

Contract as Promise: Lessons Learned

Charles Fried*

In THE CHOICE THEORY OF CONTRACTS, Hanoch Dagan and Michael Heller state that by arguing “that autonomy matters centrally to contract,” CONTRACT AS PROMISE makes an “enduring contribution . . . but [its] specific arguments faltered because [they] missed the role of diverse contract types and because [it] grounded contractual freedom in a flawed rights-based view. . . . We can now say all rights-based arguments for contractual autonomy have failed.” The authors conclude that their proposed choice theory “approach returns analysis to the mainstream of twentieth-century liberalism – a tradition concerned with enhancing self-determination that is mostly absent in contract theory today.” Perhaps the signal flaw in CONTRACT AS PROMISE they sought to address was the homogenization of all contract types under a single paradigm. In this Article, I defend the promise principle as the appropriate paradigm for the regime of contract law. Along the way I defend the Kantian account of this subject, while acknowledging that state enforcement necessarily introduces elements — both normative and institutional — for which that paradigm fails adequately to account. Of particular interest and validity is Dagan and Heller’s discussion of contract types, to which the law has always and inevitably recurred. They show how this apparent constraint on contractual freedom actually enhances freedom to contract. I discuss what I have learned from their discussion: that choice like languages, is “lumpy,” so that realistically choices must be made between and framed within available types, off the rack, as it were, and not bespoke on each occasion. I do ask as well how these types come into being mutate, and can be deliberately adapted to changing circumstances.

* Beneficial Professor of Law, Harvard Law School. I am grateful to Oren Bar-Gil, Eric Claeys and John Goldberg for helpful comments and to James Pollock for research and editorial assistance.

Cite as: Charles Fried, *Contracts as Promise: Lessons Learned*, 20 THEORETICAL INQUIRIES L. 367 (2019).

INTRODUCTION

It is hard not to pay attention to a book which in Chapter 1 describes my CONTRACT AS PROMISE¹ as an “enduring contribution,” and a “great, though flawed, work”; subtitles its concluding paragraphs “Moving Beyond Fried”; and in between refers to efforts by others to “rehabilitate” my work as failures.² I take none of this personally, in part because I am very glad to be deemed to “have played a central role in all modern liberal accounts of contracts,”³ but in larger part because I think Dagan and Heller’s book THE CHOICE THEORY OF CONTRACTS applies an important corrective to what was in any event an introductory and very general effort in my original 1981 work. Thus, they bring to mind some deeper points about law, morality, and the way we think generally.

First, a few lines about how CONTRACT AS PROMISE came about. More than forty years ago it was my treat to be one of a group of young(er) Harvard faculty who met monthly at dinner to discuss their current work. I remain in awe of some of those thinkers, among them the mathematician David Mumford, the philosopher Robert Nozick and the physicist Steven Weinberg. Having taught criminal law and torts, I had just begun teaching contracts when it came my turn to present. I brought to the group something that had surprised me: In contrast to those other legal subjects I had taught, many of the intricacies of contract law could be seen as entailments of a single autonomy-enhancing premise, what I called *the promise principle*. In turning that talk into a book I did not intend a treatise, but rather to present this point of view with illustrations for a broad audience.⁴ Over time, it has become clear that especially my accounts of the primacy of expectation damages, unconscionability, good faith, and the excusing occurrences of frustration, impossibility, and mistake were either too simple or just plain wrong. I am now inclined to believe that the root difficulty from which many of these

1 CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015).

2 HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 19, 20, 25, 137 (2017).

3 *Id.* at 19.

4 Toward this end, I recently updated this project in an online MOOC for Harvard-X. See HarvardX, *ContractsX: From Trust to Promise to Contract*, YOUTUBE (Sept. 19, 2014), <https://www.youtube.com/watch?v=7EyOXo8bRwU>. This project was meant for lay persons, not lawyers nor law students. It must have had some resonance, as to date there have been over 150,000 registrants worldwide, of whom more than 10,000 completed the course and all the exercises.

defects sprang was an insufficiently nuanced conception of interpretation; a conception I did not explore in the original edition.

In recent years, prompted by a return to teaching contracts and by a conference on “Contract As Promise Thirty Years On,” I have tried to correct these errors.⁵ But I have not retreated from what Dagan and Heller consider a central flaw of CONTRACT AS PROMISE: that is, the failure to explain how a principle — justified as enhancing the ability of free persons to collaborate with others and thus extend the freedom of each — is able to explain the justice of compelling those persons to comply with commitments with which they no longer wish to comply. As Dagan and Heller put it, “state coercion seems to run counter to individual autonomy.”⁶ I think this objection is a mistake, but a deep one, and in confronting it we deepen our understanding of the promise principle and why there is no anomaly in offering it as the foundation of a liberal conception of the law of contract.

Dagan and Heller are not alone in claiming that there is an anomaly here. Promising, in its purely moral form, is an expression of free choice. Issuing from the moral ground of freedom, its commitment should last as long as that moral ground, freedom, sustains it; so when the promisor no longer freely chooses to maintain the commitment of the promise, its moral force disappears. But this is a fallacious argument.⁷ Even those who attribute no moral force to a promise as such do not deny that the promise may cause harm to those who rely on it, and that harm may be something that an actor should forbear causing and, if she causes it, morality may call upon her to repair. But is the promisee justified in relying on the promise, and if he is not why should a moral obligation of compliance or repair be laid upon the promisor? However, a promise is not like many actions — say driving down a wintry

5 See, e.g., FRIED, *supra* note 1; Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17 (Gregory Klass, George Letsas & Prince Saprai eds., 2014); Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK L. REV. 961 (2017); Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1 (2009).

6 DAGAN & HELLER, *supra* note 2, at 19 (“Chapter 1 starts with Charles Fried’s CONTRACT AS PROMISE and evaluates its central role in all modern liberal accounts of contract. Fried’s work revived debate on the relation of autonomy to contract. This is an enduring contribution. But he failed to resolve his core normative dilemma, that is, how to justify state coercion of contracts. State coercion seems to run counter to individual autonomy as he defines the term.”).

7 This subject is discussed with great verve and subtlety by Dori Kimel. Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 96 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

road — that may or may not cause harm to others. A promise is an act, the intention of which just is to elicit reliance — and reliance of a particular sort: that the promise will be kept. So commitment is instinct in the idea — or, if you prefer, convention or practice — of promise itself.⁸ From this notion of the commitment implicit in the promise it is but a short trip to the rightness, the justice, of state compulsion in certain circumstances to keep faith with the promise, now called a contract.

I. A SHORT THEORY OF THE STATE

The short trip between the commitment implied by promises to the justification behind the state's compulsory power to enforce some of these promises (contracts) requires me to return to first principles — to the whole liberal, Kantian theory of the state. In this Part, I will concisely remind the reader of that theory rather than rehearse it in detail. The central notion is that free individuals would rationally and freely choose to ensure and enlarge their freedom by binding themselves to adopt the moral principle that they must act only on such maxims as they could expect all free and rational persons to accept as universal laws. That is the categorical imperative and a duty of virtue. Further, that principle morally justifies the use of coercion by each person against others, when others would interfere with that person's exercise of will, and if that exercise does not itself violate the categorical imperative. Kant in the *GROUNDWORK OF THE METAPHYSICS OF MORALS* identifies this as the respect that free persons owe each other in what he calls the "kingdom of ends."⁹ In *METAPHYSICAL ELEMENTS OF JUSTICE*, Kant shows how it is a duty of virtue — a moral duty — to join with others in leaving the state of nature to enter into a juridical state such that the extent of the moral justification for each individual applying coercion to another can be defined and adjudicated, thus leading to the enlargement of the liberty of all.¹⁰ He writes in part:

8 *See generally* John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 13-18, 24-32 (1955).

9 IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41, 4:433 (Mary J. Gregor trans., 1998) ("a systematic union of various rational beings through common laws . . . a kingdom of ends, which is possible in accordance with the above principles.").

10 IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* (John Ladd trans., 1965) (1798).

Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.

Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.¹¹

As virtuous persons, we respect as a duty of virtue to others to leave the state of nature and to enter into a juridical state; therefore, in respecting the law of the state, we assure their and our freedom. Moreover, if we comply with the duties defined by the state, then our motive — whether it be out of respect for the humanity of others, out of respect for law, out of habit, or simply because we wish to avoid the application of justified force against us — is irrelevant. No one as a matter of morality or justice (right) is entitled to apply coercion to us just because our motive in obeying the law is not virtue but something less exalted.

Accordingly, when it is said that a creditor has a right to demand from his debtor the payment of a debt, this does not mean that he can persuade the debtor that his own reason itself obligates him to this performance; on the contrary, to say that he has such a right means only that the use of coercion to make anyone do this is entirely compatible with everyone's freedom, including the freedom of the debtor, in accordance with universal laws. Thus "right" [or "justice"] and "authorization to use coercion" mean the same thing.¹²

Finally, we do not betray our duty to ourselves to respect our own freedom — the duty of self-respect — by abiding by the categorical imperative in our dealings with others. Nor do we violate, but rather comply with that duty to ourselves and others by entering into a juridical state. Accordingly, we do not violate our duty to ourselves as free and rational beings by complying first with the duty of virtue in keeping our promises, and then complying with and invoking the state's incorporation of that duty in the law of contracts.

Dagan and Heller frequently refer to this account of legal and moral rights and duties as teleological, and therefore somehow not a deontological or rights-based view at all. This is a well-known error of critics of Kant's theory of morality and justice (right). There is no doubt that from start to finish this whole theory has to do with the exercise and the enlargement of our freedom. And that methodology in a way can be seen as instrumental to the accomplishment of our material goals, but Kant is not lost in an endless

11 *Id.* at 35.

12 *Id.* at 37.

loop where the purpose of right and justice is the enlargement of freedom, and that freedom in turn has as its end the enlargement of freedom. Throughout his accounts, Kant makes the reasonable assumption that individuals have material ends they wish to pursue. These ends are of all sorts: higher or lower, self-regarding or directed at the improvement of humanity. All these are discussed in the doctrine of virtue (*Tugendlehre*) — but law and justice have to do with setting the bounds within which we may pursue any of these ends, high or low, selfish or generous.¹³

The two prime examples Kant offers of this system are property and contract (promise). In property, Kant argues that without law we could have no secure property rights, and without secure property rights we could not securely pursue the range of things that free persons wish to accomplish. Kant's arguments on contract are an extension of his property argument. By promising, we offer a way for others to join with us in the pursuit of a mutually chosen end. Instrumental indeed, but what of it? The state defines property and thus allows the freedom to use property so defined — or transfer it — for whatever ends we wish so long as the use is compatible with a like freedom of all. So, also when making a promise we enlarge our freedom, and we cannot complain if the state compels us to keep that promise.

I cannot call the performance of something through the will of another person mine if I can say only that the performance has come into my possession at the same time as his promise (*pactum re initum*). I can call it mine only if I can maintain that I would have possession of the will of another (to determine it to this performance) even if the time of the performance is yet to come. The promise of the latter accordingly belongs among my possessions [*Habe und Gut*] (*obligatio activa*), and I can include it under what is mine. But I can count it as belonging to me not merely when I have in my possession what is promised (that is, the first case) but also when I do not yet possess what is promised. Consequently, I must be able to think of myself as having possession of this object [the performance] quite independently of temporal limitations and empirical possession.¹⁴

This is the heart of what Dagan and Heller call transfer theory, that is the account by which promissory obligation effects an immediate “transfer” to the promisee of a property right in the future performance by the promisor. Dagan and Heller write as if they have refuted this theory by naming and describing

13 See generally WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* (Philip Stratton-Lake ed., 1930); JOHN RAWLS, *A THEORY OF JUSTICE* § 68 (1971).

14 KANT, *supra* note 10, at 54–55.

it, but I do not find the refutation compelling. It seems that Dagan and Heller find transfer theory fallacious because it treats our future performance as a right that we can transfer to others, therefore justifying the state in compelling that performance as it protects property rights (which we can sell or give away). But such state coercion is just what the Kantian (and Lockean) theory of property authorizes, so if this argument for the state enforcement of (some) contracts fails, then so does the argument for property, for law, and for the state writ large. Contract is different, Dagan and Heller argue, because it has to do with performances, but that difference is just what needs to be shown. Theirs is a classic example of an argument that proves too much — or nothing at all.

Their objection that holding people to their promises conflicts with, rather than enables, autonomy is misconceived at another level. It is an aspect of the very concept of a rational being that our projects occur in time and are time-extended. The very notion of a project or plan entails that we limit our future options, that our will is not punctual but extends into and limits our future choices. This is so at the mundane level for any human action, from the simplest (walking from here to there, opening a can of beer) to the complex and elaborate: humming a tune or training for the Olympics.¹⁵ And if this is so for our solitary plans, why is it problematic that it also be so for our joint undertakings? This is obvious with respect to property. What sense would the argument for the right to external property make if it applied merely to instantaneous dominion over that property? So just as we must be able to use and use up our property, so must we be able to transfer it to others — to give it away or sell it, in present or future forms. Dagan and Heller tax me for not justifying the state's exercise of coercion to enforce my promises.¹⁶ Would they find an analogous defect in an argument like Kant's that the laws of freedom justify — indeed *entail* — the institution of property? But it is of the essence of that argument (or Locke's) that we may do with our property as we please (so long as we violate no one else's rights — *sic utere...*). And

15 See generally CHARLES FRIED, AN ANATOMY OF VALUES 97-101, 155-66 (1970); CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT ch. 1 (2004); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994); RAWLS, *supra* note 13, at § 63 (presenting the definition of good for life plans). These ideas are closely related to questions of personal identity, responsibility and blame. A person's identity depends on the continuities in his plans. No continuity at all, and the concepts of action, person and identity have no application. But how much continuity and how abrupt the changes? The literature on this topic is vast. Whether or not one accepts his conclusions, the master is Derek Parfit. See generally Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3-27 (1971).

16 See Dagan & Heller, *supra* note 2, at 19.

that has always been understood to entail the power to give that property away irrevocably. So why should the same not apply to promises? If the donor of property who regrets his gift may not simply repossess, why should a promisor enjoy the option of disregarding his promise, failing to perform? Oh, but in the case of promises it is just a promise of a future action. *Just?* That is exactly the point. No takesies-backsies in both cases.

II. THE SHORTCOMINGS OF CONTRACT AS PROMISE

Surely, this argument does not entail that a promisee must in justice have the right to compel performance of just *any* promise made to that promisee. For just as a promisor can choose to enlarge her present options by authorizing future compulsion against her, she also need not. It is entirely up to her. That is the essence of the requirement that a promisor has the *intention* to create legal relations. Parties do not usually specify whether they intend a promise to entail legal obligation. That implication is generally left to be read off from the context. This seems to me to affirm the continuity from promise to contract that I propose.

Dagan and Heller use an extended analysis of Seana Shiffrin's scholarship on this subject as an example of a failed "corrective of Fried's."¹⁷ Shiffrin argues that promises meant to create legal relations must be kept according to their terms, a rule that would favor specific performance over damages, and would frown altogether on the doctrine of efficient breach, on the duty to mitigate, and on the enforcement of any terms that lead to less than full compensation on breach (including such procedural terms as compelled arbitration or the preclusion of class actions).¹⁸ But Shiffrin's argument fails on its own terms. Granted the freedom to bind ourselves and others by promising, and granting that sometimes this includes the intention to create legal relations, why does this freedom not extend to all (what might be called) second-order agreements on which Shiffrin casts a thick shadow of doubt, if not disapproval? Shiffrin also argues that enforcing such second-order promises has the external effect of weakening the morality of promising. This argument relentlessly begs the question: What exactly does that morality of promising entail? Why does it not include second-order promises?

Among the terms of such second-order promises may be counted the intention to create legal relations (or not), the specification of one or another

17 *Id.* at 25.

18 See Seana Valentine Shiffrin, *Are Contracts Promises?*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 241 (Andrei Marmor ed., 2012).

rule of damages, and the imposition on the disappointed promisee of a duty to mitigate damages. In many contracts these matters are unspecified, so they must be left as questions for interpretation. This is where I would point to the signal work of Alan Schwartz and Robert E. Scott and other contract theorists who have identified and elaborated the notion of default rules.¹⁹ It was a particular failure of CONTRACT AS PROMISE that it neglected the question of interpretation, speaking vaguely only of “gaps” and the difficulties involved in capturing the “unexpressed background of shared purposes, experiences, and even a shared theory of the world.”²⁰ I thereby slighted the deep issues lurking in the interpretation of contractual language, offering a picture of the interpreter inventively filling a gap in the speaker’s utterance. But interpretation — whether in law, literature, sacred scripture, or ordinary discourse — is an ineluctably collaborative enterprise. The same goes for the promissory language used when we seek to enlist others in some project. Not only the project itself but also the construal of the promissory (contractual) language in which the project is embodied is a collaborative enterprise. Schwartz and Scott lay down the terms of that collaboration in contract law, when they explore the different kinds of default rules that obtain in different contexts. These default rules guide the collaborative process of interpretation. So the parties or the courts interpreting that language are better seen not as inventing new substance to fill in gaps but rather as drawing out the implications (perhaps not fully grasped, or not grasped at all) in the initial conception of the enterprise. The interpreters are engaged in latterly making the best sense out of what in hindsight appears to have been just a sketch of their intentions.²¹

19 See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

20 FRIED, *supra* note 1, at 87–88.

21 See generally RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 123–56 (2011) (Chapter 7 discusses “Interpretation in General”); RONALD DWORKIN, LAW’S EMPIRE 45–86 (1986) (Chapter 2 discusses “Interpretive Concepts”). Dworkin’s account of interpretation is a particular instance of what has come to be called the principle of charity, elaborated in the writings of Donald Davidson and W. V. Quine, which underwrites the possibility of any successful communication at all. See SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY (1994); *Noscitur a sociis*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969). See also, Charles Fried, *The Cunning of Reason: Michael Klarman’s The Framers’ Coup*, 116 MICH. L. REV. 981 (2018); Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 288 n.63 (2014).

III. ADDRESSING DAGAN & HELLER'S CRITIQUE OF CONTRACT AS PROMISE

And thus, at last, after many pages of animadversions regarding CONTRACT AS PROMISE, transfer theory, teleological theories and what have you, we come to a really trenchant and creatively suggestive line of argument in Dagan and Heller's book.

Dagan and Heller are committed to a liberal conception of contract, that is, one where contract law is principally directed towards enabling the free collaboration of free persons. On their view, law does this by offering a rich menu of contractual types that both frame and specify the collaborative projects that free persons undertake. This is a conception that far surpasses the usual examination of various default rules. Dagan and Heller note that different contracting situations (types) entail whole systems of differing contract rules, including default rules. Some of these rules are not properly default rules at all, as they are woven into the very fabric of the particular contract type that is invoked. They are what is sometimes called, oxymoronically, mandatory defaults. But to bring this down to a matter of particular default rules of whatever type is to slight the depth of Dagan and Heller's point.

The types they speak of include consumer contracts, insurance contracts, bailments, different kind of employment contracts (about which they have particularly important things to say), marriage contracts, cohabitation contracts, contracts that envision a single one-time exchange, and contracts that contemplate long-term relationships (whether commercial, artistic, intimate, or some combination of these).²² These types set out the major and minor contexts in which free persons encounter each other and join in common undertakings.

What is apparent to me, though Dagan and Heller do not explicitly say so, is that we cannot but cast our common enterprises along some such typical lines. Is this in the end a constraint on our liberties? Dagan and Heller

22 This conception may explain the contradictory conclusions in the well-known pair of damage cases, see *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235 (1939); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 1962 O.K. 267, 1962 Okla 267 (Okla. 1962), both of which involved a licensee's breach of a promise to restore the owners' land at the end of mining operations. In the former the court awarded damages measured by the cost of completion, in the latter by the diminution of value. Students regularly come to the conclusion that both courts got it wrong. Using Dagan and Heller's terminology, each court failed to see that the former was the type of a commercial land development deal, while the latter dealt with the return to its prior state of a farm which the owners had inhabited before, during and after the mining operations.

see the conception of types as *enabling* our liberties. Is this a paradox, a contradiction in terms? No more than it is a paradox that our freedom of speech is bounded, constrained but finally enabled by the language and concepts that are available to us. Language *itself* is in Dagan and Heller's sense typical, providing constrained modes of language for expression and interaction. And it is language that enables thought. So without types, our minds would be blank. As Wittgenstein put it at the conclusion of the TRACTATUS LOGICO-PHILOSOPHICUS, "That wher eof we cannot speak, ther eof we must remain silent."²³ Now, we could hardly begin our communications each time from scratch without some semblance of a common language, but promising is an invention too which no two people working alone are likely to have come up with. Yet that is the convention, the ethical meme as it were, that we must possess before we can move to contract.

If promising and contracting are conventional, cultural creations, can they not however be absolutely general, blank, obliging without further specification of any kind? It is hard to imagine that. The evolved Roman law of *stipulatio* may be thought to have come close. Cicero mentions it in *pro Caecina* 3.7: "*si quis, quod spondit, qua in re verbo se uno obligavit . . .*"²⁴ If certain very simple formalities have been observed: the parties had to be present, the prescribed words had to be spoken: "Do you promise to pay 100 sesterces?" or "Do you promise to build a house according to such and such specifications?" (*spondesne . . .?*) and the promisor responded either in the precise words of the question, or simply "I promise" (*spondeo*); then the promise was binding. This is a very old form, going back to the time of the XII Tables. In classical Roman law the promisor could claim a defense if, for instance, the underlying transaction was a promise in return for a payment that was never made, or on account of a dowry in a marriage that was called off. This was the *exceptio doli* — the defense on account of fraud. The whole

23 LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D.F. Pears & B.F. McGuinness trans., 1994).

24 See Cicero, *Pro Caecina* 7, LATIN LIBRARY, <http://www.thelatinlibrary.com/cicero/caecina.shtml> (last visited Jan. 5, 2019). Latin text: "*Si quis quod spondit, qua in re verbo se uno obligavit, id non facit, maturo iudicio sine ulla religione iudicis condemnatu, Si quis quod spondit, qua in re verbo se uno obligavit, id non facit, maturo iudicio sine ulla religione iudicis condemnatur*". Translation: "If any one, when he has given security, when he has bound himself by one word, does not do what he has rendered himself liable to do, then he is condemned by the natural course of justice without any appeal to the severity of the judge."; *Latin Texts & Translations — Perseus under PhiloLogic*, U. CHI. (2018), <http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=LatinAugust2012&getid=1&query=Cic.%20Caec.%207>.

interaction having been based on the ancient Roman notion of good faith (*fides*), such circumstances could defeat the claim.²⁵

Dagan and Heller do not quite deny that this is possible,²⁶ but a combination of factors lead them to treat it as an anomaly. Contracts have become so complex and are used to make arrangements in such a variety of circumstances that casting them in such a simple form or starting from scratch are practical impossibilities; moreover, the intervention of public policies about labor protections, consumer protection, and regulatory concerns of every kind make it both crucial and inevitable to posit as a matter of interpretation that parties recur to more or less detailed prefabricated templates. These may be viewed as default rules — whether majoritarian, sticky or mandatory (or better, systems of interlocking default rules) — corresponding to a wide variety of transaction types. Dagan and Heller present this as a theory of contractual freedom, as the law in service of party autonomy and self-fulfillment, because these memes offer parties a menu of possible interactions, and because human interactions and legal interventions are hardly imaginable without them. Indeed, given the continuity of the ethical and practical justifications for property and contract, and given how familiar and even inevitable is the phenomenon of types in property law, it is altogether unsurprising that the same obtains for contracts.

Where do these cultural and legal memes, that precipitate into contractual types with accompanying legal rules and constraints, come from? Most are found now in legal codes or in definitive compilations such as American Law Institute Restatements or standard textbooks. But they did not attain such canonical statement by enactment or statement full blown, all at once, like Athena from the brow of Zeus. Rather they are usually the precipitate of gradual experience finding its way into judicial practice and surviving after a more or less Darwinian process of trial and error. This process reflects practice and experience, and ideally, as Dagan and Heller state, has been moved by an amalgam of welfarist (efficiency) concerns, concerns to offer structures that might accommodate even unusual projects (autonomy-facilitating concerns), and the accommodation of a wide variety of regulatory concerns. Sometimes they are meant to facilitate one-time, arms-length exchanges, sometimes complex, time-extended relationships — whether commercial or more intimate, or perhaps one blending into the other. On one hand, these congeries of doctrines have not and must not remain so stable that they do not

25 See H. F. JOLOWICZ, A HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 293–95 (1932); H. F. JOLOWICZ & BARRY NICHOLAS, A HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 193–96 (3d ed. 2008); FRITZ SCHULZ, CLASSICAL ROMAN LAW 473–80 (1951).

26 See DAGAN & HELLER, *supra* note 2, at 84, 116.

accommodate to changing circumstances and values, yet on the other hand they must not be so changeable and so various as to frustrate their framing function.

Dagan and Heller insist on all this, illustrating the typical (the adjectival form of Dagan and Heller's "type") trajectories of doctrine in several fields. This is analogous to the processes whereby new words enter our vocabulary, new concepts are taken up to frame our thought, and new forms pattern our literary productions, music, or dance. What emerges is at once a description of this dynamic, an account of why some such movement is necessary and inevitable, and finally normative criteria by which to judge the speed and direction of these movements according to what the master norm of autonomy demands. This account of contract as the facilitating framework of human collaboration under our shared master norm of autonomy is richer, more useful, and truer than my own account in *CONTRACT AS PROMISE*.

