

# A New Champion for the Will Theory

*Contract as Promise: A Theory of Contractual Obligation.* By Charles Fried. Cambridge: Harvard University Press, 1981. Pp. 156. \$14.00

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## I

*Contract as Promise*,<sup>1</sup> Charles Fried's readable and provocative book on the philosophical foundations of contract law, has two attractive features. The first is its attention to legal detail. After setting out a general theory of promissory obligation, Fried discusses a number of specific topics in the law of contracts, including the doctrine of consideration, the rules of offer and acceptance, the consequences of mistake, the nature of duress and unconscionability, and the theory of conditions. The clarity with which Fried states his main thesis and the determination with which he pursues it through the labyrinth of contract doctrine give the impression that even the most technical corners of contract law may not be wholly without redeeming philosophical significance.

Fried makes a powerful case for the view that the law of contracts has a recognizable and distinctive intellectual integrity of its own. Whether he is right or wrong on this score, his book is a useful antidote to the still-prevailing realist skepticism that conceives contract law as a body of only loosely connected rules and principles defying philosophical (or any other) rationalization. "Contract law is complex, and it is easy to lose sight of its essential unity."<sup>2</sup> Beginning students will find Fried's unifying hypothesis helpful in organizing their thoughts; seasoned realists may be unpersuaded, but their convictions will be tested and their wits sharpened by his argument.

The second attractive feature of Fried's book is its undogmatic character. According to Fried, the life of contract is the promise principle, "that principle by which persons may impose on themselves obligations where

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1. C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981) [hereinafter cited by page number only].

2. P. 6.

none existed before.”<sup>3</sup> Fried’s defense of the promise principle revives an older and now largely disfavored theory of contractual obligation, the so-called “will theory” of contract. However, unlike his nineteenth-century predecessors, Fried acknowledges that other, non-promissory principles—those centered around the notions of reliance, benefit and sharing—also play an important and legitimate role in the contractual domain. One of the central aims of his book is to show how these various non-promissory elements come into contract law without displacing the promise principle from its controlling position. In Fried’s view, proponents of the classical will theory made the fatal mistake of attempting to prove too much. They assumed that the promise principle occupies an exclusive, rather than merely dominant position in the field of contract law, and must therefore provide the final explanation for every rule, down to its smallest doctrinal wrinkle. This assumption led, he claims, to “a far more rigid approach than the theory of contract as promise requires.”<sup>4</sup> By contrast, Fried’s own ambition is to solve the “perennial conundrums” of contract law in ways that “accord with the idea of contract as promise and with decency and common sense as well.”<sup>5</sup> His appreciation of the limits of the promise principle and his unwillingness, beyond a certain point, to sacrifice plausibility for simplicity, give Fried’s book added appeal and make his philosophical thesis easier to accept.

Fried begins by asserting that the promise principle is “the moral basis of contract law.”<sup>6</sup> A contract is an enforceable promise or set of promises, and whatever the legal consequences of his nonperformance, a person who has made a contract is morally obligated to keep it just because he has promised to do so. This obligation is self-imposed—it is one that the promisor voluntarily assumes by committing himself to behave in a certain way at some future time. According to Fried, neither the other party’s reliance on his promise nor the benefit which the promisor himself realizes from the arrangement explains why he has a moral obligation to perform. A promisor is bound because he has promised, because he has said or done something that conventionally signals commitment, and although reliance and benefit may provide additional reasons for enforcing a promise they are not necessary conditions of promissory liability. “To enforce a promise as such is to make a defendant render a performance (or its money equivalent) just because he has promised that very thing.”<sup>7</sup>

Fried’s defense of the promise principle is motivated by his strong com-

3. P. 1.

4. P. 6.

5. P. 6.

6. P. 1.

7. P. 4.

mitment to individualism. We must, he says, accept the promise principle in order to protect the "quintessentially individualist" domain of private contractual association from the incursion of principles "that are ineluctably collective in origin and thus readily turned to collective ends."<sup>8</sup> *Contract as Promise* is, in fact, an anti-collectivist book in three distinct senses.

First, Fried opposes his own version of the will theory to the view (which he associates with Grant Gilmore and Patrick Atiyah)<sup>9</sup> that contractual liability is based on reliance rather than promise and is therefore "a special case of tort liability."<sup>10</sup> Tort law deals with the conflicts arising from involuntary transactions; as a consequence, "the role of the community in adjudicating [such] conflict[s] is particularly prominent."<sup>11</sup> According to Fried, "so long as we see contractual obligation as based on promise, on obligations that the parties have themselves assumed, the focus of the inquiry is on the will of the parties."<sup>12</sup> In tort law, however, the will of the parties cannot be controlling; here, courts must of necessity take their cue from the "community's sense of fairness"<sup>13</sup> and other collective standards. Consequently, according to Fried, the assimilation of contract to tort means "the subordination of a quintessentially individualist ground for obligation and form of social control"<sup>14</sup> to a collectivist conception of liability—a result he considers morally objectionable.

A second form of collectivism, which Fried also opposes, derives from the view that "contractual relations establish ties of community between the parties," ties that "generate their own moral imperatives."<sup>15</sup> According to this view, the parties to a contract are under a special duty to deal with each other in good faith and to act with a concern for one another's well-being, rather than pressing their individual advantage to the legally permitted limit. In Fried's judgment, this view (which he associates with his colleagues Duncan Kennedy and Roberto Unger) has tyrannical implications: if individuals are no longer free to define their own obligations to one another, however limited or extensive these obligations may be, but are forced, instead, to share their advantages and disappointments with others in a spirit of communal altruism, they are no longer autonomous persons. They become, instead, (in Rawls's phrase) "so many different

8. P. 5.

9. See also Fried, Book Review, 93 HARV. L. REV. 1858 (1980) (reviewing P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)) (associating Atiyah with view that contractual liability is based largely on reliance and benefit rather than promise).

10. P. 4.

11. *Id.*

12. *Id.*

13. *Id.*

14. P. 5.

15. P. 76.

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lines along which rights and duties are to be assigned and scarce means of satisfaction allocated . . . so as to give the greatest fulfillment of wants.”<sup>16</sup> Fried rejects the suggestion that an “ethic of altruism” be forcibly imposed on contractual partners (although he commends sharing, both in contractual and other relationships, where it is voluntary in nature).

Finally, *Contract as Promise* is a brief against a third form of collectivism, one premised upon the claim that contract law is an appropriate vehicle for redistributing wealth in order to achieve a larger measure of justice in society as a whole. Fried is not opposed to forced redistribution *per se*<sup>17</sup>—he believes that up to a point the state is justified in taking wealth from some and transferring it to others—but he argues that it is inefficient and immoral to manipulate the rules of contract law in order to achieve distributive goals.

I shall return to Fried’s attack on redistributionism later in this Review. First, however, I want to examine his general theory of promissory obligation, the theory that underlies his account of contractual liability and that provides the basis of his opposition to each of the collectivism I have described. The soundness of Fried’s entire argument depends upon the adequacy of his answer to the question: Why is a person obliged to keep the promises he makes? There are, I think, reasons to be dissatisfied with the answer he gives.

## II

Although the subject of his book is contract law, Fried begins with a more general topic: the nature and source of promissory obligation. Why does a promise bind his maker? What is the basis of the promisor’s moral duty, in the absence of excusing conditions, to keep his promise? According to Fried, a promise has an independent moral force that cannot be explained by, or reduced to, non-promissory elements like reliance (on the part of the promisee) or benefit (to the promisor). To show this, he separates these various possible grounds of obligation—reliance, benefit and promise—and examines the moral significance of each in isolation. Imagine, first, a situation in which there is reliance without any accompanying benefit to the party being relied upon or any promise by him to the one who has acted in reliance: I move in to the apartment next to yours because I enjoy listening to you practice with the other members of your string quartet and after some time, you decide to hold your practice sessions elsewhere. Although I am disappointed by your decision, I have no grounds for complaint and certainly none for compensation. If you did not

16. J. RAWLS, A THEORY OF JUSTICE 27 (1971).

17. P. 106.

*promise* that you would continue to practice in your apartment you do me no wrong, no moral wrong, by upsetting my expectations. This case demonstrates that reliance alone gives rise to no obligation, legal or moral; before it can, it must be supplemented either by a promise or the failure to observe some socially recognized standard of due care.

Similarly, according to Fried, the bare fact of benefit is not sufficient, by itself, to make the benefitted party morally or legally liable to compensate the person from whom he has received the benefit. If, unrequested, you play a Beethoven sonata under my window and then present me with a bill, I have no obligation to pay you even though I have been greatly pleased by the concert and you had reason to know that I would be. Again, only if I have promised to pay (or have in some other way encouraged the belief that you would be paid) do I have a duty to compensate you for the benefit I have received.

What do these examples demonstrate? At most, they show that neither benefit nor reliance is a *sufficient* basis of liability. In the absence of an accompanying promise (or duty to observe a prescribed standard of care), neither element gives rise to any obligation, even a moral obligation, to make compensation. This much seems unobjectionable. The difficult case, however, is one in which there has been a promise but no reliance or benefit. Suppose I promise to deliver a ton of wheat to you next week and you promise to pay me \$100 when I do. Before you have done anything in reliance on my promise and before I have reaped the benefits of our contractual arrangement, I tell you that I have no intention of performing. In breaking my promise, do I violate a moral duty even though you have not relied and I have not been benefitted? Fried's answer to this question is an emphatic *yes*. According to Fried, my promise, standing alone, is a sufficient ground of liability even though it is not accompanied by either of these other two elements. This does not follow, however, merely from the fact that reliance and benefit are not themselves sufficient bases of liability. If either reliance or benefit is a necessary condition of liability, then a bare promise cannot be a sufficient condition since it will have to be accompanied by one of these other two elements for liability to exist. At the very least, an independent argument of some sort is needed to show the sufficiency of promise as a ground of obligation.

Fried does offer such an argument and I shall examine it in a moment. First, however, it should be noted that whatever the philosophical merits of his argument, Fried's basic position lacks intuitive appeal. When we consider a case of pure promise, a case in which every vestige of reliance has been stripped away so that nothing but the promise remains, our intuitions flicker and fail to provide any clear support for the view Fried

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defends. Only where there has been reliance on the promise do our intuitions incline us strongly in the direction of enforcement.

To see this, consider more closely the case I described a moment ago. Suppose that after being told I no longer intend to deliver the wheat, you make a substitute purchase in the market for \$125, the price of wheat having increased in the period following our original agreement. In addition, it costs you \$5 (in telephone calls, brokerage fees, etc.) to arrange a substitute transaction. You then sue me for damages. How much are you entitled to recover, on the assumption that I am in breach? Clearly, \$30: this is the amount needed to put you in the position you would have been in had I performed. But although the \$30 represents compensation for what is usually called your lost expectation (the advantage of a favorable executory contract) in one rather obvious sense it is really your reliance interest that is being protected—here just as much as in cases like *Security Stove v. American Ry. Express Co.* that distinguish the plaintiff's reliance from his expectancy.<sup>18</sup> You have been harmed by your reliance on my promise to deliver the wheat for \$100; if I had not made such a promise, you would presumably have made another contract on similar terms with someone else, before the market price of wheat had risen. You are required to go back into the market and make a substitute contract at an advanced price only because you relied on my promise to perform. In short, the harm suffered here is a reliance injury—as it is in every broken contract. Consequently, if we assume that you have not been harmed in any way by your reliance on my promise to deliver the wheat, we must assume that you have not been damaged at all—that you can costlessly arrange a substitute contract at an identical price. But if that is so, your damages will be zero even if I admit the wrongfulness of my breach. Put differently, if I make a promise to you and then renege before there has been any reliance on your part, I may have wronged you in some abstract sense but I have not harmed you in a way that requires compensation. And if I owe you no duty of compensation, it makes little sense to say that my promise, by itself, is a sufficient basis of liability. Liability for what? Perhaps Fried would favor an award of punitive damages where there has been no reliance, but there is little intuitive (and even less legal) support for such a position. If anything, our intuitions support the view that a promisor should be made to “render a performance (or its money equivalent)” only where his promise is accompanied by some reliance—even if it is hidden or non-quantifiable—on the part of the promisee.<sup>19</sup>

18. 227 Mo. App. 175, 51 S.W.2d 572 (1932) (plaintiff awarded reliance, but not expectancy damages, in action against railroad for failure to transport experimental furnace to exhibition).

19. One might object that if this is so it is difficult to explain why we measure damages by the

Fried's philosophical defense of the promise principle is likewise unconvincing. His argument, which rests upon a position known as conventionalism, begs the very question it is meant to answer. According to Fried,

[t]he invocation of benefit and reliance are attempts to explain the force of a promise in terms of two of its most usual effects, but the attempts fail because these effects depend on the prior assumption of the force of the commitment. The way out of the puzzle is to recognize the bootstrap quality of the argument: To have force in a *particular case* promises must be assumed to have force generally. Once that general assumption is made, the effects we intentionally produce by a particular promise may be morally attributed to us. This recognition is not as paradoxical as its abstract statement here may make it seem. It lies, after all, behind every conventional structure: games, institutions and practices, and most important, language.<sup>20</sup>

The convention of promising makes it possible for me to commit myself to a future course of conduct and for others to count on my behaving in the promised way. This not only facilitates mutually beneficial exchanges over time; in Fried's view, it also increases my own freedom. "In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself."<sup>21</sup> And while it is true that promising restricts the promisor, the restriction, according to Fried, is self-imposed "just in order to increase one's options in the long run, and thus [is] perfectly consistent with the principle of autonomy—consistent with a respect for one's own autonomy and the autonomy of others."<sup>22</sup> Fried claims that in order to commit myself in this way, to put "my future performance into your hands," all that is required is a convention for signalling commitment, a device "which we both invoke, which you know I am invoking when I invoke it, which I know that you know I am invoking, and so on."<sup>23</sup>

Fried's argument amounts to this: the institution or convention of promising is a kind of game, the purpose of which is to increase individual

promisee's expectancy rather than his out-of-pocket reliance losses where both are calculable and the latter amount is the smaller of the two. The answer is that the promisee's reliance will often be equal to his expectancy, and where it is not, can rarely be measured with the precision this objection assumes. If it could, a rule requiring compensation only for out-of-pocket losses would be both fair and efficient, and would have considerable intuitive appeal. Given these difficulties of calculation, however, a rule which in effect sets the promisee's reliance loss equal to his expectancy is preferable on administrative grounds and because it shifts the risk of miscalculation to the party in breach.

20. Pp.11-12.

21. P. 13.

22. P. 14.

23. *Id.*

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freedom and facilitate exchange. A specific promise—my promise to deliver wheat to you next week—is a move within this game and is governed by the game's rules. One of the rules (indeed the central rule) in the game of promising is that a promise has independent moral force and creates an obligation to behave in a certain way even in the absence of reliance or benefit.

In assessing Fried's theory of promissory obligation, it is helpful to begin by distinguishing between justifications or explanations which attempt to provide support for a convention and those which are intended to justify particular moves within the convention itself.<sup>24</sup> It may be that within the convention of promising, the obligation to keep a promise is deemed to arise from the promise itself, whether or not there has been any benefit to the promisor or reliance by the promisee. If this is in fact the case, the sufficiency of promise as a ground of liability will be one of the basic rules *in* the game of promising. It does not follow, however, that the game as a whole—the institution of promising—can be explained or justified without invoking one of these other elements, in particular the concept of reliance. There may be perfectly good reasons of an administrative sort for enforcing individual promises even where there has been no demonstrable reliance on the part of the promisee (perhaps one believes that in most cases of this sort there has been some reliance although it is difficult to prove). The adoption of what might be called a no-reliance rule of promissory liability is, however, entirely compatible with the view that the purpose of promising as an institution is to encourage individuals to rely on one another and that it does so by protecting their reliance interest (broadly construed to include their expectancy as well). Put differently, one may think that particular promises should be enforced whether or not there has been any reliance on the part of the promisee, but believe that promise-keeping is in general a moral or legal duty only because it is wrong to encourage the reliance of others and then disappoint their expectations. The former is a rule within the convention of promising, the latter a view about its point or purpose.

Fried's own account of the institution of promising places heavy emphasis on the notion of trust, which is closely related to the concept of reliance. According to Fried, the purpose of promising is twofold: to expand the field of individual freedom and to promote "a general regime of trust and confidence in promises" that is "deeper than and independent of the social utility it permits."<sup>25</sup> Promising, in his view, is "a device that free, moral individuals have fashioned on the premise of mutual trust, and

24. Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

25. P. 17.



which gathers its moral force from that premise."<sup>26</sup> After having argued so vigorously against a reliance-based conception of promissory liability, it is striking that Fried grounds the institution of promise-making in the related notion of trust, basing his own argument on considerations that seem to support a two-level view of the sort just described.

Perhaps because he is aware of the potential inconsistency between his rejection of all reliance-based theories of contractual obligation and his own emphasis on the importance of trust, Fried makes a strenuous effort to associate trust with the concept of personal autonomy, a concept he elaborates in abstract moral terms and without any reference to reliance. According to Fried, one violates another's autonomy, uses him in a way inconsistent with his status as a moral person, by making a promise and then inexcusably failing to keep it. This general claim is, however, perfectly compatible with the view that reliance is a necessary condition of promissory liability. It is undoubtedly wrong for a promisor to disappoint the legitimate expectations of his promisee by failing to keep his promise just because he finds it more convenient to do so. But what are the promisee's legitimate expectations? May the promisee rightfully expect the promisor to keep his promise even where the promisee has not relied and the promisor will be inconvenienced by performance? Perhaps I am only entitled to trust others not to encourage my reliance on promises they subsequently refuse to keep. This is a perfectly defensible position and Fried offers no reasons for construing trust, and the duty of promise-keeping based upon it, in any other way.

His invocation of the Kantian injunction against using other persons as means for promoting our own welfare adds little to Fried's argument. Is it clear that I use another person, in a way inconsistent with his moral status, by failing to keep a promise on which he has not relied? Or is he using *me* in an impermissible fashion if he insists that I have a duty to keep my promise, instead of recognizing that under the circumstances he owes me a "duty of release"?<sup>27</sup> Granted that it is in general wrong to use another person, it can plausibly be argued that my obligation not to use you is founded upon your reliance; indeed, it would be perfectly possible to construct a reliance-based theory of promissory obligation on the general Kantian principle of respect for persons that Fried invokes.

The concept of individual freedom, which Fried also emphasizes in his account of the moral foundations of promising, is similarly inconclusive. Even if we assume that "the restrictions involved in promising are restrictions undertaken just in order to increase one's options in the long run" (a

26. *Id.*

27. I owe this point to Jerry Mashaw.

claim that raises what Fried himself calls “deep and difficult” problems concerning the temporal continuity of the self and the identify of persons),<sup>28</sup> there does not appear to be any reason for thinking that a strict, no-reliance rule of promissory liability is more likely to promote individual freedom than a rule that recognizes a duty to keep one’s promises only where there has been some reliance on the part of the promisee. In the absence of any reliance, the freedom of the promisor can be increased by permitting him to rescind his earlier promise—at no cost to the promisee. Does this nevertheless diminish the promisee’s freedom or compromise his autonomy? Not obviously: like trust and respect, freedom is an indeterminate concept and can be interpreted in various ways, not all of which are inconsistent with the view Fried wishes to reject, the view that reliance is a necessary condition of promissory liability.

In sum, Fried’s conventionalist argument fails to show that the institution of promising rests upon a belief in the sufficiency of promise as a ground of moral obligation. Whether it makes sense, *within* the convention of promising, to enforce all promises regardless of the promisee’s reliance is, I reiterate, an entirely different question. However, an affirmative answer to this question is almost certain to turn upon considerations of administrative convenience rather than moral principle and thus cannot provide the ethical foundation for the promise principle that Fried seeks. The promise principle is not supported by our intuitions, and Fried’s philosophical defense of it has, as he himself acknowledges, a “bootstrap” and therefore question-begging quality.

### III

Not all promises are contracts. Some promises—indeed, a significant number of those we make in the ordinary course of living—are not legally enforceable; although we may have a moral obligation to keep such promises, no legal sanction attaches to their breach. Why are only some promises contracts and what determines which promises are singled out for legal enforcement? Any comprehensive theory of contract law must have an answer to this question. In the Anglo-American law of contracts, the same question has traditionally been put in different and seemingly more specific terms: which promises are supported by consideration, and which are purely gratuitous and hence legally unenforceable? The doctrine of consideration is the main intellectual tool with which lawyers in the common-law tradition have attempted to delimit the bounds of the legally enforceable within the wider domain of promissory obligation.

28. P. 14. Fried promises to address this problem later in the book but, so far as I can determine, never returns to it.

Fried devotes a chapter to the doctrine of consideration and it is here that a reader must look for his explanation of the obvious but puzzling fact that not all morally binding promises are contracts underwritten by the authoritarian powers of the state.

Fried's discussion of the consideration doctrine is sharply critical. The criticisms he offers, however, are of two different sorts—one normative, the other positive—and it is never entirely clear which of them he means to emphasize or what he conceives the relationship between them to be. For the most part, Fried uses his own concept of promissory obligation to criticize the consideration doctrine on moral grounds and to dramatize its alleged irrationalities. He also implies, however, that the promise principle best explains the evolving content of contract law and is to be preferred to the consideration doctrine on this basis as well. The latter, positivistic use of the promise principle is more pronounced elsewhere in the book (for example, in his chapter on offer and acceptance); even in his discussion of the consideration doctrine, however, Fried combines his attack on the doctrine's moral foundations with an implied criticism of its descriptive adequacy. This combination of normative and positive elements explains, perhaps, the curiously qualified conclusion that he reaches:

I conclude that the life of contract is indeed promise, but this conclusion is *not exactly* a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis [as a descriptive principle? a normative ideal?] for the force of contracts, while still treating promises as necessary to it.<sup>29</sup>

Fried's normative criticisms of the consideration doctrine are based upon his belief that it imposes "substantial if random restrictions on perfectly rational projects."<sup>30</sup> What ought to matter, according to Fried, is the *freedom* with which a promise is made, not whether it is part of a bargain or exchange of economic values. By limiting the class of enforceable arrangements to bargains, the doctrine of consideration "holds that individual self-determination is not a sufficient ground of legal obligation, and so implies that collective policies may after all override individual judgments, frustrating the projects of promisees after the fact and the potential projects of promisors."<sup>31</sup> As an alternative, Fried endorses what he calls "the liberal principle that the free arrangements of rational persons

29. Pp. 37-38 (emphasis added).

30. P. 35.

31. *Id.*

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should be respected.”<sup>32</sup> This excludes, of course, unfree or coerced arrangements and those of irrational persons such as children or the mentally incompetent. There is, however, according to Fried, no good reason for imposing the additional requirement that a promise be supported by consideration before it can be enforced at law.

Despite his antipathy to the doctrine of consideration, Fried stops short of suggesting that all promises be legally enforceable—wisely, since such a proposal would undoubtedly strike most of his readers as either pointless or impractical, and in any case unwarranted by even the most stringent conception of promissory obligation. According to Fried, for a promise to be enforceable it “must be freely made and not unfair” and in addition “[t]he promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised.”<sup>33</sup> A footnote makes it clear that this last qualification is meant to deal with the problem of the so-called “social promise”—the invitation to dinner, the promise to take a walk, the agreement to visit an ailing friend in the hospital—which no one intends to be legally enforceable.<sup>34</sup> These promises may give rise to a *moral* obligation on the part of the promisor but absent very special circumstances they do not create a corresponding legal duty. Traditionally, this has been explained by appeal to the doctrine of consideration: social promises are gratuitous and therefore legally unenforceable. Fried’s theory of promissory obligation bars him from explaining the unenforceability of social promises in this way; instead, he attempts to do so by appealing to the intentions of the parties. If A and B intend to create a legally binding relationship, their intention should be given effect (so long as their agreement is free and fair); similarly, if they intend their relationship, whatever its moral implications, to have no legal consequences, this, too, should be recognized and respected. Thus, the decision as to which promises are contracts is left to the parties themselves, a result that is entirely consistent with Fried’s general belief that individual self-determination is the ground of all promissory obligation.

There is, however, a problem with Fried’s (very brief) explanation of the unenforceability of social promises, a problem that points to a more serious defect in his theory of contractual obligation. Fried himself acknowledges that in particular cases it may be difficult to determine whether the parties to an agreement actually intended that it have legal consequences, although he dismisses this as simply a “problem of inter-

32. *Id.*

33. P. 38.

34. *Id.*

pretation."<sup>35</sup> What is striking about this interpretive difficulty, however, is that it cannot be solved by appeal to the actual intentions of the parties. Instead, to solve the difficulty, it is necessary to construct a hypothetical agreement. This is a familiar technique; it is the one which must necessarily be employed whenever a court is called upon to fill a gap in an existing contract. But it is also a technique that must be used to determine which promises are contracts, so long as one accepts Fried's suggestion that this question is to be decided by reference to the intentions of the parties. And even if the *actual* intent of the parties is always to be given legal effect, it will still be necessary to devise baseline rules of enforceability or nonenforceability to deal with different kinds or classes of promises. These rules themselves require the construction of hypothetical agreements of the sort I have described.

I emphasize this point for the following reason. Early in his book, Fried asserts that considerations of self-interest or utility cannot "supply the moral basis of my obligation to keep a promise";<sup>36</sup> in Fried's view, my obligation to do so rests solely on the fact that I have made a promise in some conventionally recognized form. Considerations of self-interest and utility are sure to play an important role in the construction of hypothetical agreements, however, since agreements of this sort are meant to express what it is, or would have been, rational for the parties to want. This is something that cannot be determined on the basis of the promise principle alone. Consequently, to the extent that the legal enforceability of a promise depends upon the intention of the parties and this in turn requires—at a minimum—the construction of presumptive baseline rules that reflect what the parties might rationally expect and intend under various circumstances, considerations of utility and self-interest will be important in deciding which promises are legally enforceable contracts. Fried acknowledges that considerations of this sort and other, non-promissory elements play a role *within* the domain of contract law; what he is less willing to acknowledge—perhaps because it would challenge his general theory of contractual obligation—is the extent to which they also help to define the boundaries or limits of this domain itself.

#### IV

Fried's defense of the promise principle is motivated not only by an intellectual desire to clarify the special character of contractual liability, but also by his powerful commitment to individualism and his belief that the sphere of private contractual association should be one in which indi-

35. *Id.*

36. P. 15.

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viduals are permitted to pursue their own plans and projects unburdened by an overriding, positive duty to promote general social goals. Unlike certain libertarians, Fried does not deny that there are collective duties of sharing and support to which each of us is subject, independently of our voluntary engagements with others; what he *does* deny is that a person's contractual opportunities and obligations—the kinds of contracts he may make and the terms on which he may make them—should be determined by these same duties and the collectivist ideals they reflect.

Fried's anti-collectivism leads him to reject a number of currently fashionable positions in contract scholarship—the assimilation of contract to tort, the elevation of altruistic sharing to an enforceable duty, and the recommendation that contract law be used as an instrument of distributive justice, as a device for achieving a fairer distribution of resources in society as a whole. Each view, and Fried's criticism of it, raises special problems. I shall discuss only the last—the appropriateness of using contract law as an instrument of distributive justice—since this is a position I myself have defended and for which Fried takes me to task.<sup>37</sup>

Many rules of contract law are concerned with what is sometimes called “policing the bargain.” These rules, traditionally grouped together in the doctrinal trilogy of fraud, duress and unconscionability, seek to distinguish between permissible and impermissible forms of advantage-taking in the exchange process—between those types of exploitation that are thought to undermine the basic voluntariness of an agreement and those that are considered legitimate expressions of the self-interestedness which motivates people to make contracts in the first place. In a recent article in the *Yale Law Journal*,<sup>38</sup> I claimed that seemingly neutral rules which purport merely to define the limits of permissible advantage-taking in the exchange process actually have a distributional *effect* insofar as they determine the conditions under which various valuable advantages may or may not be exploited by their possessors, and I argued that these same rules ought to be *evaluated* by the fairness of the distributional pattern they create. I concluded that rules of this sort should be designed, by courts and legislatures, with a view to their distributional consequences—that they should be framed, modified or abandoned in a deliberate effort to promote distributive justice. While Fried acknowledges that rules respecting the use of force and fraud in the exchange process are likely to have distributive effects, he denied that “redistributive aims lie behind” the judgments these rules represent.<sup>39</sup> “Indeed it is a nonsequitur,” Fried asserts, “to argue that because the use of force and fraud

37. See pp. 5, 83.

38. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980).

39. P. 76.

may confer advantages in bargaining, therefore the general purpose behind condemning them is to achieve some desired balance of advantage between contracting parties (or indeed between all citizens)."<sup>40</sup>

Fried begins his attack on my redistributivist position by considering the well-known case of *Obde v. Schlemeyer*.<sup>41</sup> In *Obde*, the owner of a house sold it, failing to disclose that the house was infested with termites although he knew it was. Even though the owner had done nothing to conceal the infestation, the contract of sale was declared unenforceable on the ground that the buyer had been defrauded by the owner's failure to disclose. Fried notes that if, contrary to the actual facts of the case, the seller had lied to the buyer (by telling him, for example, that the house was free of termites when he knew it was not), the seller would have had no right to enforce the contract. He explains this on the grounds that lying is wrong, that it is a morally impermissible "way of procuring an advantage" over another.<sup>42</sup> According to Fried, "the capacity to form true and rational judgments and to act on them is the heart of moral personality and the basis of a person's claim to respect as a moral being. A liar seeks to accomplish his purpose by creating a false belief in his interlocutor, and so he may be said to do harm by touching the mind, as an assailant does harm by laying hands on his victim's body."<sup>43</sup> Fried's moralistic explanation is appealing, but can it be extended beyond what he himself calls the "easy case" of deliberate lying? More specifically, does it tell us how *Obde* itself should have been decided?

Fried raises this question himself, but instead of answering it directly, he puts another case to the reader. Suppose, he says, that

[a]n oil company has made extensive geological surveys seeking to identify possible oil and gas reserves. These surveys are extremely expensive. Having identified one promising site, the oil company (acting through a broker) buys a large tract of land from its prosperous farmer owner, revealing nothing about its survey, its purposes, or even its identity. The price paid is the going price for farmland of that quality in that region.<sup>44</sup>

Should the farmer, upon discovering the real value of the land, be held to his promise, or should he be excused (as the buyer was in *Obde*) on the grounds that the other party owed him a duty of disclosure? According to Fried, each case involves a unilateral mistake, and where one party to a

40. *Id.*

41. 56 Wash. 2d 449, 353 P.2d 672 (1960).

42. P. 78.

43. *Id.*

44. P. 79.

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contract has given his agreement only because he has made a mistake of some sort, the mistaken party—the buyer in *Obde* or the farmer-seller in Fried’s hypothetical—cannot be said to have assumed a promissory obligation: the duty to keep a promise “does not take hold where the promisor has not knowingly undertaken that obligation.”<sup>45</sup> It does not follow, however, that a unilateral mistake necessarily renders a contract unenforceable; in Fried’s view, the occurrence of such a mistake represents what he calls “a contractual accident,”<sup>46</sup> the risk of which, like any other accident, must be allocated on the basis of non-promissory considerations. “In every mistake case,” Fried claims, “no promise but the competing equities must be used to resolve the inevitable dilemma caused by a contractual accident.”<sup>47</sup> He then characterizes *Obde* as a case in which the party seeking enforcement of the contract (the seller) not only knew of the other party’s mistake but “helped to create it,” and asserts that “[w]here one of the parties causes the accident . . . the equities quite clearly do not favor him” (apparently concluding that *Obde* was correctly decided).<sup>48</sup> This last step in the argument is unconvincing, however. Is the seller in *Obde* any more the cause of his buyer’s mistake than the oil company is the cause of the farmer’s error? In both cases the mistake could have been corrected by a disclosure of the relevant information, and in neither case was the mistake the product of an outright lie: it makes as much sense, in my view, to say that the mistake was equally caused or uncaused in each case, but not caused in one and merely exploited in the other.

At this point, Fried’s argument becomes somewhat difficult to follow. As we have just seen, he denies that the buyer in his hypothetical case was causally responsible for the seller’s mistake concerning the value of his own property. Consequently, the buyer (unlike the seller in *Obde*) cannot be said to have forfeited his equitable claim “to enforce an imperfect deal.”<sup>49</sup> Nevertheless, there *is* a lack of genuine (i.e., knowing) agreement on the seller’s part and according to Fried, an “imperfect agreement should not be enforced unless there is some equitable ground for enforcing it.”<sup>50</sup> This implies that the contract in his hypothetical example should not be enforced either, although for different reasons than those justifying nonenforcement in *Obde*. But Fried recognizes that “we are little inclined . . . to deny the oil company the fruits of its bargain,” and points out that “the law would generally hold for the oil company” in a case such as he

45. P. 81.

46. *Id.* See also pp. 69-73 (allocation of risks between parties when circumstances arise that were not contemplated at time of contract).

47. P. 81.

48. *Id.*

49. *Id.*

50. Pp. 81-82.



has described.<sup>51</sup> "What lurking equity," he asks, "favors making a bargain for the oil company, though . . . no true agreement exists?"<sup>52</sup>

In answering his own question, Fried once again appeals to the notion of a convention: "where the better-informed party cannot compensate for the other's defects without depriving himself of an advantage on which he is conventionally entitled to count, his failure to disclose will not cause the equities to tilt against him."<sup>53</sup> Who the equities favor in any particular case must therefore be determined by the set of "general background understandings"<sup>54</sup> that specify which forms of advantage-taking are permissible and which are not. Fried does not tell us whether a conventionalist approach of this sort ultimately supports the farmer or the oil company—both may be able to appeal to (conflicting) background understandings to support their positions—but he seems sure that this approach, in general terms at least, is the right one.

In Fried's view, then, the line between acceptable and unacceptable forms of advantage-taking has to be drawn by referring to the background conventions that explicitly or implicitly shape the parties' expectations. This approach must be adopted, he claims, if the "past reasonable expectations"<sup>55</sup> of the parties are to be protected; by contrast, the deliberate use of contract law to promote distributive ends is certain, in Fried's view, to frustrate these same expectations—a result he considers both unfair and inefficient.

This conventionalist argument is the heart of Fried's attack on the view that contract law may properly be used as an instrument of distributive justice; unfortunately, it does not prove what he wishes it to. The conventions that define the "past reasonable expectations" of the parties to a particular contract are, to a significant degree, the result of judicial decisions and legislative enactments. Fried himself recognizes that the relevant background conventions include those "established prospectively or gradually by courts,"<sup>56</sup> so that the legitimate expectations of contracting parties must be defined, at least in part, by reference to judicially formulated rules specifying the permissible forms of advantage-taking in contractual relationships (the extent of a party's duty to disclose, the meaning of duress, the special rules governing fiduciary relationships, and so on). He also acknowledges that in formulating such rules, a court may, among other things, take distributive considerations into account and adopt one rule rather than another for the purpose of achieving what it believes to

51. P. 82.

52. *Id.*

53. P. 83.

54. P. 82.

55. P. 83.

56. P. 84.

be a legitimate and desired distributive goal.<sup>57</sup> But if that is so, then the pursuit of this goal will be part of the “past reasonable expectations” of the parties to every contract governed by the rule in the sense that they can expect their particular transaction to be carried out within a framework of norms which, among other things, is designed to promote certain distributional ends.

Fried does not object to legal rules being selected on the basis of their distributive consequences; indeed, all that his conventionalism requires is that *particular cases* not be decided for *ad hoc* distributional reasons—giving the nod to the plaintiff in one case because he is poor and holding for the defendant in the next for the same reason—since this would violate the parties’ right to have their dispute resolved in accordance with established conventions.<sup>58</sup> In Fried’s view, distributive ends may only be pursued through the establishment of general conventions; by doing so, “the collectivity acknowledges that individuals have rights and cannot just be sacrificed to collective goals.”<sup>59</sup> The requirement that courts decide cases on that basis of general conventions, rather than an *ad hoc* assessment of distributional consequences, “permits individuals to plan, to consider and pursue their own ends. And once they have made and embarked on plans against this background it would be unjust to change the rules in midcourse by requiring unexpected disclosures and sharing just in case the plans succeed.”<sup>60</sup> This all seems unobjectionable—but who is Fried arguing against? One can certainly believe that contract law is an appropriate vehicle for promoting distributive justice without embracing the kind of particularism that he castigates: although Fried seems to think that my own argument was intended to support an approach of this sort, it is in fact incompatible with it since the incentive effects of a rule—without which its intended distributive purpose cannot be achieved—will be undermined if the rule is applied in an *ad hoc* and unpredictable manner.

So in the final analysis, Fried has no argument against the type of redistributionism that I defended—the only type that seems to me to be defensible. Fried *might* have argued that distributive considerations should not be taken into account even in framing the general legal rules which form part of the background conventions surrounding every contractual arrangement, and if he had said this, he and I would have a genuine disagreement. Fried chooses, however, to focus his attack on redistributionism on the faithlessness to background conventions that he wrongly

57. *Id.*

58. Pp. 83-84, 106.

59. P. 84.

60. *Id.*

believes this position entails—wrongly, because even the most ardent defender of redistributionist policies may be committed to the principle that contract cases should be decided on the basis of general rules rather than in an *ad hoc*, particularistic fashion, and accept the idea that changes in the rules should be prospective only.

Fried is therefore wrong when he claims that those who believe the law of contracts ought to be used as an instrument for promoting “policies of social betterment” will consider an inquiry into “the background understandings (including those established by prior decisions) of a particular case” to be a “vain, even foolish exercise.”<sup>61</sup> This assumes, in effect, that those who advocate using the law of contracts as an instrument of distributive justice are unable to distinguish between reasons that may properly be given in justification of a particular action within an established conventional framework and reasons that may be given for adopting or supporting the framework in the first place. But there is nothing about redistributivism itself which prevents its proponents from taking cognizance of this distinction. I should add that this particular line of attack on redistributionism is especially unconvincing in light of Fried’s own tendency to blur the distinction between these two sorts of reasons in his account of the conventionalist foundations of promise-keeping—if anyone is guilty of ignoring the distinction, it is Fried himself.

Like much of his book Fried’s attack on redistributionism combines, somewhat confusingly, normative and positive criticisms. Redistributionism is bad, he argues, because it subordinates the rights of individuals to the interests of the collectivity. But it is also bad, he implies, because it falsely (or at least inaccurately) describes the Anglo-American law of contracts; in Fried’s view, our law of contracts—with its various rules for policing the bargain—is better described as the elaboration of a few simple moral ideas, rooted in the concept of personal autonomy, than as a disguised effort to promote certain distributional goals. But this descriptive claim is also dubious. The prohibition on active deception in exchange relationships—on hardcore fraud—does seem best explained in moral terms of the sort Fried favors. In more difficult cases, however (those dealing, for example, with the whole problem of non-disclosure) an economic-distributionist explanation better accounts for the legal rules we actually have (or so I have argued elsewhere).<sup>62</sup> This being the case, I am inclined to prefer an explanation of the latter sort even where hardcore fraud is concerned (“we prohibit fraud because the long term welfare of fraud victims—indeed, of everyone in society—would be decreased by permitting

61. P. 85.

62. See Kronman, *supra* note 38; Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

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it") on the grounds that a unified theory of advantage-taking in exchange relations is to be preferred to several different theories of limited scope.

But this may be only an aesthetic preference, and I certainly appreciate the force of Fried's moralistic explanation of why we consider lying to be an impermissible form of advantage-taking. Here, as elsewhere, his views have forced me to reappraise, and in some cases significantly recast, my own. *Contract as Promise* is a book full of intelligent arguments, always challenging, if sometimes unconvincing. It is a book guaranteed to wake even the most dogmatic collectivist from his slumbers.

