

The Equitable Dimension of Contract

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I. INTRODUCTION

Contract theory has long been preoccupied with the common law. Contracts is taught in the first year of law school along with the other “common law subjects.” The rise of the modern view of contracts as involving mutually dependent undertakings—as opposed to the earlier independent covenants model—was carried out by the common law courts. Contracts are usually enforced with damages, the classic common law remedy. From proto-realists like Holmes, through the realists and their successors in law and economics, theorists have emphasized the law and downplayed the special role of equity, as developed over the centuries by Chancery and building on a tradition of thought going back at least to Aristotle. Equity is treated either with disdain as useless moralizing or with impatience as a mere proto-version of freewheeling contextualized inquiry that the law courts should be engaging in without artificial constraints of a separate “equity.” Whether they have been anti-moralists, formalists, realists, or consequentialists, commentators have been quite unified in their preference for contract law over equity.

This orientation to the common law, narrowly conceived, is even true of Charles Fried’s landmark book *Contract as Promise*,¹ which did much to bring a moral approach to contracts back into the spotlight. In this Essay I will argue that Fried conceded too much to the conventional exclusive focus on the common law, but that once we recapture an older tradition of equity, the central role of morality in contracts comes more clearly into view. Equity is the missing dimension from contract theory.

This older tradition uses equity as a structured safety valve to deal with the opportunism arising from the simple structures of the common law. At the same time, equity as a safety valve can be justified on both deontological and consequentialist approaches to contract law. Thus, the Kantian and utilitarian views of contract can converge at the descriptive level. If so, then the disagreement between promise theorists like Fried and legal economists is a

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1. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

foundational rather than a descriptive one.

II. PROMISE AND THE MORALITY OF THE COMMON LAW

Fried's great innovation was to place contract on a moral footing. More specifically, as his title reflects, Fried argues for the centrality of the moral obligation of promise to the law of contract. To do so, he must explain why not all promises are enforced, and why the law does not allow an unconstrained and therefore "tyrannical" direct implementation of judicial views on morality through courts' remedial responses to contract.

Fried was not writing on a blank slate, even if it was one from which morality had largely been erased. Two currents made a morals-based theory of contract implausible at the time he wrote. On the one hand, starting with proto-realists like Holmes, some had grown skeptical of traditional and *a priori* moral notions in the law and sought to put them on a more objective footing.² On the other, the realists and their successors saw a need for a wider version of morality, to include social and class justice and distributive concerns, rather than corrective justice or personal morality.³ Such expansive notions could then be part of the greater context to which realist courts could and should respond when deciding in common law mode. Interestingly, modern law and economics, which is often taken as a main counterpoint to Fried's Kantian theory of contract, partakes somewhat of both of these currents. In law and economics, notions of fairness are often (but not always) dismissed as fussy ex post thinking that gets in the way of more generalizable rules that can better guide ex ante behavior with proper incentives.⁴ At the same time, much of traditional law and economics incorporates a version of utilitarianism and cost-benefit analysis that tends, despite some attention to administrative cost, to treat contextual information as presumptively relevant, although more recently, especially in contracts, a new formalism has emerged—to which I will return. Thus, to argue for the morality of promising—a matter of personal morality and an important but not all-encompassing social institution—faced challenges from all sides.

I will argue that Fried did not go far enough in challenging the classical and

2. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 130-40 (1881); see also DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 42-68 (1995) (discussing the "new jurisprudence").

3. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815-17, 840 (1935) (contrasting positivist and pragmatic approach with earlier "moral faiths and prejudices" and "otherworldly" morality).

4. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1007-09 (2001). Recently, psychologists and economists have chalked this up to some version of hindsight bias or the availability heuristic. See *id.* at 1010 & n.97 (citing *inter alia* JONATHAN BARON, *JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING* (1998)); see also Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576-88 (1998).

realist legacy, and that there is another dimension of contract theory that even he leaves out of the picture: the dimension of equity. Before turning to what I mean—and what contract law used to mean—by “equity,” let me pick among the shards of equity to be found in the thinking of Fried and his opponents.

Modern commentators tend to use Holmes as a jumping-off point or a foil—in Fried’s case the latter. To Holmes, contract, like the rest of the common law, had to be shorn of its moral baggage:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.⁵

Holmes thought this was of a piece with the law ridding itself of subjective moral notions. Holmes did analogize breach of contract to a tort,⁶ so it is not clear he really believed that one had an option to perform or pay, but the notion of breach is an objective and nonmoral one, as he advocated likewise for the law of torts. This thin view of contractual obligation has carried over into law and economics, most famously in the controversy over efficient breach, which adopts the “option” view of Holmes’s famous passage. I do not propose to get deeply into the question of efficient breach here, other than to note that commentators tend to agree that explicit options should generally be respected.⁷ Disagreement starts when the question becomes the possible presence of implicit options, and when unforeseeable circumstances arise. Partly this is a matter of the sociology of the institution of contract and promising, to the extent that the expectations are not created by the law itself. I return to this larger issue later.

Back to Holmes. Holmes did not think morality was irrelevant to the shaping of the law, or that law was purely autonomous, but he did approve of what he saw as the law as becoming more and more couched in objective, policy-oriented terms. But this left Holmes a little uncomfortable with the role

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

6. See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1086-87 (2000).

7. See, e.g., FRIED, *supra* note 1, at 116-18; Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 12 (1989); Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004).

of equity, and rightly so. After his famous perform-or-pay passage quoted earlier and a further discussion of an opinion by that paragon of law and foe of equity, Lord Coke,⁸ Holmes goes on to say:

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.⁹

To Holmes, equity was an anomaly and exceptional, and its role was to be downplayed—and contrasted with law, which was better understood as “a body of dogma enclosed within definite lines.”¹⁰ As we will see, something can be exceptional in practice without being anomalous or unimportant. Equity is one of those somethings.

For the realists and their successors, equity has remained as marginal as it was for Holmes. The realists doubted the value of the limits on and separateness of equity and wanted to carry the equitable impulse much further by making the law more responsive to context.¹¹ The final fusion of equity

8. *Bromage v. Genning*, (1616) 81 Eng. Rep. 540 (K.B.) (denying specific performance for a covenant to grant a lease). Holmes had this to say about the case:

In *Bromage v. Genning*, a prohibition was sought in the King's Bench against a suit in the marches of Wales for the specific performance of a covenant to grant a lease, and Coke said that it would subvert the intention of the covenantor, since he intends it to be at his election either to lose the damages or to make the lease. Sergeant Harris for the plaintiff confessed that he moved the matter against his conscience, and a prohibition was granted. This goes further than we should go now, but it shows what I venture to say has been the common law point of view from the beginning, although Mr. Harriman, in his very able little book upon Contracts has been misled, as I humbly think, to a different conclusion.

Holmes, *supra* note 5, at 462 (footnote omitted). Joseph Perillo notes that Holmes mentions this case as having been earlier law in an opinion for the United States Supreme Court: “[t]he old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage v. Genning*, 1 Roll. R. 368; *Hubert v. Hart*, 1 Vern. 133.” Perillo, *supra* note 6, at 1086 n.6 (quoting *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903)).

9. Holmes, *supra* note 5, at 462-63.

10. *Id.* at 459.

11. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1214-19 (2006); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1177-82 (2003).

happened during the legal realist era. Courts were given flexible procedures originating in equity, most notably in the Federal Rules of Civil Procedure.¹² On the substantive side, common law courts were urged to consider policy context in an unconstrained way. Older ideas of equity, including even Roscoe Pound's notion of equity as a "safety valve," met with realist criticism.¹³ At the opposite end of the spectrum, modern formalists have reasserted some formalism in contracts,¹⁴ and have even decried equity and the fairness-oriented judicial intervention they see as its natural outgrowth. Often this has taken the form of skepticism about ex post judicial reasoning and expansive approaches to promissory estoppel, unconscionability, the penalty doctrine, and substantive unfairness more generally.¹⁵ Some have even identified this super-contextualism and fairness-based discretionary reasoning with the traditions of the courts of equity.¹⁶ Their purpose is not to praise, but rather the new formalists would be inclined to agree with Selden that equity in its supposed arbitrariness is like the "Chancellor's foot."¹⁷

Against this backdrop, Fried does not make much of equity. His promise principle has antecedents in the rule-oriented classical theory of contract, and Fried believes that classical contract theorists were too stingy about their response to mistake, frustration, and good faith.¹⁸ Fried spends several chapters explaining how a somewhat more generous approach to excuse and the like is consistent with the promise principle.

Much of the traditional response to these problems—fraud, accident, mistake—sounded in equity, and like the new formalists, Fried drops hints that equity makes him nervous for its emphasis on judicial discretion. Perhaps

12. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

13. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 132-33 (1922) (refusal to enforce hard bargains is a "needed safety valve in the working of our legal system"). For Realist criticism, see Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 434-35 (1930).

14. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); *Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999); see also GARY J. AICHELE, LEGAL REALISM AND TWENTIETH-CENTURY AMERICAN JURISPRUDENCE x (1990) ("Impossible only a decade ago, 'mechanical jurisprudence' has made a remarkable comeback, and a new legal formalism may yet triumph as the principal mode of [judicial] interpretation . . ."); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

15. For criticism, see the sources cited in note 14, *supra*.

16. See generally Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009).

17. See JOHN SELDEN, TABLE TALK 43-44 (Israel Gollancz ed., J.M. Dent & Co. 1906) (1689) ("Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor's Foot; what an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.")

18. FRIED, *supra* note 1, at 24-25, 57-63.

Fried thinks that the main alternative to the classical-formalist view is unbridled discretion, as he implies in his discussion of sharing,¹⁹ redistribution,²⁰ doctrines relating to good faith,²¹ and the direct enforcement of altruism.²²

Instead, Fried, like the realists, looks to other common law areas for help with problems arising from the rigidity of contract law. He identifies a tort principle relating to harm stemming from reliance on promises and a restitution principle for situations in which failure of a promise-based contract leaves someone with unjust gains.²³ Both of these principles operate outside the confines of promise. Although restitution has roots in both the common law and equity, it has always been considered to have a special equitable flavor compared to other branches of the common law.²⁴

In the next Part, I will show that there are hints at a more full-blown, but nonetheless constrained version of equity in Fried's book, but for the most part Fried only dips his toes into these waters. He occasionally uses the term "equitable," but in the sense of an all-things-considered fairness. For example, does a buyer have a duty to disclose knowledge about an asset he is buying (as in the case of an oil speculator purchasing a plot of land from a farmer)?²⁵ Fried treats this as a case of competing values of autonomy, prudence, and fairness, rather than under the limited approach to near-fraud in traditional equity. Also, like the legal realists, Fried adopts a simple sharing approach to filling in gaps.²⁶ More direct applications like the unconscionability doctrine and notions of duress he treats with extreme caution,²⁷ perhaps because by the time that Fried wrote, they had come to stand for many things—not least the type of all-things-considered fairness and enforced altruism he is at pains not to let swamp the promise principle.

Fried was not wrong to worry about opening the floodgates of equity, and as

19. *Id.* at 71.

20. *Id.* at 78, 103-08 (distributive concerns are general).

21. *Id.* at 74-91.

22. FRIED, *supra* note 1, at 76-77; see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773-74 (1976); see also *infra* notes 46, 54 and accompanying text.

23. FRIED, *supra* note 1, at 69.

24. Restitution embraces (equitable) constructive trust and (legal) quasi-contract. Although the latter was technically on the common law side, it was considered to have a special equitable flavor. This was taken quite far by Lord Mansfield in *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.) 681; 2 Burr. Rep. 1005, 1012, which was quite influential. The Mansfield tradition was influential and may have appealed to James Barr Ames, who, as Andrew Kull has recently shown, first conceived of the field of restitution in the 1880s. See Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 310-16 (2005). For a narrow view of the proper relation between unjust enrichment and equity, see Emily Sherwin, *Restitution and Unjust Enrichment: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).

25. FRIED, *supra* note 1, at 79-85.

26. *Id.* at 72-73.

27. *Id.* at 39, 92-111.

already noted, the common lawyers and formalists always harbored a deep suspicion about equity's potential for arbitrariness and expansion. But much of what gives Fried the most difficulty in terms of bad faith, unconscionability, and the like were at the heart of traditional equity. Is there a way to allow equitable considerations—which are themselves moral—into contract law without giving away the benefits of autonomy and stability? The older tradition of equity, which had all but disappeared by the time of *Contract as Promise*, contains the seeds of an answer.

III. THE ROLE OF EQUITY

This older tradition of equity is an essential part of contract. Equity is not the caricature of a “realist” approach to judging—doing whatever seems best to the judge *ex post* in an individual case. Rather in this Part, I will present a reconstruction of the traditional approach to equity, for which I argue at length elsewhere.²⁸ My purpose is not historical but functional. Equity served as a safety valve to deal with the problem of opportunism that arises where the simple *ex ante* structures of the common law invite efforts at manipulation by the sophisticated and unscrupulous.

What is opportunism? Economists have offered a variety of definitions, and not all are convinced of its usefulness as a concept, but by “opportunism,” I mean the use of the system in hard-to-foresee ways by well-informed parties, even at the expense of shrinking total surplus.²⁹ Although it is a moral notion like theft and fraud, like those more overt forms of misdoing, opportunism is closely related to transaction costs and incomplete contracts. Contracting parties would contract away fraud and opportunism if they could, but contracting is not costless. Opportunism in particular is inherently difficult to deal with *ex ante*. As in the tax law, announcing a bright line invites people to dance around the line.³⁰ “Walking the line” is only a problem where the rule is imperfect because of the costs of making it perfect.³¹ This is one reason that

28. Henry E. Smith, *An Economic Analysis of Law Versus Equity* (draft Oct. 22, 2010), available at http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.

29. For discussions of opportunism in the economics of contracts, see, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 47 (1985) (defining “opportunism” as “self-interest seeking with guile”); Margaret F. Brinig & Steven M. Crafton, *Opportunism in Marriage*, 23 J. LEGAL STUD. 869 (1994); Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L.J. 43 (2007); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981); Oliver E. Williamson, *Opportunism and Its Critics*, 14 MANAGERIAL & DECISION ECON. 97 (1993).

30. See David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999); see also Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 707 n.31 (1969).

31. Cf. Kennedy, *supra* note 22, at 1695-96 (noting tendency of rules to encourage people to “walk the line” in order to comply with the letter but not the spirit of a rule).

equity must intervene when law is imperfect owing to its generality,³² as Aristotle said, and the Aristotelian tradition has been invoked by judges through the history of equity.³³ Opportunism also harks back to notions of “near fraud” prevalent in the nineteenth century, in which a highly unequal exchange would be taken as a sign of fraud not provable through conventional means.³⁴

To discourage opportunism, the various features of equity act in concert. Very familiarly, equity employs *ex post* standards rather than *ex ante* rules,³⁵ and the problem of opportunism requires this approach: it can be more cost-effective to use simple rules backed up with discretion to punish abuse of the rules *ex post* than to try to close off every loophole *ex ante*.³⁶ Closing nine loopholes is ineffective if all the sophisticated parties will rush through the tenth open one. The cost of equity is the chilling effect it can have on legitimate behavior stemming from its vagueness.³⁷ But other features of equity aim to

32. Courts of equity have often quoted Aristotle’s distinction between law and equity in which equity corrects “law where law is defective because of its generality.” ARISTOTLE, *NICOMACHEAN ETHICS* 317 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press 1982). One problem of generality is its invitation to opportunism.

33. See, e.g., *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889) (quoting Aristotle on equity); CHRISTOPHER ST. GERMAIN, *DOCTOR AND STUDENT* 96-97 (T.F.T. Plucknett & J.L. Barton eds., Selden Soc’y 1974) (1528) (invoking in a discussion of equity the notion of “Epikaya” [Greek *epieikeia*] and Aristotelian notion that equity supplements the law with justice when the law fails on account of its generality); Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 *LAW & CONTEMP. PROBS.* 263, 270-75 (1996) (documenting influence of Aristotelian equity on Anglo-American law). *But cf.* Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 *STAN. L. REV.* 2053 (2005) (arguing that Aristotle’s equity was not primarily legal).

34. Richard Epstein’s theory of unconscionability as a presumption against deals that raise the specter of fraud without the full evidence for it (“near-fraud”) is a perhaps slightly narrowed-down version of this vision. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & ECON.* 293, 293-301 (1975). On the nineteenth century view that unconscionability referred to fraud that could not readily be proved, see, e.g., *Seymour v. Delancy*, 3 *Cow.* 445, 532 (N.Y. Sup. Ct. 1824) (discussing prevalence of the view that “[i]nadequacy of price, unless it amount to conclusive evidence of fraud, is not itself a sufficient ground for refusing a specific performance of an agreement”) (citing cases); James Gordley, *Equality in Exchange*, 69 *CALIF. L. REV.* 1587, 1639 (1981).

35. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 7-8 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992); Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 *Rutgers L.J.* 81, 90-98 (2010); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, 56-67 (1992).

36. The civilians seem to have something like this in mind when they speak of “abuse of right.” See, e.g., Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 *HASTINGS L.J.* 687 (2010); Antonio Gambaro, *Abuse of Rights in Civil Law Tradition*, 4 *EUR. REV. PRIVATE L.* 561 (1995); Lehavi, *supra* note 35, at 136-37; Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 *PAC. L.J.* 37 (1995); A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 *LA. L. REV.* 1173, 1192-93 (1994) (noting similarities and differences between abuse of right and equity); Larissa M. Katz, *A Jurisdictional Principle of Abuse of Right* (Nov. 8, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1417955>.

37. See, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 *VA. L. REV.* 965 (1984).

minimize these impacts. These include the operation of equity in personam and not in rem, and the structured set of presumptions that used to be jurisdictional—for example, the irreparable injury requirement.³⁸ Even the emphasis on good faith and notice has a limiting effect a little like the scienter requirements in criminal law. And, as we will see, sometimes the employment of very simple, everyday morality can make equity more certain and less expansive, as long as it is kept to its proper domain. In the case of contracts, this means not letting morality displace the deal the parties chose for themselves.

Interestingly, Fried's discussion of his moral approach touches on these various pieces of equity without identifying it as a whole elephant. But it is the elephant in the room of the contract law! First of all, Fried does recognize something like the problem of opportunism, when he mentions that mistake can be the occasion for self-serving statements by parties to take advantage of a situation *ex post*.³⁹ Fried's discussion of good faith also touches on the problems of "chicanery and sharp practice,"⁴⁰ as well as malice, personal harassment, and even extortion.⁴¹ But, in an echo of the common lawyers, he apparently does not want to open the door to full-blown equity: he treats duress, unfairness, and unconscionability as a challenge to the promise principle and solutions to them as requiring extreme caution.⁴²

Fried nevertheless does not try to tie these problems together, and more importantly, he sees solutions to them as stopgaps deriving from competing general principles. So when he speaks of Bad Samaritans and notes that it is difficult to foresee their behavior, he treats this as a gap in the system and states that such actors put themselves beyond civil society.⁴³ To the extent he sees the need for a solution here, it is a legal one outside contract as promise, namely the tort principle. Alternatively, he invokes limits of language and good will, which he sees as flowing from the promise, but he considers going beyond this to be a resort to tyranny.⁴⁴ (The Chancellor's foot strikes again!) What Fried would like to avoid is having the promise principle superseded by

38. Douglas Laycock has argued that this requirement no longer binds. *See, e.g.*, DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 688-701 (1990). But I would argue that it is not a "rule" and serves as a loose proxy. *See* Smith, *supra* note 28.

39. FRIED, *supra* note 1, at 62. Interestingly, Brian Simpson has shown that such self-serving opportunism probably occurred in the most famous mistake case of all, *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch.). A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 135, 162-65 (1995); A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 293-308 (1989).

40. FRIED, *supra* note 1, at 85.

41. *Id.* at 89-91.

42. *Id.* at 39, 92-111.

43. *Id.* at 110-11.

44. FRIED, *supra* note 1, at 91.

general social policies, such as giving employees security through contract law.⁴⁵ And he certainly sees the enforcement of general duties of altruism as unconstrained and likewise incompatible with the promise principle and the values of autonomy, liberty, and stability of expectations that it fosters. Indeed the closest he comes to dealing with equity, as traditionally conceived, is a brief reference to Duncan Kennedy's theory of standards as embodying a communitarian and altruistic world view in contrast to the individualism of the common law.⁴⁶

One might think—and from the signs discussed above Fried might very well have thought—that traditional equity is exactly what one does not want to deal with the misuse of the common law. As common lawyers and formalists through the centuries would have it, that is the problematic essence of equity. And the current view of equity, if anything, exaggerates this view, making of equity a naked appeal to judicial discretion implemented in (ex post) standards couched in terms of amorphous fairness.

But there is an alternative, and one that is more compatible with a modest role for the common law and its simple structures: traditional equity. Equity is best seen—as it was seen before the late nineteenth century—as a structured safety valve aimed at discouraging opportunism. Jurists from before the classical era of contract thought this way.⁴⁷ For example, Justice Story argued that equity must be open-textured in order to deal with manipulators and opportunists, or as he put it, fixed rules against fraud would be “eluded” because “[f]raud is infinite” given the “fertility of man's invention.”⁴⁸ And part

45. *Id.* at 89-91.

46. *Id.* at 76-77 (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773-74 (1976)); see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15, 38, 40-63 (1987).

47. See Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 948 (2000) (quoting Carl M. Dibble, *The Lost Tradition of Modern Legal Interpretation* 5 (1994) (unpublished essay prepared for delivery at the 1994 Annual Meeting of the American Political Science Association)) (discussing Carl Dibble's identification of a “moderate Enlightenment” tradition of legal interpretation associated with Grotius, Blackstone, and Marshall, that emphasized the role of equity and located the need for interpreting laws not in the ambiguity of language but in the possibility “that corrupt, duplicitous persons will ‘treat the law in a sophisticated manner’ in order to advance their own individual interests”).

48. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 186, at 161 n.5 (2d ed. 1839) (1836) (quoting Letter from Lord Hardwicke to Lord Kaims (June 30, 1759)). Or, as Chancellor Ellesmere put the point: “The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.” *Earl of Oxford's Case*, (1615) 21 Eng. Rep. 485 (Ch.) 486. Story further quotes a very clear judicial statement of the role of equity in discouraging opportunistic evasion of the law:

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law,

of this approach was to structure equity in terms of flipping presumptions and proxies for opportunism.⁴⁹ Let me focus on just a few here that are particularly important and that resonate with some of Fried's discussion.

The first is spite. Fried flirts with the idea that courts should not aid one who is enforcing a promise out of spite.⁵⁰ As it happens, spite is a major, albeit narrow proxy in equity for opportunistic behavior. Where someone is enforcing a right out of motivation to harm someone else, it is likely that something other than serving contractual purposes or welfare maximization is going on. Closely related is pretext,⁵¹ and on the equitable view, when one cannot be forthcoming about one's true reasons for invoking a right, we have reason to worry about opportunism.

The second cluster of proxies centers on unclean hands and estoppel. Fried does invoke something along these lines at various points,⁵² sometimes under the heading of the "importance of being in the right."⁵³ But Fried sees this as akin to entrapment and treats it as a near-tort (again). Unclean hands and estoppel, though, are at the heart of equity, and serve to pick out situations that present a great danger of opportunism.

A broader and more fundamental proxy in equity is disproportionate hardship. Here too, Fried touches on such cases, but his response shows his ambivalence about expansive principles that might compete with promise. For example, he notes that great imbalance of gain or loss is taken by Kennedy to imply a duty of altruism.⁵⁴ But in traditional equity, disproportionate hardship was a reason to flip the presumption of justification to the one proposing to enforce.⁵⁵ The idea is that unexpected discontinuities raise a red flag, and the burden of proof should be on the one benefitting because of a high likelihood of opportunism.⁵⁶ This does not prevent discontinuities, especially if they were bargained for as part of explicit risk allocation, but it does focus equity and employs a flexible presumption. Disproportionate hardship (or undue hardship) is thus a presumption-flipping proxy rather than the cost-benefit test or formless policy inquiry that it is sometimes mistaken for.⁵⁷

whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.

1 STORY, *supra*, § 17, at 15 (quoting *Dudley v. Dudley*, (1705) 24 Eng. Rep. 118 (Ch.) 119).

49. Smith, *supra* note 28.

50. FRIED, *supra* note 1, at 96-98, 102-03 (spite).

51. *Id.* at 119, 127.

52. *Id.* at 128-30.

53. *Id.* at 112 (title of Chapter 8).

54. Kennedy, *supra* note 22, at 1717-22.

55. Smith, *supra* note 28, at 36-38.

56. These presumptions can be varied in their strength. Compare Epstein's analysis of the statute of frauds and unconscionability as raising presumptions against validity and enforcement. Epstein, *supra* note 34.

57. A dramatic recent example is the "balance of the hardships" as a "factor" for injunctions, which

By contrast, Fried takes the discontinuities thrown up by contracts cases as evidence for the moral view of contract based on the promise principle. He identifies excessive sharp discontinuities with the classical tradition and would allow some softening around the edges, but he thinks that an irreducible on/off quality is characteristic of a moral view in general and one based on promising in particular.⁵⁸ It is true that deontology and sharp breaks go together. As Robert Cooter notes, sanctions have moral overtones and tend to work best when we know the substantive standard.⁵⁹ We can back up the standard with a strong and discontinuous remedy because we don't expect people to be in equipoise.⁶⁰ By contrast, where we have relatively better knowledge about external harm than the correct activity level, we should use prices.⁶¹ In a sense, Fried is treating some of the basics of contract law like formation, breach, mistake,⁶² and the like as sharply defined alternatives coupled with sanctions, because

if the domain of right and wrong is seen as autonomous, it must contain sharp breaks: between the permissible and the impermissible, between the obligatory and the optional. And contractual obligation (promissory obligation) is obligation after all. A particular act may be more or less good or indifferent, but once it is the subject of a promise it is transformed and becomes obligatory. This is a discrete step, and so it should be no surprise that judgments (and consequences) visited upon acts will vary sharply (discontinuously) depending on whether or not obligations may be invoked in respect of those acts.⁶³

Fried does allow for option contracts, in which parties contract around sharp breaks, but he assumes that much liability will come off the rack. As he sees it, he differs from utilitarians in endorsing morals-based sharp discontinuities.⁶⁴ If so, we might expect the promise principle to be paired with supracompensatory remedies (sanctions in Cooter's sense), rather than expectation damages, which look like prices in Cooter's sense.⁶⁵

traditionally was a safety valve based on disproportionate hardship and not a cost-benefit test or an all-things-considered equipoise-style evaluation. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); see also Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2125-32 (2009); Mark Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012).

58. FRIED, *supra* note 1, at 113, 120-21, 130-32, 153 n.1.

59. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

60. *Id.* at 1528-30, 1556-58.

61. *Id.*

62. FRIED, *supra* note 1, at 63, 67, 70 (mistake).

63. *Id.* at 132.

64. *Id.* at 131-32.

65. See, e.g., DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARD A LIBERAL THEORY OF CONTRACT 95-96 (2003); Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 291-93 (1995); T.M. Scanlon, *Promises and Contracts*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS

But on the equitable view, morality does not necessarily always favor sharp discontinuities. Disproportionate hardship is used as a proxy for flipping the presumption from validity to invalidity, from enforcement to nonenforcement (by injunctions, or sometimes even by damages).⁶⁶ Obligation can be compatible with morality and involve presumptive force coupled with shifts in presumptions based on proxies.⁶⁷

Equity as a mode of decision making to deter opportunism makes sense of ex post intervention that would otherwise be questionable at best. Take *Jacob & Youngs, Inc. v. Kent*,⁶⁸ which presents a famous but typical situation of disproportionate hardship. The promisee-homeowner refused to pay the remaining price for the construction unless the builder would largely tear down a house at great cost to replace Cohoes with equal-quality Reading pipe. Fried treats this as an example of the restitution principle, preventing the owner of the house from retaining the benefit without paying for it.⁶⁹ But again, why not grant specific performance or damages in the amount of the cost of partially demolishing the house and replacing the pipe? Judge Cardozo sets forth a set of presumptions:

Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

. . . This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions.⁷⁰

86, 92 (Peter Benson ed., 2001); see also Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1605-06 (2009). Commentators outside of promise-based contract theory have raised the same question. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 160-61 (2002); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 523 (1989).

66. Compare Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253 (1991) (arguing that there is no defensible reason for equitable doctrines of contract enforcement to be paired with equitable remedies), with Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990) (arguing that if equitable defenses apply across the board, they risk becoming all or nothing).

67. It is also interesting to note that philosophers have started proposing a presumptive version of deontology, in which rights are defeasible and are not absolute. Usually this is reserved for extreme situations. See, e.g., CHARLES FRIED, RIGHT AND WRONG 10 (1978); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 41 (2009).

68. 129 N.E. 889 (N.Y. 1921).

69. FRIED, *supra* note 1, at 69, 125-26.

70. *Kent*, 129 N.E. at 891 (citations omitted).

Interestingly, this is exactly the same approach that equity takes to situations like building encroachments⁷¹: in a small, innocent encroachment, courts tend to give damages rather than an injunction because of the disproportionate hardship, but a bad faith encroacher is hit with the full injunctive remedy.⁷²

In cases like *Jacob & Youngs*, the promisee is limited to the difference in value (rather than the cost of fixing the shortfall in performance),⁷³ if the shortfall in performance is not in bad faith (knowing the homeowner wants exactly Reading pipe and intending to use disproportionate hardship as an out). The only difference here is the actuality of contracting, and here, Judge Cardozo can be seen as employing an ex post information-forcing standard triggered by disproportionate hardship (“out of proportion,” “forfeiture”). This standard, in effect, shifts the burden to the prospective homeowner to be clear that this is what was contemplated (for example, by making a further showing that this was the actual intent or by spelling this out in the contract).⁷⁴ Absent

71. Judge Cardozo invokes equity and justice and recognizes the undesirable fuzziness they involve:

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. Where the line is to be drawn between the important and the trivial cannot be settled by a formula. ‘In the nature of the case precise boundaries are impossible.’ 2 Williston on Contracts, § 841. The same omission may take on one aspect or another according to its setting.

Id. (citations omitted).

72. See, e.g., *Raab v. Casper*, 124 Cal. Rptr. 590 (Ct. App. 1975) (interpreting California Good Faith Improver Act); *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951); see also Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 42-49 (1985) (discussing statutory and judicial relief for encroachment). A similar approach can be taken to injunctions for patent infringement, for similar reasons. See generally Vincenzi Denicolò et al., *Revisiting Injunctive Relief: Interpreting eBay in High-Tech Industries with Non-Practicing Patent Holders*, 4 J. COMPETITION L. & ECON. 571 (2008); Smith, *supra* note 57, at 2125-32; Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008).

73. *Kent*, 129 N.E. at 891.

74. Interestingly, subsequent studies suggest that the promisee would have had a hard time proving that Cohoes was essential to the performance, and that ex ante contracting should have involved displacing a trade usage under which reference to a brand like Reading was to indicate quality rather than the particular brand. See RICHARD DANZIG & GEOFFREY R. WATSON, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* 111-12 (2d ed. 2004) (“[I]t was the normal trade practice to assure wrought iron pipe quality by naming a manufacturer.”); Carol Chomsky, *Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts*, 75 MINN. L. REV. 1445, 1447 (1991) (“The contract apparently specified Reading pipe only to provide a standard to ensure that Jacob & Youngs used pipe of the proper quality.”). Law and economics usually takes a more ex ante approach to information-forcing default rules, and much of the strategic behavior they are meant to address is akin to opportunism except in being more foreseeable. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Lucien Ayre Bebchuk & Steven

this, actually completing the work to the letter of the contract would be so costly compared to the evident benefit and gives the promisee correspondingly great leverage that it raises the presumption of opportunism. If so, cases in which courts appear to be deciding on the basis of ex post waste, and thereby causing a misallocation of resources,⁷⁵ can be seen as employing the discontinuity presented by the waste—the disproportionate hardship—as a proxy for opportunism and an occasion to flip the information-forcing presumption against the one seeking enforcement. The disproportionate hardship cases are consistent with both fairness and welfare-maximization.

Equity is couched in moral terms and intervenes where sharp discontinuities occur—forfeitures or disproportionate hardship. Doing so can improve the contracting process, and on this account equity is consistent with social welfare maximization. This convergence between deontology and consequentialism—the right and the good—should be encouraging. That it accords with an idealized reconstruction of an older, pre-classical version of equity is intriguing. While it would be a familiar mistake to derive an “ought” from an “is,” we can take some comfort from the wisdom of our forbears.

IV. THE RIGHT AND THE GOOD AS THE CONTRACTING BACKGROUND

The convergence of morality and fairness on the one hand and consequentialism and welfare on the other does leave one wondering which takes priority. In this Part, I will address only one aspect of this question: the background norms that inform and support agreements.

Fried recognizes the role of conventions that precede the agreement.⁷⁶ But this raises the question of the content of those conventions, including ones involving promising. Do the conventions of promising give rise to a near-absolute obligation to perform, come what may, or do people implicitly allow for wealth-maximizing nonperformance to be moral?⁷⁷ In a sense, this is a

Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J.L. ECON. & ORG. 284 (1991); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990). *But cf.* Yair Listokin, *Bayesian Contractual Interpretation*, 39 J. LEGAL STUD. 359 (2010) (justifying Judge Cardozo’s information-forcing default interpretation in a Bayesian framework).

75. Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610 (2008).

76. FRIED, *supra* note 1, at 12, 84.

77. Compare Friedmann, *supra* note 7 (analogizing some contract breach to theft), and Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) (arguing for fidelity-based morality to which contract law should accommodate itself), with KAPLOW & SHAVELL, *supra* note 65, at 172-213 (arguing that people implicitly promise to act in welfare maximizing way, including breaching incomplete contracts), and Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569 (2009) (noting that contingencies that people would want to excuse performance cannot all be cost-effectively foreseen and built into contracts, making breach less of a moral issue).

sociological question, and a complicated one. From a consequentialist point of view, it might make sense for the obligation to keep one's promises to be somewhat stronger than would be implied by a situation-specific cost-benefit analysis, because we think that contracting parties will be too self-serving, too inclined not to weigh the destabilization of nonperformance to expectations, and courts too bad at internalizing the true costs of nonperformance.⁷⁸ Everyone recognizes that sometimes contracting parties bargain for explicit options,⁷⁹ but it is less clear when they may have done so implicitly.

Contract as promise rests on autonomy, trust, and respect, which are values that exist outside and apart from the agreement.⁸⁰ Trust is also important for equity in that people who fear opportunism on the part of their potential or actual contractual partners will take costly precautions and sometimes forgo contracting altogether.⁸¹ Yes, one can always say that the parties could have agreed otherwise, but without the moral guideposts that come in through equity a potential contacting partner has reason to worry about opportunism and can be regarded as facing Knightian uncertainty (also known among economists as ambiguity),⁸² rather than risk.⁸³ With risk one has knowledge of the states of the world and some probability distribution over them, such as the probability of one's contracting partner being dishonest. By contrast, uncertainty cannot be quantified in this fashion because one does not know either the probability distribution or the set of outcome states—as for example all the possible types of opportunism to which one could fall victim.

The equitable view suggests that the most important role for morality lies outside the parties' agreement itself as an infrastructure without which many agreements would collapse. Fried refers to a more primitive and general background,⁸⁴ especially identified with tort and restitution,⁸⁵ that promise

78. See KAPLOW & SHAVELL, *supra* note 65, at 205-06 (arguing that norm of promise keeping is important supplement to law and that robust norm may need to be backed by idea that keeping promises is a moral virtue and breaking them an "evil in and of itself").

79. FRIED, *supra* note 1, at 116, 124 (recognizing the role of explicit options); *id.* at 117 (expressing reservations about Holmes's perform-or-pay view of contract).

80. *Id.* at 8 ("The device that gives trust its sharpest, most palpable form is promise."); *id.* at 17.

81. See, e.g., KAPLOW & SHAVELL, *supra* note 65, at 217; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 600-01 (1988) (noting that if "mopes" fear being duped, some will avoid transacting or take excessive precaution).

82. See, e.g., Larry G. Epstein, *A Definition of Uncertainty Aversion*, 66 REV. ECON. STUD. 579, 579-81 (1999) (proposing a definition of uncertainty aversion that aligns more appropriately with the Savage framework); Larry G. Epstein & Martin Schneider, *Recursive Multiple-Priors*, 113 J. ECON. THEORY 1, 20 (2003) (extending the Gilboa-Schmeidler "atemporal model" and creating their own "axiomatic model of dynamic preference"); Larry G. Epstein & Tan Wang, *Intertemporal Asset Pricing Under Knightian Uncertainty*, 62 ECONOMETRICA 283 (1994) (presenting "a formal model of asset price determination in which Knightian uncertainty plays a role"); Itzhak Gilboa & David Schmeidler, *Maxmin Expected Utility with Non-Unique Prior*, 18 J. MATHEMATICAL ECON. 141 (1989) (modeling ambiguity aversion as based on maxmin expected utility).

83. FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 19-21, 197-232 (1921).

84. FRIED, *supra* note 1, at 40 ("primitive moral intuition").

partially displaces, but I would argue that this primitive and general background is the everyday morality that makes equity possible.

An analogy to property is helpful. The basic in rem rights of property rest on the everyday morality of the wrongness of theft and trespass, because the message sent by property to duty bearers has to be processed by this large and disparate group.⁸⁶ In more personal and refined contexts, property may well rely on more balancing and more context-specific information and moral norms, but for the basic set-up of in rem property rights, simple morality is needed. Likewise in torts, the appeal of natural rights, corrective justice, and civil recourse theories that emphasize the role of wrongs and duty in torts rests in part on the informational simplicity that this allows when it comes to duty bearers.⁸⁷ In contracts, where agreement peters out and people's expectations are formed by general guideposts, basic morality is key to solving the problem of opportunism. The big, open question is whether notions of near-fraud are intuitive and general enough to serve in this role. I would argue that it is possible, although by no means guaranteed, that there is enough moral consensus on the limited questions that equity requires to be answered in the structured safety valve to discourage opportunism.

One might ask why in contracts such a matrix of morality is necessary at all. Contracts are incomplete, but why not fill them in with something else? Equity benefits from basic morality to the extent that it is based on widely known and shared morals, as we see in property and tort. The incompleteness of contracts is complemented here by the incompleteness of the law: trying to capture all opportunism *ex ante* may well be more costly than using basic morality in a structured equitable safety valve and tolerating the (thereby limited) chilling effect.⁸⁸

There is a regress lurking here. There is little to be gained from making these moral guideposts merely defaults subject to variation by the parties to particular contracts. Usually, people can serve their contractual ends by contracting within these guideposts, and allowing contracting at a meta level around basic morality as it comes in through the equitable safety valve would present too little benefit in light of the costliness of administering such a system and communicating about it to its users. As elsewhere in the law, leaving morality and custom undisturbed at the meta level has its virtues in terms of information cost. Nor is this the only such limit on party autonomy. We allow people making offers to specify the mode of acceptance, and this is useful, but

85. Fried recognizes the need for "residual general principles" but limits them to background principles within the common law or something close to it—especially the "tort" principle. *Id.* at 58, 144 n.1 (citing to Gilmore); *id.* at 69, 125-26 (discussing "restitution" principle and *Jacob & Youngs v. Kent*).

86. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

87. Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1, 32 (2011).

88. Smith, *supra* note 28.

we do not allow people to vary the law of offer and acceptance itself, such as the definition of an offer.⁸⁹ Again, little would be gained that could not be achieved easily within the system, and much complexity would be introduced. As we allow contracting about contracting about contracting, and so on, each additional layer can be expected to yield fewer benefits from freedom to tailor and to proliferate costs of complexity to users of the system. Another way to look at all this is that it is hard to envision a system of ascending defaults without some fixed point at the top. Basic moral notions form a plausible candidate for that resting point.

But the level of basic coordination is where the right and the good are least likely to conflict in terms of results. As in property and torts, once information costs are taken into account, Kantian and utilitarian accounts agree at the level of description. A very narrow case-by-case utilitarianism is inconsistent with the simplicity and generality needed here, but some version of rule utilitarianism is not thereby ruled out. I do not claim that differences between moral and welfarist theories of contract do not matter. They do differ as to their foundations. Nevertheless, I would argue that within contract law is not the place to look for the answer to the question of whether contract ultimately takes the right or the good as prior. That is a more general question.

V. CONCLUSION

Contract as Promise is a rich source of insight, legal and moral, but like much of the consequentialist and policy-oriented commentary it takes as its foil, Fried's theory is preoccupied with the common law of contract. In this Essay, I have suggested that we reorganize some of the moral insights of the book, relating to advantage-taking and trust, around the notion of opportunism. Traditional equity can then be seen—as it was seen before the classical era—as a limited safety valve to discourage opportunism. Equity is the missing dimension in contract theory. Despite parties' ability to freely contract within the confines of contract law and moral institutions of promising, equity relies on overarching, but simple, everyday morals in order to provide the guideposts necessary to police potentially boundless opportunistic behavior. Certain notions, like spite and disproportionate hardship, are not the embarrassing anomalies of classical contract law, but proxies for opportunism in a structured set of flipping presumptions. Looked at this way, the moral and consequential accounts of contracts can agree on much of the content of contract law, and both point outward to empirical facts about the sociology and philosophy of commercial morality. The main disagreement can be located at the foundational level rather than in the workings of the law, about which we can hope for an increasing degree of consensus.

89. Cf. FRIED, *supra* note 1, at 40-48 (arguing that offer and acceptance have to be simple and moral).