitute an adequate normative theory for the analysis of contract.

Trebilcock, we have seen, considers two main types of moral theories of contract which might make good this deficiency. The first, autonomy-based approaches, ground the obligation to perform in a duty to do what one has promised or consented to. The first set of preferences is thereby accorded priority because it forms the content of a promise or an act of consent. For an autonomy-based approach, the first set is given priority, not because this will make either or both parties better off, but just because one has promised or consented to terms that embody the first set of preferences. The second type of moral theory considered is welfare-based and includes utilitarianism and wealth-maximization, among other approaches. These hold that performance ought to take place—and therefore that the first set of preferences ought to be satisfied despite subsequent regret—whenever this will best promote the end favoured by a particular theory. Everything depends on the particular conception of the good made regulative. In contrast to efficiency conceptions, welfare-based approaches are teleological in

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25 For discussion of this point, see Coleman, *ibid.* at 93.

character. It is by virtue of this that they can purport to establish the baseline that is needed, but not provided for, by the concepts of efficiency.

I now want to consider whether either an autonomy or a welfare-based approach has, in fact, the resources to set the baseline. For the purposes of this article, I will limit my discussion to theories considered by Trebilcock. Accordingly, I propose to examine, first, the autonomy-based approaches of Fried and Barnett, and then three welfare-based approaches, namely, the reliance theory of Goetz and Scott, Kronman's distributive conception, and wealth-maximization.

### B. *Autonomy-Based Theories: Fried and Barnett*

I wish to focus on Charles Fried's fundamental claim that the obligation to perform one's contract is founded on the duty to keep one's promises. According to Fried, the primacy—indeed the very intelligibility—of the expectation interest (which holds that the law should try by way of damages to place the plaintiff in the position that he or she would have been in had the defendant performed) can be explained on no other basis. How does Fried account for the duty to keep one's promises and can his explanation establish the kind of baseline needed for contract analysis?

Fried makes his argument in two steps.[26] In the first, he begins with the premise that for promises to be binding on any given occasion, we must first suppose a general convention of promising that provides individuals with a way to commit themselves to future performances if they so wish. At this first stage of the argument, Fried's object is only to establish that such a convention would rationally be wanted by people, given the ordinary needs of daily life. Absent such a convention, we could not have access to each other's persons and powers or actively serve each other's purposes, except in circumstances of present, immediately completed transactions. This would drastically shrink the scope of our efficacy and deny our wills the greatest possible range consistent with the similar will of others. "It is necessary," Fried concludes, "that there be a way to make nonoptional a course of conduct that would otherwise be optional."[27] A general convention of promising

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[26] *Supra* note 9 at 12-17. I have discussed Fried's theory in greater detail in "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory" (1989) 10 Cardozo L. Rev. 1077 at 1095-1117 [hereinafter *"Abstract Right"*].

[27] *Ibid.* at 13.

defines a practice that enables individuals to create in others expectations that they will render certain future performances just because they have committed themselves to do so.

However, as Fried emphasizes, the fact that the convention may be individually or collectively rational does not by itself explain why someone who has invoked it on a particular occasion is morally obligated to keep his or her promise even if he or she later comes to regret it. One may always come to regret a prior decision to commit oneself to a course of action, no matter how firm the initial expression of commitment may have been. The convention of promising is just a device for communicating commitment. It is justified on the basis that as a general matter, the possibility of promising enables us to expand the efficacy of our choices and is therefore individually and collectively rational. The question of whether, in a particular instance, one ought to keep one's promise is distinct. While it may in general be rational that a practice of promising be available to us, if we wish to make use of it, it does not follow that on an—or theoretically, any—particular occasion it need be rational for a promisor to keep his or her promise. This will depend on a variety of considerations. Nor does this general justification of the practice of promising decide the quite different matter of whether one should be *obliged* on a particular occasion to keep one's promise even if one no longer views it as in one's rational self-interest to do so. The latter question concerns how one should act *toward others*, taking their interests or expectations suitably into account. It goes to the reasonable, not merely the rational, in human conduct.[28] More precisely, the question of moral obligation is this: Why does a promisor's intentional communication of commitment *entitle* the promisee to the promisor's performance, making *wrongful* a subsequent change of mind by the promisor?

Here we see raised the fundamental problem of the baseline in contract analysis. Unless Fried can explain why the content of a promise, and the preferences it embodies, have priority over a subsequent and inconsistent set of preferences, he cannot advance analysis beyond the indeterminacy of the efficiency concepts. Whatever insights his theory may otherwise provide, it will be fundamentally inadequate for this reason.

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*28* The distinction between the reasonable and the rational is taken from Rawls. Whereas the rational refers to the pursuit of one's own interests (whether one is an individual or association), the reasonable focusses on how this pursuit affects others and whether it is fair or justified *vis-à-vis* them. See Rawls, *supra* note 4 at 48-54.

Fried's answer to this question constitutes the second step of his argument, and it may be briefly stated as follows. By invoking the convention of promising, the promisor invites the promisee to trust the promisor on moral grounds. Breach of promise abuses that trust and uses the promisee. For Fried, the wrongfulness of the promisor's breach is like the wrongfulness of lying. Both violate what he calls "basic Kantian principles of trust and respect."[29] But what exactly does Fried mean by "trust" in the context of promising?

While Fried does not explain in detail what he means by trust, he does say that, by promising, the promisor invites the promisee to believe that the promisor has committed him or herself to forward the promisee's good from a sense of right and not merely for reasons of prudence. In doing this, the promisor invites the promisee to make him or herself vulnerable. According to Fried, it is the intentional inducement of vulnerability that gives rise to the obligation to keep the promise. But what exactly is the nature of the promisee's vulnerability? For Fried, it cannot be merely the fact that the promisee has detrimentally relied on the promise, or that he or she entertains expectations of future benefit because of it. In Fried's view, such reactions to the promise are morally justified and imputable to the promisor only if we already hold that the promise is binding. They cannot explain the obligation, but on the contrary, presuppose it. The promisee's vulnerability must therefore consist of something else.

To make clear Fried's understanding of the promisee's vulnerability, we must go back to certain first principles of liberal theory which he endorses. Liberal theory, Fried suggests, views individuals as morally independent of one another in the pursuit of their good.[30] This means that persons cannot claim against each other a general right to be assisted in the pursuit of their good. They can only claim a right to be left free from wrongful interference with, or injury to, whatever they have managed to achieve or acquire. That being said, liberal theory also holds that persons are under a general duty to care for and to advance the means and conditions of human fulfilment, so far as this is compatible with respect for the freedom and equality of everyone. However, this duty is not owed to persons in their individual capacity. Consequently, when someone refuses to promote another's good, he or she does not, for this reason alone, show lack of respect for that person or for his or her good.

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[29] *Supra* note 9 at 17.

[30] *Ibid.* at 7.

By promising, however, the promisor can change all of this. The promisor invites the promisee to bring the furtherance of his or her good within the sphere of the promisor's commitment and responsibility. The promisor distinguishes the promisee from individuals in general by intentionally conveying to the promisee his or her commitment to take seriously and to promote the promisee's good, something that the promisor was under no antecedent duty to do. The promisee is now vulnerable as he or she was not before: the promisor can show moral contempt for the promisee's good by choosing not to benefit the promisee in breach of his or her promise. It is precisely because the promisor need not have promised, and because he or she was under no antecedent duty to further the promisee's good in particular, that the promisor can inflict this injury on the promisee. The promisee places trust in the promisor that the promisor will not do this. For Fried, this is the trust that necessarily is invited by a promise and that is violated by its breach, irrespective of whether the promisee detrimentally relies on the promise. It is the basis of the obligation to keep a promise.

Having explained promissory obligation in this way, Fried directly deduces from this obligation the promisee's right to exact the promised performance: "if I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance."[31] On this basis, Fried upholds the centrality of the expectation measure of damages for breach of contract. To limit promisees to the reliance measure as a matter of principle would, Fried argues, excuse promisors from the full obligation they freely undertook. Indeed it would preclude promisors from incurring the very obligation they chose to assume at the time of promising. Hence Fried views the claim that damages should be so limited in principle as destructive of the very moral basis of contract.

Now, the first difficulty with Fried's account is that it does not seem to be the case that our sense of morality holds that necessarily, or even in most circumstances, a breach of promise should reasonably be viewed as an abuse of trust in the way Fried supposes. Except in cases where the promisor has promised without intention of performing, or breached simply out of spite or without significant reason, the conclusion that a given breach constitutes an abuse of trust will be far from evident. We will want to consider a number of diverse and potentially conflicting factors, such as the promisor's motives for breaching, whether in reaching the decision to breach, the promisor gave appropriate weight to the promisee's interests, whether the promisor tried his or her best to

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31 *Ibid.* at 17.

perform in the circumstances, whether the promisor was willing to compensate the promisee for reasonable reliance losses, whether the promisor apologized for the breach or sought to justify it in some way, and so on. But the idea of trust does not tell us the appropriate weight that should be given to each such consideration in relation to the others. In particular, it does not direct how the promisor should weigh the promisee's interests when balancing them with his or her own. Indeed, on Fried's understanding of the moral role that trust is *supposed* to play, it cannot order or balance these considerations: for trust is correlative to commitment, and commitment, according to Fried, excludes balancing by making irrelevant every consideration except the promisee's interest in performance. The irrelevance of balancing is further reflected in the legal analysis of contract formation and breach. Yet Fried's account of promissory obligation on the basis of Kantian principles of trust and respect does not explain why this must be so.

Even if we view a breach of promise as an abuse of the promisee's trust, there remains a further—and for our purposes, a more serious—difficulty with the theory. If his theory is to count as an explanation of contract *law*, Fried must hold that a breach of promise, as an abuse of trust, necessarily infringes a right in the promisee that can be coercively enforced. But this need not be so.

On Kant's view,[32] for instance, there are fully binding "duties of virtue," breach of which certainly fails to treat humanity, whether in ourselves or in others, as an end in its own right. These merely ethical duties, however, are not correlative to rights in others, and their performance cannot be directly coerced (whether by an award of damages or otherwise). In this respect, they are categorically different from juridical obligations which *are* coercible because they are correlative to rights in others. In the same vein, both the natural law writers—such as Grotius,[33] whom Fried cites[34] for his promise principle—and the common law regularly distinguish between promises that may be fully binding in morals and conscience, but which do not, as such, give the promisee an enforceable right to performance, and those promises that do, even in the absence of detrimental reliance by the

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32 As set out in I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1991) at 45-47 and 185-87. I discuss the distinction between duties of virtue and juridical duties in "External Freedom According to Kant" (1987) 87 Col. L. Rev. at 559.

33 H. Grotius, *De Jure Belli ac Pacis* (trans. F.W. Kelsey, 1925), Bk. II, Ch. XI, II-IV. I have discussed Grotius' view in "Grotius' Contribution to the Natural Law of Contract" (1985) Can. J. Neth. Studies 1 at 1-28.

34 *Supra* note 9 at 142, note 4.

promisee. These two kinds of promises are distinguished by fundamental qualitative differences in their principles of formation and in their basic structures. Fried's account of trust as the basis of contract does not, however, take cognizance of these distinct kinds of obligations and promises. It does not explain how the obligation to keep a promise is construed as something other than a merely ethical duty. While Fried's principles of trust and respect articulate a conception of the reasonable that is meant to supplement and constrain the pursuit of the rational (as reflected in the general justification of the convention of promising), he does not show this idea of the reasonable to be juridical, as distinct from ethical. But this means that Fried has not shown that the premise "I should do as I promise," even if correct, leads to the conclusion that "it is *fair* that I should be *made* to hand over the equivalent of the promised performance."

The upshot of this criticism is that Fried has failed to show how or why a promisor violates the promisee's rights—and can therefore be liable for resulting losses—if he or she decides to breach after having invoked the convention of promising. Put in other terms, the explanation of contractual obligation on the basis of trust does not establish the kind of moral baseline that is necessary for contractual analysis. It is important to emphasize here that the necessary baseline must be of a kind, and must be justified in a way, that makes it suitable for determining if and when conduct violates the *rights* of others, rights that are enforceable through legal coercion. Because Fried's account does not provide this, it is insufficient and indeterminate at the most fundamental level. Given this deficiency, it cannot justify (or refute) such basic features of contract doctrine as the primacy of the expectation interest or the requirement of consideration, except on a theoretically *ad hoc* basis. This is because, on their face, these legal doctrines suppose a distinction between promises that create correlative rights and duties which are coercible, and promises that may only give rise to an ethical duty of fidelity—the very distinction that Fried's theory fails to make.

By contrast, Randy Barnett's consent theory of contract[35] does not seem to be vulnerable to this line of criticism. His theory explicitly purports to explain contract *law*, and therefore elucidates the conditions under which legal coercion may be justifiably exercised against individuals for failure to perform. Barnett supposes the general distinction between uncoercible moral obligations and coercible legal obligations, and argues for a conception of intention that justifies the conclusion that a promisor may be legally, and not just morally, bound to

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35 *Supra* note 10 at 269.

perform in certain circumstances. According to Barnett, an expression of commitment to do or not to do something is categorically insufficient to explain this consequence. It may, at most, give rise to a moral obligation to keep one's promise, an obligation that cannot in principle be coerced. As we will see, Barnett suggests that, by contrast, the manifestation of an intention to alienate one's rights to another provides the essential basis for finding a legal obligation to perform.

Barnett begins from the premise that respect for our freedom of action requires that we have principles to govern the rightful acquisition, use, and transfer of the relatively scarce resources which we want and need. These principles determine our enforceable entitlements to things *vis-à-vis* others. They establish moral boundaries that must be respected by others on pain of coercion and they mark a domain within which the right-holders are relatively free to do as they wish with the objects of their entitlement: they may use or transfer them at will. Whereas property law specifies the principles governing the acquisition of entitlements, and tort law is concerned with their protection and use, contract law deals with the valid transfer of entitlements between persons. Thus far, Barnett's view is essentially the same as Fried's. They diverge, however, when Barnett rests contract on a consent[36] to transfer rights rather than on promising.

A valid transfer of entitlements, he argues, changes the enforceable moral boundaries between the transferor and transferee. The transferor can now be constrained from interfering with the entitlement that was once his or hers, but that, by virtue of the transfer, has become the transferee's. Barnett derives the crucial condition of a valid transfer, namely consent, from the fact that, prior to the transfer, the entitlement is already vested in someone—the transferor. Therefore, in a rights-respecting system, the only person who can decide to give up the entitlement and transfer it to another is the transferor himself. Absent his consent, and without his act, appropriation by another must be invalid, being a tortious interference with his rights. Hence we have the fundamental requirement of consent. Because entitlements are, by hypothesis, legally enforceable, the intention to transfer them necessarily implies, according to Barnett, an intention to be legally bound. This, he contends, provides the moral basis for legal enforceability that is missing in Fried's account.

Barnett claims that, in contrast to a promise-based approach, which is one-sidedly concerned with protecting the promisor or a

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[36] The crucial discussion of the basis and nature of the consent requirement is found at *ibid.* 297-300.

reliance-based theory, which is equally one-sided in its exclusive focus on the promisee, his own consent theory brings out the *interrelational* function of contract. The consent requirement as derived above highlights, however, only one side of a transfer, namely the entitlement vested in the transferor and the need for the transferor's decision to alienate it. What constitutive role does the *transferee* play in the formation of contract, in keeping with contract's interrelational character? The principal, and, it seems, the only reference to the transferee's contribution to the creation of a transfer of right is found in Barnett's elucidation of the objective test for formation.[37] For Barnett, that test ensures that, at the time of transacting, the transferee can ascertain whether or not the transferor has indeed parted with his or her right and has thereby changed the enforceable boundaries between them. No act or statement by the transferor that falls short of a form of expression that can fulfil this boundary-determining function will give rise to a contractual obligation. At the same time, anything a transferor says or does will be interpreted from this objective standpoint, even if the transferor actually intends otherwise. Barnett views this test as protecting the rights and liberty interests of the transferee, whose plans and expectations would be seriously restricted if he or she were not entitled to rely on things as they were presented. In sum, for Barnett, the interrelational character of contract is reflected in the fact that it is the *transferor's* consent, *objectively* construed, that can create a relation of right and corresponding duty between the parties. The transferee's intention, however, is not presented as a constitutive element of a transfer of right.

Does Barnett's consent theory avoid the difficulties which, I suggested, beset Fried's account? Does it, in short, establish and justify a moral baseline of the kind and in the way that are needed? I suggest that it does not. To explain my view, let me first state the basic intuitive idea that seems to underlie the conception of contract as a transfer of right.

While the notion that contractual obligation arises through an intention to alienate rights may at first blush seem unusual, it can be approached by relating it to our understanding of the more familiar idea of an actual completed transfer of property between two persons.[38] We do not doubt that there can be completed gifts or exchanges and that,

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37 *Ibid.* at 302.

38 Barnett refers to this idea throughout his discussion, but in particular see *ibid.* at 297-99 and accompanying notes. Centuries earlier, Grotius noted the parallel between transfers of property and enforceable promises: *supra* note 33, Bk. II, Ch. XI, I & IV.

once completed, a valid gift or exchange alters the moral boundaries between transferor and transferee, giving the latter a right that must be respected by the former and by third parties. As between the parties, the transfer establishes a new moral baseline against which their conduct is to be measured. If the consent theory of contract correctly incorporates those features of a completed transaction that explain this result, we may tentatively conclude that the consent theory also provides the baseline needed to explain contract. But does it?

Barnett's consent theory focuses on the transferor's consent or intention to alienate as the source of the obligation to perform. However, for there to be a completed gift or exchange, something more is required than just the transferor's act of alienation. The *transferee* must also take possession of the transferred object for there to be acquisition. Absent the transferee's act, the transferor can, at most, abandon rightful possession of the object without thereby making it the transferee's. It may cease to belong to the transferor, but it does not become the transferee's. So long as the transferee has not taken possession of it, the transferor can repossess the object without infringing the transferee's rights. Accordingly, the consent of one party to alienate his or her right to another cannot by itself give the other party that right. The second party must also manifest an intention of the requisite kind; an intention to acquire the right. A consent theory must postulate and fully explain this double consent as the basis of contractual obligation. Barnett's account fails to do this. The following brief discussion is intended to give the reader an idea of what this would seem to entail.

To avoid misunderstanding here, it is essential to keep in mind that what is needed, in addition to the transferor's intention to alienate, is a second expression of intention, a second act of will, that can be reasonably construed as a present, unqualified decision to appropriate. On this view of contract, a transfer of right—and thus the creation of an obligation to perform—is constituted by two distinct acts of will. Not every acceptance of a promise, however, will qualify as such an act of will. For example, suppose that in response to your promise to give me a horse tomorrow, I say that I will gladly receive it then. My "acceptance" may be reasonably viewed merely as a statement of satisfaction at the prospect of receiving the horse, as well as an expression of appreciation that you have undertaken the commitment to give it. If this is so, the obligation is constituted here by the promisor's undertaking alone. The fact that the promisee views the promise as a benefit may be important to the promisor, if only because it will normally be the promisor's intention that the promisee be benefited by the promise. The conferral

of a benefit will be a principal aim and point of the undertaking. Still, this is perfectly consistent with the view that, reasonably interpreted, the promisor's intention is to bring himself or herself under a full obligation to perform simply by his or her act of promising. While a promise made with this intention may certainly create a relation of trust with the promisee, for the reasons mentioned in the discussion of Fried, this will not be enough to identify it as a relation of correlative rights and duties which can be coercively enforced. There may thus be a moral duty to keep the promise without a correlative right to its performance. Such a promise is analogous to an alienation of property that is not followed by appropriation. No acquisition occurs and no new rights are created.

If there is to be a transfer of right from one person to another, not only must there be two acts of will, but, in addition, these acts must be related in a certain way. This follows from the very idea of a transfer of ownership. If by a present gift or exchange, you have transferred property to me, then my entitlement (and title) *derive from you.* I am in rightful possession just because you, the owner, gave it to me. In the case of a transfer of right, it is only because *you* have done something to give me a right, that I may have a right *as against you.* This determines the way in which the parties' acts must be related.

First, their acts must be mutually related. This means that the expressed consent to alienate must already contain, explicitly or by necessary implication, a request for a return manifestation of consent to appropriate, without which there is no intention to transfer ownership or to invest the transferee with a right. It must be possible to construe this second decision to appropriate as wanted by the transferor in return for his or her decision to alienate.

But second, it is not enough if the second party's appropriation is represented as taking place after the first has alienated. If there is the smallest interval between the two acts of alienation and appropriation, the object alienated will cease to belong to the first party (who has given up ownership), but not yet belong to the second (who has yet to take possession). During this interval, it will be ownerless. Consequently, should the second party take possession, her ownership will derive, not from the first party's title to the thing, but rather from the fact that she (the second party) has, by her unilateral act, acquired something which at the time was unowned. It will not be acquired by transfer from another. It follows, therefore, as a strict entailment of the idea of a transfer of ownership, that the two acts of alienation and appropriation must, in addition to being mutually related, be represented as happening

*at the same time.*[39] For the same reason, both parties must be represented as having rightful possession of the object transferred at the same time. On a view of contract as a transfer of right, modelled on the idea of a completed transfer of property, two mutually and simultaneously related acts of alienation and appropriation define the contractual relation. In this way, contract is irreducibly relational.

There is one further basic requirement that must be met. Not only must the parties' manifestations of intention represent acts of alienation and appropriation, and not only must these manifestations be mutually combined in a way that can effect a transfer between them, but the peculiar and essential feature of contract that distinguishes it from a completed transfer of property must be accounted for. In a completed gift or exchange, ownership is transferred simultaneously with the transfer of physical possession. In contrast, because contracts are binding from the moment of agreement, and thus prior to performance, they must transfer rights between the parties prior to and independent of any transfer of physical possession between them, the latter being accomplished through actual performance. Thus, what we must have in contract, viewed on the model of a transfer of property, are combined acts of alienation and appropriation that effect a transfer of "non-physical" possession.[40] It would be these combined acts that, by themselves and prior to any actual reliance by the promisee, alter the moral boundaries between the parties by giving the promisee an effective and valid entitlement as against the promisor, something which he or she did not have prior to the agreement. On this view, a failure to perform would count as an interference with or injury to the promisee's entitlement.

As a result of Barnett's apparent failure to elucidate these further aspects, which are nevertheless implied by the model of a transfer of property, the consent theory cannot fulfil its own claims. Given its premises, it cannot determine when legal coercion is justifiably exercised against a promisor as part of a contractual analysis. In other words, like Fried's promise principle, the consent theory does not provide us with the kind of moral baseline which makes possible a theory of contract.

Thus far, I have argued that the concepts of efficiency cannot, by themselves, sustain a theory of contract, and that the autonomy-based theories of Fried and Barnett do not provide what is needed to

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[39] To my knowledge, Kant was the first to formulate this requirement, referring to it as *"lex continui."* See *supra* note 32 at 93.

[40] The most instructive account of this idea is still Kant's. See *ibid.* at 68-77.

supplement them. It should be noted that my criticism of Fried and Barnett is not the same as Richard Craswell's[41] (which Trebilcock endorses).[42] Craswell contends that their theories—and indeed *any* autonomy-based approach—must be indeterminate because they are content-neutral. As I will indicate in the following section, content-neutrality in some form is a justified and, indeed, an indispensable feature of a suitable conception of contract. In contrast, my criticism has been directed against an analysis of promising or consent which cannot show how these can give rise to a relation between the parties of correlative right and duty that justifies the use of legal coercion. For it is only in this way that autonomy theories can provide a baseline that is consistent with their own fundamental normative premises and aims.

### C. *Three Welfare-Based Approaches*

I now consider whether three welfare-based theories provide what is needed to supplement the efficiency concepts. I shall discuss the reliance theory of Goetz and Scott, the distributive conception of Kronman, and the notion of wealth-maximization. Each of these theories seems to provide a rationale that is plausible on its own terms for giving priority, in certain circumstances, to a first set of preferences over subsequent regret. In different ways, they are able to set a moral baseline. The difficulty with them, I suggest, lies elsewhere. While my criticism draws in part on certain arguments from *Limits*, my principal aim will be to make explicit a certain idea of justification that *Limits* seems clearly to presuppose, and that is at odds with the approach taken by these welfare-based theories. *Limits* implicitly supposes the validity and the appropriateness of "a public basis of justification" for contract. I introduce this idea of justification here and discuss it in more detail in the section that follows.

To begin, consider the following objection made by Trebilcock against the reliance theory of Goetz and Scott.[43] These authors treat a promisee's reliance on a (non-reciprocal) promise as a protected interest that, in itself, justifies legal intervention when this is efficient. Reliance is a basis for the enforcement of promises. What Goetz and Scott call

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[41] *Supra* note 15.

[42] *Supra* note 1 at 144, 166, 291, and note 45.

[43] *Supra* note 6.

reasonable "beneficial reliance" should be encouraged to the extent that this is efficient. To decide whether it is efficient in particular circumstances, the costs of encouraging such reliance must also be weighed in the balance. Trebilcock criticizes the theory because it fails to take seriously an essential prerequisite of liability, namely, that the promisor must have in fact accepted legal responsibility for the reliance.[44]

According to Trebilcock, the basic difficulty with the conception of reliance supposed by Goetz and Scott is that it is merely probabilistic. A promisee, as a rational person, makes his or her best judgment as to the probability that the promisor will perform and decides to rely on that basis, whether by altering his or her pattern of consumption, foregoing opportunities, or making expenditures. A reliance commitment is not rational *ex ante* if it rests on a mistaken assessment of the probability of performance, given the available information, and in such circumstances, should be discouraged. Trebilcock argues, however, that even though certain reliance commitments may be rational *ex ante*, this does not mean that the "promisor" has accepted legal responsibility for them. Depending on the circumstances, a person may reasonably be interpreted as intending a "best efforts" promise to perform, a "present intentions" commitment allowing him or her to change his or her mind, or, finally, a legally binding promise which gives the promisee a right to performance. Whether or not the promisee has relied probabilistically or not cannot in itself determine which interpretation of the promisor's intention is most reasonable. It could still be rational to rely probabilistically on a non-reciprocal promise, even if the promise merely entailed a "best efforts" or a "present intentions" commitment. But either kind of commitment, Trebilcock contends, would be an insufficient basis on which to conclude that the promisor accepted legal responsibility for the reliance, making any imposition of contractual (or other) liability problematic.

In other words, it is difficult to see how one who engages in probabilistic reliance can claim, on that basis alone, that a promisor has wronged him or her if he or she suffers a loss as a result of the decision to rely. Unless the promisor has in some way accepted legal responsibility for the risk that performance may not take place, there is nothing in the idea of probabilistic reliance that gives the promisee grounds for complaint. After all, even assuming that the promisee's reliance was probabilistically rational *ex ante*, the promisor's failure to perform merely confirms the promisee's expectation about the

[44] This criticism is found principally in *Limits, supra* note 1 at 174-77 and 185-87.

probability of non-performance. Nor does it deprive the promisee of the expected value of the promise, for this has also, by hypothesis, been discounted for the probability of non-performance.

Against this criticism, Goetz and Scott might reasonably respond that the question of whether the promisor has, in fact, accepted legal responsibility is, in itself, morally irrelevant. Their account of reliance is part of a teleological theory which has welfare-maximization as its goal. Beneficial reliance, being a good in its own right because it entails an enhancement of welfare, must be included in the maximizing calculus. The fact that a promisor may not have "accepted legal responsibility" for such reliance is no basis for excluding it as a relevant consideration. From the standpoint of this theory, to make the promisor's non-performance a relevant factor, it is enough that it can have welfare consequences causally connected with the promisee's decision to rely. Trebilcock's objection seems to raise an irrelevant concern.

To dismiss Trebilcock's criticism in this way would be, I believe, to miss its point. What Trebilcock is presupposing in making this objection is that *any* satisfactory account of contract must suitably incorporate certain basic intuitive normative notions. One of these is an idea of reasonableness that holds that, before a person can properly be held liable for the consequences of *another's* decision to rely, one must have done something to invite the latter's reliance, on the basis of which it is reasonable to conclude that one assumed a responsibility to act with due care in these circumstances. This idea of the reasonable postulates that, prior to any voluntary conduct that can bring them into a special relationship with each other, individuals are deemed to be mutually independent. The consequences flowing from one's own decisions are imputed to oneself alone. All that a person may rightly demand of others is that they refrain from injuring what already belongs to him or her, not that they minister to his or her needs or wishes, however basic or pressing these may be. The requirement that there must be an assumption of responsibility by the defendant before the consequences of the plaintiff's decision to rely can be imputed to him or her reflects this postulate of initial mutual independence. Mere probabilistic reliance, however rational, is insufficient because it need not follow from any invitation to rely or from any assumption of responsibility by the defendant. To hold the defendant liable absent an assumption of responsibility would not be fair or reasonable. Welfare-diminishing or welfare-enhancing effects of a plaintiff's probabilistic reliance are, as such, juridically irrelevant unless they can first be imputed to the defendant as his or her responsibility. This is a normatively prior

requirement of the reasonable which the Goetz and Scott analysis simply ignores.

At common law, the requirement of an assumption of responsibility, and the presupposition of the initial mutual independence of persons, illustrate the idea that there can be no liability for nonfeasance. This idea is fundamental to the articulation of rights and duties in private law. It informs the law of tort, and as I will indicate in more detail, it is also basic to the contract law.[45] In making his objection against the reliance approach of Goetz and Scott, Trebilcock supposes implicitly that an idea of this kind is legitimate and reasonable in its own right and that it is widely accepted in the legal culture, at least in the domain of private law. A theory that does not make room for it is likely to prove self-defeating.[46] Hence the unsatisfactory character of the Goetz and Scott reliance-based approach. Through the discussion of the other welfare-based theories, I will try to bring out more fully the nature and significance of this point. Trebilcock's criticism here, I will suggest, presupposes the standpoint—and thus the possibility and the relevance—of a *public* basis of justifying contract law.

Kronman's distributive theory of contract, which is the second welfare-based approach I want to consider, makes the comprehensive claim that "the idea of voluntary agreement ... cannot be understood except as a distributional concept."[47] Briefly stated, the argument is that whether a person's consent to an agreement is voluntary depends on finding that the other party has not taken advantage of him or her in an impermissible way. To decide whether, in given circumstances, there has been an impermissible advantage-taking, Kronman applies a principle of fairness which he calls "the principle of paretianism."[48] In Kronman's

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[45] There is a fairly extensive literature on this principle. It is treated as a basic feature of private law in a variety of philosophical accounts of law including, among others, Kant, *supra* note 32 at 56; G.W. Hegel, *Philosophy of Right*, trans. T.M. Knox (Oxford: Clarendon Press, 1958) §§37, 38, and 113; and H. Sidgwick, *The Elements of Politics*, 4th ed. (London: MacMillan, 1929) c. IV-VIII. Drawing on these and other writings, I have tried to provide a theoretical account of the basic elements of private law organized around this principle in "The Basis of Corrective Justice and its Relation to Distributive Justice" (1992) 77 Iowa L. Review 515 at 550-601 [hereinafter "Corrective Justice"]. More recently, I have attempted to show how this principle is widely supposed, and often explicitly recognized in tort law and how the different, apparently conflicting, areas of tort liability for pure economic loss can be rationalized on its basis. See, P. Benson, "The Basis for Excluding Liability for Pure Economic Loss in Tort Law" in D. Owen, ed., *The Philosophical Foundations of Tort Law: A Collection of Essays* (New York: Oxford University Press, 1995) [hereinafter "Excluding Liability"].

[46] *Supra* note 1 at 248.

[47] *Supra* note 5 at 474.

[48] *Ibid.* at 484.

account, the principle of paretianism embodies an idea of the reasonable that constrains the rational pursuit of individual or collective interests. The principle holds that advantage-taking in a given transaction is permissible if, but only if, the person taken advantage of will be better off in the long run if this kind of advantage-taking is generally allowed than if it is not. For practical reasons, however, Kronman suggests that the principle requires only that the welfare of *most* people who are taken advantage of in this way is increased in the long run.

At first blush, Kronman's theory might seem to be indistinguishable from an efficiency analysis. But this is not the case. In contrast to efficiency concepts, Kronman's principle of paretianism posits a definite moral baseline against which changes in welfare are to be measured. That baseline, Kronman contends, is one of strict equality. No individual is deemed to have any prior claim whatsoever to any asset, personal or external, or in general, to any beneficial advantage. All assets and advantages are to be viewed as if they belonged to a common pool. By treating assets in this way, we avoid, Kronman contends, the moral arbitrariness of taking what people happen to possess as a moral baseline. Whether or not a given individual can make exclusive beneficial use of a particular asset is settled solely by the paretian principle. One must show that by granting an individual an exclusive entitlement to do this, those who are excluded are made even better off than they would be in the absence of the entitlement. In contrast to efficiency concepts, this analysis provides a normative standpoint for judging contractual relations.

The question becomes whether this normative standpoint is adequate. Here, Trebilcock endorses and summarizes certain criticisms which the present writer has made elsewhere.[49] The main point of these objections is that while the paretian principle, and the moral baseline it supposes, articulate a definite conception of reasonableness or fairness, they seem to be incompatible with certain widely accepted normative premises of legal analysis and to be in tension with the transactional framework that is normally presupposed in two-party litigation.

For example, viewing assets as part of a common pool, in conjunction with the paretian principle, in effect, obliges individuals to use their assets so as to benefit others.[50] Yet, as I indicated in the discussion of the Goetz and Scott reliance approach, basic to the common law is the idea that persons are not, as individuals, under an

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[49] "Abstract Right," *supra* note 26 at 1119-45.

[50] I discuss this in more detail in *ibid.* at 1133-40.

affirmative coercible duty to confer benefits on each other, or to meet one another's needs, however urgent. People must refrain only from injuring what already belongs to others. What belongs to others is, in turn, determined by principles of acquisition and transfer that themselves reflect this severely restricted idea of responsibility. At common law, I have said, this idea is expressed in the basic premise that there is no liability for nonfeasance.

Once this idea is abandoned, as it is in Kronman's theory, it is not clear that consent has any essential role to play in the analysis of contractual obligation. In law, consent figures in its own right as an essential condition of the validity of a contract. At a minimum, the normative significance of a consent requirement must be that a person has the right to exclude another from using an asset, even if such exclusion diminishes the latter's welfare. In Kronman's theory, however, it is not a person's consent, but only the paretian principle, which settles whether one can have the exclusive use of an asset. Impact on the welfare of others is the decisive factor.

Moreover, the kind of welfare analysis required by the paretian principle necessarily goes beyond the immediate interaction between the parties to a given transaction.[51] In Trebilcock's words, "the validity of the contract between A and B turns not on the nature of the interaction between A and B, but rather on a series of hypothetical or putative interactions between B, or parties like B, with a variety of subsequent unidentified parties."[52] The point here is that the calculus required by the paretian principle is inherently expansive. The only stable, non-arbitrary stopping point is the analysis of welfare changes across the public as a whole via innumerable, unidentified, individual transactions, and over an indefinite period of time. But to suppose that any institution, let alone a court, could make this determination is implausible. In other words, Kronman's distributive analysis does not readily lend itself to decision-making in a public institutional setting. It certainly does not fit within the limits and presuppositions of common law adjudication of two-party disputes.

As is the case with the reliance theory of Goetz and Scott, the difficulty with Kronman's account is not its radical incompleteness, but its failure to incorporate fundamental notions of responsibility and consent that are widely presupposed in our public legal culture, specifically in the domain of private law. While it expresses a conception

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[51] *Ibid.* at 1129-33.

[52] *Supra* note 1 at 83.

of the reasonable through the idea of equality postulated by the paretian principle, this conception is distinct from, and does not respect the limits set by, the notion of reasonableness informing the exclusion of liability for nonfeasance and related normative ideas. Moreover, Kronman's theory is incongruous with the very institutional framework that determines the validity of contractual claims.

Stated in other terms, my contention is that Kronman's account does not provide a "*public* basis of justification" for contract law. What makes a justification of contract "public?" At this point, I will simply introduce the idea of a public basis of justification in general and summary terms, leaving more detailed discussion to the following section.[53]

A justification is *public* if it is framed to be acceptable, as a matter of reason and principle, to individuals considered as legal or political personae. A public justification is legal or, more exactly, *juridical* if it addresses individuals in their role as parties to voluntary and involuntary transactions in which they figure as bearers of rights and correlative duties that may be coercively enforced.[54] On this view then, a public juridical justification of contract postulates, first, a certain conception of the person with characteristic and defining features and second, a certain kind of social relation which is distinct from other kinds of relations, for example, political or familial association.

To be acceptable to individuals viewed in this way, a public basis of justification of contract draws on basic normative ideas that are explicitly or implicitly present in the public legal culture, and more specifically, in its principles and doctrines of contract law. Being at least latent in the legal culture, these ideas are, in principle, fully accessible to the individuals whom the justification addresses. These ideas constitute (provisionally) fixed starting points for the development of a public justification. The immediate aim is to show how these ideas form a coherent and perspicuous conception that provides a reasoned and shared basis for settling most, if not all, of the important questions of right and justice that arise in contractual transactions. A conception of this sort is meant to give parties to transactions a common point of view

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53 My discussion here, and elsewhere, of a public justification is heavily indebted to Rawls, *supra* note 4, which has guided me throughout. His exceptionally illuminating discussion of a public political basis of justification for what he calls the "basic structure of society" has provided me with an indispensable framework for trying to formulate a public juridical basis of justification for contract.

54 I discuss some of the defining features of a juridical conception and the differences between it and a political conception in "Rawls, Hegel, and Personhood" (1994) 22 Political Theory at 491-500.

from which to determine and adjudicate the claims they may have as against each other. A public juridical justification also postulates, even if provisionally, a certain kind of institution as the appropriate authoritative source of norms and procedures for the governance of the parties: it addresses individuals in their capacity as parties to a civil suit before a court of law. If a normative idea or matter of fact is not suitable for application in such an institutional setting, it cannot be part of the public justification. It should be emphasized at the outset that a justification that is not public in the way I have just indicated is not, therefore, to be viewed as invalid or defective so far as its truth or adequacy is concerned. It simply cannot count as a public justification, and whatever this may entail.

It may be asked: what is the significance of a public justification of contract? While I will not even try here to provide a complete answer to this question, this much, I think, should be said. If it were indeed possible to work out a public justification, this would mean that there is present in the common law—in judicial decisions—a set of normative ideas that implicitly contain a whole theory of contract and, furthermore, that this theory is able to settle the very questions which the law must answer to adjudicate contract disputes. This would be highly significant for both practical and theoretical reasons. Despite their divergent purposes and differing conceptions of their good, parties to transactions would have a shared and reasonable standpoint from which to ascertain and determine the justice of their interactions. For a liberal conception, this is essential to making the coercive operation of the law legitimate. As for its theoretical significance, the articulation of a public conception of contract would disclose a legal point of view which itself could be the object of further theoretical reflection. The *first* task of constructing a theory of contract law must be to uncover and clearly to identify such an object. A theory that fails to begin in this way condemns itself to being irrelevant as a theory *of law*. A public justification satisfies this requirement by remaining internal to the law, and by making explicit a conception of contractual obligation that is present in it.

To make the character of a public conception of contract more clear, I want now to generalize the preceding criticisms of the welfare-based theories of Goetz and Scott and of Kronman, and consider whether consequentialist theories, as such, can provide a public basis of justification. I shall take a consequentialist theory to be any teleological normative account in which, first, some substantive conception of the good is postulated as the end of action, and second, the right is deemed to consist in the maximization of that good. One such good is arguably wealth, and Posner, among others, has contended

not only that contract law can be explained by referring to this good as its goal, but further, that contract law *ought* to pursue this as its end.[55] In general, discussions of wealth-maximization, either as an explanation of the law or as a normative goal for the law, focus on whether the *conclusions* of legal doctrine and judicial decisions are, in fact, explicable on the basis of wealth-maximization, or whether wealth does indeed constitute a genuine good from a moral point of view. These discussions do not touch on the very different question of whether a teleological theory can provide a public basis of justification. I shall assume for the sake of argument that wealth is a good, if only an instrumental one, from a moral point of view, and that many, if not most, of the conclusions of law are consistent with the explanatory hypothesis of wealth-maximization. The question remains: can wealth-maximization meet the requirements of a *public* justification of contract? Stated in general terms, the question is whether a theory that postulates an instrumental or intrinsic good as the goal of contract can provide a public basis of justification. Even minimal familiarity with the basic doctrines of contract formation and discharge suggests not. Let me explain.

While parties certainly decide to transact because they hope thereby to procure diverse substantive satisfactions, it does not follow that this aspect of the matter is juridically relevant. Clearly, unless individuals desire to obtain wished-for outcomes, they have no reason to transact. And since the law of contract applies to, and thus assumes the possiblity of transactions, it does not deny the existence of these reasons for transacting. Yet, and this is the crucial point, these reasons do not in themselves form any part of the legal analysis of the conditions for contract formation or discharge.

The doctrine of offer and acceptance, for example, takes no cognizance of the parties' particular substantive aims and wants which may, nevertheless, have led them to enter what the law deems to be a binding agreement. Offer and acceptance occur if and when two parties have manifested their assent to identical terms, whatever their particular content may be.[56] Whether or not the parties have done so is determined from an objective point of view, irrespective of what a party may have actually wanted or intended. The sole juridical relevance of the content of an offer or an acceptance is that it is the content of an act which counts only as an act. While every act, being purposive, supposes

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55 See R. Posner, *The Economic Analysis of Law,* 4th ed. (Boston: Little, Brown, 1992).

56 For example, see A. Corbin, *Corbin on Contracts.* (St. Paul: West, 1952) s. 11.

that the agent has reasons or ends for acting this way rather than other, its status as an act does not depend on the particulars of those reasons. The focus is exclusively on the existence of acts, not the evaluation of action. Take, for example, an agreement to sell a horse. However the parties may actually view the horse or the money in light of their individual conceptions of (instrumental or intrinsic) good, these objects count simply as the contents of possible performances which can be offered or accepted. The focus is solely on whether two acts of will of the requisite kind—offer and acceptance—have occurred, not on the substantive satisfactions which the parties may have sought to procure in committing themselves to these terms. Thus, analysis of interaction, in terms of offer and acceptance, is categorically distinct from inquiry into the parties' immediate or remote purposes, their hoped-for satisfactions, or their evaluations (divergent or identical) of the subject matter of the contract—all factors that may have influenced the parties to transact in the first place.

Similarly, whether one party has breached a contract, or whether a contract should be set aside for fundamental mistake or frustration is determined without ascribing any juridical significance as such to the parties' individual wants and goals. While it is true that in circumstances of frustration or fundamental mistake, courts regularly refer to a contract's underlying purpose or aim, the latter is a notion that is juridically constructed in accordance with the objective theory of interpretation and is attributed to the transaction or contract itself, not to the individuals transacting.[57] The contract's purpose is articulated on the basis of a reasonable interpretation of the performances owed by one party to the other. Here again, the juridically relevant consideration is categorically distinct from and irreducible to the parties' wants, aims, or expectations.

Contract law's indifference to the individual wants and purposes of transacting parties fixes the terms with which a public justification can be developed. Briefly stated, the justification will not give any standing as such to the parties' conceptions of their good, whether that good be intrinsic or instrumental, individual, or shared. This is a fundamental defining feature of contract. In this respect, a public *juridical* justification of contract may be contrasted with a public *political*

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[57] See, for example, Cardozo J.'s decision in *Utica City National Bank* v. *Gunn* 222 N.Y. 204 (N.Y. Ct. App. 1912) where he says that "the genesis and aim of the *transaction* may rightly guide our choice" [emphasis added]. Note that he does not say "the individual aims of the parties." This analytic approach is also explicitly adopted by Lord Wilberforce in *Prenn* v. *Simmonds,* [1971] 3 All E.R. 237 (H.L.).

conception of justice, such as that of Rawls, which is meant to apply directly to the basic structure of society, rather than to private transactions between individuals. There, notions of instrumental and intrinsic good do play an integral role within the limits set by the idea of the political. To prevent misunderstanding, I should repeat that the contention that contract law is indifferent to the wants and purposes of the transacting parties does not deny that these factors decisively influence parties' decisions to transact or that transactions have outcomes that seriously affect the parties' well-being. The point is that the reasons for and consequences of transacting are, in themselves, categorically irrelevant to the juridical analysis of whether a contract has been formed or breached, whether it should be set aside for mistake or frustration, and so forth.

The upshot of the preceding discussion is that for a justification of contract to be public, it must not postulate any good, whether instrumental or inherent, as pertinent to the determination of the justice of contractual claims that parties may make against each other. The justification must not incorporate considerations that are constructed on the basis of, or that give standing to, the parties wants, purposes, or expectations. In a public justification, contract is not presented as being directed toward any substantive good. There is, therefore, no good to be maximized. This, to be sure, is merely a negative stipulation. In the next section, I will tentatively sketch the positive features of such a justification. However, even this merely negative conclusion that certain considerations are categorically excluded is already important because it suggests that teleological theories of *any* kind—and therefore an approach that proposes wealth-maximization as the explanation and goal of contract law—cannot qualify as a public justification. They make relevant, and indeed central, considerations that are without significance from a legal point of view.

Viewed from the standpoint of public justification, the reliance theory of Goetz and Scott, the distributive approach of Kronman, and Posner's wealth-maximization share the same basic difficulty, notwithstanding their evident differences. Each fails to recognize the limited idea of legal responsibility embodied in the common law distinction between misfeasance and nonfeasance, a distinction that is presupposed throughout contract law. A justification that wishes to be public must not ignore the boundary set by this distinction. As I explained earlier, to say that persons can be liable only for misfeasance means that they can be held accountable only for injuring what already belongs to others. This is the limit of their responsibility and their duty and it frames the idea of reasonableness for the purposes of contract

law. Individuals are not obliged to preserve or assist others, to meet their needs or wishes, or to further their good. In contrast, each of the above welfare-based theories attributes to contract law the goal of bringing about the efficient, fair, or maximum satisfaction of transacting parties' needs. At bottom, then, each theory must postulate a qualified right to have one's needs recognized and met. This makes them unsuitable as *public* justifications of contract.

There is a further, but related, difficulty with welfare-based theories and with consequentialist justifications of contract in general—a difficulty already noted in our discussion of Kronman. As Trebilcock makes clear in a variety of doctrinal situations,[58] the criterion of wealth-maximization and the principle of paretianism—to mention but two examples—are extremely difficult, if not impossible, to apply in the context of two-party litigation, leading at best to highly indeterminate conclusions in which one can have little or no confidence. The data that are necessary to apply the criterion will often be unavailable to a court. Even where the data are at hand, a court will have to identify which factors are significant and assign them appropriate weights in light of the criterion. Here again the competence of courts will be severely limited and will vary considerably, making impossible the realization of the ideals of similar treatment of similar cases and certainty in outcome. Trebilcock's point can now be seen as a criticism of these theories as possible public justifications of contract. Information and procedures are required that are either unavailable, or too complex, or too uncertain for the theories to be applied successfully and equitably in the institutional context of adjudication. Hence, they are unsuited to provide a public basis of justification.

The fact that consequentialist theories might not be suitable as public justifications need not be incompatible with the claims or aims of those theories, even from their own standpoint. This is made clear by the following example. A certain domain of social life, we shall suppose, is understood and judged in the common public understanding on the basis of moral ideas that on their face do not reflect, say, a utilitarian standpoint. For instance, in that domain, people might think that individuals have rights which they can exercise as they wish, so long as they respect the equal rights of others. We are to assume that neither the commonly-held justification for these rights, nor the modes by which they may be acquired, nor yet their scope or limits, expressly invoke the utilitarian standard of right action. Indeed, it is a feature of the public understanding that the elucidation and justification of this conception of

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[58] *Supra* note 1 at 83-84, 132-36, and 244-50.

rights be indifferent toward, or at least independent of, utilitarian considerations. Nevertheless, utilitarian analysis might very well be able to show that, in given circumstances, this system of belief contributes positively to the general happiness, in accordance with the utilitarian test. Altering the general understanding so that it directly embodied a utilitarian analysis would be productive of less good. Utiliarianism could endorse the public understanding just because it is productive of felicific consequences, although the common understanding would be self-consciously non-utilitarian. Utilitarian theory would view the public conception of rights as a socially useful illusion, to use Rawls' phrase. In other words, utilitarianism—and more generally, any consequentialist theory—could itself require that it *not* function as a *public* justification.[59]

### D. *Concluding Remarks*

To close this section, I will first summarize the main conclusions reached thus far and then consider very briefly an understandable reaction thereto: scepticism about the very possibility of a coherent theory of contract.

Viewed as attempts to answer the first question of contract theory—namely, why agreed-upon terms should be coercively enforced against the promisor despite his or her subsequent regret even in the absence of justified detrimental reliance by the promisee—the three types of theoretical approaches we have considered seem to be deficient in ways that are both basic and qualitatively different.

The difficulty specific to efficiency concepts is that they are radically incomplete. They must be supplemented by a moral conception that can single out a definite baseline. We need this baseline to determine which changes in welfare count from a moral point of view. Without it, the efficiency concepts do not lead to determinate or consistent conclusions when applied to contractual transactions. The two types of moral conceptions that figure prominently in the literature and that are examined at length in *Limits* are autonomy and welfare-based approaches. The question is whether they can supplement the efficiency concepts in the necessary way. I have argued that both fail to do this, but for very different reasons.

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[59] Sidgwick, for one, argued that under ordinary social conditions the principle of utility might very well require that utilitarianism be an esoteric, that is, a non-public, doctrine: see H. Sidgwick, *The Methods of Ethics*, 7th ed. (London: MacMillan, 1907) Bk. IV, c. v. at 488-90.

In the discussion of the autonomy theories of Fried and Barnett, I argued that Fried's account of contract as promise invokes an idea of promissory obligation which does not entail a relation of correlative right and duty between the contracting parties. For this reason, it does not explain why the law may coercively enforce, as a matter of strict justice, the promisor's duty to perform, whether through an award of damages or by a decree of specific performance. In other words, Fried does not show that a promisor's regret is ruled out as legally irrelevant because it is incompatible with a duty coming under strict right (which can be coercively compelled) as distinguished from an ethical duty of virtue (which cannot). Fried's theory does not justify a baseline that is appropriate for the purposes of doing justice between the parties. While Barnett's basic conception of a transfer of rights does seem to imply a relation of correlative rights and duties, the difficulty with his autonomy-based approach is that his elucidation of the conception of a transfer is one-sided, in that he focusses on the transferor's consent to the exclusion of the transferee's. It is also undeveloped in that he fails to explain, or even to identify, the essential features of a contract that distinguish it from a completed transfer of property. Until these deficiencies are remedied, Barnett's conception of a transfer of rights cannot explain how a relation of correlative rights and duties is actually constituted or created. The requisite baseline is still unaccounted for.

The welfare-based approaches fail for a different reason. The objection is not that they cannot provide a baseline—they can—but that, as teleological theories, they do this in a way that does not sufficiently respect certain basic normative premises of contract law that are well-established and widely presupposed. Welfare theories fail, not because they are incoherent or incomplete, but because they cannot provide a basis for a public justification of contract.

Thus we reach the merely negative conclusion that none of the theories considered has been found suitable to provide a satisfactory theory of contract—a result that is not very different from Trebilcock's. His conclusion is also essentially negative. We saw in the first section that he finds that both autonomy and welfare theories are subject to serious, if not decisive, objections. This, he says, casts doubt on the validity of the congruence claim. Trebilcock's criticisms, and the discussion in this section, seem to have brought us to a theoretical impasse.

However, Trebilcock does not accept this outcome as inevitable. Despite the "indeterminacies implicit in all the major competing

normative perspectives,"[60] he questions whether this justifies rejection of the private ordering paradigm or radical scepticism about the legitimacy and distinctiveness of private law. "The fact of the matter," he writes, "is that all the values reflected in the various normative perspectives reviewed appear to command wide-spread public support and to be legitimate in their own terms."[61] Trebilcock thinks that a single-value view of contract would likely prove self-defeating. Although he does not pretend to offer a meta-theory that weighs or ranks the various values, he suggests that significant progress can be made at a lower level of abstraction if we can identify institutions or instruments that are especially suited to vindicate these values. So, for example, given the institutional constraints that characterize adjudication of two-party contract disputes, certain tasks may be inappropriate and should not be attempted by courts. In this way, he suggests, we can defend private law against the spectre of theoretical scepticism.

Yet, while careful thinking about institutional competencies and qualities is certainly important and indeed indispensable in order to vindicate the different values which are reflected in the various approaches to contract, it cannot, as Trebilcock himself notes, resolve the value conflicts that will arise in deciding contract disputes. Even within the constraints set by a given institution, we must still face the fact that this pluralism of values constitutes an unstable alliance, in which each side, if unchecked, will tend to oust the other. There is here no genuine unity; no coherence; no integration. Such an unstable alliance of values will not suffice to ward off scepticism; it will only confirm it.

My contention is that there is an alternative to this unintegrated pluralism of values and to the theoretical impasse which we seem to have reached through the critical analysis of efficiency, autonomy, and welfare-based theories. We can give a reasonable and reasoned response to the challenge of scepticism. Indeed, as I shall indicate in the following section, the formulation of this alternative builds on the critical analysis undertaken in this section. To go beyond the seeming impasse in contract theory we must attend to the basic and widely-endorsed normative ideas *that are present in the law of contract*, ideas which contract doctrine treats as sufficient and conclusive for the purpose of determining the validity of claims that arise in a contractual setting. These normative ideas may or may not be recognized by, and reflected in, a given theoretical account of contract. For this reason, they are best

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[60] *Supra* note 1 at 247.

[61] *Ibid.* at 247-48.

viewed as pre-theoretical normative ideas that are present in the law. A theory that purports to be a theory *of* contract law must, whatever else it does, begin with ideas that are internal to the law. They provide theoretical reflection with its first indispensable, even if always provisional, object of cognition. Whatever course further reflection takes, it must proceed from the immanent critical analysis of this first object. Contract law, we may suppose, itself identifies these normative ideas more or less explicitly. The first task of any theory of contract is to see whether these ideas, suitably combined, can be worked up into a coherent and complete conception of contractual obligation. What is necessary, in short, is to determine whether a public justification of contract is possible. I take up this question in the next and final section.

## IV. TOWARD A PUBLIC BASIS OF JUSTIFICATION FOR CONTRACT

How is a public justification of contract to be developed and what might it look like if brought to completion? The discussion in this section is intended to provide only the merest sketch of an answer and, even at that, one that is necessarily selective and provisional.[62] Nevertheless, I think that the following remarks about the method of developing a public justification of contract and about its character and scope should enable the reader to judge whether such a justification is *prima facie* possible, and give him or her a better idea of what can be expected of it.

### A. *Developing a Public Justification of Contract*

The first step in developing a public basis of justification is to specify the moral point of view which is appropriate to the specific object, namely contract, which we are seeking to explain. A primary function of this point of view is to provide a suitable framework in which the different elements of the justification can be organized and integrated. In the case of a public justification of contract, it is from this point of view that we are to construe and elucidate contractual rights and obligations. We try to specify it on the basis of a normative idea, or

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62 In an earlier essay "Contract Law and Corrective Justice" (prepared for the 22nd Annual Workshop on Commercial and Consumer Law 1992) [unpublished], I tried to present in some detail what I now call, following Rawls, a public conception of contract. I attempted to show how the availability of expectation damages, the doctrines of offer and acceptance and consideration, and the principle of unconscionability fit together.

a set of normative ideas, that are present in the public legal culture—in our case, in the legally recognized principles and doctrines of contract and, more generally, in private law. At common law there is one fundamental principle that provides a basic point of view from which the rights and duties that can arise between parties in private transactions are construed and elaborated. I am referring to the previously discussed principle that there can be no liability for nonfeasance, with the severely limited idea of responsibility which this entails. This principle pervades, and is often explicitly recognized as regulative, in all areas of private law. Indeed, it is taken as an essential and distinctive feature of private law, in contrast to public law. Offhand, it therefore appears well-suited to serve as an organizing principle for a public basis of justification of contract.

According to the principle of no liability for nonfeasance, a right always has the form of being a claim against someone else who is under a corresponding or correlative duty, and the content of the right always has to do with rightful possession of something that can be owned. One may have rightful possession of one's own body (by virtue of being alive), or rightful possession of external objects or another's performance (which must be acquired). *Unless* and *until* one has rightful possession of something, others cannot be under a corresponding duty. Duties are thus obligations owed to persons with respect to something that is their own. It is thus misleading to view the distinction between misfeasance and nonfeasance, as I have presented it and as it is postulated at common law, as reducible to a difference between acts and omissions. An omission (*e.g.*, to return property to its rightful owner) can constitute misfeasance, because it entails a wrongful interference with another's rightful possession; and an act (*e.g.*, drawing customers away from another's business) can constitute mere nonfeasance, because it does not interfere with anything that the other can rightfully claim as his or her own. The distinction between misfeasance and nonfeasance presupposes that no one is accountable just for failing to minister to another's needs, wishes, or purposes. One need not assist others to acquire or preserve rightful possession of anything. What a person must not do is to interfere with, injure, or adversely affect another's rightful possession, whether innate or acquired. The principle of no liability for nonfeasance stipulates only prohibitions. This limited idea of responsibility, with its essential indifference to need and advantage as such, has one further implication: what, and how much, individuals rightfully possess can be determined by good or bad fortune, native abilities, external circumstances, and so forth—in other words, by factors that have little or nothing to do with the moral worth of the persons

involved. The distributions of holdings that are permitted under this principle need not correlate with, or otherwise reflect, criteria of moral worth.

Along with the the moral point of view specified by the principle of no liability for nonfeasance, there is a corresponding conception of the person which also forms part of the basis of the public justification of contract. This conception of the person is also a fundamental normative idea that is implicit in the way private law construes and accounts for the rights and duties of parties in private transactions. It should be emphasized that this conception specifies an idea of the person that is intended for private law only, and for this reason I shall refer to it as a *juridical* conception of the person. For purposes of the public justification, we need not suppose that it holds for other domains of moral and political life which may have their own distinctive conceptions of the person.

Moreover, whatever normative features or powers are attributed to individuals in virtue of this juridical conception must be consistent with, and must reflect, the moral point of view specified by the principle of no liability for nonfeasance. Thus, negatively speaking, their powers must be specified in a way that does not give intrinsic moral standing to their needs or purposes and, more generally, to their ability to pursue their good. In positive terms, individuals are to be viewed as, and *only* as, subjects with a capacity to have, acquire, and exercise rightful possession for and by themselves. Their personal characteristics and activities are normatively significant only insofar as they can be construed in terms of this central and defining feature. Finally, while individuals so conceived are free and equal, the character of their freedom and equality reflects the moral point of view specific to private law. For instance, freedom here does not consist of persons being entitled to make claims on others in light of their needs or good, nor does their equality require that there be any particular distribution of holdings, even as a benchmark. Substantive *in*equality, however great, in resources, starting-points, or opportunities, is compatible with the relatively formal equality implied by the principle of no liability for nonfeasance.

At the basis of a public justification of contract, there is a third fundamental idea. We presuppose a certain category of social relation to which the justification is meant to apply: the idea of a private transaction between two persons. Like the juridical conception of the person, "transaction" denotes a normative idea that is implicit in the public legal culture and that fits within the limits set by the moral point of view specified by the principle of no liability for nonfeasance. What

makes for a transaction is the fact that through their interaction, one party either acquires rightful possession of something from the other or, alternatively, suffers an interference with his or her rightful possession by the other. Only insofar as interaction has this feature does it count as a transaction. Thus, the fact that one person has refused to meet another's needs, has gone against the other's wishes, or has frustrated his or her purposes does not make their interaction a transaction. While the parties' wishes, needs, or purposes, whether individual or shared, may certainly shape their interaction, they are factors that, in themselves, are irrelevant for the purpose of analyzing the interaction *as* a transaction. A transaction is thus not a cooperative venture, for this postulates shared purpose. It is simply an interaction between two parties which, depending on the particular circumstances, can result in the acquisition of or interference with individual rightful possession. For the same reason, parties to a transaction are not, strictly speaking, partners: there is no "ours" here, but only a "mine" and a "thine."

The three fundamental ideas that are at the basis of a public justification of contract—namely, the point of view specified by the principle of no liability for nonfeasance, the juridical conception of the person, and the idea of a transaction—are *normative* ideas that inform the doctrines of contract law and private law in general. The public justification, it must be emphasized, always works within the domain of the normative. However, these three elements alone are insufficient to develop a justification specific to contract, as distinguished from a justification for tort or unjust enrichment. To these three elements we must join certain features or principles of contract doctrine, themselves moral or juridical ideas, that identify it as a distinct domain within private law. In keeping with the character and aims of a public basis of justification, these features or principles should be well-established and widely recognized, in addition to being truly basic. They are to be treated as provisionally fixed points to be combined with the three elements for the purpose of developing a justification of contract. Ideally, we should try to make the justification depend on as few, and as uncontroversial, fixed points as possible. As I shall now indicate, I think it is possible to begin with just one.

From a legal point of view, the specific way in which a violation of duty is corrected by compensatory remedy or punishment is supposed to mirror, and thus to be indicative of, the particular character of the wrong as well as of the right that has been infringed. It is basic to contract law that a plaintiff is entitled to receive, by way of damages, the value of the defendant's promised performance. That the law should, in principle, protect the plaintiff's expectation interest—that is, that it

should try to place the plaintiff in the same position as he or she would have been in if the promise had been performed—is widely taken as a ruling and just principle.[63] Moreover, this principle is distinctive to contract law alone, in contrast to other areas of private law, such as tort or unjust enrichment, where, respectively, only the reliance and restitutionary interests are protected. From a legal point of view, the fact that it is the distinctive task of contract law to protect the expectation interest must reflect something fundamental about the specific nature of contractual rights and obligations. It seems reasonable then, to take this fact as a provisionally fixed point to be used in conjunction with the three basic elements for the purpose of developing a public justification of contract.

To prevent misunderstanding at this point, I should emphasize that, in the public justification, neither the fundamental normative ideas (the principle of no liability for nonfeasance, the juridical conception of the person, and the idea of a transaction) nor the fixed points (such as the availability of expectation damages) are to be viewed as foundational or conceptually primary. The validity of the other elements in the public justification does not rest on, or derive from, the prior validity of these ideas. However basic or significant a given element in the justification may be, it does not play a conceptually privileged or foundational role *vis-à-vis* the other parts. While we begin with fundamental normative ideas, we do this only because it seems natural and appropriate to start with ideas that are at once pervasive and regulative in the analysis of private law. We combine the availability of expectation damages with these ideas because legal intervention typically occurs at the remedy stage and because the existence and specific character of a legal remedy indicates the law's view of the distinctive nature of the right that it is vindicating. With this as its basis, the public justification introduces and seeks to integrate the other salient features of contract. The appropriateness of *any* element in the justification can be judged only when it is viewed in combination with the others and in light of the reasonableness of the justification as a whole. What must be ascertained is whether the various elements fit together and are mutually supportive, and whether they articulate in combination a reasonable and coherent conception of contract—one that suitably integrates the main aspects of

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[63] "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should so far as it can be done by money, be placed in the same position as he [sic] would have been if the contract had been performed. That is a ruling principle. It is a just principle." *Sally Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301 at 307 (P.C.), Lord Atkinson. For an historical account of the availability of expectation damages, see A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46 U. Chicago L. Rev. 533.

the law of contract. Our principal aim is to fashion just such a conception.

To develop this conception, we see whether, from the standpoint of the principle of no liability for nonfeasance, the fact that the law treats expectation damages as compensatory and as awarded to protect the expectation interest implies a definite conception of contract. That it does, can be shown in the following way. Unless a binding agreement gives the plaintiff rightful possession of something prior to and independent of performance, a breach cannot deprive him or her of anything that is his or hers other than in the form of reliance losses. But if a plaintiff has lost nothing, an award of expectation damages to protect the expectation interest cannot be compensatory in character. It would, in effect, compel the defendant to confer a benefit on the plaintiff, giving him or her something new.[64] And this would violate the idea of no liability for nonfeasance.[65] To be consistent, therefore, with the principle of no liability for nonfeasance, a public conception of contract must have this central feature: at the moment of formation, and therefore prior to and independent of performance, the plaintiff must be represented in legal contemplation as having acquired from the defendant actual rightful possession of something that is interfered with by breach and restored by an award of expectation damages at the remedy stage. In protecting the expectation interest, the law supposes that the plaintiff ought to have received the defendant's promised performance. We may infer from this that what, in legal contemplation, the plaintiff must be deemed to have acquired at formation is, therefore, rightful or juridical possession of this performance. Only if contract can be construed in this way will a breach constitute the kind of wrong that comes under misfeasance.

The question is how we might present this conception of contract without invoking teleological considerations of any kind, since, as previously discussed, such considerations do not form part of a public basis of justification. Here, a public justification could draw on the widely recognized and simple model of completed gifts and exchanges discussed in the previous section. Of the different approaches, this model appears on its face to be the most promising. It articulates the conditions that are necessary and sufficient for obtaining rightful possession of something from another. It postulates acts of alienation

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64 This is Fuller's objection against the claim that protection of the expectation interest is compensatory in nature: L. Fuller & W. Perdue, Jr., "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 52-53.

65 *Ibid.* at 56, note 7.

and appropriation which can be defined without reference to the parties' particular purposes, needs, or welfare. In this model, either one or both parties can acquire possession from the other: in the former case, there is a gift; in the latter, an exchange. But in both cases, possession is acquired through a transfer of ownership from one party to the other. In gift, as well as in exchange, this transfer is effected through two acts of will, namely, an act of alienation and an act of appropriation. Moreover, as discussed previously, these acts of will must be mutually related in a definite way. Possession must not be interrupted, otherwise acquisition by one will not occur through the other's consent.

However, this model, and the analysis it suggests, must be specified further to take into account the distinguishing feature of contract. It must be possible to elucidate a transfer of possession that takes place at formation and therefore prior to actual performance. Because it is only through performance that a plaintiff obtains *physical* possession or enjoyment of the defendant's performance, possession which is acquired at the moment of agreement, that is, prior to performance, cannot be characterized as physical possession. We have to analyse the transfer that constitutes a contract as a transfer of non-physical, but actual, rightful possession. Given this view, a breach, that is, a mere omission to perform, can count juridically as a physical retention by the defendant of what already belongs in right to the plaintiff, against the latter's consent. In other words, a breach can be construed as a wrongful appropriation in violation of the plaintiff's rightful possession, thereby producing an injury that comes squarely under misfeasance.

This conception of contract has been developed with great rigour and completeness in the long tradition of legal philosophy that stretches from Aristotle to Hegel.[66] In particular, the idea of contract as a transfer of non-physical possession has been developed in detail, independent of teleological considerations, by such thinkers as Hobbes, Grotius, Kant, and Hegel. While the work of Kant and Hegel, where this idea is most fully elaborated, supposes a philosophically deep conception of practical reason, their arguments can be presented and understood on the basis of widely-shared everyday notions of legal accountability and obligation, leaving the exploration of the presuppositions of these notions to further theoretical reflection. In other words, the leading ideas and claims in their accounts of contract can be presented in a way that stands apart from their deeper

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[66] I discuss this tradition in "Abstract Right," *supra* note 26 at 1147-96, and in "Corrective Justice," *supra* note 45 at 529-601.

philosophical elaboration. Moreover, while the philosophical tradition elucidates the form and content of this conception of contract at a high level of abstraction, it can provide guidance in the endeavour to exhibit the coherence and the unity of conception in the well-established doctrines of contract law, because after all, philosophy too begins—and can only begin—with ordinary moral experience. For instance, Kant's discussion of the character and unity of the acts that must combine to constitute a transfer of non-physical possession[67] provides a precisely articulated standpoint from which to discern this conception of contract in such common law doctrines as the requirement of consideration or offer and acceptance. Another example is Hegel's argument that a definite idea of equivalence of exchange is integral to this conception of contract.[68] Hegel's account enables one to better understand the fit between the common law principle of unconscionability and other aspects of contract doctrine, whether they be the rules of formation or the availability of expectation damages. My intention here, however, is not to go into these matters, but simply to indicate briefly the direction that the development of a public basis of justification might take. The important point to keep in mind is that our main task is to show how the doctrines and principles of contract law articulate a reasonable and coherent conception of contract which reflects widely-accepted normative ideas (at different levels of generality) and which can settle most, if not all, questions of justice that arise in contractual transactions.

### B. *The Completeness of a Public Justification of Contract*

Clearly, the conception of contract proposed here shares important features with autonomy-based approaches, in particular with that of Barnett.[69] A question that naturally arises at this point is

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[67] *Supra* note 32 at 91-92.

[68] *Supra* note 45, §77.

[69] As the following discussion suggests, there are, however, important and basic differences between the main autonomy-based approaches and the public conception proposed here, which may be summed up in these terms: in the former, the idea of autonomy is moral and non-public, whereas in the latter, it is juridical and public. The public conception articulates an idea of autonomy which refers to nothing other than the mutually-related acts of will that constitute a transfer of non-physical or merely rightful possession. This defines and exhausts the meaning of autonomy for the public conception. Reference to autonomy does not purport, therefore, to provide a value-laden underlying rationale for the principles of contract. It simply makes explicit the normative content of, or in, those principles. It is juridical because it belongs to the sphere of *strict jus*, that is, to relations of correlative rights and duties that are enforceable by coercion. Autonomy-based theories, by contrast, present autonomy as a deep explanation of contract law that poses as an alternative to the possible underlying rationales, such as welfare-maximization or distributive

whether this conception is indeterminate in the way that Trebilcock and Craswell contend autonomy theories are. To answer this question, it would of course be necessary to have the fully developed public conception before us, which is not the case here. Nevertheless, I think that in light of the preceding discussion, I can sketch the beginning of an argument that suggests why the public conception need not be indeterminate or incomplete. To this end, I will present briefly two different ways in which the public conception attempts to settle doctrinal questions, using examples drawn from the law of contract damages and from the rules governing non-disclosure, mistake, and frustration.

To begin, I should make a preliminary point regarding a significant difference between Trebilcock's and Craswell's claims about indeterminacy. As a rule, Trebilcock limits the objection of indeterminacy to the very theories he has examined—those of Fried, Barnett, and so forth. He does not seem to claim—or at least does not present an argument to show—that any autonomy theory *must* be indeterminate. Consistent with his comparative methodology, Trebilcock would be quite willing to admit that there might possibly be a theory which is not vulnerable to this objection, even if it had certain affinities with the autonomy-based approaches of Fried and Barnett. Craswell, by contrast, links the indeterminacy of autonomy theories to their content-neutrality.[70] Insofar as content-neutrality is a necessary feature of all such theories, he concludes that they must all be indeterminate.

Now the public conception of contract sketched above is also content-neutral. Indeed, it *must* be content-neutral by virtue of the misfeasance/nonfeasance distinction. This is because, in holding that there can be no liability for nonfeasance, the law must be completely indifferent toward the particular conception of the good that a person may wish to realize through a given contractual arrangement, as long as the good is compatible with the rights of others and with the legal order. Teleological considerations, we have seen, cannot be directly incorporated into the justification. The public justification is therefore content-neutral in the extreme. Thus, Craswell's claim about the indeterminacy of autonomy theories directly challenges the public

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justice. Its strength and validity as a foundation for contractual obligations derive from its being a moral value that is expressed, not only in the legal domain, but in a variety of others. Fried clearly supposes this: *supra* note 9 at 20-21. Insofar as autonomy-based theories like Fried's go below and beyond the immediate normative content of the principles and doctrines of contract law, they are non-public. This, of course, says nothing about their validity or their strengths and weaknesses, relative to those of competing non-public theories, such as the economic analysis of law.

[70] *Supra* note 15 at 514-16.

conception of contract. We must consider his argument a little more closely.

Briefly stated, Craswell argues that autonomy-based theories can only justify enforcement of what the parties have *expressly* assented to. Such theories leave it to the parties themselves to specify the content of their agreement, in this way respecting their autonomy. According to autonomy theories, valid promises or consent make the promised or agreed-upon course of conduct non-optional. However, the content and scope of that course of conduct, as well as the fact that it is non-optional, may not and usually will not, be completely specified by the parties. Yet these are matters that contract law must resolve. It must be able to specify, for example, the appropriate remedy for breach or the existence of excusing conditions. But autonomy theories cannot answer these questions where the parties have been silent or have failed to reach explicit and unambiguous agreement. Thus, Craswell contends, autonomy-based approaches must be supplemented by other, very different substantive values, such as economic efficiency or distributive fairness, which autonomy theories reject as possible moral bases for contractual obligation. In Craswell's view, autonomy theories lead to an inevitable syncretism, which is at once unstable and unintegrated.

This criticism does not touch the public conception of contract, however, even though the latter is grounded in the parties' wills and is content-neutral.

First, in contrast to the conception of autonomy which Craswell's criticism presupposes, the public justification does not limit the kind of act of will that can generate a contractual obligation to the express words of the parties. Conduct or words of any kind may provide a basis for inferring manifestations of will that can reasonably be construed as mutually-related voluntary acts which transfer non-physical possession. Moreover, like any meaningful act or utterance, such conduct and words must be viewed and interpreted in a given particular context. And because the idea of a transfer of possession from one person to another is inherently *relational*, the standard of interpretation has the same character: a party's conduct or words, and the meaning thereof, are actual and effective only insofar as they exist for the other party, viewed as a reasonable person. The public conception rejects a purely subjective test of interpretation. On this view, the basis of contract does not lie in the private will of one or both parties, but in an irreducible relation of will to will that defines every aspect of the contracting parties' correlative rights and duties.

Moreover, the public conception of contract does not begin with an idea of autonomy which, like Fried's, belongs to the sphere of ethics,

or one which generally applies in a range of different normative domains, including the personal, familial, political, and so forth. Rather, it supposes a juridical idea of autonomy which is framed by a *specific* form that pertains to the legal domain and to it alone, that is, the standpoint specified by the principle of no liability for nonfeasance. This framework sets a categorical limit on what can qualify as normatively relevant for the purposes of contractual analysis. Unless a doctrine or principle can fit within, and give expression to, this framework, it cannot be part of the public conception. Thus, the very feature that accounts for the conception's content-neutrality sets a definite limit on—and therefore determines—the kinds of principles that can belong to it. As I shall now suggest, this has definite implications for the public conception's capacity to settle matters of principle, whether they relate to appropriate remedies for breach, excusing conditions, or other aspects that go to the content and scope of contractual rights and obligations.

The determination of the appropriate measure of damages for breach has been problematic for legal scholars, at least since Fuller questioned the basis of expectation damages. Craswell contends that if the most that autonomy theories can establish is that performance, once promised, becomes non-optional, this is not enough to favour expectation damages over other remedies. Performance is treated as non-optional if *any* remedy is available on breach.

This objection, however, does not touch the public justification of the primacy of expectation damages. The public justification goes further than merely holding that promised performances are non-optional in some unspecified way. It elucidates a definite form and content for this non-optionality: performance is non-optional in the sense that the defendant's breach violates the plaintiff's rightful possession acquired at the moment of, and through, their agreement. The idea that the formation of a contract entails a transfer of non-physical possession at the moment of agreement implies, in turn, a general entitlement in principle to expectation damages for breach of contract. Expectation damages, I have suggested, fit with and are implied by this conception of contract, consistent with the principle of no liability for nonfeasance. On this basis, when the law seeks to put the plaintiff in the position that he or she would have been in had the contract been performed, it simply ensures that, at the remedy stage, the plaintiff obtains in fact what he or she acquired in right at the moment of agreement. Expectation damages protect and, as it were, give back to the plaintiff something that already belongs to him or her. If, however, the plaintiff was limited to reliance damages, a contract could not be viewed as conferring any possession different from or in addition to what

the plaintiff already had *prior* to the transaction. Contract could not be conceived as a mode of acquisition, and the defendant's duty to perform would apply to something that the plaintiff possessed prior to and independent of the defendant's promise. The action for breach would be indistinguishable from a claim in tort against a defendant for failing to use due care in the making and the performance of a voluntary undertaking. But then there would be no need for the further legal requirements of offer and acceptance or consideration. We could not account for the legal point of view.

This conclusion supporting a general entitlement to expectation damages for breach of contract contrasts sharply with the outcome of an economic efficiency analysis. According to Polinsky,[71] while the expectation measure is the only remedy that creates efficient incentives with respect to breaches, it will generally lead to excessive and therefore inefficient reliance investments, and will probably be more costly to implement than either the reliance or the restitutionary measures. On this analysis, there are at least two competing efficiency objectives—efficient breach and reliance decisions—and Polinsky argues that neither the expectation nor any other measure is efficient with respect to both. Which remedy ought to be used will depend on whether, in a given contractual situation, the breach or reliance decision is deemed to be more important from the standpoint of efficiency. The upshot of Polinsky's analysis, then, is that economic analysis does not justify the legal proposition that, as a matter of *general* principle, a plaintiff should be entitled to expectation damages for breach of contract.

Against the proposed public justification of expectation damages, the objection might be made that it presupposes the very thing that is in need of explanation. After all, we have taken the availability of expectation damages as a provisionally fixed point for the purpose of developing the public justification. Having begun in this way, it is not surprising that we end up with the expectation measure as an appropriate—or indeed *the* appropriate—remedy.

In reply, this objection supposes that the validity of expectation damages has already been assumed and it implicitly supposes that we are, or should be, trying to justify the expectation remedy by deriving it from some other principle, such as an abstract idea of autonomy, which we treat as foundational. But that is not the course of argument adopted in the public justification. As I previously emphasized, the public

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[71] M. Polinsky, *An Introduction to Law and Economics*, 2d ed. (Boston: Little, Brown, 1988) c. 5.

justification treats no principle as foundational relative to the others. Validation is a matter of seeing whether there is a genuine fit among all the different normative ideas and principles that are invoked in the public justification, whatever their place in the order of presentation (which itself can be varied). We select these ideas and principles because we think that they are deemed basic or significant from the point of view of an actual system of positive (contract) law. What must be stressed here is that any fixed point, whether abstract or particular, remains at most *provisionally* valid until we show that there is an adequate fit between it and all other elements in the justification. Proof of validity consists just in proof of this fit. Accordingly, the case for expectation damages depends on showing that the main doctrines of contract law—in particular, the doctrines of consideration and offer and acceptance—cohere with an entitlement to expectation damages in a unified conception of contract, such as the one that views contract as entailing a transfer of rights. Until this is done, the justification of expectation damages remains incomplete and will seem open to the objection that we have merely assumed its validity.

This brief discussion about the appropriateness of expectation damages brings out an important point about how the public justification is determinate. The determinateness of the public justification lies in the fact that it proposes a determinate conception of contractual obligation characterized by definite and specific doctrines and principles which are mutually supportive and integrated within this conception. Not every doctrine will fit within this conception. In this way, the justification is neither empty nor open-ended.

Cases of what Trebilcock calls "symmetric and assymmetric information imperfections" seem to challenge the determinacy of the public justification in a different way. Here, even proponents of autonomy theories like Fried seem to share the views of critics like Craswell and Trebilcock that an autonomy-based conception of contract law does not have the resources to determine the parties' rights and duties in circumstances of non-disclosure, mutual mistake, or frustration.[72] The principle of autonomy must be supplemented by other values, for example, fairness, due care, or altruistic loss-sharing. According to these writers, the reason for this "gap" is that autonomy theories locate the source of contractual rights and duties in the parties' actual, express consent. The problem is that in circumstances of non-disclosure, mistake, or frustration, the parties typically have not specified what legal consequences should follow from the information

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[72] Fried, *supra* note 9, c. 5.

imperfection. These gaps in contract must be filled on the basis of substantive values other than the parties' autonomy.

In my view, the conception of contract developed by the public justification is not subject to this indeterminacy. However, before I explain why it is not, I should make clear, to prevent misunderstanding, what I am *not* claiming. I do not contend that the application of legal principles or categories to particular facts can be *thoroughly* determined and carried out *simply* on the basis of ideas and concepts that form part of the public justification. To suppose this would be to misunderstand the character and function of the public justification. A public justification attempts to show that the public legal culture contains, even implicitly, a coherent and definite conception of contract informed by principles that can settle most, if not all, issues of justice that arise in contractual relations. Such a justification, if successful, will undoubtedly guide the application of these principles to particular facts, but it will not be determinative. Inevitably, judgment must be brought to bear to decide the significance, weight, and appropriate application of the favoured principles in particular, always individual, circumstances, thus making inescapable a range of different possible assessments, all reasonable. The following remarks, then, are intended to address the objection that an autonomy-based approach, such as the public justification, cannot yield regulative principles that may be appropriately applied to settle contractual rights and duties in circumstances of non-disclosure, mistake, or frustration.

In settling the rights and duties of parties in circumstances of non-disclosure, mistake, or impossibility, both the public justification and economic approaches view contracts as arrangements that allocate risks between the parties. However, each does so in a different way. An economic approach, being teleological, asks: how, as rational persons, would the parties, or others similarly situated, have allocated a given risk so as to maximize, say, their joint wealth? Because the inquiry here is teleological, the analysis will be dynamic and hypothetical. The justification for a given solution will be that it produces certain desirable consequences. Inevitably a justification of this kind must focus attention on how a particular solution may affect the interests and the future conduct of parties other than the particular litigants before the court. For it is on this basis that a rule maximizes or fails to maximize desirable consequences. Moreover, the inquiry will be hypothetical. Because of the teleological character of the economic approach, it need not show that the favoured solution is one to which the parties actually consented. It is enough to establish that they would have consented to it, supposing that they were endowed with a desire to maximize the postulated good.

Indeed, the very idea of consent, whether actual or hypothetical, need not be relevant. Everything turns on whether, in given circumstances, a consent requirement would promote that good.

By virtue of its rigour and comprehensiveness, Trebilcock's proposed analysis of cases of non-disclosure is an excellent example of this approach.[73] In the typical case, one party, but not the other, has acquired information that is material to the second party's decision to transact. The question is whether the contract should be set aside because of the first party's failure to disclose this information. Trebilcock's answer builds on his criticism of Kronman's solution,[74] which makes the outcome turn on whether the first party acquired the information "casually" or as a result of deliberate investigation. Kronman argues that only information acquired casually should be subject to the disclosure rule. According to Kronman, the rationale for this distinction is that it preserves incentives for the efficient production of information. Trebilcock's criticism is that, while this distinction may be important in certain circumstances, it is just one among several considerations that must be empirically assessed in relation to the goal of facilitating the movement of assets to their most productive uses with as few transaction costs as possible. The distinction between casual and deliberate acquisition must not "take on a life of its own, disconnected from this over-riding objective."[75] By way of correction, Trebilcock suggests, for example, that in many cases sellers will not be discouraged from acquiring information deliberately, even if they are obliged to disclose. On the other hand, buyers who have acquired information casually should not be required to disclose it if this would discourage them from using, as opposed to generating, the information in procuring transactions with sellers, for this could impede the movement of resources from lower-valued to higher-valued uses. By introducing these and other considerations, both static and dynamic, into the analysis, Trebilcock is able to ensure that the rules governing non-disclosure are more finely tuned to achieve the postulated end.

In sharp contrast, the public justification roots the allocation of risks in the parties' actual consent. As previously discussed, actual consent may be express or implied. The central idea is that the analysis turns entirely on what the parties did. In this way, it is thoroughly

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73 *Supra* note 1 at 106-18.

74 A. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" (1979) 7 J. of Legal Stud. 1.

75 *Supra* note 1 at 115.

retrospective and indifferent to dynamic considerations. This requires explanation.

Cases of non-disclosure, mistake in basic assumptions, and frustration arise in circumstances where the parties have concluded a binding agreement satisfying the requirements of contract formation. One or both parties has therefore acquired a right *in personam* to the other's performance. In each of these situations, however, one party seeks to be released from her duty to perform on the basis that she would not have made the agreement had she known at that time what she now knows. In cases of non-disclosure, the complaint is that the party with the information should have disclosed it to the party now asking release. Where there has been mistake or frustration, typically neither party possessed the information at the time of entering the agreement.

To analyse these situations, a public basis of justification combines two elements. First, it begins with the organizing principle of no liability for nonfeasance. In accordance with this principle, the fact that a party's needs or purposes might have been better served had he or she been apprised of certain matters is not by itself a reason for setting aside an agreement. Nor may this be done to achieve a favoured end, whether it be the parties' joint welfare, general welfare, efficiency, distributive fairness, or something else. By the principle of no liability for nonfeasance, no one is obliged to further the needs or purposes of others. Thus, the fact that performance turns out to be onerous or detrimental to the promisor's interests will not justify release. *Prima facie*, the promisor is taken to have assumed the risk of such losses. This represents the initial baseline which a public justification adopts in analysing all cases of information imperfection.[76]

This baseline is not, however, final. It can be shifted if, but *only* if, a party *does* something that may be fairly and reasonably construed as an assumption (or exclusion) of a risk of loss consequential upon information imperfection. This is the second factor which we combine with the principle of no liability for nonfeasance to provide an analysis of all cases of information imperfection.

There are two ways in which one may assume responsibility for (or exclude) a risk. First, a party, A, can assume responsibility for a risk that would otherwise be borne by the other party, B, by inviting B to rely

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76 In relation to impossibility cases, this baseline is well-stated in the old case of *Paradine* v. *Jane* (1647), 82 E.R. 897 (K.B.): "[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

detrimentally on A's undertaking to provide against that risk as part of a special relationship between them. The existence and scope of this relationship are governed by tort principles. In addition to being liable for damages in negligence, A may be estopped from enforcing claims that are incompatible with having shifted a risk in consequence of his or her voluntary undertaking.[77]

The second way that one can alter risks is contractually. Parties can expressly, or by necessary implication, make their contractual rights and duties respecting performance in effect conditional upon the absence of certain information imperfections. It is uncontroversial that a court should, and will, respect an *express* contractual provision which clearly stipulates that performance will not be due if certain facts do or do not exist, either at the time of agreement or at any time prior to performance. The parties' common intention to make performance conditional may be inferred, not only from the parties' express words, but also from the "substance, words, and circumstances"[78] of their transaction. In short, this common intention may also be found to be implicit in their agreement as interpreted in its particular context. In both instances—express and implicit—it should be emphasized that this

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[77] Given the purposes of the present paper, I will not explore this tort analysis further here, however, I discuss it in greater detail in "Excluding Liability," *supra* note 45, Pt. IV(a).

[78] These words are taken from Grotius, *supra* note 39, Bk. II, Ch. XI, VI, whose succinct discussion of mistake deserves to be quoted in full:

> The treatment of agreements based on a misapprehension is perplexing enough. It is, in fact, customary to distinguish between errors which affect the substance of the matter and those which do not; to consider whether a contract was based on fraud or not, whether the person with whom the contract was made was a party to the fraud, and whether the act was one of strict justice or only of good faith. ...
>
> The majority of these distinctions come from the Roman law, not only the old civil law, but also the edicts and decisions of the praetors; and some of them are not entirely true or accurate.
>
> Now a method of ascertaining the truth according to nature is furnished to us by the fact that as regards the force and effect of laws nearly every one agrees that, if [the application of] a law rests upon the presumption of a certain fact which does not actually obtain, then that law does not apply; for the whole foundation for the [application of the] law is overthrown whether the truth of the [alleged] fact fails. The decision when a law has been based on such a presumption must be inferred from the substance, words, and circumstances of the law.
>
> In like manner, then, we shall say that, if a promise has been based on a certain presumption of fact which does not so obtain, by the law of nature it has no force. For the promisor did not consent to the promise except under a certain condition which, in fact, did not exist.

For further discussion of the views of Grotius and other natural law writers on mistake, see Gordley, *supra* note 3 at 85-93.

determination is arrived at by inferring from what the parties have actually done.

This analysis can be applied to the main types of information imperfection, and in fact it is found in the leading cases on non-disclosure,[79] mistake,[80] and frustration.[81] It was perhaps Cardozo, J., however, who set it forth most clearly in the frustration case of *Canadian Industrial Alcohol Co.* v. *Dunbar Molasses:*[82] "the inquiry is hereby this, whether the continuance of a special group of circumstances appears from the terms of the contract, interpreted in the setting of the occasion, to have been a tacit or implied presupposition in the minds of the contracting parties, conditioning their belief in a continued obligation."

Note that the test is not whether the parties, as rational individuals, *would* have transacted differently or more efficiently had they known about a contingency which affected the interests of one or both of them. It does not authorize a court to substitute a contract that, in hindsight, is superior to the one actually concluded by the parties. A court must determine the parties' common intention retrospectively on the basis of their manifested acts of will, reasonably construed in accordance with an objective standard.[83] The test is:[84] looking at the terms and subject matter of a contract in light of its surrounding circumstances, can we infer that the parties considered, or ought to have considered, as reasonable people, the duty to perform as so obviously

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*79* In addition to *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597 [hereinafter *Smith*], which I discuss shortly, there is of course *Laidlaw* v. *Organ,* 15 U.S. (2 Wheat.) 178 (1817) [hereinafter *Laidlaw*].

*80* See, for example, *Scott* v. *Coulson,* [1903] 2 Ch. 249 (C.A.); the decision of Wright J. (as he then was) at first instance in *Lever Bros.* v. *Bell,* [1931] 1 K.B. 557 (C.A.); *Solle* v. *Butcher,* [1950] 1 K.B. 671 (C.A.); *Sherwood* v. *Walker,* 33 N.W. 919 (Cir. Ct. 1887) (Sherwood J. dissenting). See also, G.E. Palmer's *Mistake and Unjust Enrichment,* (Ohio: Ohio State University Press, 1962). In my view, this book provides the best basis for working out a unified analysis along the lines suggested here for the different kinds of information imperfection.

*81* In addition to Cardozo J.'s seminal analysis in *Canadian Industrial Alcohol Co.* v. *Dunbar Molasses,* 179 N.E. 383, 258 N.Y. 194 (N.Y. Ct. App. 1932), see *Herne Bay Steam Boat Company* v. *Hutton,* [1903] 2 K.B. 683 (C.A.); *Krell* v. *Henry* [1903] 2 K.B. 740 (C.A.); and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 (H.L.), Lord Wright.

*82* *Ibid.* at 198.

*83* Of course, this analysis of information imperfections presupposes that we have successfully shown how "common intention," "mutually-related and manifested acts of will," and "the objective standpoint of reasonableness" may be construed as part of the conception of contract as a transfer of rights. In this article, I have provided only the merest sketch of the kind of argument that is necessary to show this.

*84* I draw here on F.C. Woodward, "Impossibility of Performance as an Excuse for Breach of Contract" (1901) 1 Col. L. Rev. 529.

dependent on the non-occurrence of a contingency that, had this contingency been brought to their attention, they would have thought it unnecessary to provide for it explicitly in their agreement? If yes, a court is justified in finding an implicit condition that makes the duty to perform dependent on the absence of the contingency.

I should add that "surrounding circumstances" can certainly include, in appropriate cases, widely-shared community understandings, special trade meanings, and so forth. However, these terms of reference are relevant, not because they are deemed to reflect or to be conducive to postulated goals such as efficiency or distributive justice, but simply because they exist and because reasonable people in the position of the parties would, we may presume, normally transact on this basis, whether or not these meanings satisfy the criteria of economic rationality. The incorporation of such shared meanings is content-neutral.[85]

To illustrate the proposed analysis, consider the famous case of *Smith* v. *Hughes*.[86] Here the plaintiff-vendor offerred the defendant a quantity of oats for sale, and to this end, he gave the defendant a sample of the oats to inspect and to evaluate on his own. On this basis, the defendant agreed to purchase the oats. Because the oats turned out to be new, and because the defendant could use only old oats, he sought release from the agreement. On the facts, the plaintiff may actually have known that the defendant only wanted old oats. However, the plaintiff neither said nor did anything to contribute to the defendant's mistake; he simply failed to dispel it. Should the defendant be entitled to avoid the contract because of the plaintiff's non-disclosure and his own mistake?

On the above analysis, the answer would seem to be no. Both parties had formally equal access to ascertain the qualities of the oats. Indeed, here, the defendant had full opportunity and the actual means to determine whether the oats were suitable to his purposes. The decision as to its qualities and suitability was given exclusively to, and

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[85] Here I want to acknowledge, for the purpose of distinguishing, the quite different issue of the inevitable indeterminacy entailed in applying the idea of shared understandings. The point that I am arguing for in the text is simply that the public conception of contract contains appropriate and determinate principles to apply in cases of information imperfections and that, at this level of principle, reference to shared meanings can be warranted and perfectly reasonable. If such principles exist, the public conception is not vulnerable to Craswell's objection against autonomy-based theories. The fact that there can be reasonable disagreement (within bounds) about the proper application of these principles, in particular circumstances, does not distinguish the public conception from any other theory. As previously discussed, application of general categories and principles to particular cases must always entail a certain measure of indeterminacy.

[86] *Supra* note 79.

was entirely made by, the defendant, and he purchased the oats on this footing, with the plaintiff remaining wholly passive throughout. This set of circumstances precluded the inference of any assumption of responsibility by the plaintiff for the age or other qualities of the oats, as well as any implication of a *common* implicit intention to provide in the contract against the contingency of the oats being new.[87] The fact that the plaintiff may have acquired the information about the oats casually, or that the defendant could not make any use of the oats is irrelevant. The parties did nothing, whether in tort or in contract, to modify the defendant's original responsibility to take charge of the rational pursuit of his own interests. To set aside the contract for non-disclosure or mistake would be to attach legal consequences to mere nonfeasance. The fact that a person of "tender conscience" or "high honour"[88] might have been unwilling to take advantage of the buyer's ignorance does not decide the very different question of what the seller could legally be obliged to do.

I cannot develop this analysis further here. I wish to underline, however, certain important differences between it and other approaches. First, in contrast to Fried's conception of contract as promise, the conception of contract elucidated as part of the public conception is intended to guide the resolution of doctrinal issues such as the legal consequences flowing from information imperfections: it aims to be complete and relatively self-sufficient, thus obviating the need to invoke values that go beyond it. Second, the suggested analysis is framed to apply directly to the main kinds of information imperfections, that is, to

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87 This is how I view the legal significance of Marshall, Ch. J.'s reference in *Laidlaw, supra* note 79 at 195, to the fact that "the means of intelligence [were] equally accessible to both parties." It does not reflect a concern about distributive fairness or economic efficiency. Based on the facts of *Laidlaw*, Chief Justice Marshall seems quite willing to hold that "equal access" exists even where one party, through greater talent, more resources, better luck, or particularly favourable circumstances and relationships, is able to obtain information which the other does not: equal access here can only mean formally equal access. For Marshall, C.J. a situation in which the means of intelligence are formally accessible to both parties precludes, all other things being equal, the defendant from claiming that he or she was entitled to rely on the plaintiff or that there was a common intention to make his (the defendant's) performance dependent on his having the information. This is the initial baseline of the parties' mutual independence, in keeping with the idea of no liability for nonfeasance. That is why Marshall makes clear in the following sentence that this conclusion might no longer hold if a party (here, the plaintiff) says or does anything tending to impose upon the other. Words or deeds of this kind can provide a basis for implying an assumption of responsibility by the plaintiff in tort or in contract. Note that, on the analysis proposed in this essay, the fact that the party seeking release in *Smith, supra* note 79, is the buyer whereas in *Laidlaw* it is the seller is immaterial to the proper outcome.

88 The words are Cockburn C.J.'s in *Smith, ibid.*, where she is also distinguishing the more limited requirements of legal obligation from those of morals.

non-disclosure, mistake, and frustration. It purports to provide a unified analysis. Of course, how it applies in a given case will depend on that case's particular features and circumstances. Third, it refers only to ideas and principles which have already been invoked in leading decisions and which are therefore present in the public legal culture. Fourth, the proposed analysis is able to connect the principles governing information imperfections with those relating to other doctrinal issues, such as remedies, by explaining them as aspects of the same conception of contract, thus bringing out the unity underlying seemingly discrete areas of contract doctrine. Finally, while it may reach conclusions in particular cases of information imperfections that coincide with the conclusions arrived at, for example, on Trebilcock's welfare analysis,[89] it, unlike the latter, does not give standing to any teleological considerations, is retrospective rather than dynamic in character, and fully respects throughout, the centrality of actual, as opposed to hypothetical, consent. These features qualify the proposed analysis to function as part of a public basis of justification of contract.

### C. *Conclusion*

In keeping with the comparative approach of *Limits*, I shall conclude with some brief remarks about the relation between efficiency and welfare analyses of contract, on the one hand, and the proposed public conception of contract on the other.

In section three, I argued that efficiency concepts are radically incomplete and need to be supplemented by a theory that can set an appropriate moral baseline. Teleological theories, I suggested, are not able to provide a baseline that is suitable from a public legal point of view. In contrast, the juridical conception of contract sketched in this section is framed to meet this need. This should enable determinate judgments of efficiency to be made. In circumstances where a transfer of non-physical possession has occurred, a party's subsequent regret would be juridically irrelevant because he or she would have no basis in right to turn that regret into a claim in private law. This would resolve the Paretian dilemma. That dilemma, we saw, arises only when Pareto superiority must apply to preferences *qua* preferences without the

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[89] Clearly, there will be differences in outcomes especially, I conjecture, in cases where it is the vendor who has failed to disclose. Trebilcock argues that vendors, but not purchasers, should disclose, *supra* note 1 at 114, whereas on my approach, the same initial baseline—where each party bears the risk that information imperfections can render performance less beneficial or more onerous—applies to both.

assistance of a moral theory capable of setting a baseline. Moreover, the public justification would single out Pareto superiority —as opposed to Kaldor-Hicks efficiency—as the only concept of efficiency that should apply in assessing the efficiency of, say, damage awards. Here, according to the public juridical conception of contract, rights would be at stake, and given that this conception is meant to set the baseline for (and thus to constrain) efficiency analysis, actual compensation would be required. In contrast, in circumstances where no rights are at stake (as determined, for example, by the principle of no liability for nonfeasance), the Kaldor-Hicks concept might be applied.

While judgments of efficiency can apply to contractual regimes, they would not have independent standing as *public* reasons for conclusions in law. For example, the fact that one might show that awarding plaintiffs only expectation damages often encourages efficient outcomes would not be viewed, by itself, as a public reason for setting damages at this level. Efficiency considerations can play a role in public reason if, but only if, they can be construed as part of what two parties actually, albeit implicitly, consented to, where consent is understood as consisting in the parties' mutually-related manifestations of will. For instance, if in certain circumstances efficiency considerations have become crystallized as shared background understandings, they ought to be taken into account in construing the parties' common intention. Efficiency considerations can be invoked only in this indirect way, never as criteria which are relevant in and of themselves. As I have noted previously, there is no public legal reason for holding that the parties' common intention must be rational, as economics presupposes or encourages. From a public legal point of view, this would suppose the parties to be subject to an obligatory end, namely, the pursuit of economic rationality, but this would be incompatible with the limited idea of responsibility that underlies the principle of no liability for nonfeasance.

The same basic point holds for welfare-maximizing and other teleological justifications: as normative justifications in their own right, they do not belong to public legal reason. What they can provide are *non-public* justifications for both the principles and the conclusions of contract law. It is worth emphasizing again, however, that if they are to be justifications of law, these theories must attend to, and must attempt to account for, the very categories and principles made salient by the public juridical conception of contract or by some other account that is qualified to function as a *public* justification. The public justification represents the first step in theoretical reflection about law, and it provides the indispensable object for all further theorizing. Thus, if a

theory were to ignore or simply to dismiss, say, the pervasive and basic organizing principle of no liability for nonfeasance, this would seem *prima facie* a ground for disqualifying that theory even as a non-public account of contract law. A most striking characteristic and perhaps the most serious failing of contemporary theorizing about contract is that, as far as I can see, there does not seem to be at present any theory of contract that satisfies this threshold requirement. Until we know what a public justification of contract consists in, this will continue to be the case.

But if we do not have a public justification, on what basis can we ascertain whether or not autonomy and welfare theories converge in the conditions they imply for voluntary transactions? For the question of convergence clearly presupposes that we can already identify an initial, definite legal object—the idea of a contractual transaction—which it is the business of autonomy and welfare theories to explain. In the absence of a public, and hence shared, conception of contract, we cannot say what this object is, making this line of inquiry premature. By placing the question of convergence at the center of contract theory, *Limits* underscores the need for the development of a satisfactory public basis of justification.