

Review

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## BOOK REVIEWS

CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION. By Charles Fried.<sup>1</sup> Cambridge, Mass.: Harvard University Press. 1981. Pp. 162. \$14.00.

*Reviewed by P.S. Atiyah<sup>2</sup>*

In this book, Charles Fried attempts to restate and defend a liberal theory of contract. His purpose is to justify the main structure and doctrines of traditional contract law (with qualifications noted below) by reference to the "promise principle." He thus aims to demonstrate that the law of contract can be seen as an instrument for the implementation of a basic moral principle that is itself a key feature of liberal theories of justice — the principle that autonomous individuals can choose to impose obligations on themselves by an exercise of free will which the state and its courts are bound to respect.

In setting out to defend what is, albeit in modified form, the classical theory of contract, Professor Fried is conscious that he is confronting a considerable weight of modern contract scholarship. During the past fifty years,<sup>3</sup> many contract scholars have become increasingly skeptical of the reality and hence of the validity of the classical theory of contract for a variety of reasons. First, there has been the development of reliance theory in both its positive aspect (imposition of liability for unbargained-for reliance) and its negative aspect (unwillingness in some circumstances to recognize the promisee's entitlement to expectation damages). Second, increasing doubts are felt about the neutrality of the judicial process in the interpretation and enforcement of contracts, and hence there is greater belief that the enforcement of contracts depends ultimately on collectively imposed value choices. Third, many lawyers have a growing conviction that some degree of paternalistic protection of unsophisticated and unskillful bargainers is necessary to avoid results that shock the conscience, and this has led to the development of doctrines of unconscionability and a host of ad hoc statutory protections that violate the basic principle of freedom of contract. Fourth, there is an increasing awareness that the doctrine of consideration ineluctably ties contract law

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<sup>3</sup> Many would locate the beginning of this movement in 1936 with the publication of the influential article, Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937).

at one end with reliance and tort ideas, and at the other end with restitutive and fair-exchange ideas, so that all these sources of obligation come to appear as a continuous spectrum with no sharp discontinuities between the voluntarily assumed and the collectively imposed obligation.

All of this Professor Fried confronts or finesse with elegance, grace, and skill. The strength and originality of his case lies largely in the substantial concessions he makes to the postclassical theorists. The excesses of classical theory are purged, and the scope of contract law that can be justified by the promise principle is thus a great deal narrower than what generally passes for contract law in student hornbooks, legal judgments, or the *Restatements*. Rejecting alike the "death of contract" theories and the rigidities associated with an older generation of contract scholars, Professor Fried attempts to breathe fresh life into the promise principle as the moral basis of contract law.

## I.

Fried starts with the basic principle of a liberal society — "that we be secure in what is ours" (p. 7). The liberal ideal requires respect for the person, property, and choices of others, but our purposes frequently make cooperation necessary. A crucial moral discovery came when free men learned that they could secure such cooperation, without losing their freedom, through trust and promises (p. 8). A promise, unlike a lie or a mere statement of intention, imports the idea of a commitment, and an initial problem is to explain how a person can, by promising, become morally obligated to do something that is not morally required absent the promise. Fried, like many others before him,<sup>4</sup> finds the answer to this problem in the concept of convention: the moral obligation arises because a promisor intentionally invokes a convention whose function is to give moral grounds for another to expect the promised performance (p. 16). Having offered this somewhat sketchy account of the moral basis of promissory obligation, Fried attempts to demonstrate in the remainder of the book that the law of contract can be based on the promise principle.<sup>5</sup>

Fried rightly begins with the central and crucial problem

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<sup>4</sup> The classic exposition is that of David Hume. See D. HUME, A TREATISE OF HUMAN NATURE (London 1739-1740).

<sup>5</sup> I shall not discuss in this Review the moral basis of promising itself. I have argued in a new book that theories of promising akin to that of Fried leave a lot to be desired. See P. ATIYAH, PROMISES, MORALS, AND LAW (1981).

of damages (pp. 17-21). Because the critics of classical theory have found so many circumstances in which the law awards damages on a reliance or a restitutionary principle, they have been able to argue that the basis of contractual liability may not be the promise itself. If a person who breaks a promise is not made to pay the full value of the promise, we may doubt whether it is the *promise* that binds him to perform. Fried does not share these doubts. To him the entitlement of a promisee to the full value of the promised performance is a natural corollary of the promise principle.

Why then, asks Fried, are we sometimes distressed at the idea that a promisee is entitled to a full measure of expectation damages? He discusses three possible cases (pp. 19-20). First, the promisor regrets having to pay for what he has bought, though he would do the same again; no sympathy need be wasted on him. Second, the promisor may regret his promise because of some mistake or change of circumstance; here the doctrines of mistake, impossibility, or frustration may come to the promisor's assistance. Third, and most difficult, are cases in which the promisor has simply changed his mind; "he regrets the promise because he regrets the value judgment that led him to make it" (p. 20). Even when the promisee's complaint is based solely on his lost expectations, this, according to Fried, is no defense at all, in part because it would open the door to all manner of insincere excuses, but mainly because it would show disrespect for contracting parties by not taking their initial choices seriously (p. 21). Fried concludes that classical contract law was quite right to insist that the promisee is *prima facie* entitled to the full expectation value of the promise, and to that extent contract law *is* based on the promise principle.

Exceptions are, of course, recognized by the law when the expectation loss cannot adequately be computed or when reliance losses exceed the expectation value of the promise (p. 22-23). Moreover, even unbargained-for reliance is protected by law in some circumstances, most vividly illustrated by the famous case of *Hoffman v. Red Owl Stores, Inc.*<sup>6</sup> How can this protection be justified on the promise principle? Fried's answer is that of course it cannot be so justified and that classical contract lawyers who made the attempt were placing too much weight on the promise principle. This does not mean, however, that unbargained-for reliance cannot be protected on some other moral basis. Principles of tort law can be invoked to support the result in *Hoffman*. Analogous

<sup>6</sup> 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

arguments apply to cases in which the law protects restitution interests.

Professor Fried next turns to the doctrine of consideration. Unlike the modern critics of classical theory, who see a valuable role for the doctrine of consideration in emphasizing the links between contractual liability and reliance and restitutionary liability, Fried has difficulties with consideration. For him the doctrine is incoherent because it requires the law to affirm the desirability of enforcing promises and yet at the same time to deny parties the freedom to make enforceable one-sided promises. In enforcing bargained exchanges, the law permits the parties total freedom to decide on the adequacy of what each receives from the other. Once it is conceded that adequacy is entirely for the promisor, it is illogical to balk at the final step of allowing the promisor to commit himself to an obligation for what others might regard as inadequate or no consideration. Professor Fried recognizes that black letter law here departs from the morally based promise principle. But in the case law, the bargain theory of consideration does not stand up: courts sometimes treat the existence of a bargain as a question of form only, and thus in practice do recognize the promise principle; in other cases they require something more, and therefore fail to give full effect to the promise principle.<sup>7</sup> Hence the doctrine of consideration in the present law is incoherent. But Fried seems confident that, in the not too distant future, the promise principle is likely to be more openly recognized by courts as the real basis for many of the decisions presently justified by the anomalous doctrine of consideration; the conflicts between the promise principle and the doctrine of consideration will then disappear (pp. 38–39).

Professor Fried proceeds to an analysis of the rules of offer and acceptance, third party beneficiaries, and conditional promises. Far from skirting any of the difficulties confronting him, Fried here goes out of his way to construct the counter-arguments to his thesis. In particular, he sets out to explain why a bare “I accept” (unaccompanied by a promise) is not generally recognized by the law, except in third party cases, as sufficient to trigger the obligation of the offeror’s promise (p. 47). The answer, as might have been expected, is found in the notion that the offer is intended to be conditional. The promisor in this case only means to bind himself in return for

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<sup>7</sup> Nor can economic or social arguments about the “sterility” of gifts as opposed to exchanges provide any better justification. In recognizing the validity of actual (executed) gifts, the law recognizes, correctly, that gifts can serve social purposes. It is inconsistent to deny the same validity to promises to make gifts.

an exchange-promise. A purported acceptance that does not give him the return promise is no acceptance at all.

It is in considering the doctrines of mistake, impossibility, and frustration that Fried makes his most substantial concessions to the critics of classical theory, without in any way weakening his own thesis. Classical theorists insisted that contract law and the promise principle were the exclusive sources of the rights and duties of the parties to a contract. This, he says, is manifestly wrong. Since the basis of the promise principle is the will of the promisor to bind himself, an obligation not founded on that will cannot derive from the principle. But the parties do not provide for all contingencies, and there is a gap in the contract when some event occurs or some fact exists to which they have not directed their wills. If such gaps cannot be filled by the promise principle, they can be filled by other moral and legal principles, and that is indeed what the law does.<sup>8</sup> Two such alternatives are a fairness principle based on the encouragement of due care and an administrative principle based on the application of the rule that is least likely to involve court error (pp. 62–63). A third principle of gap-filling — sharing a risk — is rejected as inappropriate to contractual relations: sharing is a redistributive matter to be dealt with by taxation.

Gap-filling is one thing; overturning deliberate agreements on the ground that they are in some sense “unfair” is quite another. To a limited extent, modern contract law permits a direct challenge to an agreed exchange on this ground through doctrines of fraud, good faith, duress, and unconscionability. Fried contends that these doctrines can be reconciled with a revised version of classical theory. Lying to procure a contract is an easy case: because lying is morally wrong, the liar should not be allowed to retain any ill-gotten gains and must answer for the losses he causes the promisee.<sup>9</sup> Passively allowing the promisor to deceive himself is a more difficult case, one for which the law today sometimes gives relief. Some of these cases, says Fried, are in effect mistake or “gap” cases, and as before, gaps can and must be filled by invoking other principles. Other cases are justified by reference to the conventions on which parties have relied (pp. 84–85).<sup>10</sup>

<sup>8</sup> One may, in passing, note some similarity here with the views of Richard Posner, who, for different reasons, also seeks to distinguish within traditional contract law between “genuine” intentionally assumed obligations and those imposed by the law. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 71–73 (2d ed. 1977).

<sup>9</sup> But that hardly explains why the liar may be held responsible, as he sometimes is, for the promisee’s lost expectations.

<sup>10</sup> Notice how reliance creeps in here as part of the rationale of the institution of

As to good faith in performance, traditional ideas of "reasonable interpretation" can be invoked to justify nonenforcement of the literal terms of a promise. Parties often, perhaps usually, have a general or vague intention regarding certain risks, one which the courts must flesh out,<sup>11</sup> but in doing this they must and can still display "loyalty to the promise" (p. 88).

The section on duress again shows Fried refusing to underestimate the difficulties confronting him. Invalidating a contract for duress depends on a finding that the act of offering was a wrong, that the proponent offered something he had no right to offer. Property rights, it is true, may lie at the root of the distinction between coerced and fair promises, and property rights are to some extent conventional; but they are not *wholly* conventional, for they, like the promise principle, also rest on moral foundations arising out of respect for individual autonomy.

Unconscionability is perhaps the acid test of any version of classical contract theory, and Fried deals deftly with this challenge. In the first place, he rigorously excludes as irrelevant all cognitive flaws in the transaction — these concern procedural unconscionability<sup>12</sup> and can be dealt with as cases of mistake or good faith. Second, he insists that doctrines of substantive unconscionability limit the free choice of contracting parties, who are (we must now assume) wholly aware of what they want to do and fully appreciate the risks and prospects. To limit this freedom requires justification, and there is none (p. 104). Redistribution is a job for the legislature through taxation, not for the law of contract. However — and here the unconscionability doctrine makes some sense — all this assumes a well-functioning market, when in reality cartels, high entry barriers, and informational problems may limit the proper functioning of the market. Moreover, classical liberal theory does not exclude a duty to be concerned about and to assist others. In rare and random situations of market failure or breakdown of the social order, the courts may justifiably refuse to assist the bad samaritan to retain his ill-gotten gains, even where they are reluctant to impose a requirement to act as a good samaritan.

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promising as a whole, while Fried rejects its place as part of the moral basis of the obligation to keep a particular promise. *See also infra* note 29.

<sup>11</sup> Criticisms of classical theory that depend on the common belief that a person can only "intend" something if he has a mental picture of it have been shown, by Wittgenstein among others, to be unfounded. *See L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS* 33e (G. Anscombe trans. 3d ed. 1958).

<sup>12</sup> For the origin of this generally accepted terminology, see Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

In his concluding chapter, Professor Fried turns his attention to a number of ancillary doctrines of contract law dealing with conditions, waivers, forfeitures, and repudiations. Again, the purpose is to demonstrate that the law can generally be accommodated to the promise principle. Old case law relating to conditions is, however, summarily rejected: courts formerly made the mistake of assuming that all terms must be conditions and that any breach, however trivial, justified the innocent party in repudiating his own obligations. This error is now not generally followed. The innocent party retains his claim to damages but is not justified in refusing performance of his own promise. Further, many of these problem situations can be met by invoking restitutionary principles.

## II.

As I have already indicated, much of the strength of Fried's thesis derives from the concessions he makes. These concessions enable him to avoid — indeed to criticize — many of the familiar weaknesses of classical contract law and many of the decisions, widely regarded as unjust, that are associated with those weaknesses. Fried reconciles much of postclassical contract law with his version of the promise principle; indeed, postclassical developments are not so much grudgingly accepted as positively welcomed. With respect to the protection of unbargained-for reliance when appropriate, the reading of conditions and promises against a background of good faith conventions, liberal use of restitutionary principles, the filling of gaps by tort and other nonpromissory doctrines, and even the limited use of rules of substantive unconscionability, Professor Fried is, as it were, on the side of the angels.

As a matter of positive law, there is little difference between Fried's version and that of most postclassical theorists. One might have doubts about the limits Fried would place on the use of unconscionability; one might wonder about Fried's reaction to the massive extent of statutory interference with freedom of contract (he says very little about this); and one might take issue with him, even when the outcome is agreed, on the reasons for which contractual liability is imposed. But even on this last point, Fried makes substantial concessions; he admits that "the law itself imposes contractual liability on the basis of a complex of moral, political, and social judgments" (p. 69). I do not suppose that even the most vehement opponent of classical theory would dispute that the intention of contracting parties is at least one relevant factor in this complex judgment. Indeed, intention is often a significant

factor in the imposition or nonimposition of tort liability as well.<sup>13</sup> Thus, if the law imposes liability for a complex of reasons and the intentions of the parties concerned are a subset of those reasons, there might seem little here with which any modern contract theorist would need to quarrel. On this view, even the line between contractual and noncontractual liability seems to melt away, as the "death of contract" theorists have argued.

Professor Fried makes it quite clear, however, that his concessions do not go this far. The distinction between promissory and nonpromissory obligation, he insists, is marked by sharp discontinuities (pp. 112-13). Insofar as contract law reflects the promissory principle, the same sharp discontinuities ought therefore to arise between contractual and noncontractual obligations. If this is not the case, it must be because contract law now uses many moral principles besides the promissory principle. Because Fried admits as much, what he has justified in his book is only a very small part of contract law. In order to identify the promise principle as the basis of contract law, Professor Fried has simply reclassified large parts of contract law as tort, restitution, or some other subject. Let us consider what he has left out.

In the first place, liability for unintended consequences is not justified by the promise principle. Fried does not dispute that, if a seller intends to warrant the fitness of the bolt he sells, he is justifiably held liable on the promise principle for the consequences of the failure of the bolt (pp. 22-23). But liability for truly unintended consequences — consequences that cannot be fairly imputed to the promisor after all implications and background conventions are taken into account — cannot be justified on the promise principle. He also concedes that many cases of mistake, impossibility, and frustration have to be treated as gap-filling cases and that the gaps must be filled from other moral and legal sources. Once this concession is made, however, it calls into question how often judicial decisions in contractual disputes can be attributed to the promise principle.

Fried appears to take as the paradigmatic case of contract the situation in which two individuals are face to face and make a bargain of the very simplest character — my cow Rose for your \$80. Even that type of bargain can raise issues that

<sup>13</sup> See Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALTA. L. REV. 347, 352-53 (1971). Most torts rest upon voluntary conduct; many of them involve distinctions between acts done with and without consent (liability to a lawful visitor differs from liability to a trespasser); and assumption of risk is still a widely available defense in tort.

Fried admits cannot adequately be dealt with by the promise principle. How much more is this the case with many standard consumer contracts that are only imperfectly understood by one party and understood scarcely at all, except in essentials, by the other. Even commercial contracts between corporations frequently incorporate all manner of standard printed terms whose effect is only in the most general way "intended" by the parties. It is not clear to me whether a signature at the foot of a multipage printed contract indicates the kind of intention to commit oneself to all its contents that Fried would think sufficient to invoke the promise principle. Strictly, this ought to be a strong case for the invocation of his notion of a generalized intent that can be fleshed out by the court. But if generalized intent goes this far, we are back with the worst absurdities of classical fictitious intent. On the other hand, if these are not cases of intent at all, then the promise principle covers no more than a small fraction of the disputes with which contract law deals.<sup>14</sup>

On the question of remedies, Professor Fried observes the importance of tying the promise principle to the expectation damages rule (pp. 18–21), but he says very little about the way in which that rule is modified in practice by the mitigation principle. To insist that the law only enforces intended promises is, with due respect, a great oversimplification of the practical position. First, the law does not "enforce" a promise as such, but only as part of an exchange, past or prospective.<sup>15</sup> Second, the law does not really *enforce* the promise at all, but instead gives a remedy in damages for its nonperformance. Third, the doctrine of mitigation means that large numbers of contracts are regularly breached for which promisees are unable to obtain any damages at all, as when a seller fails to deliver goods but equivalent goods are available in the market at or below the contract price.

<sup>14</sup> When I raised this point at a Tanner Seminar at Stanford University following Professor Fried's Tanner Lectures in May 1981, he replied (as I understood) that he did not regard this case as one falling within his concept of the generalized intent of the promisor.

<sup>15</sup> When the promisor has already received his rights under the contract or when the court can decree specific performance, in which case the promisor will again receive the other's promised performance in exchange for his own, the law is enforcing an exchange, not a promise. It thus secures to the promisor the benefit of the other's performance, and receipt of that benefit is a necessary condition of the duty to perform. Even at the height of the classical common law, the mere existence of an executory bargain was never regarded as a sufficient justification for the literal enforcement of one of the promises to that bargain. The promisee recovered *damages*, not the full value of the promise. See P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 424–31 (1979).

The effect of the mitigation rule, therefore, is that the damages which the breaching party pays will not be what he has promised to pay. Even in the simplest situation where the damages are readily calculable as a result of a clear change in market prices, it thus becomes difficult to explain the ultimate outcome of an action for damages as the recognition of a promissory liability; in complex cases, it becomes still more difficult to attribute the ultimate outcome to the intentions of the promisor. An adequate explanation of the mitigation rule is thus an essential part of the argument that Fried is offering, but all we are given is a brief paragraph far removed from the discussion of expectation damages (p. 131). In this paragraph, Fried notes that the duty to mitigate is a "kind of altruistic duty . . . the more altruistic that it is directed to a partner in the wrong" (p. 131). Considering the otherwise limited role of altruism in Fried's explanation of the law of contract, it does seem remarkable that one of its chief functions is to shield the promise-breaker from the full consequences of his wrong. But the explanation for this result, he argues, is that the duty is one without cost, since in theory the victim of the breach is never worse off for having mitigated than he would be in the absence of the duty.

Many will find this argument less than compelling. In practice, the duty to mitigate often places the innocent party in a dilemma. If he fails to mitigate, his damages will be cut, and if he does mitigate, he may find that his only recoverable damages are trivial reliance costs not worth pursuing. The postclassical explanation of these rules is that the expectations of the promisee, insofar as they rest on the promise alone, are often not as worthy of protection as classical law and the promise principle have claimed. The mitigation rule has the practical result of *pro tanto* (and often entirely) eliminating the binding nature of the promise. Without going as far as Holmes, who denied that a promise created any legal duty of performance at all, the postclassical position does maintain that the duty to perform an unpaid-for and unrelied-upon promise is often weak, and that one purpose of the mitigation rule is to recognize this fact.

I have mentioned above that Professor Fried's discussion seems to take a very simple factual case as the paradigm of contractual and promissory obligation. In particular, he assumes that it is usually easy to identify the bargain — the set of mutual promises involving intentional commitment on both sides. Here again, Fried is writing firmly in the classical tradition. But some contract lawyers today would doubt the reality of many of the "promises" on which contractual obli-

gations are founded. When one lives in a culture and works in a professional tradition in which it is taken for granted that people who do or say certain things *ought* to come under certain obligations, it is very easy to convince oneself that these obligations have been voluntarily undertaken, impliedly or even expressly. But can we so readily assume that transactions that lead to remedies devised by lawyers must be promise-based? Consider an example of what in England would be a unilateral contract: a homeowner asks a real estate agent to find a buyer for him and agrees to the rate of commission charged by the agent. How does one decide by the light of nature, or of the promise principle, what the owner has promised to do? In English law it is clear that the owner is only bound to pay the commission if a sale eventually takes place. If the owner changes his mind and decides not to sell, he is not liable.<sup>16</sup> So what kind of "deal" did the parties make at the outset? Were any promises made at all? The postclassical lawyer would argue that the court, based on its judgment of policy and social values, is creating and imposing legal rights and duties on the parties.<sup>17</sup> The promises of the parties are legal constructs that cannot be identified until we have decided what the parties ought to do. Obligation comes first, promise afterwards.

I assume that Professor Fried would accept the foregoing analysis as correct only where there is a real gap to be filled, and even then he might object to justifying the obligation by "implying" a promise. But I suspect we differ on the empirical issue of how often such gaps arise. The greater the proportion of cases in which legal duties are imposed by gap-filling, the smaller the role of traditional contract law and the promise principle as expounded by Fried. Perhaps Fried would reply that this empirical dispute is a minor matter since his aims are, after all, philosophical and not sociological. Even if he has to surrender the major part of contract law to tort or restitution, he may claim that he is justifying the residue by reference to the promise principle. Although I would not dispute that in principle such an exercise could be valuable, the empirical question still seems important for two reasons.

First, our views of what is morally and legally right are often determined by our vision of a paradigmatic case, and I am quite sure that Fried's paradigm of a contract differs from mine. Indeed, I doubt whether there is a single such paradigm. Second, the larger the number of gaps that the courts

<sup>16</sup> Luxor (Eastbourne), Ltd. v. Cooper, 1941 A.C. 108 (1940).

<sup>17</sup> See my discussion in P. ATIYAH, CONSIDERATION IN CONTRACT 24-27 (1971).

have to fill in by use of principles other than the promise principle, the greater will be the number of borderline cases involving a choice between dramatically different principles. Fried admits that the promise principle produces sharp discontinuities of result. Indeed, he argues that there is nothing irrational about these discontinuities because the purpose of promising is to produce large shifts in result (p. 153 n.1). But this answer once again falls back on the oversimple paradigm as a justification and neglects cases of interpretation and difficulty. In Fried's view, very different results may turn on whether we are still in the realm of contract law based on the promise principle or have bridged the gulf that separates promising from other principles.

### III.

Because Professor Fried rejects so many of the extreme conclusions of classical contract law, his version of what the promise principle demands conforms more to modern ideas of justice. Further, as I have already indicated in addressing the gap-filling problem, Fried's version is in some respects more theoretically defensible than classical law. But there are, I believe, respects in which it is less coherent than classical law and in which Fried gives the appearance of trying to ride two horses traveling in different directions.

In classical law it was clear that the promise principle was not merely an affirmative principle of liability, but also an exclusionary principle of no liability. In general, if you promised, you were liable, but if you did *not* promise, then conversely you were *not* liable. There was, of course, tort law, but that was generally confined to dealing with matters of property, force, and fraud. Laws designed to protect property and prohibit force had their own justification. Laws against fraud were the weak point of classical theory, but they were also the weak point of classical law. Fried's argument that, when the promise principle leaves something to be desired, we can make good its deficiencies by invoking other moral and legal principles, was utterly rejected by classical lawyers. In particular, classical theorists would have denied that liability for unbargained-for reliance or for the unpromised restitution of benefits should be widely imposed when no promissory liability can be found.

If one starts from the position that a promise is an intentional commitment to assume an obligation, the natural inference is that a person who makes *no* promise is refraining from assuming any commitment. If another party chooses to rely

upon him and suffers loss as a result, how then can that other party justifiably demand that the nonpromisor be made to pay? Fried makes this argument when he discusses the distinction between a promise and a mere statement of intent. As long as I refrain from promising, he insists, I am not *bound*; I may foresee and even invite reliance, and yet remain free to change my mind. But Fried leaves here a loophole of which he makes full use later: although I am not bound if I make no promise, I must not mislead you; I must not harm you by my carelessness (p. 11). It is with the aid of this principle that Fried supports the result in *Hoffman*: "Red Owl was held liable not in order to force it to perform a promise, which it had never made, but rather to compensate Hoffman for losses he had suffered through Red Owl's inconsiderate and temporizing assurances" (p. 24).

The difficulty, however, is that Fried does not adequately explain any theory of causation that entitles him to attribute Hoffman's losses to Red Owl. In classical contract law, you were justified in relying on a promise, but you were not generally justified in relying on anything short of a promise. Insofar as a person suffered losses through reliance on another's nonpromissory conduct, those losses were attributable to his own voluntary conduct and not to the other party. Nor was this exclusionary function of promising purely the result of formalism or of limited vision. It reflected an ideological commitment to the respect for individual autonomy that is precisely the basis of Fried's own version of the promise principle. Respect for the autonomy of individuals would have led classical lawyers to reject Hoffman's claim. They would have insisted that his own choices, his own autonomous decisions, led him to rely on the vague assurances of Red Owl. The purpose of giving a promise, they would have said, is to mark the point at which I choose to accept responsibility for your acts of reliance; if I have given no promise, you act at your peril, not mine.<sup>18</sup>

Decisions like *Hoffman* completely reject the exclusionary aspect of the promise principle and are intelligible only if one assumes that, in *some* circumstances, each of us is his brother's keeper. And this goes not only for *Hoffman* but also for large parts of the field of unbargained-for reliance, promissory estoppel, implied warranty, misrepresentation, strict products liability, and other developments of postclassical law. All of

<sup>18</sup> This very point was made (and rejected) in the nearest English equivalent to the *Hoffman* case, *Box v. Midland Bank, Ltd.*, [1979] 2 Lloyd's L.R. 391, 399 (Q.B. 1978).

these impose liability for losses that would not occur but for the free choice of the plaintiff in acting in reliance on the defendant's language or conduct. In classical law, free choice would often have been decisive in rejecting the claim. Professor Fried respects that choice but accepts its consequences only for the affirmative aspect of the promising principle.

Much the same difficulty faces Fried's attempts to use restitutionary principles to fill in other deficiencies of the promise principle. In classical law, there was little room for a law of restitution except where claims could be said to be quasi-proprietary. In general, classical law imposed an obligation to pay for benefits received only when the recipient promised to pay for those benefits. Again, this arose largely from respect for the autonomy of the individual: each person was entitled to decide for himself whether something was a benefit and how much it was worth. If he did promise to pay for a benefit, he was of course liable, but if he did not, then he was not liable. Here too the promise principle was exclusionary in effect and in purpose.

Consider the extreme case of *Jacob & Youngs v. Kent*,<sup>19</sup> the Reading pipes case. Fried stigmatizes as "absurd" the owner's claim that he could keep the house without paying for it (p. 123). Even at the height of classical times, some might have agreed with Fried, though there is certainly evidence that others, including Baron Bramwell, would not.<sup>20</sup> Faced with such a case, Bramwell might well have argued that he had no means of knowing whether the house as built was worth its price, or worth anything, to the owner. The defendant has decided what the house is worth with the Reading pipes. The court has no power to force him to pay for a house with different pipes. To do so would be to show disrespect for the defendant's autonomy, his free choice. I do not see anything illogical or absurd about such an argument. If it would seem unreasonable to most people today, that is surely because we no longer have quite the same respect for individual autonomy and free choice. We are prepared to overrule the owner's

<sup>19</sup> 230 N.Y. 239, 129 N.E. 889 (1921). The defendant in *Jacob & Youngs* refused to pay the full contract price for a house built by the plaintiff. The contract specified that pipe "of Reading manufacture" was to be used; when the defendant learned that the plaintiff's subcontractor had installed (virtually indistinguishable) Cohoes pipe, he refused to pay the full contract price.

<sup>20</sup> In *Boulton v. Jones*, 2 H. & N. 564, 566, 157 Eng. Rep. 232, 233 (Ex. 1857), Baron Bramwell made no bones about exempting the defendant from liability for paying for goods that he had consumed, and elsewhere Bramwell made it quite clear that he thought a man's obligation to pay for benefits supplied to him rested on contract or nothing. See P. ATIYAH, *supra* note 15, at 376.

defense in such a case because we feel that the loss to the plaintiff would be too great, and we are prepared to judge for ourselves (through our courts) whether the change in pipes has in fact diminished the value of the house.

But it is much less clear to me that Fried can, consistently with his basic position, defend a verdict for the plaintiff in *Jacob & Youngs*. It is, he claims, just an application of the restitution principle that, if the owner does not retain the benefit under the contract, he need not pay for it (p. 125). The fact that the owner cannot return the house only means, according to Fried, that he cannot avail himself of this principle. All he can do is to claim the next best thing, which is that he should have to pay not the contract price but the fair value. But this conclusion just does not seem to follow. If the owner cannot return the house (and after all, the cause of that is the builder's breach of contract — *his* free choice), why should he not be entitled to keep the house without payment?<sup>21</sup> As with unbargained-for reliance, the reality surely is that values have changed about such matters; indeed, Fried admits that there is "an alternation in the priority between the restitutive and the promissory principle" (p. 126).<sup>22</sup>

#### IV.

The heart of the conflict between all versions of classical contract theory, including Fried's, and postclassical theories is the extent to which respect for the promise principle, as a matter of morality or law, requires us to recognize as binding and to "enforce" the free choices of sane adult individuals. The earlier classical theorists, drawing upon utilitarian economic theory and resting heavily upon a subjective theory of value, insisted that every person was the best judge of his own interests. Professor Fried, while apparently unwilling to rely upon so crude an empirical proposition, prefers to rest his version of classical theory on the moral argument that to refuse to recognize, or to interfere with, a person's free choice is to refuse him the respect of treating him as an autonomous moral agent. The result is the same.

No modern contract scholar would deny that respect for

<sup>21</sup> In fact, the disputed amount was \$3,483.46 out of a total price of over \$77,000. No realist would think that the defendant's argument would have been treated nearly so respectfully if he had refused to pay any part of the price.

<sup>22</sup> I am not sure I have wholly grasped Fried's views on the nature of this "alternation," but as I read his text he seems to admit that the law has sometimes given priority to the one and, at different times, to the other of these principles, and he does not seem to see anything wrong with this process.

individual free choice remains an important value of Western societies, but I suspect most of these scholars would argue that the law must also accommodate countervailing values deriving from the pursuit of collective goals and from the paternalistic belief that collective judgments about the best interests of individuals are sometimes more likely to be correct than the individual's own judgment. I have myself argued at length elsewhere<sup>23</sup> that, ever since the reign of Elizabeth I, the common law of contract has, to varying degrees, recognized collective and paternalistic as well as individual values. Professor Fried, however, seems to argue that the law of contract is based on just *one* set of values and, indeed, that it is and has for two hundred years been moving toward greater recognition of those values to the exclusion of all others.<sup>24</sup> As a version of the history of the last hundred years, this is so remarkable as to be perverse. As an account of the basis of contemporary law, Fried's view also seems to me to be wildly off the mark.

The pursuit of collective goals by the law is an immense theme, on which I must confine myself to a few brief points. It is surely undeniable that the law now pursues many such goals and that much legislation clearly impinges upon contract law, for example, by rendering it impossible to enforce contracts entered into in plain breach of statutory provisions. It is hard to deny the legitimacy of laws of this character except by denying the legitimacy of the democratic process in virtually all Western societies. But there is another type of collective activity that impinges on contract law — activity in pursuit of egalitarian goals. Like many economists, Professor Fried wants to relegate redistribution to taxation laws. He objects that, once judges begin to use contract cases for redistributive purposes, the sanctity of the promise principle is undermined. Moreover, such redistribution is inefficient and unfair, according to Fried, because it visits only randomly selected victims of the judicial process (p. 106).

This, too, is an enormous theme on which I can only mention a number of selected points. To start with, it is wrong to assume that the use of egalitarian values in a contractual setting is always in pursuit of redistributive goals.<sup>25</sup> Courts may rely on egalitarian values not in order to redistribute wealth between plaintiff and defendant, but to insist,

<sup>23</sup> See P. ATIYAH, *supra* note 15.

<sup>24</sup> "It is true that over the last two centuries citizens in the liberal democracies have become increasingly free to dispose of their talents, labor, and property as seems best to them" (p. 21).

<sup>25</sup> I think Fried does make this assumption. See, e.g., p. 106.

for instance, that the defendant should treat this plaintiff in the same way he has treated other contracting parties. In this respect, egalitarianism carries none of the suspect redistributive connotations of majoritarianism but is based on traditional notions of equality before the law.

If, for example, a person refuses to make with a black man a contract that he would have been willing to make with a white man, the law may condemn this refusal on egalitarian, but not necessarily redistributive, grounds. Fried sees nothing inconsistent with his views in supporting laws of this kind because, he says, this discrimination is "without reason" and therefore morally wrong (p. 103 n.\*). Whether or not this can be reconciled with Fried's apparent acceptance of the subjective theory of value, a more difficult question arises when a party *does* contract, say, with a black man, but only on terms more advantageous to himself than he would have exacted from a white man. Intervention here overrides the consent of *both* parties in the pursuit of egalitarian values. Perhaps Fried would still accept this result because of the "wrongful" nature of the discrimination, but there are more difficult cases yet. For instance, the takeover rules enforced in the City of London (without any statutory backing) compel a takeover bidder to treat all shareholders equally; if he buys shares from one seller at so much a share and later, in pursuit of the same takeover bid, acquires shares from another seller at a higher price per share, he is obliged to pay the first seller the difference.<sup>26</sup> Considering the source of these rules, it is hardly possible to write them off as socialist nonsense, yet observe how the first seller is entitled to reopen his contract, voluntarily and freely made, because it is felt that equality of treatment of the shareholders in a takeover bid is an overriding value.

A more fundamental difficulty with reading all redistributive notions out of the law of contract is that the enforcement of executory contracts itself presupposes an initial distribution of entitlements that is part of the very structure of contract law — and I am *not* referring to the distribution of property entitlements. Like the classical theorists, Fried leaps easily over the gulf between laws that intervene to prohibit parties from making a present exchange and laws that intervene in the already interventionist process of enforcing executory contracts. Because the making of a present exchange, if free and voluntary, is so obviously a Pareto-optimal move, it is assumed that the same holds true of agreements to make a future

<sup>26</sup> See A. JOHNSTON, THE CITY TAKE-OVER CODE 202–05 (1980).

exchange. This is fallacious. People can and do change their minds. Indeed, one obvious reason why parties sometimes fail to perform contracts is that they have changed their minds on the relative value of the benefits to be exchanged. Fried recognizes this possibility, only to dismiss it on the ground that respect for the autonomy of agents requires us to treat their first choices as determinative (pp. 20–21).<sup>27</sup> I can see no persuasive reason for insisting that respect for another's autonomy requires us to accord conclusive weight to his prior choice rather than to his present choice.<sup>28</sup> Yet the enforcement of executory contracts is only justifiable on the assumption that we have already distributed a property-like entitlement to the promisee: the promisee is entitled to the benefit of the promise, and the promisor is not entitled to change his mind. Without that initial distribution of entitlements, there is no case for enforcing executory contracts, not even a utilitarian case based on expectations: if the promisor is entitled to change his mind, all expectations must be discounted and breach will not in fact lead to the defeat of justified expectations.

The law may distribute entitlements as it does for good reason, but the fact that the law of contract, like the Ritz Hotel, is open to all, does not mean that the distribution is fair to all alike. It is only too obvious that this distribution of entitlements is of most benefit to those who are best at planning, whether their advantage lies in material resources, skill, foresight, or temperament. Nor is it enough to say, as I take it Fried would say, that liberalism starts from the basis that each of us is entitled to his own skills and talents and to the fruits thereof. At this point in the argument, the whole question is whether I am entitled to the *additional* advantages that will accrue to me from a law for the enforcement of executory contracts. The upshot is that the enforcement of such contracts cannot be regarded as a distributively neutral exercise.

I turn finally to the paternalistic grounds for overriding the promise principle in limited circumstances. Professor Fried likens this to holding out a helping hand to the person who has bought a lottery ticket and failed to win a prize, even

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<sup>27</sup> Of course, it could be argued that a person may come to regret an executed contract, no less than an executory one; and if he is not permitted to undo it, the original optimality of the exchange is then destroyed. I see no logical answer to this argument, but there are obviously overwhelming policy reasons to justify refusing to undo an executed transaction, many of which do not apply to executory transactions.

<sup>28</sup> Consider the analogous case of marriage, or even promises to marry: doesn't respect for the autonomy of others here tend to mean respect for their *present* and not their *past* choices? Isn't that the reason for "liberal" divorce laws and, in some jurisdictions, abolition of the action for breach of promise of marriage?

though he would do the same again. No sympathy, Fried says, need be wasted on this gambler (p. 20). But all surely depends on the ability of the person in question to judge his own future state of mind, as well as more obvious matters like the true nature and extent of the risk. In fact, all democratic Western societies have massive bodies of law — retirement pension laws, compulsory medical insurance, compulsory liability insurance laws, and so forth — that demonstrate our considerable sympathy for one who wrongly calculates, or otherwise foolishly takes, a risk. The proposition that a person is always the best judge of his own interests is a good starting point for laws and institutional arrangements, but as an infallible empirical proposition it is an outrage to human experience. The parallel moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little bargaining skill. If a smart operator makes a highly advantageous deal with a person of low intelligence or skill, does the former really show "respect" for the latter's moral autonomy by exploiting his advantage in this way?

It makes more sense to treat the promise principle as presumptive rather than conclusive. By and large, this is what the law does. Promises ought to be treated as *prima facie* binding rather than absolutely and conclusively binding. Exchanges of benefits are likely to be in the interests of those who make them, and there is therefore a strong *prima facie* case for upholding them. Promises are likely to be relied upon and those who rely would suffer loss from breach: these too are *prima facie* good reasons for upholding the binding nature of a promise.<sup>29</sup>

On the other hand, to say that such results are likely to follow is not to say that they are certain to follow; the presumption must be rebuttable. Even classical law recognized some circumstances — fraud, coercion, and the like — that would rebut the presumption. Today, there are rather more circumstances in which the presumption is rebuttable, especially if we take account of legislation. Some, like Professor Fried, would say that we take a great leap when we move from cognitive failures to substantive unfairness as a ground

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<sup>29</sup> Fried rejects this argument on the ground that the promise is the source and not the consequence of the reliance, but he is nevertheless constantly drawn to justify the promise principle itself in terms of "trust," virtually a synonym for reliance (pp. 8, 16, 65, 78, 83, 85).

for allowing the binding nature of a contractual promise to be rebutted. Conceptually this may be true, although in practice the leap is not usually obvious. The reason is that those who rely upon fraud, misrepresentation, and other cognitive weaknesses as grounds for upsetting contracts are usually complaining that the contract was substantively unfair. But even if we agree with Fried on the quantum nature of the leap, we take it because we recognize that the law must reflect diverse and conflicting values. Given this diversity, there is no hope of reducing the whole body of contract, or even its main outlines, to a single principle.

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THE WAYS OF A JUDGE: REFLECTIONS FROM THE APPELLATE BENCH. By Frank M. Coffin.<sup>1</sup> Boston: Houghton Mifflin Co. 1980. Pp. xiv, 272. \$10.95.

*Reviewed by Benjamin Kaplan<sup>2</sup>*

The man in the street, even if uncommonly intelligent and literate, can have no clear picture of the ways of judges, and least of all of the habits of those relatively few judges who carry on their esoteric duties at the appellate level.<sup>3</sup> This ignorance is surely one of the causes of the public's frequently immoderate responses to judicial decisions. Chief Judge Coffin of the First Circuit court of appeals finds the situation regrettable and undertakes in the present book to try to help "non-judges of all ranks and ages" (p. 246) achieve a better understanding of the appellate process. His method is to present a rather detailed insider's account of the work patterns of his court and his frank thoughts and feelings about them — a personal statement, but one that will, he hopes, "reflect basic values widely held" (p. 14).

Here is an occasion for prolonged applause. The book is excellent. It should, as intended, lead unanointed readers,

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<sup>1</sup> Chief Judge, United States Court of Appeals for the First Circuit.

<sup>2</sup> Associate Justice, Massachusetts Supreme Judicial Court, retired; Royall Professor of Law Emeritus, Harvard Law School.

<sup>3</sup> On the federal side, as of June 30, 1978, there were an estimated 132 judges on courts of last resort (except the Supreme Court), as against 516 on trial courts of general jurisdiction. In addition, some 140 senior and retired judges gave more than half their time to judicial work. On the state side, in 1976 there were 352 judges on courts of last resort, 463 on intermediate appellate courts, and 6043 on trial courts of general jurisdiction. Here too there was help from senior or retired judges, but numbers are not supplied (p. 40).