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TOO MANY THEORIES

Todd D. Rakoff*

THE LIMITS OF FREEDOM OF CONTRACT. By *Michael J. Trebilcock*. Cambridge: Harvard University Press. 1993. Pp. vii, 310. \$35.

Contract law aspires both to state the law governing actual social interactions — buying, hiring, leasing, and licensing — and to depict an ideal society — the market free and just. Contracts scholars, taken as a group, share these aspirations. It is still an honorable calling to fashion the positive law of contracts into a coherent set of doctrines.¹ Over the last couple of decades, however, a growing body of scholarship has addressed the relationship between the law of contracts and the desirable social order.² Being somewhat abstract, this literature has tended to reflect various jurisprudential, sociological, and political assumptions. We thus see in contract scholarship what we see in legal scholarship generally these days — a proliferation of theories. In an effort to sort out these theories, Professor Michael Trebilcock³ has written *The Limits of Freedom of Contract*.

Considered as a guide to the scholarly debate of the last twenty years, *The Limits of Freedom of Contract* is an excellent book. Trebilcock canvasses a wide range of theoretical perspectives: utilitarians, Kantians, social contractarians, Paretians, libertarians, communitarians, and some others all have their say. He also confronts a wide range of legal and social topics: prostitution, surrogacy, monopoly, just price, pollution, mistake and regret, consideration, affirmative action, international trade, and many more make their appearance. Yet the book does not fall apart; to the contrary, it is tightly and clearly organized. It opens and closes with a chapter setting out the general themes. In between, eight chapters grapple with specific topics: “Commodification,” “Externalities,” “Coercion,” “Asymmetric Information Imperfections,” “Symmetric In-

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1. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* at xix (2d ed. 1990).

2. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

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formation Imperfections," "Paternalism," "Consideration," and "Discrimination." Each of these eight opens with a discussion of "The Nature of the Conceptual Problem," proceeds to a consideration of instances in which the problem arises, and rounds off with a short conclusion.

Trebilcock explicates the existing literature with great care. I have not read all of the works he discusses, but I have read a lot of them, and at no point did I see a dismissive or unfair rendition. There is one body of work that is omitted; because he treats contract law as a doctrinal system, Trebilcock has little time for the writings of those who emphasize context above doctrine.⁴ Aside from that, the book gives each major point of view an extended consideration across a large range of examples. As a result, each chapter, considered by itself, provides an excellent overview of an important topic in contract theory.

What is Trebilcock's own point of view? In the first sentence of the preface he proclaims: "I am a law and economics scholar by trade" (p. v). Certainly he takes the market society as a given. The chapter headings, recited above, by and large reflect the law and economics paradigm. And, if there is a leitmotif running through the book, it is this quotation from Milton Friedman: "The possibility of coordination through voluntary cooperation rests on the elementary — yet frequently denied — proposition that both parties to an economic transaction benefit from it, *provided the transaction is bilaterally voluntary and informed.*"⁵

By the fifth sentence of the preface, however, we find that one of Trebilcock's principal motivations for writing the book is "a concern that much law and economic[s] scholarship is far too unself-critical" (p. v). By and large, the book lives up to the promise implicit in that statement. As already said, it takes up many different social and philosophical theories, and from first to last comprehends that "freedom of contract" is as much a political as an economic proposition. Moreover, Trebilcock does not assume that the analyses offered by law and economics are, in the end, inherently superior to the alternatives. Indeed, he criticizes these analyses in at least three distinct ways. At times, he faults the use of economics in legal analysis for producing hopelessly indeterminate results. In considering the problem of externalities, for example, he says that

4. The most sustained such body of work, that of Professor Ian MacNeil, makes its entrance and exit in under a page. See pp. 141-42. "MacNeil's approach," says Professor Trebilcock, "no matter how accurately it describes reality, does not yield determinate legal principles." P. 141.

5. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962), *quoted at* pp. 7, 102, 164, 242.

the literal Pareto-superiority test⁶ is almost never met; but if one instead employs the Kaldor-Hicks criterion,⁷ there are a great many situations when the empirical uncertainties are overwhelming (pp. 66, 244-45). At other times, Trebilcock reproaches law and economics for being insensitive to important moral distinctions. A pure Pareto-efficiency approach to coercion — one that asks only whether the parties think they are better off having traded than never having encountered each other — will, he says, fail to see that, in conditions of pervasive scarcity, we need to make an essentially moral judgment as to which of the sets of baseline conditions that induce trade are tolerable, and which are not. The pure law and economics view of coercion “would have a very meagre, indeed impoverished, content” (p. 84). At still other times, Trebilcock takes the economic approach to task for assuming matters too important to be assumed. He frames the whole chapter on “Paternalism” around the problems raised by the fact that “neo-classical economics essentially has no theory of how preferences are formed, whether they are good or bad in terms of the welfare of those holding them . . . all preferences are accepted as equally valid” (p. 147). All of this is not to say that Trebilcock is picking a fight with law and economics, for he makes comparable points about the other theories he surveys. It is to say that he does not write from the standpoint of a true believer who tries to produce the best defense of his own theory at every turn. While the tone sometimes wavers, by the end of the book it is clear that Trebilcock rather takes his stand as the intelligent citizen, or the intelligent scholarly generalist, trying to make sense of the regime of contract law in a world of multiple contesting theories.

This, Trebilcock concludes in the final chapter, is no easy task. On the one hand, the applicable theories are typically so abstract that their implications for the law remain arguable. There is, he says, a “plasticity to concepts of autonomy, efficiency, and distributive justice” such that they can seem to endorse almost the same outcomes, or remarkably different ones, depending on the course of further argument (pp. 246-47). On the other hand, “nihilism on the part of analysts” — “the conclusion that any set of legal rules that is likely to be constructed for governing the private ordering process is likely to be relatively unprincipled” — is not justified, because each of the various theories does represent, at its core, a commitment to a value worthy of, and often commanding, widespread support (pp. 247-48). He continues:

6. Does someone consider himself better off, and no one consider himself worse off, as a result of the transaction?

7. Could the gainers from the transaction compensate the losers and still have a welfare surplus?

Both as individuals and as a community, we do not operate within a one-value view of the world. . . . For economists to claim that they are interested only in maximizing the total value of social resources, without being concerned about how gains in the value of social resources are to be distributed . . . or while ignoring the impact of economic change on the lives of individuals or on the integrity or viability of long-standing communities, reflects a highly impoverished view of the world. Alternatively, theorists committed only to concepts of distributive justice, who proceed in their analysis by inviting us to assume a given stock of wealth, or a given increase in the stock of wealth, and then asking what a just distribution of that wealth might entail, are largely engaging in idle chatter as long as the wealth creation function is simply assumed. . . . Similarly, communitarians who stress values of solidarity and interconnectedness and discount values of individual autonomy and freedom risk pushing this perspective to an extreme, where communitarian values become exclusionary, authoritarian, or repressive. [p. 248; footnotes omitted]

If that is the shape of the matter, how does one determine “The Limits of Freedom of Contract”? How can judgment be exercised once one concludes that no theory is by itself wholly adequate and that several share truth among them? At least three choices appear. First, one can rely on a weak form of theory: while no theory is true all the time, a particular theory is presumptively true, and other contestants bear the burden of contrary proof. Second, one can treat theoretical truths as additive: given that each theory has part of the truth, the more theories that converge on a particular conclusion, the more likely the conclusion is valid. Finally, one can segment the domain to which the theories apply: while each theory is true to some extent, this one applies more to one part of the practical world; that one, to another.

At one time or another, Trebilcock uses all three of these methods. To begin with an example of the first, he focuses his chapter concerning “Externalities” on the question of pornography. Should the law support or prohibit a market in pornographic materials? The direct parties to the transaction eagerly buy and sell these materials, but free trade in them might have baneful consequences for others — in terms of direct violence, social subjugation, or mere nastiness. Trebilcock offers a comprehensive discussion of the many authors who, in recent years, have written about this problem from many perspectives, offering quite different answers. (Joel Feinberg, Catharine MacKinnon, Cass Sunstein, and Guido Calabresi are among those who appear.) His own view, however, is that no single theory of externalities adequately resolves the tension between the direct parties who want to trade and the others who object. What, then, to do?

Trebilcock points out at the start of this chapter that if the mere existence of third-party effects

should count in prohibiting the exchange process or in justifying constraints upon it, freedom of contract would largely be at an end. The crucial questions then become (1) what should count as an externality in welfare terms, or what should count as a harm to others in liberal terms? and (2) what should count as an externality or a harm that one may justifiably impose on others? As we will see, the concept of externalities is one of the least satisfactory concepts in welfare economics, and the concept of harm to others is one of the least satisfactory and most indeterminate concepts in liberal political theory. [pp. 58-59; footnotes omitted]

How, then, should the specific issue of pornography be resolved? Trebilcock concludes:

In the end, I am not persuaded that the case for criminalizing or regulating pornography . . . is especially compelling, in part because the empirical evidence does not strongly suggest any significant causal relationship between exposure to pornography and an increased propensity to engage in violent acts or to adopt negative attitudinal changes towards women . . . and in part because any theory of egalitarian liberalism that dispenses with the harm principle seems to entail censorship of a vast array of material other than pornography premised on a highly patronizing assumption of false consciousness or false preferences. [p. 74]

There is nothing disreputable in this conclusion. But is it not clear that this conclusion depends on assuming that the same welfare economics and the same liberal political theory that Trebilcock finds unsatisfactory in their general treatment of the question of externalities have, yet, some presumptive force? A presumption in favor of freedom of contract pervades this whole conclusion — in the sense that a widespread censorship of marketable ideas is unthinkable, in that the burden of proof as to causal relationships lies on those who assert harm from pornography rather than those who deny harm, and indeed in the very posing of the question whether there is a case for “criminalizing or regulating pornography.” At the same time, this presumption is only a presumption. The arguments against it, or the empirical data, could be stronger, and I credit Trebilcock’s honesty in these matters; in such a situation he would be willing to change his mind. The mental operation involved here is not that of applying a clear theory that also clearly states its own limits or exceptions; rather, it is that of taking an admittedly not entirely satisfactory theory and converting theoretical doubt into the distinction between actually valid and presumptively valid. This, then, is an example — one of several that could be adduced — of Trebilcock’s use of what I am terming a “weak theory” to resolve theoretical disagreement.

The search for places where more than one theory reaches the same conclusion — for convergence among theories as a resolving technique — is another approach Trebilcock uses several times.

Most clearly, this method forms the framework through which he defends his conclusions regarding discrimination — regarding, that is, the appropriate legal limitations on the ability of private contracting agents to choose their contracting partners or to vary the terms they offer different partners (pp. 188-213). Here, he organizes his discussion of the existing literature self-consciously by theoretical orientation, discussing in succession autonomy or deontological theories, utilitarianism, efficiency theories, specifically distributive justice theories, and communitarianism. Having noted the points of agreement and disagreement among these theories — and having reconstructed them, where necessary, so that they address specific points such as invidious discrimination, discrimination based on statistical generalizations, and affirmative action programs — he formulates his conclusion as follows:

Where does all this leave us? It might be felt that the normative theorizing surrounding the issue of discrimination . . . is both ethereal and indeterminate However, the various perspectives canvassed above in fact reflect views that are intensely held (albeit perhaps at a more intuitive level) by substantial segments of the population in most communities, so that we cannot afford to dismiss the challenge of developing a normatively coherent perspective on the case for anti-discrimination laws as applied to private conduct. In terms of forging some common ground among these various perspectives, which all adopt in one form or another the concept of equality as a central premise, I believe that the following set of policy orientations reflect the contours of the widest potential range of convergence. First, invidious forms of discrimination should attract strong public and private legal sanctions. Even classical liberals, who emphasize the centrality of autonomy values, should be prepared to accept a harm principle that recognizes a failure to accept the equal moral agency of other individuals as a transgression of this principle. . . . The issue of statistical discrimination is somewhat more complex, but if we accept the importance of social, cultural, and historical contexts, the use of either direct or indirect statistical proxies that systematically encumber individual members of historically disadvantaged groups . . . should not be tolerated, whether these statistical proxies are on average accurate or not. . . . With respect to further demand-side policies, strong-form affirmative action programmes create major moral dilemmas for most of the normative theories canvassed above. I believe that the severity of these dilemmas can be mitigated in several ways. [pp. 208-09; footnote omitted]

This way of proceeding, which may seem simply commonsensical, rests in fact on a very distinct methodological premise. Of course, if all relevant theories honestly can be seen to converge on the same practical outcome, as this passage suggests may be the case regarding invidious discrimination, there is not a whole lot to worry about. But what is the purpose of seeing, in the cases of disagreement, how many theories support a particular program, or of

recasting the programmatic particulars to mitigate the severity of the remaining dissonance? At points Trebilcock seems to suggest that the purpose is political — that he is carrying out a task akin to a legislative leader counting the votes for and against a proposed statute. But if that really were the task, Trebilcock would need to provide much further contextual data. So I take it that his true goal is to develop the “normatively coherent perspective on the case for anti-discrimination laws” to which he alludes. On that basis, the claim is, roughly speaking, that theoretical value is additive — that a particular conclusion is more likely to be true when different theories converge on it.

Besides employing a weak theory and looking for theoretical convergence, Trebilcock uses a third approach for resolving theoretical disputes, that of correlating partial truths with the particular domains to which they especially apply. Indeed, in the concluding chapter, he offers an extended treatment of one form of this approach, the form often referred to as “institutional competence.”

Although I do not pretend to be able to offer a meta-theory that weighs or ranks these various values [efficiency, distributive justice, community, etc.], I believe significant progress can be made at a lower level of abstraction by identifying the institutions or instruments which are best placed, among the array of instruments and institutions available to a community, to vindicate these values. . . . In other words, it seems important that we try to think clearly about an appropriate institutional division of labour for vindicating these values, recognizing that they all command legitimate adherence. [p. 248]

Getting down to specifics, Trebilcock starts by drawing a dividing line between “The Common Law of Contracts” and “Contract Regulation,” largely by distinguishing concerns that are situation-specific from concerns that are systemic. On this basis, for example, some parts of the large topic “coercion” belong in court, and some in the legislative and regulatory realm. He then goes on to what he calls “The Unfinished Normative Agenda” — distributive concerns for which neither case law nor regulation provides, in his view, an adequate answer. Here, he greatly prefers governmental action that promotes the development of human capital and opportunity to that which merely transfers wealth, and in a very interesting concluding section — although one that is not very well integrated with the rest of the book — he discusses the possibility of building institutions that will make this new sort of humane governmental action a reality.

Despite the considerable detail of this concluding section, the institutional-competence approach, at least as here presented, makes only very partial headway toward resolving the conflicts presented in the rest of the book. It does serve to shift certain issues away from the domain of the judge — although some of the

underlying theories would contest the desirability of even this change. But when these issues arrive on the doorstep of an agency or legislature, they have not gone away, and Trebilcock does little to show that they suddenly have become more tractable. For example, in considering from this perspective the point that parties' preferences may merely reveal how they cope with circumstances we should consider hopelessly unfair, he initially observes that "courts also do not seem well-equipped, in the context of two-party contract disputes, to make generic judgements about historical or social processes that may have led to adaptive preferences on the part of individuals or classes of individuals" (p. 249). Fair enough. But when he turns to generic forms of lawmaking, through legislation or administrative regulation, he has this to say about the same problem:

For those who take the view that adaptive preferences are a pervasive and serious problem, extensive forms of contract regulation would on that account be justified. I am deeply sceptical of, and troubled by, this rationale for contract regulation. It has no natural or inherent limits if one accepts that most preferences are socially shaped or constructed, and at the limit it is a license for tyranny or authoritarianism.
[p. 251]

Again, perhaps, fair enough — but certainly a shift of ground! Now the very systemic quality of regulation compared with adjudication becomes the problem rather than the cure, and the ultimate ground for resolution turns on a choice among values rather than among legal institutions.

The upshot of Trebilcock's use of these three techniques — a presumptive weak theory, the search for convergence, and differentiation according to institutional competence — is that this book, which discusses theory after theory of contract law, is in fact deeply untheoretical. Indeed, it is untheoretical in three separate ways. First, the very act of discussing theories on the basis that each could own part of the truth, or be sometimes the proper theory to apply and sometimes not, ignores the assertions of comprehensiveness and exclusivity implicit in many of these theories. Utilitarianism, for example, claims to cover all social action and, in principle, to give mandatory answers — if this contractual arrangement maximizes welfare it must be enforced, and if it does not, it must not. Even theories that may not have a mandatory answer for every question surely claim to exclude many of the possible rival answers. Kantianism, for example, is not neutral toward utilitarian answers — it positively rejects many of them because they treat people as means rather than as ends. Indeed, it is a feature of the theoretical imagination to have this imperial grasp; it is the very act of following thought very far along a particular dimension that gives theory its potentially transformative power.

Second, whether or not the particular methods Trebilcock uses for resolving theoretical disputes are themselves capable of theoretical statement, he does not provide any such account. He does not, so far as I can see, provide a defense either of his implicit choice of weak theory or, more significant from a methodological point of view, of the proposition that a theory that is not strongly true still can be employed in a presumptive fashion. He does not provide any defense of his use of a method of convergence. He does, as already said, make a somewhat extended effort, in his concluding chapter, to lay out what he terms "The Institutional Division of Labour," but, for reasons already suggested, the effort is not fully adequate.

Third, Trebilcock uses each of his methods episodically. Some chapters, for example, give almost no consideration to the institutional implications of alternative formulations. If Trebilcock means to employ several different techniques, as he seems to, then his account, to be theoretically satisfying, must provide an explanation for why one technique applies in the one case, and another in the other. As far as I can see, he never provides such a justification.

It might be thought, as a consequence of these points, that this book's singular excellence lies in its scrupulous reporting about, and comparison of, what others have written, and that its principal flaw lies in its untheoretical approach to resolving theoretical disputes. But this conclusion depends on the assumption that we ought, in the end, to have either a single, consistent theory of contract law, or a metatheory that tells us which of several partial theories should govern a particular instance. One might go the other way, and say that Trebilcock's instinct is right, that in the end we do not want a single, consistent, theoretical statement of contract law. On that view, the flaw in the book is not its attitude toward its subject, but its failure to work out and justify what is in fact a good approach.

Several things speak in favor of this latter assessment. To begin, if we were to seek a single, consistent theory of the matters covered by the term "freedom of contract," we probably would not desire a theory of contract law *per se*. True, some of the theories Trebilcock discusses are theories of contract — most notably Professor Fried's "contract as promise"⁸ — but most are more general and organized along different axes. This is not accidental; what the law treats as a matter of "contract" is rather conventional and compounded at least as much by history and by particular institutional arrangements as by logic. There is no reason to expect the boundaries of any theoretical treatment to match or even to resemble closely the boundaries of the legal entity.

8. See FRIED, *supra* note 2.

If, then, the probable universe of theoretical candidates are general social, political, and philosophical theories — social contractarianism, utilitarianism, Kantianism, communitarianism, and so forth — we face several well-known problems in using these theories to decide questions like what background conditions are sufficiently objectionable that contract terms induced by those conditions should be voidable for duress, or what information known to one party alone must that party reveal to the other party before a deal is closed for the deal to be enforceable. For those theories that rely primarily on deduction, the logical connections between the theoretical abstractions and the particular rules tend in practice to be more contingent, or “looser,” than the theoretical imagination supposes. For those theories that depend on knowing empirical consequences, the fixed principles often dissolve when faced with alternative and, practically speaking, untestable visions of how the world works. Furthermore, for any theory, when applied to the richness of life, there is always the tug of the story, the impulse to respond to the “equities” that lack formal relevance at all. Trebilcock often asserts that the theories he addresses are indeterminate regarding the matter at hand; this is not an accidental feature of the situation.

Moreover, because the likely candidates are broad social theories, they are not only contestable on political grounds, but in fact are contested. Perhaps the law could be used as an instrument to instantiate the clear victory of one such view. But as a practical matter, in the liberal, democratic market societies envisioned by Trebilcock, law serves much more the function of mediating among different theoretical perspectives than of declaring a winner. Perhaps a metatheory that would put each substantive theory in its place also could fill that function, but that only would remove the problem to a yet higher level of abstraction.

In short, there is much to recommend the proposition that “doing law,” or at least “doing contract law,” is substantially different from “doing theory.” At the same time, it is clear from the wealth of material displayed in this book that no sensible thinker about contract law should turn his back on what can be learned from theory. But if that is so, then it is not easy to say what the connection between “doing law” and “doing theory” ought to be. The net effect of Trebilcock’s approach is to turn “theories” into “perspectives” — interesting points of view that show us important angles on legal issues. Surely theoretical inquiry should, by taking premises very seriously and carrying them to their logical conclusions, make possible vistas we otherwise, wearing the blinders of common sense, would not see. However, this approach inherently rejects the claims to systematic truth or validity made by most, if not all, of the relevant theories. If we reject those claims as not appropriate to

the task of doing law, we need some alternative account of what we do propose to do. We need our own, if not theoretical, at least methodological account of how we intend to put various perspectives together within the legal enterprise, and of why this approach is a sensible way to proceed.

This challenge faces all present-day scholars of contract law, not merely Professor Trebilcock. There has been very little recent writing that, while not adopting a particular social or political theory, recognizes the place of theory and tries to give an account of what properly constitutes doing contract law in a multitheoried universe. Probably the last such effort that is widely known is the work of Karl Llewellyn.⁹ But Llewellyn's well-known solution — "situation sense" — self-evidently produces highly contextual results and will not serve the purposes of those who, like Professor Trebilcock, think it important to maintain contract law as a doctrinal system.¹⁰ In addition, needless to say, the world of legal theory has become considerably more sophisticated since Llewellyn wrote.

This book — *The Limits of Freedom of Contract* — does an outstanding job of presenting the contract law writings of the present generation of theoretical scholars. It is a considerable achievement to organize the ideas of so many thinkers into one grand conversation. The honesty with which the author presents the work of others, his reactions to their work, and the bases for his conclusions are all admirable. Nevertheless, even after this excellent book, work of a very fundamental sort remains to be done.

9. I am assuming that Llewellyn's jurisprudence, as most notably set out in KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960), was connected closely to his substantive studies in contract law.

10. For a discussion of Llewellyn's approach, see Todd D. Rakoff, *Implied Terms: Of 'Default Rules' and 'Situation Sense,'* in *GOOD FAITH & FAULT IN CONTRACT LAW* (Jack Beatson & Daniel Friedmann eds., 1995).