CONTRACT AS DELIBERATION

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I
INTRODUCTION

Contracts are communication. "'Will you give it?' 'I will give it.' 'Do you promise?' 'I do promise.' 'Do you pledge your faith?' 'I do pledge my faith.' 'Do you guarantee?' 'I do guarantee.' 'Will you do this?' 'I will do it.'"[1] What grounds the commitment of a contractual communication? Contract theory circles around the question of what is the "basis of contract."[2] Freedom, efficiency, reliance, and equality are perhaps the most prominent among a host of competing grounds. Even if one could separate a mere analytical question of how contracts are constructed,[3] at least two opposing narratives remain: promissory and conventionalist theories. Contracts are often said to mediate pluralistic interests within and between modern societies. But the many worlds of contract theories are deeply divided themselves.

The aim of this article is to construct an integral core for one pluralist theory of contract based on public reason. Its main task is to reconcile the promissory account of contract with a public dimension, which is inherent in efficiency, justice, and reliance theories of contract. The first step of that endeavor will be to reconstruct recent promissory contract theories as a turn towards public reason.[4] The second step liberates conventionalism of its utilitarian chains and shows its plural normative core.[5] Yet a foundationally pluralistic theory of contract needs even to break off with the dichotomy of deontological and consequentialist constructions. An integrated pluralistic theory must overarch intention and convention. Pluralistic theory needs a pragmatic procedural underpinning.

The consequent response to foundational value pluralism is a deliberative contract theory.[6] Under the deliberative contract scheme, contract is not

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1. Gaius, *The Institutes of Gaius* 3.92, *in* 1 THE CIVIL LAW 163 (S.P. Scott ed., 1932). In Roman law this formal "stipulation" of words was only one of four common forms to enter into contract. The other three were transfer of things, written exchange, and consent.

2. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

3. For a strict distinction between an "analytic" and a "normative question," see chapters 3 and 4 of STEPHEN A. SMITH, CONTRACT THEORY 64-165 (2004).

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

governed by one single ethical principle. No monistic answer can hope to explain the whole of contract law. Only a deliberative framework is capable of capturing the political battle between competing ethical principles. Individual freedom has the same normative weight as, for instance, fairness, security, efficiency, or social welfare. Such a deliberative reading of contract law is not only consistent with at least some promissory and conventionalist theories of contract. Taking the deliberative space of reasons as the foundation of contract theory, the conflict between intention and convention even blurs. The common element of contract might be seen as the existence of a special discursive commitment between the parties.[7] Within these inferential practices of giving and asking for reasons, contract is an explicit promise of reasons.[8]

The communicative theory of contract offers an integral framework for the exchange of plural normative reasons. It could offer a useful argumentative grammar for lawmakers, judges, and legal scholars. Because it refrains from preferential treatment of any substantive normative contract principle, it could even mediate between opposing camps of contract theory itself. Yet one normative conclusion persists: contract has lost its private innocence. Within a deliberative frame, contract never is completely private—it is a political institution. Every contract has an implicit public dimension of reasoning.

II
THE PUBLIC DIMENSION OF PROMISING

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[9] Continental lawyers stumble over section 1 of the Restatement (Second) of Contracts. For the common law tradition, "[t]he common element of all contracts might be said to be a promise."[10] Despite a legal decline of freedom of contract,[11] about thirty years ago Charles Fried initiated a new focus on deontological readings of contract.[12] From Fried's "moralist of duty" perspective, "breaking [a] promise is wrong."[13] There is "a general obligation to keep promises, of which the obligation of contract will be only a special case—that special case in which certain promises have attained legal as well as moral force."[14] Promissory contract theory renewed its ethical underpinning as liberal Kantian theory.[15] Contractual obligation springs from a pure act of private

7. *See infra* Part V.
8. *See infra* Part VI.
9. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).
10. OLIVER W. HOLMES, JR., THE COMMON LAW 289 (Dover Publications 1991) (1881).
11. P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 569–779 (1979) (detailing the historical circumstances culminating in the "fall of freedom of contract").
12. CHARLES FRIED, CONTRACT AS PROMISE 17, 19, 127 (1981).
13. *Id.* at 17, 127.
14. *Id.* at 17.
15. *See* IMMANUEL KANT, METAPHYSICS OF MORALS 57–59 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (discussing Doctrine of Right).

autonomy. The promisor commits himself by his freedom of will. In continental "will theory" this background was always present;[16] it was coined anew in the common law as *contract as promise*. The liberal promissory paradigm remains one of the most influential contract theories today.[17]

The promissory theory of contract typically carries three implications. (1) Contracts emerge as private relation through at least one promise. (2) The normative force of promising springs from the free will of the promisor who voluntarily commits himself to perform the contract. (3) The law plays only a supportive role in enforcing pre-existing morally binding promises. In short, promissory theory implies *privacy*, *self-obligation*, and *passive law*. Promises precede law.[18]

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The commitment of the contract is created by the intention of the promising party or parties, not the law. The normative power is encapsulated in the principle of private autonomy, which points to the Kantian version of the idea of freedom. Law serves only as a functional butler of the will complying with the wishes of his master. If the butler fails to comply, this disgraceful disobedience must be corrected. Along these lines, Seana Shiffrin denounced the "divergence" between the moral culture of promising and contract law practices.[19] All three implications of the typical picture are challenged by recent promissory accounts of contract.

Though deeply convinced of the private moral autonomy of promising, Shiffrin herself subverts the first implication of the privacy paradigm for contracts.[20] "In creating a contract, the parties render public their efforts to manage morally their disparate interests, as well as the associated latent or emergent vulnerabilities this disparity may create or feed. Creation of a contract invites this relationship to be witnessed, recognized, and scrutinized by the public."[21] The promise is no longer in the sole hands of the parties, but involves

16. Its most prominent proponent was FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (William Holloway trans., Hyperion Press 1979) (1840). For the influence of Savigny on the common law, see chapter 6 of ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 139–65 (1921), and Frederick Pollock, *Dedication* of FREDERICK POLLOCK, PRINCIPLES OF CONTRACT, at vi (Cincinnati, Robert Clarke & Co. 1881).

17. The symposium *Contract as Promise at 30: The Future of Contract Theory*, organized by Jeffrey M. Lipshaw, gathered most leading U.S. contract scholars. *See* Symposium, *Contract as Promise at 30: The Future of Contract Theory*, 45 SUFFOLK U. L. REV. 601–960 (2012).

18. For a typical promissory account, see Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (reviewing P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981)); *see also* Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 PROC. ARISTOTELIAN SOC. 79 (Supp. 1972).

19. Seana Valetine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007). For a dissenting reply, see Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 9 (2007).

20. Shiffrin, *supra* note 19, at 750–51. Yet it is certainly not Shiffrin's intention to weaken the promissory account—something she blames others of doing in *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 484 (2008).

21. Shiffrin, *supra* note 19, at 750.

the larger public. "The public has an interest in protecting parties from the consequences and harm caused by breaches that result from these vulnerabilities. Second, and more broadly, the reinforcement of equal status facilitated by promises takes on a political value when made public."[22] Shiffrin might restrain her idea of public interest to the mere protection of the moral culture of promising. Nonetheless, her construction opens the contract for public reasons.[23] Upon becoming a contract, the promise transforms into a public relationship.

The second, individualistic moral implication of most promissory theories was prominently criticized by Daniel Markovits.[24] The core of contract for him is a "collaboration" for common ends. He agrees with the promissory mainstream that contract is "a special case of promise" and, as such, a "distinctive and freestanding fount of moral obligation."[25] Yet his normative basis is not individual freedom but "moral community grounded in mutual respect."[26] Drawing upon "Kant's formula of the End in Itself," Markovits develops a conception of "respectful community," which has to be joined freely and requires shared ends.[27] "[C]ontracts, like all promises, invoke shared ends through which the parties to them come to treat each other as ends."[28] Although developed using Kantian ideas, collaboration at least implies a more intersubjective construction. Sharing means communicating. The "pursuit of ends that [persons] adopt together" requires intense communication.[29] In the end, the binding force of promises, like contracts, rests on communicative collaboration. It is unsurprising, then, that Markovits makes explicit reference to Hannah Arendt's communitarian explanation of promise-keeping. For her, the binding force of promise springs "directly out of the will to live together with others in the mode of acting and speaking."[30]

Finally, Thomas Scanlon plainly prepares the deliberative field at the borders of promissory theory. For Scanlon, promises do not presuppose a social institution, notwithstanding that "the law of contracts obviously is such an institution."[31] The moral wrong in breaking a promise for him springs from

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22. *Id.* at 751.

23. Jeffrey M. Lipshaw, *Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin*, 21 CAN. J. L. & JURISPRUDENCE 399, 404 (2008) (commenting on that aspect of Shiffrin's work as "public airing of private relationships").

24. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1449 (2004).

25. *Id.* at 1448, 1421.

26. *Id.* at 1438.

27. *Id.* at 1429. For Kant, however, the "End in Itself" formula was not a self-standing moral system, but one formulation of the categorical imperative as general law of freedom. This relation is essential for Kant's overall theory as laid down in his third antinomy in IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

28. Markovits, *supra* note 24, at 1449.

29. *Id.* at 1429.

30. HANNAH ARENDT, THE HUMAN CONDITION 246 (1958); *see* Markovits, *supra* note 24, at 1435.

31. Thomas Scanlon, *Promises and Contracts*, *in* THE THEORY OF CONTRACT LAW 86, 99 (Peter

"what we owe to other people when we have led them to form expectations about our future conduct."[32] The promisee has a moral "'right to rely'" on the promised performance in the absence of "special justification."[33] The enforcement of a contractual promise by the law is "morally permissible if a principle licensing this use is one that no one . . . could reasonably reject."[34] In accordance with the third implication of promissory contract theories, the priority of promise over law, Scanlon then elaborates certain substantive legal enforcement principles directly based on prior promising principles. Still, his general moral demand for contract law to be legitimate is independent of the morality of promising. Scanlon's moral claim for each principle is to be "justifiable to others on terms they could not reasonably reject."[35] On that level of second-order normativity, promises do not precede the law. Instead, contract law and promises have to satisfy independently the procedural justification principle: what we owe to each other is giving reasons.

III
THE PLURAL CORE OF SOCIAL CONVENTIONS

Most competing narratives to promissory theory are labeled as "conventionalism." There is broad unanimity among scholars that the use of the words "I promise" requires linguistic conventions. Scholars diverge only over the ground of moral obligations that arise from promising. Deontologically laden promises clash with the focus on their social consequences. For the prototypical conventionalist, David Hume, promises have "no force antecedent to human conventions."[36] To become present in the social world, a will must be expressed by words or signs. "The expression being once brought in as subservient to the will, soon becomes the principal part of the promise."[37] On this view, contracts, like promises, are "human inventions, founded on the necessities and interests of society."[38] At least on the conceptual level, *contract as convention* has a strong continental tradition stretching from Ulpian and Pufendorf to the French Civil Code.[39]

Benson ed., 2001).

32. *Id*. at 87.

33. *Id.* at 97 (citing Neil MacCormick, *Voluntary Obligations and Normative Powers I*, 46 PROC. ARISTOTELIAN SOC'Y, at 59 (1972)).

34. *Id.* at 100.

35. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 189, 295–327 (1998) (mostly identical with *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990)).

36. DAVID HUME, A TREATISE OF HUMAN NATURE 516–25 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1793).

37. *Id.* at 523.

38. *Id.* at 519.

39. DIGEST 2.14.1.3 (Ulpian), *translated in* THE CIVIL LAW (Samuel P. Scott ed. & trans., 1932); SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW I (Frank Gardner Moore trans., 1682) (1673), *reprinted in* THE CLASSICS OF INTERNATIONAL LAW 15 (James Brown Scott ed., 1964); Code Civil [C.civ.] art. 1101 (Fr.).

Typical conventionalist contract theory reverses the promissory picture. Conventionalism implies *sociality*, *utility*, and *active law*: (1) contracts emerge as social conventions; (2) the classical normative reason for keeping the social convention of contracting is their utility for social interaction; and (3) law enables and constitutes contractual obligations.

CONTRACT < LAW

From a conventionalist view, a contract is constituted by the law. If one wishes to speak of a contractual "promise," then this special promise is enabled by the legal rules concerning the formation of contracts. "[L]egal rules themselves are part of the social institution of promising."[40] Law could be even seen as the main social context and the most relevant practice of promising.[41] Contract as promise transforms to promise as contract. Law institutionalizes conventional regularities, for instance, in the rules of offer and acceptance.[42] Law constitutes the social forms in which contractual behavior becomes possible.

As intellectual descendants of utilitarianism, the law and economics approach unsurprisingly is the most prominent conventionalist theory of contract law. On this view, it is not the emergence of the obligation, but the economic consequences of conventional rules that matter: "which system of promissory enforcement yields the maximum net social benefits from promise making?"[43] To enable the private ordering forces of the market, the goal of welfare maximization requires legal enforcement of contracts.[44] Economic analysis refines the abstract utilitarian background as calculable efficiency in allocating scarce resources.[45] The legal convention of contract is obligatory because—and as long as—it serves the improvement of social welfare. As legal rules are considered to affect parties by influencing their incentives, law becomes an active instrument to regulate the conventional patterns of behavior.

Yet efficiency and utility are not the only values on which a conventionalist contract theory might be grounded. The core of conventionalism is not its close

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40. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1110 (2001). One could even argue that Shiffrin, *supra* note 19, at 742, indirectly supports this claim with her argument (that is, that legal practices will have a bad influence on the moral culture of promising).

41. *See* P. S. ATIYAH, PROMISES, MORALS, AND LAW 127, 138–76 (1981) (explaining the social relationship between law and promise, and using examples to illustrate this interaction).

42. *See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 503 (1989) (arguing that promissory theories could not explain the concrete substance of agreement rules like offer and acceptance and background rules defining the scope of the obligation).

43. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1264 (1980).

44. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003); Oliver E. Williamson, *The Lens of Contract: Private Ordering*, 92 AM. ECON. REV. 438, 438–39 (2002).

45. For a pure efficiency-based account of contracting, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 101 (5th ed. 1998) and his leading opinion in *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985).

relation to social utility but a public two-stage construction. On the first level, there is the conventional social rule of contracting or promising guiding the corresponding action of the parties. "Convention" here means nothing more than temporarily stabilized regularities of social behavior.[46] These regularities are purely empirical and might change over time. Yet the conventional rules of promising and contracting have been culturally stabilized for thousands of years. The second stage concerns normative motivation: why and to what extent the convention should be followed. For Hume, the normative motivation was utility, whereas recent alternatives point to reliance or the prevention of harm.[47] The constructive core of conventionalism is open for pluralism. Michael Trebilcock, himself a law and economics scholar, considers inherently pluralistic conceptions even more attractive. For him, efficiency alone merely leads to an "unstable equilibrium" of contract theory.[48]

The plural core of conventionalism is fully revealed in John Rawls's *A Theory of Justice*, where he unfolds the two-stage model for the convention of promising.[49] Promises uttered in accordance with a "constitutive convention" are mere "*bona fide* promises."[50] Only a distinct "principle of fidelity" requires that these *bona fide* promises "are to be kept."[51] For Rawls, the moral obligation in the principle of fidelity is rooted in his principle of fairness. However, he concedes that the adoption of principles in his hypothetical original position is undetermined. The normative basis of the obligation is nothing but a "hypothetical agreement."[52] In reality, there might be plural or even conflicting principles regarding the source and scope of contractual obligations. In that circumstance,

> [t]he correct moral decision is the one most in line with the dictates of this system of principles when it is applied to all the facts it deems to be relevant. Thus the reason identified by one principle may be supported, overridden, or even canceled (brought to naught) by reasons identified by one or more other principles.[53]

Conventionalism enters deliberative ground.

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46. DAVID K. LEWIS, CONVENTION 51 (1969).

47. *See* GRANT GILMORE, THE DEATH OF CONTRACT 96 (1974) (reading contract law as a special case of tort law); P.S. Atiyah, *Contract, Promises and the Law of Obligations*, 94 LAW Q. REV. 193 (1978)

48. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 244–49 (1993) (advocating a perspective that supplements efficiency with some aspects of individual freedom). *But see* Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001) (giving strict normative priority to individual freedom, in contrast with Trebilcock's perspective).

49. JOHN RAWLS, A THEORY OF JUSTICE 344–50 (1971).

50. *Id.* at 346.

51. *Id.*

52. *Id.* at 350.

53. *Id.* at 348.

IV
DELIBERATIVE CONTRACT LAW

One major challenge of our globalized world is fundamental legal and ethical pluralism. The recent developments in both promissory theory as well as conventionalism could be read as deliberative efforts to cope with pluralism. Shiffrin's public interest, Markovits's collaboration, and Scanlon's reasonable expectations share a movement towards public justification. But promises stress the subjective origin of contract in private autonomy. The promissory account, therefore, has an inherent problem with collective values, whereas social conventions are naturally akin to more collective values. Conventionalism is communicative and public but was traditionally linked to utilitarian ethics. Trebilcock's unstable equilibrium, as well as Rawls's hypothetical agreement, acknowledges more pluralistic ethical foundations. A conventionalist construction of contract could easily integrate plural social values, but it cannot easily accommodate the deontological claim of private autonomy.

A newer camp of scholars offers genuine pluralistic multi-value theories of contract law.[54] "Pluralism in contract law" urges judges to identify a range of plural values, consider plural reasons in ranking them, and construe the contract in light of those values and reasons.[55] Here, the relation between contract and law remains unclear. Furthermore, many legal voices insist that if pluralist theories are "urging courts to pursue efficiency, fairness, good faith, and the protection of individual autonomy," they "need, but so far lack, a meta-principle that tells which of these goals should be decisive when they conflict."[56] This plea for a meta-principle, however, does not take value pluralism seriously.

In a pluralistic world, ethical values collide with each other day by day. Ethical-value pluralism is an empirical fact, as well as a normative necessity, of modern societies.[57] *Ethical values* denotes every normative principle evaluating individual or social actions. *Ethical pluralism* posits foundationally independent values without preset hierarchies that could all conflict with each other.[58] Plural values are incommensurable insofar as they are irreducible and thus could not be ranked in a universal manner. Yet they are comparable insofar as collective choice and deliberation require the possibility of weighing them in concrete

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54. *See, e.g.*, Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW 206, 240 (Peter Benson ed., 2001); JOHN WIGHTMAN, CONTRACT: A CRITICAL COMMENTARY (1996).

55. Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1041 (2010).

56. Schwartz & Scott, *supra* note 44, at 543.

57. One classical formulation for a foundational conflict of values between liberty and equality is ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

58. *See, e.g.*, JOHN KEKES, THE MORALITY OF PLURALISM (1993) (discussing the implications of moral disintegration resulting from pluralism); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987) (exploring competing considerations in moral judgment that are often ignored). Whereas JOSEPH RAZ, THE MORALITY OF FREEDOM 165–255 (1986) builds his pluralism on the foundational value of individual freedom. For a "structural pluralism" in contract theory based on Raz's account of autonomy, see Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 19.

situations.[59] Such a value pluralism rejects any general substantive meta-principle.

To resolve the challenge of value pluralism without lapsing into relativism, contract theory needs a deliberative grounding. *Deliberation* denotes a process of practical reasoning in which different positions, reasons, and counter-reasons are carefully analyzed and weighed against each other. To "deliberate" means to come to a common decision through an exchange of reasons. This concept first saw the light of day in political theory. A *deliberative democracy* commits to the respect of value pluralism and requires that, for political choices to be legitimate, they "must be the outcome of *deliberation about ends among free, equal, and rational agents*."[60] Subjective freedom is transformed into an intersubjective discourse.

Regardless of whether the discursive procedure should aim for a full motivational consensus,[61] a mere overlapping consensus,[62] a pragmatic compromise,[63] or just a reasonable disagreement,[64] all of these deliberative standards are based on an open exchange of reasons. Explicit public justification is the touchstone for every deliberative theory. Its meta-principle is a meta-procedure. Within that procedure, a deliberative theory does not tolerate ethical totalities. Instead, absolute ethical values are transformed into relative (*pro tanto*) reasons in a common pluralistic discourse. Individual values become public reasons. Every real conflict of ethical rationalities, then, is "political," because it is insoluble by individual moral reflection. The only way out remains public deliberation leading to a common political decision. A deliberative theory tries to be—as far as possible—neutral towards plural ethical rationalities. It only frames and structures the political process of balancing plural ethical reasons. A "deliberative rationality" aims to transcend different ethical cultures.[65]

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59. For the possibility of rational choice between irreducibly plural values, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985) and MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990). For an extensive overview, see INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang ed., 1997).

60. Jon Elster, *Introduction* to DELIBERATIVE DEMOCRACY 5 (Jon Elster ed., 1998); *See also* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY 67, 72 (James Bohman & William Rehg, eds., 1997); DEMOCRACY AND DIFFERENCE (Seyla Benhabib ed., 1996). Even French poststructuralists link to a "deliberative" model of democracy. *See, e.g.*, Jean-François Lyotard, *The Differend*, *in* 46 THEORY AND HISTORY OF LITERATURE 1, 147 (Wlad Godzich & Jochen Schulte-Sasse eds., Georges Van Den Abbeele trans., 1988).

61. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 116–194 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) (1983). *But see* NICHOLAS RESCHER, PLURALISM AGAINST THE DEMAND FOR CONSENSUS (L. Jonathan Cohen ed., 1993) (fundamentally criticizing Habermas's consensual position).

62. JOHN RAWLS, POLITICAL LIBERALISM 133–72 (1993).

63. Jon Elster, *The Market and the Forum*, *in* FOUNDATION OF SOCIAL CHOICE THEORY 103 (Jon Elster & Aanund Hylland eds., 1986).

64. Thomas McCarthy, *Legitimacy and Diversity*, 17 CARDOZO L. REV. 1083, 1089 (1996).

65. Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS 26 (1994).

The essence of a deliberative theory of law is an open exchange of reasons in an impartial argumentative procedure. A deliberative theory establishes a procedural legal paradigm.[66] Its core is neither substantive individual rights, like it would be under a liberal paradigm, nor the social public good as a communitarian paradigm would suggest. Instead, a deliberative paradigm focuses on the procedures of legal argumentation. Lawmaking, as well as every interpretation or application of legal norms, demands reasons. The application of a rule requires another rule of application and so forth.[67] The rule paradox leads into a discursive space of reasons. Legal argumentation could be considered a special case of practical rational discourse.[68] In legal discourse, the subjective interests of the parties, as well as public interests, could enter in the form of legal reasons. Statutes, precedence, custom, doctrines, and methods of interpretation all structure this public field of deliberation.

A helpful theoretical tool to further analyze the legal discourse is the distinction between rules and principles. While legal rules compete in an all-or-nothing fashion, legal principles can apply simultaneously and have a dimension of weight.[69] Colliding principles have to be weighed against each other. That balancing of principles is the nucleus of a deliberative picture of law. *Legal principles* denote, of course, not absolute values, but relative (*pro tanto*) reasons. Whereas legal rules institutionalize argumentative structures of the balancing process,[70] legal principles conceptualize the ethical deep layer of every legal action. They are only explicitly discussed in hard cases. But every legal decision could be reconstructed as a balancing process between colliding principles.

Each legal conflict involves a collision of underlying principles. For instance, in the case of a drafting error the "will principle" clashes with a "reliance principle" in the wrongly written text. The basic rule of the English common law is that

> [i]f, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[71]

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66. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 388–446 (William Regh trans., 1996) (1992).

67. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201, at 81 (G.E.M. Anscombe trans., 1953) and the skeptical interpretation in SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982).

68. *See* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION (Ruth Adler & Neil MacCormick trans., 1989) (1978).

69. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–23 (1967); Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS 294, 294–97 (2000).

70. For a discussion of how rules could structure the balancing of legal principles, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 44–110 (Julian Rivers trans., 2002) (1985).

71. Smith v. Hughes, (1871) L.R. 6 Q.B. 597 (Blackburn, C.J.) (U.K.).

This rule of objective appearance formulates a conditional priority of the reliance principle over the will principle for the situation of drafting errors. The conditions set out in the rule guide the balancing of colliding principles. Legal doctrines like mistake or misrepresentation denote the conditions under which the drafter could dispute the contract.[72]

Legal rules formulate abstract conditional priorities between colliding principles. Yet the concrete balancing happens in each case. The judge analyzes the factual and normative context and decides. Ideally, she could reveal the conflicting normative reasons—for instance, a will principle based on private autonomy and a reliance principle based on a communitarian theory oriented towards social stability. She could reflect on their intensity and depreciation in the concrete case. Her decision implies a concrete ranking of the colliding principles for the given factual and normative situation of the case. In the legal proceeding, the parties offer reasons for different balancing outcomes. Legal rules structure that process by determining the burden of reasoning. In the aforementioned case of a contractual drafting error, the basic "objective appearance" rule gives priority to the reliance principle. The burden of reasoning why the will principle should nevertheless prevail under the special circumstances of the case falls on the drafter.

Legal principles do not spring from a neutral legal nowhere, but from plural ethical backgrounds of legislators, judges, law professors, attorneys, and the parties. Legal principles could be read as *ethical reasons*. Law only formulates a specific discursive grammar for the ongoing and unavoidable social ethical conflicts. Each legal rule structures the deliberative process of balancing ethical principles. Yet the legal structure never ultimately determines a specific outcome. Beyond legislative actions, each legal interpretation and application is political as it always demands an open deliberation between plural reasons. Legal rules are not stock politics. Every legal decision breathes some political air. Apart from legislation and cases, judicial doctrines also determine the argumentative structures of deliberation. Doctrinal quarrels, like the question of due consideration in contract law, could be understood as political disputes over the abstract weight of conflicting ethical values. A deliberative theory of law aims to enlighten and reconstruct the ethical underpinnings of legal statutes and decisions.

A deliberative theory of contract law aims to transcend the plural ethical narratives of contract and integrate them into one procedural legal framework. Different contract theories attribute the ethical source of the contractual obligation to different principles. Each monistic ethical principle offers a comprehensive account of contract and contract law. That is why the interpretation of contract law is determined by the ethical perspective that underpins it. A deliberative theory of contract law integrates plural ethical

72. *See, e.g.*, Bell v. Lever Brothers Ltd, (1932) A.C. 161 (common mistake); Hartog v. Colin & Shields, (1939) 3 All E.R. 566 (unilateral mistake); Derry v. Peek, (1889) 5 T.L.R. 625 (fraudulent misrepresentation).

principles into one normative system. Each principle represents only one deliberative reason, which has to be weighed against other reasons. Deliberation qualifies the ethical commitment of each reason yet does not annul its normative force. Each deliberative reason remains an ethical guarantor for the binding force of contract. The deliberative picture of contract law follows a procedural legal paradigm. Contract law institutionalizes the procedural framework for the deliberation of conflicting ethical reasons.

Given this deliberative legal paradigm without any dominating values, does anything remain that can provide a solid normative basis of contract? One pluralist answer posits a contract "*without a core*."[73] In a coreless contract theory "there is no one idea that encapsulates the *sine qua non* of contract, no nodal point from which all the instantiations of the institution of contract flow."[74] Any contractual goals could be relevant at any given time, and "only particularistic argumentation could establish that any individual goal should take precedence for a given contract problem."[75] Such pluralistic anarchy risks lapsing into relativism and arbitrariness. That is why the deliberative theory of contract law outlines a distinct procedural legal framework. Yet the question remains as to what special role a contract could play in this procedural legal paradigm. What does a deliberative core of contract look like?

V
DISCURSIVE COMMITMENT IN COMMUNICATIVE PRACTICES

Contracts are communication. In a colloquial sense, that assertion is in no way surprising. Everybody would agree that the parties communicate with each other during the formation of a contract. Yet a deliberative contract theory builds on a more extensive idea of communicative action. *Communicative action*, as opposed to *strategic action*, aims for a common understanding of social reality.[76] Each communicative act fulfills a double function. Apart from generating or transferring information, it claims validity and intersubjective recognition. This claim for recognition establishes a special commitment between the communicating subjects. If being criticized, the speaker has to cash in his claim with good reasons in a rational discourse. *Prima facie*, the committing effect of communicative action is based on potential reasons.

Against this theory of rational discourse, social conventions transform into communicative practices. Conventional regularities could be pragmatically

73. Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 917, 923, 926 (2012).

74. *Id.* at 923.

75. *Id.* at 927.

76. JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 273–337 (Thomas McCarthy trans., 1984) (1981). However, still skeptical towards legal institutions at that time, Habermas considers contracts to be mainly a medium for strategic action. *See* JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM 199–300 fig. 37 (Thomas McCarthy trans., 1987) (1981).

reformulated as discursive commitments in ongoing language games.[77] Conventional commitments become inferential in *discursive practices*.[78] A discursive practice is every mutual interpretation of each other's assertions: "At the core of the discursive practice is the game of giving and asking for reasons."[79] At least in our Western tradition, this reasoning game plays a principal role in the multiplicity of language games: "The fundamental sort of move in the game of giving and asking for reasons is making a *claim*—producing a performance that is propositionally contentful, in that it can be the offering of a reason, and reasons can be demanded for it."[80] Within the practice of reasoning, the discursive players have commitments and entitlements. With every communicative action, the speaker commits himself to give reasons for his communicative claim when it is challenged and he entitles everybody to challenge him.

Not only does the game of offer and acceptance amount to a communicative action, each communicative conduct within a contractual framework amounts to communicative actions. A contractual promise makes explicit the normally implicit claim for recognition in every communicative act. A contract reflects explicitly its own social commitment. In case of conflicts, objections, or irregularities, this expressive *prima facie* obligation entails the commitment to deliver reasons within a special discursive practice, which will normally be the law. Defaults demand justification. Contracts open an explicit door into the realm of discursive interaction. Contract law normally facilitates this contractual discourse. A deliberative contract theory enfolds contract as a discursive institution between law and a plurality of ethical reasons.

CONTRACT — LAW
\ /
REASONS

The anticipation of ethical reasons allows for a *prima facie* commitment in the moment of contract formation. The contract establishes a special communicative relation between the contracting parties with discursive rights and duties. A contract constitutes a distinct *discursive relation*. The relational moment in contract is not tied to some sort of substantive cooperation,[81] but is based on the ongoing discursive collaboration. By creating discursive entitlements, contracts build their own deliberative framework. Legal systems

77. For a pragmatic reading of Wittgenstein, see WILFRID SELLARS, EMPIRICISM AND THE PHILOSOPHY OF MIND (Harvard Univ. Press 1997) (1956); Wilfrid Sellars, *Some Reflections on Language Games*, 21 PHIL. SCI. 204 (1954); *see also* LUDWIG WITTGENSTEIN, ON CERTAINTY (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) (pointing in a similar direction).

78. ROBERT B. BRANDOM, MAKING IT EXPLICIT 158 (1994).

79. *Id.* at 159.

80. *Id.* at 141.

81. As the relational theory of contract suggests. *See* IAN MACNEIL, THE RELATIONAL THEORY OF CONTRACT (David Campbell ed., 2001) (including a selection of Macneil's works with introductions by recent relational contract scholars David Campbell, Jay Feinmann, and Peter Vincent-Jones).

then institutionalize procedures for cashing in the discursive commitments in contract law. Contract law is a specific discursive formation that occurs with contractual reasoning. Contracts emerge against the background of existing national, international, and transnational contract laws. Laws shape the form of contracts. Contracts facilitate the transition from social conflicts to legal argumentation.

A contractual relation stabilizes itself as reflexive form, which channels transitions to reasoned deliberation. The discursive seed blooms in the argumentative structures of a legal system. Yet transnational business contracts in particular often establish an independent system for conflict resolution. The autonomy of the discursive system of a contract becomes fully obvious in complex contractual networks.[82] However, the sales contract at the bakery next door also sets up an autonomous *discursive system*. The accepted order of bread for the next evening implies a discursive commitment and constitutes a discursive relation. In case of conflict, it will guide the deliberation. If the bread fails to be there the following evening, the customer will first face the baker and ask for reasons. He might be more satisfied with a shortfall of supply or an accident than with the answer that another customer just offered a higher price for the last remaining bread. In the latter case, a compassionate judge might indeed award him expectation or reliance damages, whereas in a similar business case he would opt for simple restitution. However, the deliberative account is not limited to distinct contract types.[83] The outcomes may differ, but the underlying deliberative core always remains the same.

Such an inferential reading of contract as deliberation directly affects its legal interpretation. Contracts do not *represent* the intentions of the parties. Neither do they just enact an established social convention. Contracts *infer* their meaning from the communicative actions of the parties. There are fundamental differences between these readings. The first version views contract as a mere tool in the hands of the parties. The judge tries to figure out what the real intention of the parties might have been. The second immediately applies an objective interpretation. The judge reads the contract in light of reasonable business customs. The deliberative account acknowledges that the contract is a genuine discursive system of meaning production.[84]

Following the deliberative legal paradigm, the court delivers its own interpretation, explicitly deliberating on its premises and reasons. Yet there are

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82. *See* GUNTHER TEUBNER, NETWORKS AS CONNECTED CONTRACTS 145–78 (Michelle Everson trans., 2011) (2004).

83. There is a considerable plea to apply different theoretical accounts for distinct contract types, not only between law and economics scholars who focus on business contracts, *see* Schwartz & Scott, *supra* note 44, but also as a general pluralist strategy. *See, e.g.*, Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 RATIO JURIS 194, 195 (2008) (asserting "that variation of remedies strongly supports the conclusion that there is (and can be) no general, universal theory of Contract Law").

84. The quality of contract as an emergent system is stressed in the functional tradition of systems theory. *See* Dan Wielsch, *Relational Justice*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 191.

two more substantive ideas that spring from a deliberative reading of contract. The court considers the subsequent communication of the parties within its contract interpretation. And it tries to uphold the contract as a communicative framework (*favor contractus*).[85] The substantive contractual obligations might change, but the contract remains as a viable discursive core. A practical consequence of that deliberative reading is, for instance, a duty to renegotiate and adapt the contract to a change of circumstances.

VI
CONTRACT AS PROMISE OF REASONS

Up to this point, a skeptic might criticize deliberative contract theory as a rather conventional story. The normative core of contract is the social practice of giving and asking for reasons. Each promise is embedded in an ongoing discursive practice of reasoning. But the inferential reformulation of conventionalism is not merely an exercise in repackaging. Instead of an objective convention, the idea of discursive practices focuses on the active intersubjective procedure of deliberating reasons. There is a hidden promissory twist in that deliberative contract narrative. A conventionalist theory could not explain the fact of *prima facie* commitments by promising. Once the contract is established as reflective discourse between the parties, it receives normative backing from the game of reasoning itself. Yet the constitutional moment of contracting is the blind spot of conventionalism.

The creation of a contract requires a performative act. Every communicative action has a performative dimension. The speech act of promising articulates the contractual commitment expressively. It shares the foundational paradox of law itself—the "mystical foundation of authority."[86] A "performative tautology or *a priori* synthesis . . . structures any foundation of the law upon which one performatively produces the conventions that guarantee the validity of the performative."[87] A successful foundation of contract, as well as of law, will produce "the discourse of its self-legitimation."[88] The foundational parallel between contract and the law becomes obvious in international treaties and the philosophical idea of social contract. "A foundation is a promise. . . . And even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundation."[89] Every legal foundation shares a promissory moment in its constitution.

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85. *See* Bertram Keller, *Favor Contractus: Reading the CISG in Favor of the Contract*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES 247–48 (Camilla B Andersen & Ulrich G Schroeter eds., 2008).

86. Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 921 (Mary Quintance trans., 1990).

87. *Id.* at 987.

88. *Id.* at 993.

89. *Id.* at 997.

Understanding the promise as discursive commitment dissolves the mystery. A contractual promise is not one, but two promises. On one level, a substantive promise determines the substance of future contract performance. On a second level, a *discursive promise* guarantees reasons for the range and the limits of the commitment. Contracts do not only incorporate substantive content, they also reflect their own validity. As a result, contracts commit and shape future communication. Contractual parties could cash in their discursive promises in informal negotiations with each other, as well as in legal discourses. Legal systems institutionalize procedures in which discursive promises can be enforced. If the parties cannot find a deliberative compromise, the judge decides. Yet the legal decision must acknowledge and weigh the diverse reasons in play. Contracts open discursive passages between the communication of the parties and the legal discourse.

A contract is neither promissory obligation nor conventional commitment. It is both. A contract is a discursive institution that promises further reasons. One party transfers a discourse right to the other party requesting reasons whenever irregularities in performance occur. The explicit *right to justification* constitutes the discursive justification relation between the contractual parties. A right to justification establishes a second-order morality that demands the reciprocal and universal exchange of reasons.[90] The contract remains a special relationship between promisor and promisee. Only the reasons take part in the public game of justification. The deontological core of contract is a discursive promise of reasons. Thus, each contractual partnership involves a second-order contract establishing a special justification relation.[91]

One could even read Section 2 of the Restatement (Second) of Contracts in this sense: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as *to justify* a promisee in understanding that a commitment has been made."[92] Contractual promises open an expressive justification relation with the discursive commitment to give reasons if requested. Contracts install a communicative basis that is always built upon in the future of the contractual relation. By promising future reasons in a communicative relation, a contract creates its own discursive system. Thus, contracts are able to frame the paradox of every constitutional moment. In setting discursive rights, contracts act as constitutions.[93] The genuine performative force of contractual promises is their expressive character: "The

90. Rainer Forst, *The Basic Right to Justification*, 6 CONSTELLATIONS 35 (1999); *see generally* THE RIGHT TO JUSTIFICATION (Amy Allen ed., Jeffrey Flynn trans., 2011) (2007).

91. For the idea of second-order contract, see NIELS A. ANDERSEN, PARTNERSHIPS: MACHINES OF POSSIBILITY 97–110 (2008). Yet he defines this partnership as a special new type of contract, which deviates from normal one-order contracts.

92. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981) (emphasis added).

93. For the constitutional function of contract from a system theoretical perspective, see Gunther Teubner, *In the Blind Spot: The Hybridization of Contract*, 7 THEORETICAL INQUIRIES 51, 67–71 (2007); *see also* Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399, 412–14 (2000).

beauty of promise and contract is its explicitness."[94] They make explicit the second-order right to discursive justification.

VII
CONCLUSION

In a world of fundamentally plural values and principles, every decision is political. Contract theory and contract law are intrinsically pluralistic endeavors. An integrated pluralist theory of contract needs a second-order normativity. The deliberative political theory offers such a pragmatic procedural framing. Law offers an argumentative grammar for practical discourse about social conflicts. A deliberative reading of contract law makes explicit the ethical reasons that underpin legal argumentation about contractual conflicts. Absolute ethical values transform into comparable reasons. The only deliberative ideology is a belief in the power of reasons, that social conflicts can be resolved through rational deliberation. Legal decisions are not determined by strict ethical principles. Deliberative decisions are nevertheless not arbitrary. They are based on legally structured political argumentation.

With its expressive discursive entitlements, the communicative form "contract" opens the door to the public space of reasons. A contract does not only imply a validity claim like every other communicative action, it makes explicit and reflects its commitment. In addition to a substantive promise, it entails a second discursive promise, which constitutes a discursive relation, even an independent discursive system. Thus, contracts dissolve the paradox of social commitment in a discursive circle between contract, law, and reasons. This circle is not a vicious one. From an inferential perspective it is not desirable to escape circularity. On the contrary, a circular exchange of reasons remains the only fruitful mode of living together in an age of fundamental pluralism. The procedural hermeneutics of reasonable deliberation transform the circle of law and promise into a happy discursive spiral.

Given that deliberative pluralist conception of contract, the public dimension of contract becomes obvious. Public reason does not violate a contract or endanger otherwise free-floating promises. Rather, every contract has an intrinsic public dimension. Only the process of public justification nourishes the contractual commitment. Thus, contracts are inherently public institutions built on morally relevant, subjective promises of reasons. This justificatory picture of contract embraces both the conventionalist and the promissory construction as two sides of the same coin. Contractual communication produces a new understanding between the parties. Contracts build communicative communities. Open deliberation of normative conflicts is the day-by-day political reality of these contractual communities.

Deliberative theory does not turn contract law into public law. In an increasingly global society, quite the opposite occurs. Contracts constitute the

94. Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 250 (1986).

everyday law of transnational transactions and relations. Contracts are the basic, yet private, motors of global constitutionalism.[95] Here, the theoretical construction of contract-as-deliberation charts a course between private- and public-law debates. Contract as deliberation opens a new field for *social contractualism*. The social sphere of law forms—but does not create—contracts. Every contract initiates a justification relation between the partners of the contract. Every contract is private and public at the same time. The private promise of reasons must be redeemed in an open deliberation with public reasons. The discursive commitments in contracts generate social legitimacy. Contracts are the smallest, but most common, deliberative institutions of society. Every contract is a social contract.

95. For a version of global constitutionalism taking the role of private law seriously, see GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS (2012).