Calculating Promises

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THE EMERGENCE OF
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CONTRACT DOCTRINE

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For my parents

To ordain the future in advance . . . man must first have learned to distinguish necessary events from chance ones, to think causally, to see and anticipate distant eventualities as if they belonged to the present, to decide with certainty what is the goal and what the means to it, and in general be able to calculate and compute. Man himself must first of all have become *calculable*, *regular*, *necessary*, even in his own image of himself, if he is to be able to stand security for his own *future*, which is what one who promises does!

This precisely is the long story of how *responsibility* originated. The task of breeding an animal with the right to make promises evidently embraces and presupposes as a preparatory task that one first *makes* men to a certain degree necessary, uniform, like among like, regular, and consequently calculable.

—FRIEDRICH NIETZSCHE

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Introduction

The Imagined Individual at the Borders of Contract

This book is a genealogy of the emergence of our modern conception of contract. It argues, against conventional wisdom, that our current conception of contract is not the outgrowth of gradual, piecemeal refinements of a centuries-old idea of contract. Rather, contract as we know it was shaped by a revolution in private law undertaken by classical legal scholars toward the end of the nineteenth century. Further, the revolution in contract thinking is best understood in a frame of reference wider than the rules governing the formation and enforcement of contracts. That frame of reference is a cultural negotiation over the nature of the individual subject and his role in a society undergoing transformation.

American lawyers typically see contract as the art of enforcing promises, believing that for the most part, "contract law is confined to *promises*," and that, "No question for the law of contracts arises unless the dispute is one over a promise."[1] The view that contract is essentially about enforcing

1. E. Allan Farnsworth, *Contracts* 4 (3d ed. 1999).

promises is not limited to those who believe that the independent moral force of promises forms the underlying basis of contract enforcement.[2] Instead, this common conception is shared by a wide range of scholars and observers of contract, including some who might prefer to see a retreat from the emphasis on promise. Thus, it is an oversimplification but not a wild exaggeration to claim that, "To a lawyer, a 'contract' is a legally enforceable promise."[3] But if, as Patrick Atiyah argues, contract was not always primarily about promise, how did the current conception of contract take root?[4] How did the definition of contract as enforceable promise become so obvious? I attempt to awaken these questions by highlighting the relatively technical process by which the promissory conception of contract became the taken for granted backdrop to almost all discussions of contract.

For anyone who has experienced the first year of law school and probably for a much wider public, it is difficult to imagine an alternative view of contract. The consensus over the general definition of contract is sometimes understood as evidence of its unchanging character. Yet such consensus is not the mark of the necessity of the conception itself, but rather a trace of a successful revolution, one whose effects are so ingrained that they appear completely natural. The very essence of contract seems tied inherently to the idea of enforceable promises, and any characterization that displaces the centrality of promise seems to miss the point. In this sense, historical claims that ancient, or medieval, or early modern sources on the law did not equate contract with promise are seen as evidence, not that contract was once different, but that contract was not well understood. If we believe that the essence of contract is the enforceable promise, the history of contract becomes a story of the refinement of the art of making, classifying, and enforcing promises.

Such a history of contract is written from the present to the past, or, as it were, backward. If contract *is* enforceable promise, then the law of contract can be understood teleologically, as the sometimes bumpy road along which the enforceability of promises progressed.[5] Such a teleological history

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2. See, e.g., Melvin A. Eisenberg, "The Theory of Contracts," in *The Theory of Contract Law: New Essays* 206, 242–43, 259–64 (Peter Benson ed., 2001). For the view that the moral force of promise undergirds contract law generally, see Charles Fried, *Contract as Promise* (1981).

3. Thomas W. Joo, "Contract, Property, and the Role of Metaphor in Corporations Law," 35 *U.C. Davis L. Rev.* 779, 789 (2002).

4. P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

5. See E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract," 69 *Colum. L. Rev.* 576 (1969). Farnsworth's history is teleological in the broad view: "Over the course of the fifteenth

makes it easy to underestimate the role of the changes in our conception of contract in generating the frame for the modern discourse of contract, and of private law generally. The frame supplied by the conception of contract is the private ordering paradigm. Within the frame of private ordering, individuals are preexisting entities with preexisting preferences or desires. They use contract as a means to achieve their preexisting ends by exchanging their entitlements.[6] The development of modern contract law, according to the teleological picture, goes hand in hand with the expansion of the free market. And that concurrent development is the story of individuals capturing the power to make their own decisions about production and consumption, in accordance with their own preferences and interests. This much is so widely accepted that it is nearly forgotten background; it becomes the very stage on which the play of contract law is enacted.

My principal aim in this book is to undermine the stability of the perspective of modern contract discourse. The key to such a process lies in a close reading of contract cases and theory, side by side. Late nineteenth-century contract theory was revolutionary, in that it instated systematic, theoretical neatness and order into a chaotic mass of materials. Theoretical extrapolations of doctrine proposed and refined a framework for abstracting and understanding contract problems. But the case law is richer than the theory: the cases cannot be explained in accordance with the simplicity offered by the new contract theory and doctrinal articulation. They consistently have to deal more explicitly with the contaminating effects of relationships, precisely those elements that theory attempts to abstract from its treatment. The lasting theoretical framework installed by late nineteenth-century scholars articulates the autonomous calculating subject; the case law

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and sixteenth centuries the common law courts had succeeded in evolving a general basis for the enforceability of promises through the action of assumpsit. . . . [I]n view of the difficulty that mankind the world over has had in developing any general basis at all for enforcing promises, it is perhaps less remarkable that the common law developed a theory that is logically flawed than that it succeeded in developing any theory at all." Id. at 598–99.

6. Michael Trebilcock outlines the key features of the private ordering paradigm in distinguishing private ordering from traditional economies on the one hand, and command economies on the other:

> In the case of a market economy, production and consumption decisions are decentralized and depend on the myriad decisions of individual producers and consumers, acting in furtherance of individual preferences and incentives, thus minimizing the role played by social conventions or status in traditional societies and centralized information gathering and processing and coercion in command economies.

Michael J. Trebilcock, *The Limits of Freedom of Contract* 2 (1993).

offers the site for a more complex cultural negotiation of subjectivities, the site of conflict over the shape of individuality.

Contract, then, ought to be read as part of a wider cultural discourse, and at times, cultural conflict. In the late nineteenth century, the conception of contract was undergoing fundamental structural changes. At the same time, American culture more generally experienced a period of radical change and tumult surrounding the process of industrialization. The contest between labor and capital engendered by industrialization and the nationalization of the market formed a violent backdrop to wide-ranging cultural unease.[7] In conjunction with economic debates over the labor problem, there was an ongoing debate in various circles over the nature of subjectivity and individuality. On the one hand, there were proponents of a worldview that had faith in individual autonomy, and that argued that societal progress was dependent on the disciplined, autonomous self. Discipline and autonomy in this context were—with regard to the individual—keys to rationalization, elements of what Max Weber called "the specifically modern calculating attitude."[8] On the other hand, "the rationalization of urban culture and the decline of religion into sentimental religiosity further undermined a solid sense of self. For many, individual identities began to seem fragmented, diffuse, perhaps even unreal."[9] Modern subjectivity was, at the turn of the century, both an open question and a political issue.[10]

The conflict over the subject generated many responses, but complete avoidance of the issue was not an option. Contract discourse, in this respect, should be read alongside any number of elite cultural productions. There are various agenda on the table, but one recurring issue is the shape and role of the individual. Is the individual vulnerable, exposed, in need of protection? Is the individual responsible, in control? Does the individual choose freely, or succumb to pressures? Is the individual honest, or scheming? Generous, or calculating? And contract discourse is not unified within

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7. One author describes the labor-capital contest at the end of the nineteenth century thus: "Tens of thousands of industrial disputes, work stoppages, lockouts, and strikes raged throughout the northern manufacturing belt during this period and contributed to what became one of the most tumultuous and violent labor experiences in the history of industrialization." Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900*, p. 13 (2000).

8. 1 Max Weber, *Economy and Society* 86, 107–9 (Guenther Roth and Claus Wittich eds., 1978).

9. T. J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880–1920*, p. 32 (1981).

10. See James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850–1940*, pp. 80–81 (1994).

itself. At the most basic level, even elite contract discourse would be split into at least two parts. First, there is a body of scholarly work or contract theory, produced by a handful of academic lawyers; second, there are reported cases. The case law is more complex on questions of subjectivity than the scholarship, a difference I take into account in the ensuing chapters. But for purposes of introducing the work, a reductive claim should suffice: late nineteenth-century contract discourse should be read in the context of that period's cultural upheaval. The individual posited by contract thinking is both forward- and backward-looking, but in fact represents precisely those elements of individuality that fin de siècle culture in America was either rejecting or mourning the loss of.[11]

The late nineteenth century, then, is a border, a site of transition and emergence, in two distinct but related senses. First, contract law and private law generally were undergoing a thorough transformation. The dominant conception of contract was distinguishing itself from the law governing a set of defined relations (entry into which was voluntary, but whose terms were set primarily by law), and morphing into a law of private agreement, with its terms set by the parties' actual consent or extrapolation from such consent.[12] American law was busy reorganizing itself around the concept of *will*, a reorganization that yielded our familiar categorizations of property,

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11. It is in this sense, contract discourse is of a piece with what Jackson Lears calls a half-conscious, self-deceptive and evasive pattern of faith in individual autonomy within dominant culture. See Lears, *No Place of Grace*, 17.

12. Roscoe Pound's generalization of the principle of relation as the mode of organization for common law thinking about private law is instructive, and worth quoting at length:

> If we must find a fundamental idea in the common law, it is relation, not will. If the Romanist sees all problems in terms of the will of an actor and of the logical implications of what he has willed and done, the common-law lawyer sees almost all problems—all those, indeed, in which he was not led to adopt the Romanist's point of view in the last century—in terms of a relation and of the incidents in the way of reciprocal rights and duties involved in or required to give effect to that relation. . . . [O]ur private law is the field where the idea of relation is most conspicuous as a staple juristic conception. On every side we think not of transactions but of relations. We say law of landlord and tenant, not of the contract of letting. We say master and servant, not *locatio operarum*. We say law of husband and wife or of parent and child or of guardian and ward, or for the whole, law of domestic relations, not family law. We say principal and agent, not contract of mandate; principal and surety, not contract of suretyship; vendor and purchaser, not contract of sale of land. We think and speak of the partnership relation and of the agency, liabilities, claims and duties which it involves—which give effect to it as a relation of good faith—not of a contract of *societas*. We think of the claims and duties involved in a fiduciary relation and of the legal incidents that give effect to trusteeship or executorship as a relation of good faith, not of the implications of the declaration of will involved in accepting or declaring a trust or qualifying as executor. We do not ask what are the logical deductions from the will of the parties involved in a sale of land. We ask what incidents attach in equity when the vendor-purchaser relation arises. We do not think of giving effect to the will of the parties