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SYMPOSIUM—*CONTRACT AS PROMISE* AT 30: THE FUTURE OF CONTRACT THEORY

Contract as Meaning: An Introduction to "*Contract as Promise* at 30"

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I. INTRODUCTION

Charles Fried wrote *Contract as Promise*[1] because he objected to the idea—growing increasingly prevalent in the years preceding the book's publication—that something other than moral duty underlay the social institution through which the state intervenes to enforce, at the request of one private party, the promissory obligations of another private party.[2] Under one view, for example, contract law is a product of social development since the Industrial Revolution, the means by which large, impersonal institutions—corporations, unions, governments—regulate their affairs.[3] According to another line of thought,

* Associate Professor, Suffolk University Law School. We are indebted most of all to Charles Fried for his iconic work and his enthusiastic and open-minded embrace of this symposium. I am overwhelmed by the intellectual energy reflected in these papers, as well the presentations and commentary at the symposium that are available by online audio but not otherwise reduced to writing. I am solely responsible for the summaries, and I acknowledge they in no way capture the richness of these papers or the presentations, each of which deserves to be considered in the original. I offer them merely as one observer's introduction to a remarkable collection of insights, and from that observer's point of view. All of the oral proceedings are available for free download at Suffolk iTunes, http://itunes.apple.com/institution/suffolk-university/id388450120.

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1. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).
2. Charles Fried, Contract as Promise *Thirty Years On*, 45 SUFFOLK U. L. REV. 961 (2012).
3. *Id.* at 961-62; *see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 405-19 (1979);

contract law is merely a way of doing justice and imposing social policy on parties who have come, in one way or another, to interact with each other.[4] Professor Fried perceived a wholesale abandonment of the justification of contract law as a means by which the state affirms classically liberal individualism. Or, as he put it, "[t]he validity of a moral, like that of a mathematical truth, does not depend on fashion or favor."[5] The book is an unapologetic paean to Enlightenment (and particularly Kantian) conceptions of the free and autonomous self, able to injure another not just by way of inducing detrimental reliance, but also by acts of individual will that create disappointed expectations and undermine trust in the recipient of a promise.

For most of the thirty years since its publication, *Contract as Promise* has carried the lion's share of the burden of deontological justification for contract law as against theories grounded essentially in consequentialism (the underlying moral basis of welfare economics) or sociology. This issue of the *Suffolk University Law Review* records a celebration of a man and his work that has stood the test of thirty years' time as theoretical explanation, normative assessment, and an essential lightning rod for thinkers whose philosophical inclinations may well not accord with Professor Fried's. On March 25, 2011, we gathered a stellar group of Professor Fried's friends, admirers, and critics (not mutually exclusive categories, by the way) to consider the impact of his arguments, the current state of contract theory, and the likely direction of future work in the field.

II. THE PRACTICAL RELEVANCE OF CONTRACT THEORY

In this introductory essay, I want to assess this intense exercise in contract theory less for the merits of any particular position as much as to address a current criticism of legal academia, most recently articulated by the Chief Justice of the United States, that what law professors spend their time theorizing about is not of much value to what real lawyers do in their professional lives.[6] As someone who practiced before entering the academy for twenty-six years as a litigator, transactional lawyer, and business executive in matters ranging from the mundane to the arcane to the global, and has since taught contracts and written about contract theory, I am fully aware of the

Roscoe Pound, *Contract or Bargain*, 33 TULANE L. REV. 455 (1959).

4. FRIED, *supra* note 1, at 3; *see, e.g.*, LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA (1965); GRANT GILMORE, THE DEATH OF CONTRACT (1974); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, chapter 6 (1977); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 356 (1979).

5. FRIED, *supra* note 1, at 4.

6. Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES, (May 21, 2011), http://www.nytimes.com/2011/05/21/us/politics/21court.html?pagewanted=all ("The justices had very little good to say about articles published in law reviews. 'What the academy is doing, as far as I can tell,' Chief Justice John G. Roberts Jr. said, 'is largely of no use or interest to people who actually practice law.'").

tensions between pure thought and practical training in the idiosyncratic institution that presently constitutes the American legal academy. With all due respect to the Chief Justice, our job as educators is not merely to train doctrinal technicians, but also to groom what I will refer to as "lawyer-theorists." I want to suggest in this introductory essay that we need *more* theory of the kind contained in this issue, not less, or perhaps better put, more opportunities for thinking *about* theory in the way a reflective practitioner might conceive of it.[7] My theme is the relation of theory to practice, particularly in contract law, and why a theoretical orientation, broadly speaking and whether or not so conceived or not by the practitioner herself, is fundamental to that practitioner making good judgments.

Law students enter our classrooms and we teach them to think like lawyers. What that really means is that we ask them to set aside their pre-existing organizing principles and learn new ones. The Carnegie Report's conclusions are consistent with my admittedly casual empiricism about how our profession gets inculcated in a particular manner of organizing the myriad data the world presents us. This is the tradition at least since Langdell's revolution in making the disciple of law a science[8]: "law schools emphasize the priority of analytic thinking, in which students learn to categorize and discuss persons and events in highly generalized terms."[9] The pedagogical method itself tells students that their profession entails "a particular way of thinking, a distinctive stance toward the world."[10] We tell our students to put aside their pre-existing theories about the world in the interest of professional competence; as the Carnegie Report states, "the case-dialogue method offers both an accurate representation of central aspects of legal competence and a deliberate simplification of them."[11] And what is the effect? Students learn to abstract from the real-life situations those facts that are critical to the application of formal rules in the pursuit of a client's cause.

In my own experience as a litigator, for example, when after the long slog of discovery, I finished the trial brief that set forth our legal theories and the facts we expected to adduce at trial, I had indeed put my reductive training to work. What is litigation if not, as the Carnegie Report suggests, the task of "redefining messy situations of actual or potential conflict as opportunities for

7. Donald Schön at MIT coined this term. My colleague, Bill Berman, referred me to Schön's work after listening to one of my faculty workshop talks, and it has significantly influenced my thinking. *See* DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987); DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).

8. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (Boston, Little, Brown & Co., 1871); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

9. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (SUMMARY) 5 (2007) [hereinafter CARNEGIE REPORT].

10. *Id.*

11. *Id.* at 6.

advancing a client's cause through legal argument before a judge or through negotiation"?[12] These were legal skills *par excellence*: the slicing, dicing, and sorting of disputes into factual nuggets that the algorithms of legal rules would act upon to spit out a result in my clients' favor.

Contract law in particular reflects one set of organizing principles, those by which lawyers come to simplify and organize, in the transactional setting, what the Carnegie Report calls "the rich complexity of actual situations that involve full-dimensional people."[13] Being an effective transactional lawyer goes beyond learning first year contract doctrine, or even learning contract drafting or negotiating skills, the kind of things the profession now seems to demand, not unreasonably, of law schools.[14] But contrast the role of lawyers in a complex business transaction to the role they play in litigation. In litigation, lawyers are unquestionably the generals. In transactions, lawyers are important players, but even when they are leaders, it is almost always as part of a multi-disciplinary team. The Carnegie Report captured the connection between legal education and the all-too-common perception that some business lawyers are deal killers: "At a deep, largely uncritical level, the students come to understand the law as a formal and rational system, however much its doctrines and rules may diverge from the common sense understandings of the layperson."[15] Not to overstate the distinction, because good trial lawyers know how to appeal to common sense lest they lose credibility before a lay jury, but transactional lawyers operate outside the contrived theater of the deposition or the trial; they are playing on the layperson's turf, not the other way around.

It takes a lawyer-theorist, whether she conceives of herself that way or not, to be able to know when even important transactional, lawyerly tasks are often

12. *Id.*

13. CARNEGIE REPORT, *supra* note 9, at 6.

14. I do not mean to minimize the extent to which being an effective trial lawyer also entails learning more than legal doctrine and more than mere technical trial advocacy skills.

15. CARNEGIE REPORT, *supra* note 9, at 5. As I write this in the spring of 2011, the National Football League owners have locked out the players as part of a labor dispute. Reportedly, the negotiations were progressing until the lawyers came back in the room.

> At a time when many are waiting for and anticipating a deal between owners and the NFL Players Association, there was a point Tuesday when talks clearly regressed.
>
> One person close to the talks went so far as to say, "This almost blew up yesterday."
>
> How close it got to that point is a matter of opinion. The moment may have come shortly after lawyers from both sides were brought back into the process at an undisclosed location in the Washington, D.C., area.
>
> As tensions rose and anger grew, two sources said NFLPA leader DeMaurice Smith instructed his lawyers to "stand down."
>
> With lawyers removed from the direct negotiations, the process was said to be getting back on track and to be in a good spot.

Adam Schefter, *Sources: Still Much Work to Do in Talks*, ESPN.COM (June 16, 2011, 11:00 AM), http://sports.espn.go.com/nfl/news/story?id=6663832.

significantly less than the whole transaction or, as the Carnegie Report suggests, to be able to connect the law's simplifications to the complexity of real life. At its most fundamental, theory is making sense and imposing order, whether it is of the natural world or the moral realm. While academic theorizing is generally characterized by, in Robert Scott's words, precision in language and thought, the impulse to theory is simply a subset of the *a priori* (or evolutionarily hardwired) need to see the world in an ordered and predictable way. Academic theorizing is different from, but not unrelated to, the kind of sense making we do every day.

Hence, theory matters to everyday lawyer-theorists, not because it necessarily operates at the front of the mind when lawyers or their clients transact or litigate contracts, but because it is a reality of the human condition that each of us makes sense of the world through our subjective frames and points of view. Ordinary people may not call that "theory," but I have a capacious (and Kantian) view of theory as *a priori* organizing principles. Kant's insight was that our minds are predisposed to find purpose and order in nature even though we have "absolutely no a priori reason for presuming"[16] such purpose or order. Experience itself, says Kant, cannot prove to us the actual existence of such order; "there must then have preceded a rationalizing subtlety which only sportively introduces the concept of purpose into the nature of things, but which does not derive it from Objects or from their empirical cognition."[17]

Even in the hard sciences, descriptive theories, or explanations of the "is," merge subtly with normative theories, or justifications of the "ought." The reason is that we all seem to start with the usually unexamined presumption that the physical world, the "is," has a discoverable order to it and we *ought* to be able to discover what that order is. In his concluding commentary to the symposium, Robert Scott touched on this idea. In academia, the presumption of order, and hence theoretical explanation, is the *sine qua non* of any conversation; a discussion that seems "anti-theory" or unduly capacious must avoid the charge that it is simply "lazy thinking masquerading as theory" or,

16. IMMANUEL KANT, CRITIQUE OF JUDGMENT 153 (J.H. Bernard trans., Dover Publ'ns, Inc. 2005) (1790).

17. *Id.* The novelist Bruce Duffy captured this concept perhaps more accessibly in his fictionalized account of Ludwig Wittgenstein's doctoral *viva voce* (the British term for the oral examination) before Bertrand Russell and G.E. Moore. Duffy's Wittgenstein expresses his disillusionment with his own attempt, in the *Tractatus Logico-Philosophicus*, to capture a universal truth about language. He explains,

> I was captive to the illusion that, because there is a prior order to the world, there must be an *essence* to language — that my inquiries would yield a unified and utterly simple solution of the purest crystal. Much of this problem, I think, can be traced to this . . . *scientific* craving, this craving for *generality* that seems to permeate our thinking.

BRUCE DUFFY, THE WORLD AS I FOUND IT 466 (1987).

worse, mere brute *ipse dixit* of Dean Scott's *bête noir*, the "wise man."[18]

Moreover, not only do we expect orderly explanations, but we also expect those explanations to be both coherent and optimally correspondent. One theme of these papers, for example, is that Charles Fried's promise theory of contract law is unduly incomplete. Randy Barnett, Barbara Fried, and Richard Craswell observe that the promise principle fails to account for significant aspects of contract doctrine that seem inconsistent with the principle; Jean Braucher notes that the theory does not account for contracting behavior in action, and Nathan Oman contends that, even on moral terms, the promise principle cannot explain the bilateralism of damages or the private standing of plaintiffs. Why is this relative incompleteness a fair criticism of a theory? One need not dabble in metaphysics to accept that organizing principles underlying theory itself, like completeness, are *a priori*. Even Quine, the empiricist *par excellence*, thought there were five "virtues underlying hypotheses: conservatism, modesty, simplicity, generality, and refutability."[19] Thomas Kuhn made a similar point in connection with theory choice when the evidence confirming hypotheses is capable of supporting more than one: a good scientific theory should be accurate, consistent, broad in scope, simple, and fruitful of new research findings.[20]

Lawyers, particularly litigators, use a particular set of organizing principles to theorize human interaction in which events may be meaningful as legal *causes of events* in a way that is distinct from events being meaningful as *justifications for action*. We do not seek to justify the equilibrium-seeking nature of a toilet bowl float or a market; we seek simply to understand what appear to be physical or social mechanisms so regular that we can propose descriptive and predictive theories or laws. At the risk of stretching a metaphor too far, there is something that is reminiscent of seeking equilibrium in the process by which transacting parties reach an agreement. The discussion resembles the oscillations of a wave as the parties stake out their positions, including all the "wanna haves" with the "gotta haves;" as the parties compromise, the amplitude of the wave reduces, and the equilibrium state is agreement.[21] Notwithstanding the physical metaphor, it is fair to say that the

18. Robert E. Scott, *Comments on "The Future of Contract Theory," available at* http://itunes.apple.com/us/podcast/the-future-of-contract-theory/id388453580?i=94188629.

19. W.V. Quine & J.S. Ullian, *Hypothesis*, *in* INTRODUCTORY READINGS IN THE PHILOSOPHY OF SCIENCE 404, 405 (E.D. Klemke, Robert Hollinger & David Wÿss Rudge eds., 3d ed. 1998) ("Hypothesis, where successful, is a two-way street, extending back to explain the past and forward to predict the future. What we try to do in framing hypotheses is to explain some otherwise unexplained happenings by inventing a plausible story, a plausible description or history of portions of the world.").

20. Thomas S. Kuhn, *Objectivity, Value Judgment, and Theory Choice*, *in* INTRODUCTORY READINGS IN THE PHILOSOPHY OF SCIENCE, *supra* note 19, at 435, 436.

21. Juliet Kostritsky's paper draws on precisely this metaphor, turning to neuroscience in order to claim, "parties, because of the way that their brains are wired, settle on practices or agreements that are efficient equilibria to solve whatever problem needs solving." Juliet P. Kostritsky, *The Promise Principle and Contract*

meaning we take when the toilet tank fills and the water stops running, is far different from the *meaning* we take when the negotiating stops and the parties sign their contract. Moreover, there is no subjective meaning for the toilet, only the meaning taken by observers of the physical process. In the contract negotiation, each of the participants is capable of drawing meaning from the manifestations of the other, and that meaning may or may not coincide with that which might be imputed from an objective non-party observer of the transaction. In the subsequent litigation over the contract, only a limited number of events suffice as *legal* causation relevant to *legal* outcome, even if the contract has meaning to the parties apart from the import of words and phrases within it.

The recent movie, *The Social Network*, makes concrete this distinction between events as legal causation and events as justification. The film purports to recount the circumstances by which the founders of Facebook received shares of common stock in the corporate reorganization necessitated by venture capital investment. Eduardo Saverin, the young chief financial officer and Mark Zuckerberg's best friend, signs his stock purchase agreement for 34% of the company, unaware that only he, and not the other founders, is subject to dilution of his interest upon new investment. Eduardo flies to San Francisco to learn that he has been terminated and diluted to .03 percent of the company. This was the dialogue reflecting what would be Zuckerberg's position after reduction to its legal essence:

> *Zuckerberg*: You signed the papers.
>
> *Saverin*: You set me up.
>
> *Zuckerberg*: You're gonna blame me because you were the business head of the company and you made a bad business deal with your own company?[22]

From Eduardo's standpoint, the mere contract language did not reflect the rich complexity, including events as justification. There is a deeper conflict between the nerdy Mark and the connected Eduardo. Says Eduardo, "Tell me this isn't about me getting into the Phoenix [a Harvard final club]." It is not just about the money; it is about Eduardo's place in the world he and Mark have created: "This is like I'm not gonna be a part of Facebook." Eduardo accuses Mark of having planted a newspaper story that embarrassed Eduardo, and says, "And I'll bet what you hated the most was that they identified me as a co-founder of Facebook, which I am."[23] Whether or not this is factually accurate, the narrative nevertheless resonates as a common one.

Interpretation, 45 SUFFOLK U. L. REV. 843, 845 (2012).

22. THE SOCIAL NETWORK (Columbia Pictures 2010).

23. *Id.*

Consider, for example, the *ketubah*, or Jewish marriage contract, written in Aramaic, which has hung on the wall of our home for more than thirty-one years. In Jewish tradition, the rite of marriage is not as much a sacrament to God as it is a matter of nuts and bolts contract between the betrothed individuals. It lays out a specific set of legal duties and obligations of husband and wife, and those obligations may be the basis of claims in a rabbinical court (a *din torah*). What exactly does that contract *mean*? Does it rest solely on the promise principle or could it be explained as a matter of the maximization of our joint utility? Are the words and phrases in fact meaningless but the ritual meaningful? All the theories are plausible; none wholly explains our experience. What the Carnegie Report tells us is that the law schools would have our students parsing the language of the *ketubah* for its legal meaning, and failing to understand, at least as a result of their legal education, that it has social, ritual, psychological, religious, and philosophical meaning as well.

Within the law school curriculum, contract law sits at a unique juncture of normative and descriptive theory and thus provides an avenue for connecting legal analysis with the non-legal meaning that simultaneously arises in the complexity of actual situations. As Barbara Fried observes in her paper, even Holmes got it wrong when he analogized contract law to tort law.

> In the case of conduct regulated by tort law, criminal law, or other mandatory regulatory regimes, we do not voluntarily assume the relevant standards of conduct; they are imposed on us for the good of others. . . .
>
> But contracts are a very different case, precisely because the duties in question are voluntarily assumed.[24]

It is not just, however, that the duties are voluntarily assumed. It is that the private law between the parties arises out of the rich complexity of actual situations, like those in the founding of Facebook, and not by legislatures, judges, or drafters of the Restatement (Second) of Contracts. Contracts express one particular framing of the relationship of the parties, but they are often not, even in the corporate world, the sum total of that relationship.

Here is an example of this latter point. Years ago, I was involved as a lawyer and business executive in the creation of a complex joint venture in Europe. The parent companies had complementary businesses, and there were clear cost and growth synergies available if the businesses were to be combined. Neither company was willing to sell its business to the other. The industrial logic of the situation dictated that the venture be organized as a single company to which each parent would contribute the relevant assets. The

24. Barbara H. Fried, *The Holmesian Bad Man Flubs His Entrance*, 45 SUFFOLK U. L. REV. 627, 641 (2012).

problem for one of the parents, however, was that the tax law of many European countries did not recognize, as does United States tax law, the concept of a tax-free contribution to a newly formed venture to be owned by the contributing venturers.[25] Because the assets of the parent had a low tax basis but substantial current market value, a number of the European countries would have recognized substantial capital gains on the transaction, creating a prohibitive tax liability even though there was no cash changing hands. We dealt with this ingeniously (so we thought as lawyers) by creating a "virtual organization" in which the parties never formed a new company, never contributed assets, but operated under a complex web of lease, management, and services agreements. In terms of the legal effect, there was simply no difference between what we created and forming the venture under the umbrella of a single company. At least that was the legal and tax theory!

Within a short time, it became clear that the venture did not work. The organizational logic, so clear to us as lawyers, was insufficiently transparent to the two business organizations. Being organized as a single company with a single chief executive officer had a meaning to the employees that transcended the legal logic. Functional, product lines, and regional turf battles, present in even the most tightly integrated businesses, were largely unresolvable. Even though both parents vested authority under their management contracts in a single managing director, it was clear that very few people saw the relationship as permanent, or believed that their primary loyalties needed to be directed to the venture rather than their parent companies. The form of organization we had chosen evoked meaning far removed from anything we had considered as legal or tax technicians.

The particular article of faith (or fundamental organizing principle) reflected in our joint venture documentation was that there is or should be a rational linkage between before-the-fact and after-the-fact aspects of the transactional life cycle documented in the contract. A transactional lawyer in this conception serves her client by creating the optimal formal model of the transaction, the essence of which is that it contains something substantially less than all of the information that constitutes the transactional relationship, lest every contract be of infinite length. That is merely one theory of the transaction: the one lawyers use to filter out the legally irrelevant facts in creating the model. The unstated but overarching thread running through all of the papers in this symposium is the question: What are we doing or, alternatively, what should we be doing when we reduce a relationship to a legally binding agreement? The theoretical discussion in this issue concerns the ideals and values that the after-the-fact law of contracts *ought* to affirm, on one hand, and what contract law on the ground

25. *See* I.R.C. § 351 (2006): "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation."

and in action really *is*, on the other. Is contract law a descriptive exercise—a matter merely of reconstructing the reality of what the parties really wanted? Or is it a normative exercise—a matter instead of affirming a moral value like trust or advancing social policy like welfare maximization?

The answer is that it does both, and thereby invokes variously the need to explain the "is" of contract law in descriptive theoretical terms, and the need to justify the system by way of congruence to the normative "ought" of moral order. Tort law, for the very reason Barbara Fried advanced, only really invokes the latter normative concerns. It is simply an after-the-fact application of mandatory standards to a static set of facts. We can debate whether there should be strict liability, for example, or whether it is fair to eliminate the possibility of recovery if the victim's own negligence contributed one shred of causation to her injury. Moreover, manipulation of those standards may have consequences.

But in tort or criminal law the parties themselves are not, as in a transactional setting, creating the standards by way of their own inter-subjective legislation. Even that distinction understates the difficulty confronting the contract theorist. As Randy Barnett, Barbara Fried, and Jean Braucher, among others, observed, we have no infallible access to the subjective will of the parties to a transaction. Our conclusions about the "is" of the transaction—the parties' notional "mutual intention"—arise, in most circumstances, from what we think most people "ought" to have intended in those circumstances. In short, default rules are both descriptive because we use them to draw theoretical conclusions about what actually happened, and normative because we derive them not just from what people usually do or think, but what we conclude people normally ought to have done or thought in the circumstance. But contracts and contract law constitute merely a particular theory of relationships. In my joint venture example, the legal theory of the relationship was simply blind to the more significant organizational behavior, psychological, or sociological theories that might have predicted the problem. Indeed, the structure dictated by the legal and tax theory actually contributed to the operating problem.

This, then, is my defense of theory, and my answer to the Chief Justice. Let a hundred flowers bloom, and a thousand theories of contract law contend.[26] The ties that bind us, like the ties that bound Mark Zuckerberg and Eduardo Saverin or the ties that bound our European venture, are immensely complex, and incapable of being cabined merely into the promise principle, on one hand, or the maximization of joint seller and buyer surplus, on the other. Do contracts affirm promises in a moral sense, even among business people? Yes. Do contracts represent a check against opportunism? Yes. Do contracts serve

26. For another defense of theory for the practical lawyer, see Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271 (1994).

a ritual function? Yes. Do our default rules in contract have an empirical and descriptive element? Yes. Do our default rules in contract have a normative element? Yes. Are there multiple private and public meanings, and hence multiple explanations and justifications for the particular set of algorithms we teach as contract law? Yes. Do we owe it to our students to reflect upon these explanations and justifications in order to set contract law, as it rightfully should be, within the complex web of actual situations, and not merely as an abstract and purely "legal" simplification? Yes.

If the legal simplification (i.e., legal theory) were all there was to the lawyers' judgment in the ensuing litigation, then Eduardo Saverin ought not to have received a cent in settlement, at least as a matter of contract law. But he did. If legal and tax theory were all there were to organizing a business, we would not have spent another two years unraveling the web of the European venture. But we did. The reason lies in the fact that legal relationships, the ones lawyers are trained to see, do not exist in a vacuum. When, as the Carnegie Report notes, the doctrines and rules in the formal and rational system of law diverge from the common sense understandings of the layperson, it is often law that has to give. It takes a lawyer-theorist, broadly conceived, to understand that.

III. CONTRACT AS MEANING: AN OVERVIEW OF THE SYMPOSIUM

The papers in this symposium issue provide, individually, a rewarding insight into the minds of a group of accomplished theorists and, collectively, a unique conversation about the "is" and the "ought" of contract law. As Professor Fried noted in his opening remarks and in the essay that concludes this issue,[27] his book was a reaction in part to P.S. Atiyah's *The Rise and Fall of Freedom of Contract*, published two years before *Contract as Promise*.[28] In his own introduction, Atiyah disdained as misconception the force of mere promissory expectation: "A person whose expectations are disappointed, but who suffers no pecuniary or other loss from the failure to perform a promise, has surely a relatively weak claim for complaint or redress."[29] One can understand the classic liberal reaction to what Atiyah asserted both as fact and value, notwithstanding Atiyah's disclaimer that he neither approved nor disapproved of them.[30] Atiyah asserted as *fact* that "[p]romise-based liability rests upon a belief in the traditional liberal values of free choice."[31] But, contended Atiyah, "the whole trend of modern times is against arguments of

27. Charles Fried, Contract as Promise *at 30: Opening Remarks*, (Mar. 25, 2011), *available at* http://itunes.apple.com/us/podcast/contract-as-promise-at-30/id388453580?i=94188624; Fried, *supra* note 2, at 961.

28. ATIYAH, *supra* note 3.

29. *Id.* at 4.

30. *Id.* at 6.

31. *Id.*

principle of this character."[32] Some individuals were better equipped to benefit from free choice through aptitude, education, or wealth. So what, according to Atiyah, were the consequences of these liberal values put into action by contract law? "[T]he greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities."[33]

Even if the liberal theorist were to accept this as an accurate representation of the "is" of modern times, he would undoubtedly object to acquiescence in shaping contract law merely to reflect the *au courant* values. Jean Braucher is correct in her description of the "oughtness" of Professor Fried's endeavor: "It is a sacred vision of the rule of law enabling personal autonomy."[34] In his account, we are free to make our lives, just as we respect the freedom of others to do the same; in contrast to Atiyah, "[t]his ideal makes what we achieve our own and our failures our responsibility too—however much or little we may choose to share our good fortune and however we may hope for help when we fail."[35] In short, promise is the basis on which free and autonomous agents both serve their own ends and respect the humanity of other free autonomous agents. Regardless of the communitarian trend of the modern age, that is what the law of contract *ought* to affirm.[36] Charles Fried objected to a turn in intellectual history that held the commitment of a promise to be meaningless, certainly as a legal matter, and probably as a moral one.

The conversation about meaning stimulated by *Contract as Promise* began in the first panel, "How Moral Can a Contract Be?," with papers from Barbara Fried,[37] Randy Barnett,[38] Jean Braucher,[39] and Gregory Klass,[40] and commentary by T.M. Scanlon.[41] If Charles Fried's book was a reaction to Atiyah and others who contended that promise was not even *a* justification for contract law, these papers ask whether it is an overstatement to claim that promise is *the* justification for contract law, either as a private or public matter. There were three different strands here. First, is there a moral force in promising (an "ought") that is *a* justification for contract law, and, if so, does it

32. ATIYAH, *supra* note 3, at 6.

33. FRIED, *supra* note 1, at 8.

34. Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 SUFFOLK U. L. REV. 667, 670 (2012).

35. FRIED, *supra* note 1, at 8.

36. *Id.* at 17 ("To summarize: There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.").

37. B. Fried, *supra* note 24.

38. Randy Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647 (2012).

39. Braucher, *supra* note 34.

40. Gregory Klass, *Promise Etc.*, 45 SUFFOLK U. L. REV. 695 (2012).

41. T.M. Scanlon, *Comments on "How Moral Can a Contract Be?"*, (Mar. 25, 2011), *available at* http://itunes.apple.com/us/podcast/how-moral-can-a-contract-be/id388453580?i=94188628.

arise out of the willful action of a free, autonomous Kantian agent? Second, is the promise theory a true descriptive explanation of the source of contract law? In other words, is the promise theory capable of being both coherent and fully correspondent to contract law on the books? Third, even if coherent and correspondent to contract law on the books, does the promise theory do good explanatory work in terms of contract law in action?[42]

Randy Barnett and Barbara Fried each take issue with the explanatory power of the theory with respect to contract law on the books. Randy Barnett notes three problems with the promise theory: (a) its inconsistency with the objective theory of assent (under which the objective manifestations of assent trump an unexpressed subjective will); (b) its failure to explain gap-filling default rules where the parties have not made their intentions express; and (c) that promise theory would require courts to inquire into the moral merits of the parties in order to ensure that contracting parties had respected the other parties' humanity. Barnett argues that the concept of consent—the manifested intention to be legally, not just morally, bound—offers a more complete explanation and justification of contract law. The moral basis of consent is not the duty one might derive privately and subjectively (even through the application of something like the Categorical Imperative), but the duty that arises publicly when one's manifest intentions justify the state's use of coercion. Where "ethics" might describe the former, "justice" better describes the latter.[43] We might view Barnett's critique as going to the coherence and optimal correspondence of the promise theory as *explanation*. If promise theory fails to explain all doctrine, it is fair to propose something like "consent" as a more

42. Although unable to participate in the symposium itself, Brian Bix graciously submitted a paper within the scope of this panel. Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719 (2012). Professor Bix provides a measured view that *Contract as Promise* is less an attempt to provide a theoretical justification of all of contract law, then as "an important corrective for those who would disparage the role that the connected values of autonomy, will, consent, and promise play in (American) contract law." *Id.* at 734. Nevertheless, as Professor Bix observes, *Contract as Promise* was a significant catalyst to consideration of the limits of the Harm Principle as the theoretical justification for contract, in that contract law does provide an avenue for state enforcement of private promises, whether or not a broken promise constitutes "harm." *Id.*

43. For a more complete discussion of his consent theory, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). The crucial distinction, as noted, is that the consent theory emanates from a libertarian concept of public justice, in which individuals acquire entitlements in previously unowned property, have the right to the use of that property free from the interference of others, and the right, by way of manifest consent, freely to transfer that property to another. Hence, under the consent theory thus conceived, inquiry into the subjective will of the transferring individual is simply beside the point. The moral justification of contract law arises not out of Kantian duties, but out of respect for individuals' freely chosen, non-interfering, consensual, and manifest acts. "Consent is the moral component that distinguishes valid from invalid transfers of alienable rights." *Id.* at 270. Moreover, under Barnett's approach, a purely moral obligation only permits the obligee to secure it by way of voluntary act by the obligor. The moral aspect of legal theory arises in identifying those circumstances under which the obligor's original consensual transfer may now be enforced by the use or threat of legal force. *Id.* at 296.

complete alternative.[44] If Fried bends promise theory to fit the doctrine on the books (which he forthrightly has not), the theory becomes incoherent. Even Charles Fried might accept that criticism as well taken. The question is whether promise theory also needs correspondence and coherence as *justification*. That would seem to turn on whether Fried's claim is that promise theory is *a* justification or *the* justification for contract law. The question is whether affirmation of libertarian justice, as a more "complete" normative theory, is indeed a better source of meaning than the promise principle when it comes time to make hard decisions, as Barnett suggested in his seminal treatment of the consent theory, "for those cases at the margin where our intuitions are less secure."[45]

Barbara Fried's critique of liberal contract theory ("LCT") extends to the futility of finding private meaning *at all* in the objective manifestations of the parties. She contends that, whether the subject is contractual commitment or promissory commitment, the real question turns on what the parties meant when they made promissory noises about doing *X*, a task less of moral judgment than of interpretation. In other words, LCT proponents are not really making normative judgments about commitments but trying to figure out what commitments were made. The presumption of expectation damages as a default is as much a gap-filler as any other remedial presumption when the parties have not expressed a remedy. Says Barbara Fried, "LCT implies we should seek to fill the gap with our best guess as to what the parties intended, or what they would have said they intended if the question had been put to them at the time of the agreement."[46] By definition, if we do this, we are no longer dealing with the parties' intent, autonomy, or will.

Jean Braucher explores the meaning of contracts and contract law in a different way. The issue for her is not the congruence between morality and the law on the books, but separation between law on the books and law in action. Compare the metaphors to see the difference. Randy Barnett cites Charles Fried's own metaphor of law and philosophy as distinct realms. In this conception, philosophy is "an elaborate structure of arguments and considerations that descend from on high but stop some twenty feet above the

44. Indeed, Barnett so observed in his original presentation of the consent theory:

> Theories are problem-solving devices. We assess the merits of a particular theory by its ability to solve the problems that gave rise to the need for a theory. . . . [W]e compare contending theories to see which theory handles problems the best. . . .
>
> . . . When we assess legal theories, the better a particular theory explains cases where we are confident of the right outcome, the more confident we will be with the answers it suggests for those cases at the margin where our intuitions are less secure.

Id. at 269-70.

45. *Id.* at 270.

46. B. Fried, *supra* note 24, at 638.

ground"; law in contrast, serves "to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict."[47] To Braucher, Stewart Macaulay, and others of the law-in-action school, no contract doctrine, much less the morality, if any, on which that doctrine is based, is capable of explaining the mundane and self-interested (hence, "profane") system of contractual relationships that serve ordinary day-to-day business transactions.[48] In this view, legal doctrine is hardly a grounding of anything; to the contrary, "legal doctrine is typically at most a faint shadow over a small corner of the stage." That is not to suggest there is no morality in action in the marketplace, however. Braucher suggests there is one, but it is less the stern morality of promise keeping as a morality of adjustment, release, and forgiveness in contractual relations.[49]

Gregory Klass's essay considers reasons other than promise that can create obligatory meaning in either the moral or the legal sense. He observes that contracts often do not involve promises, such as implied in fact contracts in which the intention to be bound to an agreement is inferred from commonly understood signs of assent. Because individuals are capable of deriving such obligatory moral meaning from reasons like reliance, trust, or relationship, there are other possible moral accounts of contract law's duty-imposing function, including reliance, trust, or relationship. He examines arguments from Michael Pratt, Jody Kraus, and Seana Shiffrin about the relationship of contract and promise in light of this insight.

In his commentary, T.M. Scanlon noted that the morality of promises and the law of contracts are guided and justified by many of the same interests. He praised *Contract as Promise* for having identified the common interests, but cautioned against the use of the autonomy concept as justification for all of contract law. He contrasted appeals to autonomy with other more mundane interests, such as (a) wanting legal norms that variously (i) make it possible to stabilize our relations by way of binding assurances, (ii) create obligations when we want, and (iii) tell us what kind of obligations we have created, but, on the other hand, (b) objecting to legal norms that would create obligations when we did not want them. These more mundane interests would accomplish the task of justifying a contract law that protects interests, like promissory expectation, beyond the mere reliance interests. Fried's appeal to autonomy, Scanlon argued, goes too far; it invites a unitary and unvarying justification with a high moral tone, and distracts from a more helpful consideration of the

47. Barnett, *supra* note 38, at 664 (quoting Charles Fried, *Rights and the Common Law*, *in* UTILITY AND RIGHTS 215, 231 (R.G. Frey ed., 1984)).

48. Braucher, *supra* note 34, at 671.

49. *Id.* at 692-93; *see also* Jeffrey M. Lipshaw, *Freedom, Compulsion, Compliance, and Mystery: Reflections on the Duty Not to Enforce a Promise*, 3 LAW, CULTURE & HUMAN. 82 (2007).

multiplicity of circumstances, and thus the multiplicity of interests that might arise shaping a defensible public institution.[50]

The second panel, "The Ethics and Economics of Promising," with papers from Richard Craswell,[51] Avery Katz,[52] Daniel Markovits and Alan Schwartz,[53] and George Triantis,[54] and commentary by Seana Shiffrin,[55] presented an even starker contrast in the possibilities for contract as meaning. What is the appropriate aim of contract law? To what extent does law on the books promote the appropriate social values? To Richard Craswell, if there is an "ought" of contract law, it is the "ought" of neo-classical microeconomic theory: that contract law exists to facilitate social welfare, and if it is to be improved, it is not in terms of moral force, but in better service, more reliable products, and lower costs.[56] To Daniel Markovits and Alan Schwartz, the reasons for contract really depend on context; as Alan Schwartz observed in the discussion following the paper presentations, it is implicit in the contract between General Motors and General Electric that promises do not carry heavily moral overtones, at least in terms of the expected remedy, and that compensatory damages (including expectation damages) and not supracompensatory damages are the most likely to encourage the maximization of joint surplus, and thus to be encouraged. This is to be distinguished from a promise, say, to pick up one's spouse at the airport (see Nathan Oman's paper for a similar example), in which the idea of "promise or pay" would seem odd. George Triantis questions, as an empirical matter, whether the promise principle and a majoritarian default of expectation damages reflect the real or hypothetical choice of many or most contracting parties in view of the "heterogeneity in contract purposes and circumstances."[57]

If these papers fail to find a source of moral meaning in the public institution of contract law, Avery Katz and Seana Shiffrin each, like Charles Fried, find meaning in contract law as community affirmation of particular values. Professor Katz focuses on the doctrine of efficient breach to suggest that moralists seeking to explain their discomfort with the idea of money as a substitute for fulfilling the literal terms of the promise have been barking up the wrong "ought." In other words, paying money in lieu of performance may indeed be sufficient penance to discharge one's personal duty, and thus

50. Scanlon, *supra* note 41.

51. Richard Craswell, *Promises and Prices*, 45 SUFFOLK U. L. REV. 735 (2012).

52. Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777 (2012).

53. Daniel Markovits & Alan Schwartz, *The Expectation Remedy and the Promissory Basis of Contract*, 45 SUFFOLK U. L. REV. 799 (2012).

54. George Triantis, *Promissory Autonomy, Imperfect Courts and the Immorality of the Expectation Damages Default,* 45 SUFFOLK U. L. REV. 827 (2012).

55. Seana Shiffrin, *Comments on "The Ethics and Economics of Promising,"* (Mar. 25, 2011), *available at* http://itunes.apple.com/us/podcast/ethics-economics-promising/id388453580?i=94188625.

56. Craswell, *supra* note 51, at 776.

57. Triantis, *supra* note 54, at 840. Juliet Kostritsky's paper also extends this theme.

satisfying deontological concerns, but that efficient substitution may still fail to be virtuous: "a promise that can be satisfied with a cash substitute is a cheap and superficial one, and not the kind that we should valorize."[58] In her commentary, Seana Shiffrin reiterated her even more dramatic view that the divergence of contract law doctrine from the affirmation of the moral duty in promising, i.e., the real or perceived extraction of moral meaning from contract law, contributes to a general degradation of the kinds of moral values a liberal society should be encouraging.[59]

The third panel was "Promise Theory, Extended, Applied, and Critiqued," with papers from Juliet Kostritsky[60] and John C.P. Goldberg and Curtis Bridgeman,[61] presentations from Lisa Bernstein and Rachel Arnow-Richman, and commentary by Carol Chomsky.[62] Again, these papers and presentations reflected the myriad sources of moral and legal meaning in the complex web of actual situations.

Juliet Kostritsky's paper takes issue with the use of *a priori* principles as the source of a normative basis for contract law, and advocates bridging descriptive and normative theory by seeking the naturalistic basis for contracting practices. Her position evokes Kant's dictum that "ought implies can"[63]: Of what value is an ideal and aspirational contract law based on the promise principle if it does not lead us to crafting feasible rules of contract law based on what real people do use and want to use in reducing the barriers to efficient exchange? Moreover, her critique of *gedanken* (thought experiments) from *a priori* principle is not restricted to moral theories like Charles Fried's; pure economic theories equally "decide on the nature and shape of contract doctrine, while ignoring the players, their goals and their human characteristics."[64] The question I would pose to Professor Kostritsky is whether she has already assumed the answer in the way she has posed the question. The implicit

58. Katz, *supra* note 52, at 779.

59. Shiffrin, *supra* note 55; *see also* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

60. Juliet Kostritsky, *The Promise Principle and Contract Interpretation*, 45 SUFFOLK U. L. REV. 843 (2012).

61. John C.P. Goldberg & Curtis Bridgeman, *Do Promises Distinguish Contract from Tort?*, 45 SUFFOLK U. L. REV. 873 (2012).

62. Lisa Bernstein, Presentation, *Merchant Contracts as Promise* (Mar. 25, 2011); Rachel Arnow-Richman, Presentation, *A Contract Theory of Employment* (Mar. 25, 2011); Carol Chomsky, *Comments on "Promise Theory: Applied, Extended, and Critiqued,"* (Mar. 25, 2011). These presentations and commentary are available at http://itunes.apple.com/us/podcast/promise-theory-applied-extended/id388453580?i=94188627.

63. This principle appears in numerous places in Kant's writings on moral philosophy. For an example, see IMMANUEL KANT, CRITIQUE OF PURE REASON A807/B835 ("[S]ince pure reason commands that such actions ought to occur, they must be able to occur."). In other words, while pure, practical reason might lead us to a moral conclusion, we can only act on it within a physical world of experience.

64. Kostritsky, *supra* note 60, at 861-62. For a similar critique, see Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613 (2008).

normative standard in her thesis is that contract law should serve efficient exchange because descriptive theory suggests an evolutionary trend toward an equilibrium of contending social interests by means of institutions like contract law. Theorists like Charles Fried and Seana Shiffrin might well suggest that opening assumption is the very source of the problem.

In her remarks, Lisa Bernstein reflected on her research into contracting practices of Southern cotton-brokers. There is indeed a highly moral attitude toward contractual promises, and her interviewees would dispute that "promise or pay" is an acceptable moral or business stance. Here again, we need to focus on reasons as justifications, although Bernstein truly brings the discussion down to ground level, as these are justifications in individual circumstances, not justifications of an abstraction like the entire body of contract doctrine. That is, when a cotton seller is going to breach his contract, and so advises the buyer, the buyer is going to want to know the reason—the justification for the breach—because that will likely determine whether the reaction is one of enforcement (more likely, as Bernstein described, a report to the "morality clearinghouse"), or in Jean Braucher's words, of adjustment, release, or forgiveness. If the breach is an exercise in bald-faced opportunism, an efficient breach, the more likely result is a negotiation, a split of the benefit, and an amicable compromise.[65] That is, the non-breaching party is more likely to be satisfied by getting a piece of the action than by litigating the matter to a conclusion.

Curtis Bridgeman and John C.P. Goldberg ask whether *Contract as Promise* succeeded in its goal to separate contract law as affirmation of the moral duty implicit in promising from mere recompense for injury as in tort, and they suggest that it did not. The paper evokes themes we have seen in the essays by Randy Barnett, Gregory Klass, and T.M. Scanlon. The promise principle may indeed reflect common moral intuitions. Contracting may indeed often share characteristics of action with promising. Nevertheless, the invocation of legal obligation is still different than the invocation of moral obligation, and thus it does share characteristics of obligation with tort law. Bridgeman and Goldberg ask: If the promise principle is so central to the description or the justification of contract law, then how can it be so easy for parties to assume a moral obligation but not incur a legal one? Nevertheless, there is something to the intuition that the morality of promise keeping informs contracts. Hence, they propose a reformulation that is reminiscent of Scanlon's comments. It is not that contract *is* promise, or that contracts must be kept because promises must be kept. Rather, contract law, through proper contract interpretation, appropriately reflects and, to some degree, incorporates the sort of morality that is on display when "outside the law" promises are kept.[66]

65. Bernstein, *supra* note 62.

66. That there is a "family resemblance" between promise and contract is a compelling conception. I

Rachel Arnow-Richman's presentation and Carol Chomsky's commentary each demonstrated the tension between abstract theory and the possible meanings evoked by different contracts in the complex web of actual situations. Professor Arnow-Richman assessed the divergent meanings arising from disclaimer clauses often found in contracts and other documents used in the employment context. That is, employers often include language in employee materials (such as employee handbooks) disclaiming any relationship other than purely at-will. Courts may interpret that language strictly according to a formal legal construct, notwithstanding that employees may fairly (in the circumstances) understand the relationship to be something other than at-will, even if they have seen or read the provision.[67]

As Professor Chomsky observed, this highlights the difficult question of determining not just whether the contract was based in a promissory relationship, but trying to interpret what the promise might have been. Whether the justification of contract is based in autonomy, per Fried, or consent to legal enforceability, per Barnett, there is nevertheless the problem of assuming or reconstructing intent in the absence of explicit statements to that effect. Professor Chomsky questioned the likelihood of a single unified "theory of everything" about contract law in light of the multiple domains and interests in which it is invoked, and suggested that the nature of obligation must ultimately turn on the content of the explicit or implicit promise, if any. That is, the meaning of contract resides in its content, and contract theory needs to contend with the apparent meaninglessness of saying someone is bound in the mundane instances of unreflective agreement (as in a click-through contract on the internet or a smart phone).[68]

The final panel was entitled "The Future of Contract Theory," with papers from Henry Smith,[69] Roy Kreitner,[70] and Nathan Oman,[71] and commentary by Robert Scott.[72] Henry Smith's paper suggests that the attempt to reconcile moral and economic justifications at a foundational level of the common law of contract is barking up the wrong tree; equity, largely ignored in the debate, serves the function of imparting ordinary moral sensibilities into the law.[73]

Nathan Oman looks to the future of moral justifications for contract law, and seeks particularly to address two aspects of contract law—the bilateralism of

have written elsewhere about the metaphors that inform contract law as an institution, and suggest that hard cases of "contract or promise" are hard precisely because they lie in the overlap (imagine a Venn diagram) between the concepts of contract and promise, which are themselves not congruent. *See* Jeffrey M. Lipshaw, *Metaphor, Models, and Meaning in Contract Law*, 116 PENN. ST. L. REV. 987 (2012).

67. Arnow-Richman, *supra* note 62.

68. Chomsky, *supra* note 62.

69. Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897 (2012).

70. Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012).

71. Nathan B. Oman, *Promise and Private Law*, 45 SUFFOLK U. L. REV. 935 (2012).

72. Scott, *supra* note 18.

73. Smith, *supra* note 69.

contract damages and the private standing of plaintiffs—he sees as not wholly accounted for in *Contract as Promise*. Bilateralism of damages—that damages flow between private parties rather than as a fine or penalty to the state—may well arise out of a moral duty but not the promise principle itself. This is a subtle move, because it acknowledges the harm as the deprivation of the promisee's expectation, but finds the moral justification of the duty to compensate elsewhere. For example, a spouse who is not picked up at the airport may indeed have a disappointed promissory expectation, but it would strike us as absurd that this particular disappointment ought to be the subject of legal recompense by damages in lieu of performance. Professor Oman suggests that the promissory moral obligation, like the promise to pick a spouse up at the airport, is primary, and sometimes, but not always, provides the basis for an independent but second moral obligation of remedy based in something like Curtis Bridgeman's corrective justice account of secondary obligations. This would answer the question raised by Seana Shiffrin and others concerning how "pay in lieu of performance" could be a properly moral response to the broken promise.[74]

Similarly, Professor Oman finds private standing better explained by an independent normative goal that lies in a "second person account" of civil recourse: "It allows victims to address their wrongdoers in a way that demands their respect and thereby sustains liberal practices of equal accountability."[75] Finally, Professor Oman reflects on what Dean Scott described in his comments as "intra-methodological pluralism": reconciling the "uneasy and ill-defined relationship" between the normative goals of promissory morality, corrective justice, and civil recourse.[76]

Roy Kreitner's paper and the commentary from Robert Scott fittingly stepped back to consider the current richness of pluralism in contract theory itself, a theme that resonates through the papers and the commentary. Kreitner summarizes the explosion of alternative theories since the publication of *Contract as Promise* (as does Professor Fried himself in his concluding reflection) and particularly the concept of pluralism as a theoretical approach itself. Starting with the observation that we can observe this plurality of theories in tension with each other, each doing helpful descriptive or normative work, but each claiming to be *the* theoretical basis of contract law, is it possible or helpful to theorize pluralism itself? Kreitner's questions return to the subject I touched on at the outset of this essay: the *a priori* inclination to find order in "all those theories that attempt to integrate, in some orderly and predictable fashion, theories typically thought to be at odds, whether through convergence

74. Oman, *supra* note 71, at 944.
75. *Id.* at 956.
76. *Id.* at 940.

or vertical integration."[77] This is a theoretical approach to theory itself, notwithstanding that one of the questions Kreitner asks is whether "conceptualization without a core" even constitutes theory! Nevertheless, Kreitner proffers a conceptualization (and supporting examples) that is consistent with pluralistic approaches to contract:

> Contract is best understood as a framework for cooperation among societal agents. It serves as an infrastructure that provides a means to carry out a range of collaborative projects. The infrastructure, in turn, provides benefits even to those who are not using it at any given moment, because it structures in productive ways the interactions (actual and potential) among past, present, and future participants.[78]

Robert Scott's commentary considered whether pluralistic theories of contract in fact constituted theory. "Is pluralist theory an oxymoron or is contract theory dead?" In its least attractive forms, pluralism is merely ad hoc explanation, "the residue of legal realism," an atheoretical approach under which only the "wise man" is able to decide real cases by evaluating incommensurable principles and applying practical wisdom. The challenge, he suggested for four types of pluralism—intra-methodological, convergence, "true" or "vertical" pluralism, and institutional pluralism—is to achieve something beyond mere resort, at the end of the analysis, to the intuitions of the wise man.[79]

Appropriately, at least from my perspective, Dean Scott's commentary capped the entire set of papers and presentations by highlighting the tension between the scientific inquiry of the theorizer and moral normativity of the "wise man." Robert Ellickson once aptly described this as "[a] creative tension between the yin of social-scientific universalizers and the yang of humanistic particularizers [that] promises to benefit all participants in the legal academy."[80] Dean Scott raised the philosophical challenge of harmonizing this tension, and I would suggest Jürgen Habermas has already provided helpful insight. The creative tension Ellickson identifies has its source in the distinction between what we seem to be able to know outwardly and objectively in the world, and the idealized products of reason that we come to believe (or believe we know) inwardly and subjectively. On one extreme, the "naturalists" reject any role for reason in what we might know, and seek "a

77. Kreitner, *supra* note 70, at 918.

78. *Id.* at 924.

79. Scott, *supra* note 18.

80. Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J.L. & HUMAN. 333, 333 (2003).

scientific understanding of our cognitive abilities."[81] But we have strong intuitions about norms and reasons (as Bridgeman and Goldberg observe here), and we resist "the very alienating scientization of intuitive knowledge."[82] Habermas walks a middle road: we must credit, on one hand, our sense that we can draw something approaching universal conclusions about rightness and wrongness; on the other hand, we must credit our sense that there is a difference between the cognition of objective truth in the empirical world and this sense of rightness.[83] Do events evoke meaning that is atheoretical in the sense of being irreducible (the problem of the wise man's *ipse dixit*), and about which even the most rigorous scientific thinking will provide at best diminishing returns?

We want our everyday lawyer-theorists to be able to parse complex situations, predict possible outcomes, and control events by way of their technical mastery of language and doctrine. In so doing, they will be social-scientific universalizers. We would be failing in our job as educators to suggest even for a minute that they give up this rigorous analysis in favor of shaman-like intuitions. In the accommodative spirit of Habermas, however, neither do we want wholly to replace the "wise man" with "lawyer as logical positivist" who believes all that is not empirically verifiable is simply meaningless.[84] The value of thinking about theory is not merely that theory sharpens analytical and argumentative abilities and hence makes lawyers more effective in their practice. There is also value in understanding that descriptive and normative theories, whether academic or mundane, may nevertheless compete (as they have in these essays), that some theories are better than others, and that, despite aversion to the brute wisdom of the "wise man," some meaning in the rich complexity of actual situations is yet beyond the ability of descriptive theory to

81. JÜRGEN HABERMAS, TRUTH AND JUSTIFICATION 23 (Barbara Fultner trans., 2005).

82. *Id.* at 24.

83. *Id.* at 28. A fuller explication is for another time, but Habermas asks the question "how general theories of social action are possible. Can they be formulated independently of historical knowledge, or do their fundamental assumptions always include a situation-specific understanding of meaning that can be explicated only hermeneutically?" JÜRGEN HABERMAS, ON THE LOGIC OF THE SOCIAL SCIENCES 43 (Shierry Weber Nicholsen & Jerry A. Stark trans., 1996). Habermas distinguishes the conflicting social science approaches: on one hand, there is the *empirical-analytic*, and, on the other, there is the *normative-analytic*. An empirical-analytic approach would be the direct analog of a natural science methodology in which general predictive theories of human action would be possible. Yet whereas "the determination that nature behaves differently than the theory would lead one to expect is fatal for physical theories," the same does not always hold true for generalized theories of human action. *Id.* at 47 (citing J. von Kempski, *Zur Logik der Ordnungsbegriffe*, *in* THEORIE UND REALITÄT 209, 230 (Hans Albert ed., 1964)). Habermas's answer is that social sciences cannot really proceed by means of an empirical-analytical approach. We are trying to state general principles about "the decisions of acting subjects." *Id.* at 46. If one assumes that humans choose their individual actions freely, and not as automatons or even rational actors, "regularities among empirical actions cannot be analyzed without reference to the fact that acting subjects are intelligible beings, that is, must always act under the presumption of legitimation through reason: they act under the force of an imputed freedom." *Id.* at 48.

84. *See* HANS ALBERT, TREATISE ON CRITICAL REASON 32-33 (Mary Varney Rorty trans., 1985).

explain it.

The symposium concluded with reflections on the day from Professor Fried. We are delighted to include in this issue his expanded written reflections on *Contract as Promise* thirty years after its publication, the reactions to it, and the evolution of his own thinking on the subject. His observations speak for themselves, but they begin to close a circle that simply did not exist thirty years ago, given, as Professor Fried notes, the fading of the intellectual fashions to which he was reacting then, and the rise of new and powerful normative and analytic assessment of contract law.

Both at the symposium and in his concluding paper, Professor Fried demonstrates once again the power of *learning* as the basis of professing in scholarly work and teaching; he declines to say he regrets nothing about the original work, and responds extensively to, among others, Seana Shiffrin and Randy Barnett. It would be a better world were we all to retain such nimbleness of mind, civility of manner, deftness of prose, and graciousness in debate.

IV. CONCLUDING REFLECTIONS: MEANING IN THEORY AND PRACTICE

Organizing a symposium requires the organizer to focus, at least beforehand, more on things like dinner arrangements, flight schedules, and last-minute cancellations than the rich, intellectual feast being organized. Since the symposium concluded, I have been able to re-read the papers and once again listen to the panels. As I have throughout this essay invoked the organizer's license to comment, I also invoke the organizer's privilege to say the exercise was revelatory to my own work. Most of my writing has been about interpretation and the elusiveness of meaning; i.e., not the question "did we consent?" but "what exactly did we consent to?" My thesis, after many years in the commercial and corporate world, has been that the later question was far more common but ironically unsolvable as long as there was any colorable basis for differing interpretations, and hence the need for interpretive after-the-fact heuristics based on community standards.[85]

When we parse contract language well after the fact of the transaction, in our roles as students, scholars, judge, or even litigating lawyers, we are engaged in a process of interpreting language that is not necessarily the same as its use. Even sophisticated transactional lawyers can be remarkably oblivious to the objective meanings of the communication embodied in the vast majority of words and phrases that constitute a contract. This is not far removed from how remarkably oblivious we all can be to the objective meanings of our words when we use them reflexively in language, or the objective meanings of our

85. Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99 (2005).

actions as signs. (For example, when I roll my eyes at the comment of a fellow dinner guest about corporate greed as the cause of the financial crisis, I do not mean to suggest he is an idiot, only that he has insufficiently studied the issue, but that is not how he understands my facial gesture.)

"Contract as meaning" could be restated as "contract as responsibility." We are responsible for our freely undertaken commitments, whether or not those commitments can be traced to subjective will. I agree with Randy Barnett and others that trying to bring subjective intent to the surface is a futile exercise. But I also agree with Charles Fried's intuitions about freedom. By our will, we emanate signs. Others discern meaning from those signs, either as acts of reflexive understanding or thoughtful interpretive. As Barbara Fried noted, how others read those signs is always objective in the sense that there are no private languages, and any understanding or interpretation is a resort to external norms. In her essay, the reason for the intuitive distinction between the instantaneous repudiation of the antique purchase and the instantaneous repudiation of the formal house purchase is a matter precisely of external norms to which we are subject as a result of our expression of certain signs.

Our students will practice contract law in the complex web of actual situations, where clients and lawyers will communicate signs, that those signs will convey meaning, and meaning will reside in the eyes, ears, and mind of the perceiver. Will the perceiver see one's word as one's bond? Will the perceiver view "pay" as equivalent to "promise"? Will the perceiver be inclined, even if she believes the sign to be a promise, to adjustment, release, or forgiveness? When our students are lawyers, and are negotiating, drafting, administering, and litigating contracts, they will be engaged not just in IRAC exercises of law and fact, but also in making sense of the relationships of their clients. No less a transactional law theorist than Ronald Gilson recently observed there is a multi-disciplinary ability—a sense—by which smart students and lawyers know intuitively how to use "shorthand algorithms" to apply to the real world insights from disciplines like economics, psychology, finance, and the like.[86] Nor is there any reason, in Gilson's wise articulation, for a binary separation of theory and practice:

> What doesn't happen in the other disciplines, and what makes it, frankly, so much more fun to be a legal academic, is that our world doesn't fall into little disciplinary boxes. We deal with real people doing real things; lots of them are rational, lots of them have a little bit of irrationality, and sometimes we are trying to impose rationality on what is often an emotional problem, like busting up a two family closed corporation. Law schools may be the only place in the university where academics truly get rewarded for doing interdisciplinary work.

86. William J. Carney, Ronald J. Gilson & George W. Dent, Jr., *Keynote Discussion: Just What Exactly Does a Transactional Lawyer Do?*, 12 TENN. J. BUS. L. 175, 186 (2011).

> And that's allowed because we don't have much of a discipline ourselves, so nobody cares that we are grabbing stuff from elsewhere.[87]

The reasons for having entered into contracts, and the reasons for their enforcement, adjustment, release, or forgiveness, will reflect the full range of justifications the exemplary theorists in this symposium have explicated. Why study theory? Because theory is a source of meaning and, for us as everyday lawyer-theorists, meaning informs our practice.[88]

87. *Id.* I provoked this response with a question to Professor Gilson on the role of theory in teaching transactional law at Emory Law School's 2010 program, *Transactional Education: What's Next?*.

88. *See* Kreitner, *supra* note 70, at 927 ("Contract theory becomes then, the locus for a discussion of the values at stake in contractual ordering—but not at the level of high abstraction where the parties are *A* and *B* with assumed qualities (or lack thereof) imputed to them, but rather at a midrange level of pragmatic inquiry that generalizes (a bit, but not too much) from empirically observed contracting relations. Theory becomes the language that mediates between normative commitments and the complexity of their application.").