Unity and Multiplicity in Contract Law: From General Principles to Transaction-Types

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Modern contract law is characterized by a certain kind of unity and multiplicity. On the one hand, it establishes fundamental principles that apply to all contracts in general. But at the same time, it specifies further principles and rules for particular kinds of contracts or transaction-types that mark out their distinctive features, incidents and effects. Clearly, a viable theory of contract law should be able to provide a suitable account of both aspects. The central critical contention of The Choice Theory of Contracts is that all prior approaches, in particular rights-based theories, have failed to do so. Indeed, Dagan and Heller argue that only a theory that explains the settled rules of contract law as teleologically oriented toward facilitating individuals' pursuit of their different substantive goods, and thus as primarily power-conferring in this particularly robust sense, can provide the needed account. Such a theory, they believe, would be not only interpretatively accurate with respect to the actual law but also fully acceptable as a liberal view of contract. This Article challenges the core contentions of choice theory, suggesting why it may be unable to meet its own goal of explaining how contract law coherently specifies and integrates the general and specific dimensions of enforceable agreements. The Article looks into basic contract doctrines in order to specify a general conception of the contractual relation that can meet this desideratum and it sketches how, beginning with that conception, contract law unfolds a rich multiplicity of transaction-types. The resulting view is liberal but rights-based rather than teleological, and it proposes an alternative

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understanding of how the rules of contract law are power-conferring as well as duty-imposing.

Introduction

A singular achievement of all systems of modern contract law is that they comprise general principles that apply to the many different kinds of contracts. Within this unified framework, which itself consists of many distinct general principles, different kinds of contracts and transaction-types are specified, each with its own sorts of features, legal incidents and effects. In *Contract as Promise*,[1] Charles Fried sought to show that contract law rests on a general normative conception — the promise principle — that can explain both this unity and complexity.[2] In *The Choice Theory of Contracts,*[3] Professors Hanoch Dagan and Michael Heller contend that not only Fried's account but also all other rights-based and economic approaches have failed in this task.

As I will shortly discuss in more detail, Dagan and Heller argue that rights-based approaches (which include both promissory and transfer theories) cannot account for the complexity of contract types because, first, these theories (incorrectly) view contract law as "duty-imposing" instead of "power-conferring" and, second, they try to justify contract law on the basis of "negative freedom" or "independence" instead of a more robust, teleological conception of autonomy as self-determination. As a result, rights-based approaches simply continue what the authors characterize as the discredited "Willistonian project" that imposes an "unprincipled uniformity" on the internal richness of contract law.[4] As for economic approaches, Dagan and Heller argue that by focusing exclusively on commercial arrangements aiming at economic purposes and wealth-maximization, these theories ignore other possible contracting values — such as those of community — and further that the economic theories fail to anchor the economic values that they do endorse in general norms of autonomy and voluntariness that are essential to any liberal conception of contract law. For these reasons and more, Dagan and Heller conclude that at present we lack a liberal theory of contract that provides a satisfactory interpretative account — one that is "doctrinally well-

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1 Charles Fried, Contract as Promise: a Theory of Contractual Obligation (2d ed. 2015).

2 *Id*., at 6.

3 Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (2017).

4 *Id*., at 8. While I cannot discuss Williston's work here, I should say that I do not share the authors' characterization or assessment of it.

fit, conceptually coherent and normatively attractive"[5] — of contract law's unifying framework and of its rich internal multiplicity — and therefore of contract law itself. Their aim in *The Choice Theory of Contracts* is precisely to develop a view that can succeed where all others have failed.

As should already be evident, the authors' theoretical effort works at different levels and explores a wide range of issues. I would like to focus, however, on their fundamental contention that any theory that hopes to provide a satisfactory liberal justification of the complexity of contract law must be teleological in approach and must view contract law as power-conferring in a particularly robust sense. This is the basis of their rejection of rights-based theories and of the contended theoretical superiority of their own proposed choice theory. The authors fully recognize the challenges that the development of such a theory must face. Not only must their account explain the relation between contract law's internal multiplicity and its overarching framework of general principles and norms, but it must do so in a way that takes seriously the crucial moral fact that contracts are *coercively* enforceable from formation on, independently of detrimental reliance. Their theory must therefore also bring out the nature of contract law's underlying conception of freedom and account for the legitimacy of coercive enforcement of contractual obligations consistently with liberalism.

My discussion will be in two main parts. In Part I, I ask whether choice theory can live up to its own claims of providing a coherent, general and liberal interpretative account of contract law. My focus is on the conception of power-conferring rules that the theory attributes to contract law and on the cogency of the theory's teleological approach when assessed both as an interpretation of the law and also as a justification of its coercive character. As part of this discussion, I introduce the familiar but important distinction in legal and political theory between the reasonable and the rational, and I will argue that choice theory does not articulate a satisfactory conception of the reasonable for contract. But without the latter, I believe, we cannot legitimate contract law's essential coercive character. I conclude this Part with a brief critical assessment of how this issue of the reasonable figures in other leading theories — specifically in Fried's view of contract as promise and in what I refer to as the Fuller-Perdue challenge[6] — and through this discussion, I will suggest that, even though a transfer conception of contract is criticized by Dagan and Heller, it is in fact theoretically indispensable.

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5 *Id*., at 2, 12.

6 I am referring to their critical discussion of the expectation interest in Lon L. Fuller & William Perdue, Jr., *The Reliance Interest in Contract Damages:1*, 46 Yale L.J. 52 (1936).

This prepares the way for Part II, where I try to sketch only in part an alternative approach to the unity and complexity of contract law that relies on the idea of contract as transfer. This alternative account. I suggest, is more satisfactory both as an interpretative theory of basic contract doctrines and insofar as it articulates the needed liberal conception of reasonable requirements for coercively enforceable contractual obligations. It suggests a different and more defined way in which contract can be properly viewed as power-conferring while at the same time being wholly rights-based and non-teleological in character. My basic contention is that the proposed account elucidates a general idea of contractual relation that has the internal normative resources to explain the complexity of contract law and the rich diversity of contract types, all within this unifying framework.

I. A Continuing Impasse in Contract Theory

A. The Choice Theory: Some Main Points in Overview

I shall begin this Part with a brief overview of some of the central points in the choice theory. According to Dagan and Heller, contracts are arrangements that we make with others to recruit them in the pursuit of our (permissible) needs and purposes. Thus contracts are devices which we use to achieve our goals. In a world of interpersonal interdependence, this ability to enlist others legitimately via contracts is crucial, even if not analytically indispensable, to self-determination.[7] But, as the authors rightly emphasize from the start, "[c]ontracts require enforcement; enforcement entails coercion; and coercion seems at odds with freedom."[8] State enforcement of contracts thus raises the question of how, if at all, freedom of contract is possible.

The authors' core answer is that freedom requires that contract law provide individuals with a meaningful *choice* from among *sufficiently diverse contract types*, not only across but also in each of the concretely different spheres of social and economic life — from marriage and employment to commercial and consumer relations and even more. When individuals have such intra-sphere choice, and hence a real opportunity to decide *not* to pursue available and viable alternatives in each of their different kinds of relations, liberal freedom is made possible and secured. In contrast to non-teleological rights-based accounts, choice theory therefore argues that contract law should meet a positive requirement of actively recognizing and helping to develop a sufficient range of alternative contract types that effectively respond to

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7 Dagan & Heller, *supra* note 3, at 43.

8 *Id*., at 1.

individuals' concrete needs and purposes.[9] In this way, contract law fulfills its proper function of being autonomy-enhancing. According to Dagan and Heller, contract enforcement, even though coercive, can be consistent with — and indeed supportive of — individual autonomy precisely because and insofar as contract law enables parties to choose from among contract types with the *ex-ante* knowledge and purpose of producing legal effects that parties want in order to "make their lives meaningfully their own."[10]

Contract law is thus first and foremost "power-conferring" rather than "duty-imposing," making contractual obligation self-imposed in a robust sense.[11] I will shortly discuss how the authors understand and apply this distinction.[12] For now, I note that, in their view, this characterization of contract law as power-conferring is not merely a normative contention as to the ideal role that contract law should aim to fulfill, but also an accurate description of the actual doctrines and practice of contract law. The authors see it as part of an interpretative theory of contract law.[13] Moreover, they believe that it is only if contractual obligation is so understood that contemporary contract theory can move beyond its current impasse that results from rights-based approaches. Dagan and Heller argue that not only do the rights-based approaches not account for what is most distinctive about contract law — its voluntary and freedom-realizing character — but these views also lack the theoretical resources to appreciate the crucial legal and normative significance of the role of diverse contract-types. This, they contend, is because these accounts lack choice theory's particular conception of power-conferring rules. How, then, do the authors understand this seemingly pivotal distinction between power-conferring and duty-imposing rules as applied to contract?

Beginning with duty-imposing rules, Dagan and Heller define them as those rules that prohibit interference with individuals' rights.[14] In the particular context of contract law, these, the authors explain, are the rules that protect parties against coercion by others and so secure the voluntariness of contract formation. Examples include the rules against fraud, duress and so on. The authors emphasize — rightly in my view — that so defined, duty-imposing rules would play merely a derivative role in contract law. Contract law confers

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9 *Id*., at 6.

10 *Id*., at 2.

11 *Id*., at 37.

12 *See* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. Rev. 1726 (2008) (this article was referred to by Dagan and Heller concerning the distinction between "power-conferring" and "duty-imposing").

13 Dagan and Heller, *supra* note 3, at 12.

14 *Id*., at 37.

on and recognizes in parties the normative power to establish new rights and duties as between themselves. Thus Dagan and Heller suggest that duty-imposing rules "piggyback" on and protect these powers enabled by contract, in this way presupposing contract's power-conferring nature.[15] Without the latter, duty-imposing rules would in fact, they say, be pointless. If, as the authors contend, transfer or other rights-based theories view contract law as consisting solely or mainly of duty-imposing rules, these theories therefore provide no account of what is most basic to and distinctive of contractual relations: namely, that it is through parties' voluntary acts that new rights and duties are established as between them.

Now there can be no disputing that contract formation rests on the parties' mutual assent and that if the parties have so assented, they are held to have established performance-related rights and duties that did not exist prior to their contract. In this way, therefore, parties may be said in some sense to have the legal power jointly to effectuate a change in their jural relations. Indeed this is exactly what Lon Fuller called the "principle of private autonomy," which he contended is "the most pervasive and indispensable"[16] of fundamental conceptions underlying contract law. Why does the law attribute this contractual-legal effect to the parties' interaction or even give this meaning to it? The answer of choice theory is that the law does this because the parties themselves not only want and intend this very meaning and effect, but also have deliberately undertaken to bring this about in order to realize their chosen interests and purposes.[17] Dagan and Heller view the core power-conferring character of contract law in this robust sense.[18]

If, as the authors contend, contract is so characterized, the most important question becomes how contract law should shape and support individuals' exercises of these powers and their pursuit of their various interests and purposes. This implies an *ex-ante* account of the ways that contract law can facilitate kinds of bilateral voluntary obligations that are conducive to their chosen ends. The conceptualization of contractual obligation as negatively requiring noninterference with rights must therefore presuppose a more fundamental teleology of positive autonomy-enhancement. But does this view of contract as power-conferring fit with the law's settled doctrines such as, for example, those governing contract formation? And beyond this question of interpretative fit, can this view justify the basic moral fact that contractual

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15 *Id*., at 38.

16 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 806 (1941).

17 Here Dagan and Heller follow the analysis of power-conferring rules in Klass, *supra* note 12, at 1744.

18 Dagan & Heller, *supra* note 3, at 37-38.

duties are coercively enforceable obligations? I now discuss each of these questions in turn.

Gregory Klass has written that the "defining feature of legal powers is not merely to ensure that persons know legal consequences of their actions, but to enable them to effect the legal changes that they want."[19] Thus, according to Klass, a power-conferring contractual rule is designed with a view to its purposeful use by parties to produce certain legally stipulated consequences that they want and, very importantly, the fact that parties so use the rule is the *reason* why the law attaches those legal effects. A familiar example is the seal. The very point of this legally recognized formality, which also shapes its design, is to provide parties with a facility that they know in advance is a legally effective way to channel and to accomplish their purposes.[20] But what about non-formal contracts that require neither writing nor seal?

The answer, which Klass also reaches,[21] is that the contract law governing non-formal transactions does not support this characterization. Contract law only requires an agreement for consideration[22] and this, in contrast to a deed, will or other formal transaction, does *not* condition enforceability on the expectation that the parties want legal enforcement and deliberately use the requirement of consideration as a means to channel and give legal effect to their purposes. In fact, the doctrine of consideration requires only that each side promise something of value for something else of value that has been requested and given in return. What parties must want therefore is only *this other thing* and whether they "want" it is decided by whether they can reasonably be *held* to have manifested this intent: if the promisor reasonably appears to the promisee to be requesting a promise or act of something in return, that — and that alone — can be sufficient. Whether and what parties intend is governed by an objective test.[23]

Not only the principles of contract formation but even more clearly the whole implied dimension of a contract (including implied terms, obligations, impossibility, mistake, *etc.*) and the entire range of remedies for breach do not require that parties must want — or arguably must even know— the legal effect that can be given to their interaction. The differences between the features and prerequisites of formal transactions such as a sealed document

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19 Klass, *supra* note 12, at 1744.

20 *See* Fuller, *supra* note 18. Fuller famously emphasized the channeling function of legal form in *Consideration and Form*.

21 Klass, *supra* note 12, at 1747-58.

22 As Klass also emphasizes. *See Id*., at 1750.

23 Dagan and Heller briefly discuss the objective test. *See* Dagan & Heller, *supra* note 3, at 38-39.

and those of non-formal agreements remain basic. Despite the claim of choice theory to provide an interpretative framework for presenting contract law in its best light,[24] it does not attempt to show with the needed detail that its particular power-conferring conception of contract is reflected even in the main contract doctrines. In my view, this cannot be done.

Choice theory's conception of the power-conferring nature of contract makes directly salient the pursuit of individual and shared substantive purposes, which depend on mutual engagement and cooperation for their realization. These ends are concretely specified in terms of the different forms of familial, social and economic relations in which individuals participate in the pursuit of their good. It is the pursuit of these ends that makes an individual's life meaningfully his or her own. Such ends are chosen naturally because of the values and opportunities that they embody or make possible. These values can certainly be intrinsic, By contrast, contract, on Dagan and Heller's view, is essentially a means in the pursuit of these ends. It has instrumental, not intrinsic, value. Moreover, they seem to treat contract as sufficiently flexible such that it can be used for all or most of the domains of human flourishing, including those involving intimacy and community. On this account, it is by no means clear what the inherent limits, if any, of contract are even in this instrumental role, or whether, given its coercive nature, contract law can properly be used with respect to only certain aspects of these domains.[25]

This view of contract involves a certain conception of autonomy. It is one that gives center-place to a moral power to form and rationally pursue a conception of one's own good. Now, according to Rawls, whom Dagan and Heller cite in this connection,[26] this moral power for a conception of the good expresses the idea of the "rational," which he takes to be a basic dimension in his liberal conception of justice.[27] The rational applies to single unified agents (natural or corporate) who are viewed as deliberating about and seeking effectively to realize ends and interests of their own. These ends need not be selfish in the ordinary sense and can reflect attachments to other persons, communities or higher values. At the same time, however, the pursuit of these ends, even with such attachments or values, does not accord independent validity to the standing and claims of others. Of rational persons we can say

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24 Dagan & Heller, *supra* note 3, at 12.

25 By contrast, this is a question for contract law. See, for example, its approach to the enforceability of promises between family members as illustrated in such cases as Balfour v. Balfour [1919] 2 K.B. 571 (Eng. C.A.).

26 *See* Dagan and Heller, *supra* note 3, at 42.

27 Here and in the following discussion, I draw on Rawls's account of the rational and the reasonable. *See* John Rawls, Political Liberalism 48-54 (1996).

only that they have their own ends and interests and that whatever these are, they will pursue them intelligently, treating all other matters instrumentally in relation to their dominant interest in realizing their ends. Because the rational expresses just the fact that ends and interests are self-chosen, it is not *per se* a basis for justifying obligations, let alone coercive constraints.

To explain the moral possibility of obligations, a different idea is needed. According to Rawls, the rational must be supplemented by an idea of the *reasonable* which can frame and constrain the exercise of the rational. The reasonable, in Rawls's view, is an intrinsically moral idea involving moral sensibility in general and a sense of justice in particular. As reasonable, persons are viewed as having the moral power to understand, to apply, and to act from fair principles of social interaction and cooperation. Each properly respects the equality and independent claims of others and expects the same in return from them. The reasonable, in contrast to the rational, involves an essential idea of reciprocity. Unlike the rational, reasonable terms can impose genuine obligations toward others and, where justified, these other-related obligations may be coercively enforceable.

The difference as well as the relation between the reasonable and the rational is pivotal in Rawls's theory of social and political justice. The reasonable is viewed as an essential element in the liberal justification of all coercively enforceable norms. We should expect then that, in some form or other, these ideas may also be pertinent for contract theory — choice theory in particular. This brings me to the second question noted earlier: can choice theory's robust power-conferring view of contract — which at first glance seems to take the idea of the rational alone as central — explain the basic legal fact that contract formation establishes coercively enforceable contractual right and duties as between the parties?[28] The answer to this question in turn bears importantly on the theoretical adequacy of Dagan and Heller's account of the basis and role of multiplicity in contract law. The next section addresses these points.

B. Is an Alternative Approach Needed?

Contract law, we may say, contemplates a juridical relation between persons constituted by coercively enforceable correlative rights and duties with respect to particular promised performances. Now, as noted above, a relation involving duties and rights — let alone coercible obligations — cannot be explained on the basis of the idea of the rational taken by itself. This is a crucial point. The mere fact that I want or intend something and seek to realize it as my

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28 Keep in mind that according to Dagan and Heller, this is something that contract as promise cannot explain. *See* Dagan & Heller, *supra* note 3, at 22-23.

end or purpose is not in and of itself a basis for holding me to any obligation (whether self- or other-regarding) with respect to it, if and when I change my mind. Even supposing, as Dagan and Heller do, that it is desirable that the law provides individuals with a wide array of distinct contract-types that increase the possibilities of choice, this does not show that a person should reasonably be *held* to the terms that he or she has chosen. I may no longer view those terms as rationally desirable. What is there in the idea of the rational alone to prevent me from changing my mind and opting for different terms or different ends altogether? Nothing, I would submit.

Given choice theory's emphasis on the value of the rational, it is important, then, to see whether it also includes principles or norms that express the reasonable and also whether these principles can account for the kind of juridical obligation specific to contract. To be viable, the theory must explain how a promisor can be coercively obliged *vis-à-vis* the promisee not to change his or her mind when the promisor no longer views a promised exchange of performances as being in his or her interest, even where the promisee has not detrimentally relied on the promise and non-performance will not affect any of the promisee's preexisting entitlements.

The most explicit answer Dagan and Heller provide is as follows: "Contract can advance people's autonomy if, but only if, it serves as a device by which specific people can recruit other specific people who can help them in pursuing their goals, and are furthermore empowered with the authority to invoke enforcement proceedings in the case of breach."[29] According to the authors, this explanation shows that the duty to perform "nicely follows the obligation of reciprocal respect that underlies private law."[30] But how so? What reasonably constrains a party from deciding to withdraw from an arrangement (even where there is no detrimental reliance by the other party) if he or she no longer sees it as being in his or her interest to recruit or to be so recruited in that particular instance? If this rationale is to entail an obligation on the part of the promisor, the most plausible moral basis would be to postulate some sort of general positive duty[31] on all actual and potential transactors to support and further a regime of voluntary contracts that enables individuals to advance their ends — hence their autonomy — by recruiting each other to help them do so. One who voluntarily recruits another or accepts being recruited by another through such a device is required to perform what she

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29 *Id*., at 46-47.

30 *Id*., at 42.

31 Dagan and Heller emphasize that, in contrast to rights-based approaches, choice theory is hospitable to affirmative or positive duties, at least within certain parameters. *See Id*., at 45-47.

has promised in order to fulfill this duty. But in its own terms and despite the fact that the argument refers to specific individuals being able to recruit other specific individuals, this explanation does not show that the obligation is owed by the promisor *to* the promisee. Rather, the most plausible obligee is the community of present and future transactors or perhaps the body that is responsible for maintaining the regime of cooperation. To establish the requisite nexus between promisor and promisee, it is essential to show that there is a requirement of reasonableness that holds *as between them*. This, however, choice theory does not do.[32]

If indeed this is so, it also brings into question choice theory's account of contractual diversity. For conceptually prior to any division of contracts into a law of distinct contracts, the different enforceable transactions must all share the common denominator of representing juridical relations of the kind described above. In fact, the kind of diversity that can be part of contract law will depend on its being compatible with and expressive of this juridical relation. Therefore, until this first step is properly elucidated, we cannot say in advance whether choice theory's particular version of contractual multiplicity is actually sound.

Now, it is precisely because of this need to explain the normative nexus between promisor and promisee that Charles Fried insists that the first step in his own account, namely, the argument based on a general convention of promising, is not sufficient by itself but must be supplemented by a distinct and further explanation of the basis of the promisor's individual moral duty toward the promisee with respect to the promised performance.[33] Whereas the role and justification for the general convention come under the idea of the rational, the analysis of promissory duty expresses a requirement of the reasonable. The question, however, is whether the conception of relation — and the requirement of the reasonable — in Fried's theory of contract as promise are of the right sort to capture the kind of relation between parties characteristic of contract.

The core of Fried's argument for the direct relation of obligation between the contracting parties is as follows. A promisor intentionally invokes the general convention of promising for the purpose of engendering morally-grounded expectations of performance on the part of the promisee. Indeed, the very aim of doing this is to invite the promisee to trust in the promisor's

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32 Choice theory also fails to explain why "enforcement proceedings" should take the form of a right to expectation damages or specific performance rather than reliance damages or some other coercive response (including a fine payable to the state).

33 Fried, *supra* note 1, at 14-17.

moral conscientiousness and word, to make herself vulnerable. Reneging on a promise is wrong, Fried argues, because it abuses the promisee's trust. [34]

Now, accepting that it seems reasonable to hold that the promisor is under a moral obligation to live up to the requirements of conscientious conduct in light of the expectations and trust that the promisor has purposively invited, does this establish in the promisee an authority to compel performance in the way this obligation is understood in contract law? Keep in mind here that what is involved is an externally coercible obligation of strict liability specified wholly in accordance with the objective test and binding unless excused by reason of impossibility, mutual mistake, and so on. [35] To view the moral duty to fulfill one's word in such terms is not only unnecessary, but also obscures and even distorts the nature of the trust and respect that underpin this duty. Saying that the promisee has a "moral right" to performance similarly adds nothing except confusion. Fried is correct when he characterizes *promissory moral duty* as self-imposed by the promisor on himself, as enjoining the promisor to respect the promisee as someone who has made herself vulnerable by placing her trust in him, and finally as requiring the promisor, as a matter of his own autonomy and self-consistency over time, to take responsibility for his future self. [36] Nothing more is necessary. But this falls short of, and is qualitatively different from, the kind of obligation and relation that *contract law* requires. While it embodies a definite conception of the reasonable, it does not seem to be of the right sort for contract.

If the version of obligation and therefore of reasonableness in Fried's theory of contract as promise does not model the kind of relation that is pertinent to contract law, what might do this? Here we may seek guidance from an unexpected source, namely Lon Fuller and William Perdue's well-known challenge to the doctrinally settled compensatory understanding of expectation remedies for breach, and, through this, arrive at the very rationale of the enforceability of executory contracts irrespective of reliance.[37] Let me elaborate.

According to Fuller and Perdue, promissory morality cannot explain why, as a matter of compensatory justice, a plaintiff should be entitled upon breach to be put in the position of having what (or the value of what) he or she was promised. In keeping with the standard meaning of compensation, Fuller

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34 *Id*., at 16-17.

35 On this point, see the instructive discussion in Charles J. Hamson, *The Reform of Consideration*, 54 L.Q. Rev. 233, 241-57 (1938).

36 "[T]he whole moral case is built on respect for the *promisor's* autonomy." Fried, *supra* note 1, at 144 (emphasis added). *See also Id*., at 20-21.

37 Fuller & Perdue, *supra* note 6.

and Perdue presuppose here that, to qualify as compensatory, a remedy must repair loss or injury to what belongs to — some asset of — the plaintiff. Thus if protection of the expectation interest is to count as compensatory, it would have to be the case that breach per se deprives the plaintiff of something that belongs to her at the moment and as a consequence of contract formation itself — and therefore of some asset that is *already* hers prior to and independently of actual performance. Fuller and Perdue presuppose that this is conceptually and normatively required if an award of expectation damages — or even an order of specific performance — is to qualify as compensatory in character.

But this is precisely what Fuller and Perdue deny.[38] As becomes clear from their references to the Continental writers Émile Durkheim and Pierre De Tourtoulon,[39] Fuller and Perdue hold that, prior to performance, promises do *not* confer on promisees any asset that can be thought of as coming under their exclusive rights. At the point of formation, promisees have merely the hope or expectation of receiving *via* future performance what they have been promised. On this view, it is performance alone that gives them anything that is juridically in some real sense theirs to the exclusion of others, including the promisor.

Thus breach cannot be understood as a negative interference with what in rights genuinely and presently belongs to the promisee as against the promisor. Rather, breach must count simply as a failure to be "useful to" and to benefit the promisee: "the principle that promise or consent *creates* obligation is foreign to the idea of justice."[40] Hence, Fuller and Perdue conclude, in "compensating" for the loss of performance, the law passes from the realm of corrective justice to that of distributive justice: "the law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act… restoratively and assumes a more active role."[41]

The Fuller and Perdue objection does seem to apply to the promisor-promisee relation when viewed in terms of promissory morality based on respect and trust, as reflected in, say, Fried's promise principle. But that does not settle the question of its bearing on contract law unless we suppose that contract entails the same kind of promissory relation and moral transaction. The very fact that Fried's analysis most clearly applies to a purely gratuitous promise — a promise that is not supported by consideration — and that contract law categorically distinguishes this from the kind of promissory relation that is enforceable suggests that contract may rest on a different sort of relation.

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38 *Id*., at 52-53.
39 *Id*., at 56-57, 55 n.7.
40 *Id*.
41 *Id*., at 56.

In the following Part, I argue that this is in fact the case and that the sort of relation required by contract law can plausibly be construed in a way that directly and completely answers the Fuller-Perdue challenge. Indeed, we can already state here what that contractual relation must look like if this is to be so. *If,* contrary to the Fuller-Perdue argument, protection of the expectation interest *is* to qualify as compensatory in character, we must be able to understand contract formation as follows: at contract formation —and therefore prior to performance and independently of reliance — parties must be able to acquire from each other something that comes under their exclusive rights; and this thing that they acquire must correspond to what is protected by expectation remedies, whether in the form of damages or of specific performance. Such rights or interests would arise in and through contract formation: they would not be pre-transactional or in any way independent of the parties' contractual relation. Only thus can a mere omission to perform count *per se* as an interference with or as an injury to what already comes under the promisee's rights. Coercively taking from the promisor and transferring to the promisee the material equivalent of this injury can now be understood as reinstating the promisee in her rightful position *vis-à-vis* the promisor. This remedial response is now intuitively unproblematic — "self-evident"[42] in the words of Fuller and Perdue — as compensation on a rights-based account and therefore independently of teleological conceptions.

To answer Fuller and Perdue's challenge, it must, then, be possible to show that contract formation can plausibly be construed as a mode of acquisition as between the parties: a kind of, let us say, *transactional acquisition*. On this view, parties have the legal power to effectuate the establishment of new entitlements through their mutual assents at contract formation. In this limited sense at least, contract principles can be construed as power-conferring. At the same time, as I will discuss in the next section, this conception of power-conferring does not presuppose that the law attributes this effect of entitlement creation because the parties positively want or intend it. What parties have to want in order to satisfy the requirements of contract formation is something quite different, and whether they want it is decided always in accordance with the objective test. Further, I will argue that the legally imputed effect of the parties' interacting in the requisite way is always a duty not to interfere with or injure the promisee's new entitlement established at contract formation. The way in which contract law is "duty-imposing" is thus not incidental to or merely supportive of its "power-conferring" character. It reflects a distinct conception of the reasonable that is specific to the particular kind of promissory relation that is constitutive of contract.

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42 *Id*.

Now, because this view of contract as transactional acquisition supposes that in and through contract formation, each party acquires *from* the other, it seems *prima facie* to suggest some kind of transfer analysis. Among the several objections that Dagan and Heller raise against contemporary transfer theories, they allege that these theories fail to take seriously the power-conferring nature of contract law. The foregoing discussion suggests that this need not be so.

Rather than attempt to answer their other objections,[43] I want to see in Part Two whether the proposed conception of contract as transactional acquisition, along with its idea of transfer, fits with general doctrinal requirements for formation applicable to any non-formal contract, and at the same time makes appropriate room for distinct contract types building upon these general principles. In this way, I hope to show a more defensible basis for multiplicity in contract.

II. Unity and Multiplicity in Contract Law

A. The Main Features of Consideration and its Role as a General and Basic Principle

All systems of modern contract law now agree that contract is a voluntary transaction that can be enforceable on the basis of the parties' mutual assents alone. Persons can be fully and definitively bound by agreed-upon terms at contract formation prior to and independent of actual performance, even when their contract is merely executory and before they have transferred any material benefits or incurred reliance costs under their agreement. Unexcused nonperformance of an executory contract is deemed a civil wrong that gives rise to liability coercively enforceable by remedies, whether in specie or damages, that aim, so far as is possible in the circumstances of breach, to put the innocent party in the position of receiving from the promisor the owed performance or its fair value. The point has now been reached when the entire analysis of contract — from formation to liability — is embodied in generally recognized basic principles and doctrines that can govern any and every contractually enforceable agreement.[44] At the same time, across modern jurisdictions, the more particular types of contracts with their distinctive requirements and incidents are specified and elucidated in different ways that ideally build on, or at least are not inconsistent with, these more basic principles. Contract law has its own characteristic unity and multiplicity. To

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43 *Id*., at 36-40.

44 *See* James Gordley, The Philosophical Origins of Modern Contract Doctrine 1 (1991).

explain both dimensions, I shall begin with the principles that specify the basic contractual relation that constitutes the common denominator of the many different species of transactions. And among these general principles, none is so fundamental or familiar in common law systems of contract as the requirement of consideration.

If we suppose that contractual obligations can arise from mutual assents involving promises, it is clear that in common law systems the doctrine of consideration represents a general and basic principle that, in the case of non-formal transactions, separates contractually enforceable promises from those that are not.[45] There is no other common law doctrine as old, internally stable and continuous as consideration.[46] In *Contract as Promise,* Charles Fried argued that consideration does not challenge his promise principle — which views any seriously intended promise communication as morally and potentially legally obligatory — because, he contends, the doctrine is internally contradictory.[47] By assessing whether Fried's criticism is sound, I hope to bring out the full significance of this doctrinal requirement. But to do this, I first should briefly recall the doctrine's main features. [48]

The doctrine of consideration specifies a certain kind of promissory relation — what I shall refer to as the promise-for-consideration relation — that is both necessary and sufficient for a promise (not under seal) to be contractually enforceable, that is, to be enforceable *via* expectation damages or specific performance in protection of the plaintiff's performance interest. Any promise that is not expressed as part of this relation is characterized as merely gratuitous and viewed as contractually non-enforceable. Although the consideration for a promise can be either another promise or an act, I will frame the discussion

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45 "Consideration stands, doctrinally speaking, at the very center of the common law's approach to contract law. It represents an ambitious and sustained effort to construct a general doctrine." Arthur Von Mehren, *Civil Law Analogues to Consideration*, 72 Harv. L. Rev. 1009, 1009 (1959).

46 The basic features of consideration were worked out by the end of the 16th century. For discussion, see David Ibbetson, *Consideration and the Theory of Contract in the Sixteenth Century Common Law*, *in* Towards a General Law of Contract 67-124 (John L. Barton ed., 1990). By contrast, offer and acceptance became a distinct doctrinal requirement only during the 19th century. *See* Alfred W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. Rev. 247 (1975).

47 Fried, *supra* note 1, at 28-39.

48 *See* Peter Benson, Justice in Transactions: a Theory of Contract Law (Harvard University Press, forthcoming 2019) Chapter 1 (providing a more detailed and in-depth discussion of consideration).

in terms of mutual promises. This is the paradigmatic case. In my view, it is also theoretically the most instructive case.

What, then, is the requisite relation? Each side must promise something of value for the other's own promise of something else of value, where each side's promise not only requests but also simultaneously is given in return for that of the other. Unless each promise is one side of this completely reciprocal and mutual relation between them, neither promise can be construed as contractually relevant, let alone as contractually effective. The very terms of each must be stated with reference to this relation with the other. The familiar representation of each as *quid pro quo* for the other refers to the fact that each side is intelligible only as intrinsically related to and made in return for the other. It does not mean that each side must be viewed as the price of the other in anything other than a metaphorical sense. Further, in saying that the substance of the promised consideration — *what* is promised — must be something of value, it is value in legal contemplation — "in the eye of the law"[49] — that is meant. This need not coincide with market value or any commercial standard of value. Essentially, value refers to the fact that the content must be something that can be reasonably taken to be wanted, enjoyed or used by a party in her individual capacity and for her purposes. Note that what is relevant here is only that the substance of the promised consideration be useable as a concrete object for concrete purposes: it must simply figure as a use-value. Moreover, it does not matter what in particular or how much this substance is in comparison with that coming from the other side.[50] Comparative value, let alone equivalence, however measured, is neither required nor even relevant to establish the promise-for-consideration relation.[51] All that matters is that the substantive content of each side must

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49 Thomas v. Thomas (1842) 114 Eng. Rep. 330; 2 QB 851.

50 The possibility of a nominal consideration — the promise of, say, a peppercorn as consideration — is therefore logically entailed as the extreme minimum in the very definition of consideration. Note, however, that such consideration is not merely symbolic and wanted in order to produce a binding agreement, but must be a content that, *in its concreteness*, can be wanted by parties as something useable. This is the only relevant aspect and it must be clearly and credibly the case. A particle of peppercorn is such a thing.

51 This does not mean that contract law is not, or should not be, concerned about the fairness of terms. To the contrary, in my view, contract law envisages a division of labor between consideration, which ensures simply that there is a two-sided promissory relation involving the contractually requisite *quid pro quo*, and unconscionability, which ensures that these terms are fair as between the parties. Whereas the requirement of consideration establishes the *possibility* of enforceable two-sided promissory transactions ranging from (in material

be *qualitatively different* from that of the other: *something* of value that is promised for the promise of something *else* of value.[52]

There is a further feature of consideration that should be emphasized. The consideration must be something that can be represented as being *moved*[53] from one side to the other, presenting it as a loss or detriment to the mover and as a gain or benefit to the other side to whom it is moved. The idea that consideration is moved by one party (the promisee) to the other (the promisor) in return for the latter's promise is conceptual, not merely metaphorical, and is key to understanding the nature of the promise-for-consideration relation. To be moved in the required way, the consideration must be conceived as something that is initially on the promisee's side and as under his or her exclusive control *vis-à-vis* the promisor. This is how it must be *represented* in the medium of the parties' assents, irrespectively of whether the substance of the consideration is actually in existence or currently under the promisee's actual control at the moment of contract formation. The consideration must therefore count as initially *independent* from the promise for which it is given: it must be possible to construe the content of the consideration as something that could genuinely originate with the promisee, not the promisor. Consideration must be something that is not simply reducible to a mere aspect, condition, or effect of the first promise or its execution. This requirement of independence can be satisfied even though in the actual circumstances of a transaction, a consideration must in fact be executed only after the promise is performed or only when the promisee already has received the use of the thing promised by the promisor.[54] Neither the temporal sequence nor the material relation between consideration and the promised performance is *per se* determinative in this respect.

Because the promise-for-consideration relation is constituted by the parties' mutual promises, it must be conceived as a unified double movement from

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terms) those that involve a contractual donative element (for example in cases of nominal consideration) to those that are full-blown exchanges for equal values, unconscionability ensures that any given transaction *actually* counts as a reasonably intended exchange of equivalents or, if not, as a reasonably intended donative transaction or some intelligible mix of these. Both doctrines specify essential aspects of contract law and they work in tandem. See Benson, *supra* note 48, at Ch. 4, where I discuss this in detail.

52 Thus, a promise of $1 for that of $100 is not consideration: the two sides are merely quantitatively, but not qualitatively, different, with the consequence that the two promises will count in law as simply one gratuitous promise of $99.

53 *Thomas*, 2 QB 851.

54 An example: A promises B university money which B promises to use to build an atrium that will be named after A in perpetuity.

each side to the other, all this taking place in and through the representational medium of the parties' mutual assents. The relation that is required and established by the doctrine of consideration is this *process* of simultaneous and fully integrated bilateral movement. Further, the fact that consideration is moved by the parties' *promises* — in other words by their crystallized decisions of present commitment — means that the source of this double movement is represented as being in the parties' mutually related *acts* — *actus contra actum*[55] — and not just their wishes, needs or intentions. Unless *both* parties identically act in this way, nothing happens between them — contractually speaking. The absolutely coequal and mutual participation of both sides is thus prerequisite to there being a contractual relation.

This fully bilateral and reciprocal character of the consideration relation distinguishes it qualitatively from the kind of promissory relation established by gratuitous promises.[56] By definition, a gratuitous promise is not completed by anything that is independently on the promisee's side and that moves from the promisee to the promisor in return for the latter's own promise. Thus, historically, a promisor's natural love and affection for the promisee or the promisee's feelings of satisfaction and gratitude were rejected as consideration. While love and affection can certainly motivate the promisor, they do not move from the promisee. Feelings of gratitude, though on the promisee's side, are the reaction to and effect of a promise already made and completed — they cannot possibly be viewed as originating independently with the promisee and moving to meet the promise which they thereby complete. Between the promise and these feelings there is simply a unidirectional relation of cause and effect. Neither love and affection nor gratitude can be construed as one of two co-equal and mutually inducing[57] constitutive sides of a single relation. This difference in the makeup of the promise-for-consideration relation and a gratuitous promise is intrinsic and qualitative.

Nevertheless, because a gratuitous promise can generate in the promisee reactions that include feelings of satisfaction and gratitude, expectations and plans when imagining the future performance, and the placing of trust in the promisor to follow through as promised, this kind of promise can arguably give rise to a *moral* duty that the promisor owes toward the promisee. A

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55 Wiseman v. Cole (1585) 76 Eng. Rep. 418; 2 Co. Rep 15a, 15b; Co Litt. 47 (as cited in David J. Ibbetson, a Historical Introduction to the Law of Obligations 141 (1999)).

56 This bilateral and reciprocal character is emphasized by David Ibbetson, *supra* note 46.

57 *See* Wisconsin & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903) (per Justice Holmes).

promise of this kind is a central case of, and fully binding under, Fried's promise principle. But trust is not the same as consideration. It represents the promise's moral effect on the promisee. It is not a co-determinant of the promise having moral force and effect. The only operative *act* is that of the promisor alone: the promise is made to and for the promisee but *not with* her act and co-participation. Unlike the promise-for-consideration relation, a gratuitous promissory relation is not genuinely and irreducibly two-sided or bilateral in this robust sense. It is true that, before promising something, a promisor may ask the promisee whether the latter would be pleased if he were to make the promise. This information is germane because a "promise" that the promisee does not want would ordinarily have no point, even from the promisor's perspective, and would not be thought by either party as something that can fully give rise to an unequivocal promise-based moral duty owed to the promisee.

Thus far, I have suggested that there is an intrinsic qualitative difference between the kind of promissory relation that satisfies the requirement of consideration and one that is gratuitous and therefore not contractually, even if morally, binding. Taking common law contract doctrine on its face, only a promissory interaction that can be interpreted as involving the strictly two-sided promise-for-consideration relation can produce contractual effects and establish coercively enforceable rights and duties with respect to performance. Only this two-sided relation has this kind of rights-altering function.

Clearly, then, this constitutive rule presents contract formation as in some way power-conferring. It must be emphasized, however, that whether the parties' interaction can be construed as a promise-for-consideration relation and produces contractual effects is decided in accordance with the objective test; that is, by how what is said or done by one party reasonably appears to the other party in the context of their whole interaction.[58] It is trite law that the reasonable appearance of promising and a party's actual (inward) intent need not be the same and, moreover, that it is only the former that is

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58 Dagan and Heller recognize the difficulty posed by the objective test to their conception of contract as power-conferring, which naturally would seem to call for a subjective test that treats actual intentions as salient. They justify recourse to the objective test (which they accept) by distinguishing between faultless and blameworthy communicators of intention and argue that contract law rightly opts for the objective test as favoring the former over the latter. *See* Dagan & Heller, *supra* note 3, at 38, 39. However, it is not clear how fault can be legally — contractually — relevant here. Fault in a private law sense must relate in some way to a possible failure to respect another's rights, but here the issue concerns the test that should determine whether a contract — and so contract rights — exists in the first place.

contractually relevant. But note that taking such a strictly objective standpoint in ascertaining and interpreting a gratuitous promise for the purpose of deciding a promisor's moral obligations would go counter to shared understandings and expectations of the parties involved. Clearly, in this context, how a promisor actually understands her words and what she actually intends, whether or not reasonably apparent to the promisee, might be at least one factor pertinent to determining whether she has promised anything and, if so, what exactly. And unlike the determination of the legal meaning and effects of a contractual transaction, the parallel analysis in the case of gratuitous promises would not always be restricted just to the moment when the promise is made. There is a final point that should be highlighted. To establish the requisite promise-for-consideration relation, parties need not have acted with knowledge of, let alone with the purpose of effectuating, the legal effects of so finding. The only thing necessary is that parties reasonably manifest *via* their assents that each has requested from the other something that he or she can want and use in some way in return for something else of value that he or she promises the other at the other's request. Parties must request and want these promised substantive contents, not the legal effects arising therefrom.

We are now in a position to assess Fried's contention that the requirement of consideration does not challenge his conception of contract as promise because the doctrine is internally inconsistent. According to Fried, the matrix of this inconsistency is the conjunction of the following two contrary propositions: first, enforceable promises are limited to those that are part of an exchange; second, the law is not at all concerned with the adequacy of consideration.[59] Whereas, Fried writes, the second proposition appears to affirm the parties' freedom of contract by giving them the power to choose whichever terms they wish, the first is not neutral in this way but instead confines parties to exchange transactions and so does not take self-determination as a sufficient ground of contractual obligation. He contends that freedom of contract requires the law to be neutral as between gratuitous promises and promises-for-consideration. In both instances, promisors want the very same thing, namely, the satisfaction of realizing their purposes through promises; but non-recognition of gratuitous promises interferes with their freedom to do so. By becoming fully freedom of promise, freedom of contract is no longer constrained by the arbitrary limit to exchanges as set by the doctrine of consideration.

In my view, there is no such contradiction at the heart of the doctrine. It is not a matter of promises limited to exchange relations versus freedom to decide one's promissory relations. Rather, as I have suggested, the doctrine requires that there be a reciprocal, truly bilateral relation in which *all* elements —

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59 Fried, *supra* note 1, at 29, 35.

including the promises and what is promised — unambiguously fit within the framework of the requisite two-sidedness. Thus, as long as the mutual promises are of (just) *some*thing of value for (just) something *else* of value, what or how much these qualitatively different somethings are is a matter of indifference. The key is that neither side is reducible to the other. Two-sidedness of the right kind is established. Moreover, as noted earlier, a reciprocal, two-sided relation need not be an exchange in the sense of a market exchange transaction. The animating idea is mutual and intrinsic relatedness between two sides in which each side is the reason for and made in return for the other: however socially pervasive or economically important exchanges may be, they are but a particular instance of this relational *quid pro quo*. There is only one basic issue which this doctrine determines: are there two sides, each irreducibly distinct from but necessarily reciprocally connected with the other? Freedom of contract is the freedom to choose terms that can be part of such a bilateral relation. Within this bilateral framework of something of value promised for the promise of something else, parties can choose the terms they wish along a continuum of two-sided transactions that, in a material sense, can range from full-blown exchanges involving substantive equivalence to what may be called "mixed" transactions in which the two sides are reasonably intended to be unequal in value.

This naturally raises the following key question: What is it about the two-sided promise-for-consideration relation that makes it, but not a gratuitous promise, the necessary and sufficient basis for the establishment of contractually enforceable performance rights and duties? It is at this point that the idea of transfer comes into play. My discussion will have to be very brief and clearly incomplete.

B. The Basis of Contractual Obligation

At the end of Part I, I suggested that to make sense of the expectation remedies as compensatory in character, contract formation must effectuate a kind of transactional acquisition as between the parties. Now if in fact the promise-for-consideration relation, but not a gratuitous promise, can plausibly be viewed in this way, this will be an important first step in answering our question. As I now outline, I think that it can be so construed.

I begin with the fundamental point that the form and content of the promise-for-consideration relation are embodied in the representational medium of the parties' assents. If we may characterize the moment of *performance* as involving *physical* delivery of goods, services and so on in accordance with contractual terms, the parties' interaction at contract formation, by contrast, is the *purely representational and non-physical juridical reality* that both specifies

and regulates what is subsequently performed. This is made possible once the law views the whole of contract formation and the complete determination of contractual rights and duties as constituted in and through the parties' expressions of mutual assent. Recalling the main features of mutual promises that satisfy the doctrine of consideration, we note the following.

First, because the parties' assents must take the form of settled promises and therefore of definite and final crystallizations of choice, these assents can count — in this medium of representation — as the parties' *acts*, not just their wishes, aims, intentions and the like. These acts are strictly mutually related and, in the medium of representation, simultaneously move qualitatively different objects from under the exclusive control of one party into that of the other. In fact, each assent both moves to and accepts from the other something of value. Note that the kind of exclusivity involved here is as between the two contracting parties who give and take. What I move to you as consideration for your promise is necessarily presented as initially with me and on my side and moved from my domain into yours. Otherwise, it cannot count as a detriment to me or as a benefit to you. Again, all this is embodied as representation in the medium of the parties' assents. Finally, to be consideration, there must be a definite substance (whether a physical object, a service, an incorporeal right, and so on) that can be wanted and used by a party for her own independent purposes. It is something that can reasonably be construed as subject to a person's rightful control and use exclusively as against another. The consideration's substance being wanted and useable is expressed as part of the parties' mutual promises, that is, their mutually related juridical acts. Thus the double movement from each party to the other can be understood as a kind of purely transactional alienation and appropriation as between them.

Earlier I argued that, contra the Fuller-Perdue challenge, contract formation must be construed as effectuating a kind of transactional acquisition if expectation remedies are to qualify as compensatory in character. In virtue of the above features of consideration, mutual promises satisfying consideration can, I believe, be plausibly so construed. Clearly, much more would have to be said to establish this fully. For example, it would be important to show how, from a wider legal (juridical) point of view, a contract's nonphysical, purely represented mutual acts can indeed be the basis of acquisition.[60] But supposing for the moment that these further matters can be suitably explained, the promise-for-consideration relation itself tells us what contractual acquisition must comprise.

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60 See Benson, *supra* note 48, at Ch. 10, where I discuss these and related questions.

First, the same thing — the substance of the consideration as promised — moves from one side to the other and thus is acquired by one from the other. Because contract formation is this process of double-movement of the same thing from side to side, it qualifies as a *transfer* of the considerations between them. And since contract formation is complete prior to and independent of actual performance, the kind of acquisition (including the relevant notion of "ownership") that this involves must be understood as follows: *every* aspect of the direct contractual relation is specified transactionally as between the parties and in terms that are independent of actual performance.[61] Thus, as stated above, the kind of acquisition that is contractual must be defined and fully effective as a matter of rights between the parties even though the parties have not yet physically transferred or performed as promised. Finally, the duty to perform (and similarly the correlative right to performance) is simply the imperative of respect that necessarily arises as a juridical consequence of this moment of transactional acquisition. That the parties have performance rights and duties is the normative consequence of the transfer at formation, in this way showing that the duty-imposing rule of performance follows from and presupposes the power-conferring conception of formation.

So understood, the juridical meaning of the duty to perform consists in a purely negative requirement not to act inconsistently with what one has already done, namely, given the other party rightful exclusive control over the promised consideration in accordance with the contractual terms.[62] As specified by the contract's terms, the defendant's mere omission to perform can now count as the defendant interfering with the plaintiff's exercising rightful control over what, as between the parties, belongs to him, not the defendant. On this view, breach of contract represents an interference with another's rightful exclusive interest in something that is presently his or her own. Performance does not beneficially add to or in any way change the rightful relation as between the two contracting parties. Finally, the legally mandated expectation remedies (both damages and specific performance) can now count as compensatory, because they respond to breach by aiming to restore, so far as possible in the circumstances of breach, precisely what was already transferred to and vested with the plaintiff at formation as a matter of rights.[63]

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61 This is the basis and meaning of contractual rights and duties being "*in personam*."

62 It should be noted that Professor Fried now proposes a similar kind of analysis in Charles Fried, *Contracts as Promise*, 20 Theoretical Inquiries L. 367, 373-74 (2019)

63 Where the thing promised is practicably available for purchase on the market, expectation damages will give the plaintiff the means to obtain the very thing that he or she was contractually entitled to, albeit as part of the law's response

This is how the parties' voluntary interaction may be construed from a contractual-juridical point of view. Moreover, supposing something like this analysis, there is a reasonable and voluntary basis for contractually holding a party to his or her promise for consideration independently of whether that party wants or intends to produce this legal effect. Briefly stated, because each party has chosen to do something that brings into play the other as a coequal participant with separate and independent interests, each has chosen to enter a relation that is subject to reasonable interpersonal norms and standards: each party, as a reasonable person, must therefore recognize the fair and reasonable meaning of their interaction as a transaction between two. According to the proposed analysis, the law can reasonably view their interaction as a form of transactional rightful acquisition between the parties in the sense suggested above. As long as this juridical construction of the parties' voluntary interaction is both juridically sound (for example, consistent with other principles of contract and underlying ideas of ownership in private law) and morally acceptable when judged, for instance, from the standpoint of a liberal conception of justice, each side can be reasonably held to it and to whatever it entails.[64] This would also fully answer the Fuller-Perdue challenge.

C. From General Principles to Transaction-Types

The discussion so far has focused on the sort of relation required by consideration and the conception of contract formation that it seems to embody. Of course, the treatment of consideration and related issues is but one part of the kind of theoretical account needed to explain contract as transactional acquisition. This account would try to show how all the main contract principles and doctrines — including those governing other aspects of formation, implication, fairness and enforcement — work together to fill out and develop essential aspects of the basic consideration relation and the conception of contract as transfer. Clearly, this would, if successful, bring out the unity that is rich with multiplicity in contract law. While attempting this is clearly beyond the scope of the present Article, there is another dimension of multiplicity in contract law that I do wish to discuss, even if briefly.

Starting with the basic and general promise-for-consideration relation, how might we account for the relevance and role of distinct contract-types in contract law? This question takes up a central and important theme of choice

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to breach in the circumstances of breach. Where there is no such possibility, damages would be inadequate and in principle specific performance becomes necessary to achieve the same objective.

64 *See* Benson, *supra* note 51, at Ch. 10, 11, where I try to show this.

theory. In answering this question, I will also suggest how my proposed account makes room for *ex-ante* purposive use of these transaction-types, as contemplated by a more robust power-conferring conception of contract rules.

In Part I of this Article, I criticized choice theory for failing to provide an adequate justification for its version of the power-conferring character of contract from both interpretative and normative points of view. I should briefly recall here the main points of my criticism. It is reasonable to think, I suggested, that contract law presupposes a unifying conception of legal relation that can appropriately entail coercible rights and duties of the kind that are contractually enforceable. At the least, a plausible theory of contract law should try to see whether this is the case. Choice theory attempts to do this via a teleological approach that posits certain goals and directly applies these ends to transactions. But, I have asked, why should parties be held to — in other words, be subjected to — the substantive ends that choice theory postulates simply in virtue of the fact they have entered a contract? From the standpoint of contract law itself, ends of any kind are contractually irrelevant unless the parties themselves have made them relevant either as explicit terms of their agreement (when reasonably construed) or as a matter of legal implication that determines a goal to be implicitly necessary to the transactional efficacy or fair value of their chosen agreement. Apart from this, there is no general basis in contract law for directly applying to transactions general values such as the maximization of wealth or welfare and the promotion of community. Nor would the contractual imposition of obligatory ends of this kind be consistent with the parties' capacities freely and independently to adopt such ends as they wish, so long as they respect the constraints of the reasonable. What choice theory appears to lack, I suggested, is just such a conception of the reasonable that is specifically framed for the voluntary interaction between the contracting parties. I also suggested that this absence brings into question whether the theory's account of multiplicity in contract law is well-grounded in the first place.

By contrast, the approach that I am proposing anchors the normativity of the general contractual relation in an idea of the reasonable that frames and constrains the elements of the rational. I suppose then that *at every step* in its analysis, contract law must specify principles and rules that reflect the requirements of the reasonable and so can legitimately constrain parties through the coercive enforcement of legal duties and rights. In addition, I suppose that principles and rules — even so-called "default" rules — must meet this criterion as they are applied by courts in their ordinary adjudicative role and therefore even in cases of first impression where parties would not have had the opportunity to contract around the rules that are applied to them. It is the rule as so applied that must be reasonable. The fact that parties might have

been able to contract around it if they had the resources or occasion should play no part at all in showing that it is reasonable: its reasonableness need not depend on the possibility of avoidance or exit. But *once* a rule is justified as reasonable in this way, it is certainly available to be used by transactors in the pursuit of their own purposes under the idea of the rational; and the fact that it may be and is so used can — and indeed should — be taken into account by courts as part of the reasonable construction of agreements to which the parties can properly be held.[65] In fact, contract law not only recognizes this possibility, but also, within its own framework, supports it. To conclude this discussion, I will indicate briefly and impressionistically how contract law, as judicially worked out, in fact does this.[66]

Beginning with the basic promise-for-consideration relation, the contention is that *intrinsic* to it, and thus within the terms of the reasonable, there is a potential division into qualitatively distinct contract-types that are then available and suitable for deliberated use by parties in pursuit of their diverse needs to produce fully enforceable contractual effects. This is made possible because of the structured content and features of the consideration relation.[67] For example, there is obviously the basic division between promises supported by consideration and mere gratuitous promises. Assuming that this division is in general clearly and reasonably applied, it is not insignificant or irrelevant to individuals' plans and purposes since they can potentially know in advance that if they make mutual promises of contents which they credibly treat as wanted by them, they can channel and realize their purposes through these specific terms which will be enforceable. The fact that they do this with the motive of producing legal consequences can be perfectly consistent with their meeting this requirement.

Also important is the division into distinct contract-types that are subdivisions internal to the promise-for-consideration relation itself. These arise as follows. First, as noted earlier, within the two-sided parameters of mutual promises satisfying *quid pro quo*, the terms can be on a continuum from reciprocal considerations that are patently unequal in value to those that are genuine equivalents. This range is perfectly consistent with the traditional doctrine

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65 Klass's conception of what he calls a "compound rule" is very helpful in clarifying this analysis of contract rules. *See* Klass, *supra* note 12, at 1758.

66 See Benson, *supra* note 51, at Ch. 12, where I try to explain this more systematically and in much more detail. My focus on judicially worked-out contract law does not necessarily preclude the possibility of appropriate legislative determinations of these matters.

67 By contrast, Fried's conception of promissory relation, being empty and formal, cannot be the basis of such internal differentiation.

of consideration and it can also be fully compatible with fairness principles such as unconscionability as long as terms that are manifestly unequal in value can be justified on a transactionally reasonable basis.[68] Indeed, through the application of consideration and unconscionability in tandem, courts specify and enforce a basic division within the framework of enforceable two-sided promissory transactions between genuine gifts and exchanges (or some intelligible mix of the two) in a material sense.[69]

In addition to this gift-exchange distinction and continuum within the basic contractual relation, the definition of consideration encompasses the widest possible variety of ways of having exclusive rightful control over the widest possible range of objects that can be subject to such control. Forms of exclusive control — and therefore kinds of contractually effective and protected interests — can include everything from the most complete ownership to the most limited right of use or mere holding. The objects that satisfy consideration can be any kind of thing moveable or immoveable, services, incorporeal assets, privileges or interests, rights or opportunities, mere liberty of action, and the like. All of these can be elements of fully enforceable promises-for-consideration and provide the forms of different transaction-types: promissory transfers involving an element of gift (including loans for use, deposits), exchanges (including barter, sale), letting for rent, contracts for wages, and so on. Moreover, any of the contractual rights arising from these transactions can potentially (unless contractually excluded or too personal) be itself the object of a contract of assignment. These transaction-types and more (*e.g.*, there can be partnerships as well) constitute a framework of more specified but still relatively general kinds of transactions which allow for the maximum variety of protected performance interests and objects that can possibly be acquired *via* two-sided promissory transactions between persons, both natural and artificial.[70]

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68 By showing, for example, that a buyer who agreed to pay more than market price was reasonably aware of the difference and had access to a competitive market price, but either took the risk of or accepted this divergence in prices in light of his or her purposes.

69 For explicit recognition of this gift/exchange division, see *McGovern* v. *City of New York*, 234 N.Y. 377, 138 N.E. 26, 202 App. Div. 317 (1923). See also, Von Mehren, *supra* note 45, at 1031, 1033.

70 By far the most carefully worked-out elaborations of such tables of contract-types were done by the great writers in the civilian tradition, starting centuries ago with Thomas Aquinas, then with the 17th century natural law theorists Grotius and Pufendorf, and finally culminating with the tables of Kant and Hegel. For further discussion, see Gordley, *supra* note 44.

What should be emphasized is that this table of transaction-types is immanent in the promise-for-consideration baseline and provides courts with a normatively reasonable standpoint from which to characterize transactions. Moreover, each of these transaction-types expresses a kind of *quid pro quo* that reflects the nature of the transaction and implies a certain balance that is appropriate between the two sides, fleshing out requirements of the reasonable that are specified for the different kinds of transactions.[71] And, it should always be recalled, each of these transaction-types answers the general criteria that make its terms legitimately enforceable as between parties in light of their mutual assent.

This last point has implications for the kinds of transaction-types that are admissible. They must have to do with *only* those aspects of familial, social or economic relations that can be reasonably construed as embodying the promise-for-consideration and thus legitimately subject to coercive contractual enforcement just on the basis of the parties' voluntary interaction. We have seen that through its requirement that something of value be moved from one party to the other, the doctrine of consideration clearly contemplates that a contractually protected interest must be with respect to something that can be used or wanted and rightfully held by one party to the exclusion of the other. What is contractually acquired must be — and the resulting obligation to perform must be with respect to — something that the parties can treat as external to themselves. Moreover, the parties must treat each other as externally related, each with his or her separate and exclusive individual transactional interests. Their intimate life, their mutual care and support, and their sense of self do not ordinarily involve such external objects or relations.[72] That is why common law courts hesitate before mechanically applying the form of contractual transaction to the ongoing thick community relations of family, friendship and the like. Parties in such ongoing relations must have made it reasonably apparent to each other that they view their mutual assents on a

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71 Beyond the requirement that there be a sufficient consideration, this balance is specified not only by doctrines of contractual fairness such as unconscionability but also by procedures of contractual interpretation and implication which hold that, absent explicit evidence to the contrary, parties should not be reasonably presumed to intend a situation that would make their transaction wholly inefficacious, render the reasonably expected benefit of the consideration illusory, result in a hugely unequal transaction, and so on. For an instructive economic account of this aspect, see Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1590 (2005).

72 By contrast, Dagan and Heller seem to take the role of diversity among transaction types as directly reflecting and facilitating different conceptions of family intimacy and caring cooperation. *See* Dagan & Heller, *supra* note 3, at 103.

certain occasion as having the kind of externality that allows their interaction to be reasonably construed as embodying the promise-for-consideration relation. While the form of contract may be applicable to a variety of spheres of social life, it is only with respect to aspects of these domains that, consistent with the parties' shared understanding, are properly amenable to being construed in terms of the social preconditions and elements of a contractual relation.

At the same time, while commercial bargains clearly satisfy this criterion of externality and as a factual matter may even be the most pervasive kind that does so, this does not make the commercial bargain *the* paradigmatic transaction-type, let alone the basic contractual relation itself. As suggested above, what matters is that there is a two-sided relation constituted by the double-movement of qualitatively distinct substantive considerations between parties who count as separate persons with individual powers of rightful exclusive control over what is moved between them. This is the basic relation that is required for contract formation. None of the parties' goals and purposes, whether commercial or otherwise, are *per se* part of the analysis of this relation except insofar as the parties have expressly or by necessary implication made them a term or underlying assumption of their agreement.

On the view that I am sketching here, the law sets the framework of different transaction-types that are enforceable because they embody the basic promise-for-consideration relation whereas the transactors themselves determine the particular contents of these contract-types — and thus the ways transaction-types are particularized — in their pursuit of their substantive needs and interests. Through this division of labor between the operation of law and the creative social and economic activity of transactors, the rich multiplicity of transaction-types in contract law is developed.

A clear instance of this process — though not the only one — is the market or a price-driven economic system of exchanges.[73] A market of some kind and extent actualizes the practice of contract law as an ongoing, self-developing system of such relations. As participants in market relations, parties view and treat each other as mutually separate and independent persons (owners) with separate (though complementary) interests and needs that must be satisfied via voluntary (mutually consensual) transactions on a systematic scale. From the purely economic standpoint that is characteristic of market activity, market participation is a voluntary and non-coercive process that is wholly price-driven. At the same time, market transactions are constituted

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73 The following very brief discussion draws upon the more detailed analysis of the relation between contract law and the market in Benson, *supra* note 51, at Ch. 12.

by rights and duties, powers and immunities, and the like that are coercively enforceable by law.

Now just as transactors share an identical interest in the establishment of an effective and knowable price system, so they have an identical, purely *formal* interest *ex-ante* in knowing with certainty and in being secure with respect to both their *bilateral* transactional entitlements, powers, and immunities and also the actual ongoing functioning of market relations *as a system* of exchanges. I refer to this interest as formal because it is distinct from the many different substantive economic interests that market transactors seek to satisfy through market participation. According to the view that I am proposing, a crucial task of contract law is to frame its principles, rules and standards in ways that appropriately take cognizance of and reasonably meet this bilateral and systemic formal interest shared by all market transactors. By contrast, contract law does not try to determine or directly to advance their substantive interests. How is this crucial but limited role reflected in actual contract law?

First and most basically, contract law does this by framing general principles that can apply to any and every contractually enforceable transaction in such a way that parties can not only *ex-post* reasonably be held to the rights and duties arising therefrom, but also *ex-ante* can know and apply these principles in the pursuit of their freely chosen economic ends. As stated above, the development of such general principles, whether or not in codified form, is one of the most important achievements of modern contract law in all major systems.

A further way in which contract law adjusts to the formal interest of market transactors is by seeking to discern and to articulate the different forms of transaction-types embedded in the particularized contents that transactors themselves generate via their autonomous market activity. What must be emphasized is that in discharging this function, judicially developed contract law stays within the bounds of the reasonable alone. By so limiting itself, contract law leaves the determination of particular purposes up to the parties' choices and provides them with a facility that they all identically want and need to channel and realize those purposes.[74]

This role of contract law is exemplified in the judicial method that Karl Llewellyn called "situation-sense."[75] In essence, the method of situation-

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74 In this way, contract law is able to specify what Klass refers to as "compound rules." *See* Klass, *supra* note 12.

75 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). For an excellent discussion, see Todd D. Rakoff, *Implied Terms: Of 'Default Rules' and 'Situation Sense'*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 191-228 (Jack Beatson & Daniel Friedmann eds., 1995).

sense requires courts to specify, interpret and fix the distinctive meanings and incidents of transactions as embodying transactor-particularized patterns of judicially recognizable transaction-types. In doing this, contract law is guided throughout by the objective test and its companion idea of presumed intention in elaborating and elucidating these determinate situation-specific interpretations which the interacting parties may reasonably be held to.[76] Courts take cognizance of and analyze these patterns of interaction as actually realized, up-and-going schemes and working setups.[77] Moreover, in doing this, courts ensure that contract law does not lag behind or distort but, to the contrary, is equal to the creative process of market activity. Categories of distinct contract-types are specified at different levels of generality, each with features, requirements and incidents peculiar to it. The method of situation-sense also includes the presumption that "the unmentioned background [of these transactions] is assumed without mention to be the fair and balanced general law and balanced usage of the particular trades."[78] In doing all this, courts discern in the particular interactions the requirements of the reasonable, thereby specifying and applying this standard in a way that parties can fairly be held to it in the circumstances that have been brought before the court and at the same time such that future parties can practicably use it *ex-ante* in the pursuit of their interests.[79] Such rules have the potential, therefore, of operating as power-conferring in a robust sense.

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76 A particularly instructive example is Cardozo J.'s judgment in *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 129 N.E. 880 (1921). See Rakoff's superb discussion of this case, *Id*., 205-15.

77 Llewellyn, *supra* note 75, at 261.

78 This is from Llewellyn's unpublished 1941 First draft of the Revision to the Uniform Sales Act, Section 1-C, Comment (3) included as an Appendix in Michael Myerson, *The Reunification of Contract: The Objective Theory of Consumer Form Contracts*, 47 U. Miami L. Rev. 1263, 1327-33 (1993).

79 Dagan & Heller, *supra* note 3, at 117-18, 167. Dagan and Heller refer to the fairly recent recognition of the new category of "dependent contractor" by the Ontario Court of Appeal in cases such as McKee v. Reid's Heritage Homes, Ltd., 2009 ONCA 916 (Can. O.A.C). What is striking, however, is that the court's primary rationale for characterizing the relation in this way is not, as the authors contend, to provide transactors with a further choice in addition to being an "employee" or an "independent contractor," but rather to ensure that contractors who are particularly vulnerable to being prejudiced by overreaching or unreasonable treatment (in the form of unreasonable dismissal) in virtue of their dependency on their principals are suitably protected against this. It is a matter of ensuring that the incidents of their relationship are fair and reasonable — which is quite in keeping with contract law's other efforts to specify transaction-types.

To conclude this discussion, I would like to mention very briefly two other important illustrations of how courts have recognized and tried to meet the formal need for knowledge and security that each and every transactor identically shares. I am thinking of the judicial recognition of legal formalities such as the seal and the judicial development of the law of negotiable instruments or other modes of currency.[80] Whereas the seal answers this formal need with respect to the purely bilateral dimension of transactions, the law of negotiability meets it with respect to the systemic dimension.

Thus, judicial recognition of the seal is intended to supplement, not satisfy, the requirement of consideration. It specifies a transfer between parties that does not depend on its being part of — but also that does not conflict with — a promise-for-consideration relation. This possibility depends crucially upon the preexistence of pervasive customary practices *publicly* known "from time immemorial" that have been deliberately used for the purpose of producing specific legal effects. Not only does this ensure that coercive contractual effects can be imposed without taking transactors unfairly by surprise, even in the absence of consideration; it also means that, in imposing such effects, the law is reflecting the parties' actual intentions and doing this because the parties have subjectively wanted it. Recognition of the seal does not abolish or substitute for consideration. Rather, it adds a new layer, as it were, to the legal analysis. Always in the background, the requirement of consideration comes into play where the specific and demanding additional conditions for judicial application of the legal formality no longer exist or are not met. The robust power-conferring rules, it is important to emphasize, are always part of a framework of coercively enforceable rights and duties.

For its part, the judicial development of negotiability ensures that parties can have the use of currency not subject to the contingencies of title that would otherwise be determining. The use of money unaffected by the operation of title is essential to the very possibility of a price-driven *system* of exchanges. As participants in market relations, all transactors have an identical formal interest in this systemic possibility. Here again, in deciding whether to recognize something as currency, courts must base their decision on facts and considerations that ensure that transactors in general will not be taken

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80 For discussion of the seal, see, for example, R. C. Backus, *The Origin and Use of Private Seals Under the Common Law*, 51 Am. L. Rev. 369-80 (1917); Lon L. Fuller, Basic Contract Law 313-19 (1947). For a leading case on negotiability, see *Miller* v. *Race* (1758) 97 Eng. Rep. 398; 1 Burr. 452, (per Lord Mansfield). For helpful historical discussion, see S. Todd Lowry, *Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century*, 7 J. Econ. Issues 605 (1973).

unfairly by surprise and that reflect already existing customary practices widely known and purposely used. In this way, contract law can crystallize and fix for deliberate and secure use generally shared market understandings.

In neither of these two illustrations does contract law stray beyond the parameters of the reasonable and directly apply considerations that properly come within the idea of the rational. The autonomous activity that is peculiar to the market is purely voluntary price-driven interaction. As such, there is no need to refer to anything other than the rational. But contract law specifies coercively enforceable rights and duties and so, I have suggested, must embody an appropriate conception of the reasonable. The market, as a system of enforceable transactions, must also *presuppose* this dimension of the reasonable as a prior normative condition. Courts support and facilitate transactional practices by specifying the reasonable juridical meanings of the particularized transaction-types or by recognizing modes of forwarding the bilateral and systemic dimension of contract relations, thereby ideally also providing transactors with the means to advance their interests confident in the knowledge of their entitlements and the expected legal consequences of their choices. Contract law can fulfill this role precisely because it does not purport to substitute for the market-driven choices of transactors and because, from the other side, economic considerations are not directly applied as part of the repertoire of contract doctrines and principles.

Conclusion

I wish to conclude with two general observations that return to the central themes of choice theory. First, the analysis of contract that I have proposed seems to suggest that it would be mistaken to define "power-conferring" or "duty-imposing" in the abstract or in some general sense and then to apply these meanings to contract law, asking whether contract law is one or the other or some combination of both. What these terms mean in contract law and how they characterize it can only be determined as part of an analysis of the basic contractual relation. And this relation, I have suggested, is the promise-for-consideration relation involving at formation a kind of transactional acquisition between the parties. Second, a suitable theoretical account of multiplicity in contract law — whether with respect to the rich complexity of contract doctrines or the specification of distinct transaction-types — should try to explain this multiplicity as further specifying and filling out this basic relation and conception of contract, taking the latter as this multiplicity's unifying ground and framework. Multiplicity, after all, cannot count as such unless it also belongs to and expresses unity.