

## Do Promises Distinguish Contract from Tort?

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*Contract as Promise*, Charles Fried's modern classic, argues that contract law has a "moral basis" in the "promise principle."<sup>1</sup> It was written, of course, in response to scholars who foresaw the "Death of Contract."<sup>2</sup> According to them, it is a mistake to think of contract as a distinct domain of law, with a distinct foundation. Properly understood, contract is just an instantiation of the more basic category of tort, with the latter understood as law that requires persons who wrongfully cause losses to compensate their victims.

Contract-as-tort scholars made their point in different ways. Patrick Atiyah took a historical route, arguing that promising was only center stage in contract law for a brief period in the late-nineteenth and early-twentieth centuries, and has little to do with modern transactions.<sup>3</sup> "Relationalists" downplayed the importance of specific agreements and formal legal rules, instead highlighting the enforcement of extra-legal interpersonal norms.<sup>4</sup> Grant Gilmore combined these and other themes with a healthy dose of sarcasm, decrying the rules of classical contract law as barriers to justice.<sup>5</sup> Despite these differences, all subscribed to the idea that contract collapses into tort. As Fried put it so memorably, to these scholars, a breach of contract "is like a pit I have dug in the road, into which you fall. I have harmed you and should make you

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

2. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (2d ed. 1995).

3. See P.S. ATIYAH, *Contracts, Promises and the Law of Obligations*, in *ESSAYS ON CONTRACT* 10 (1986).

[C]onsider such simple transactions as the boarding of a bus, or a purchase of goods in a supermarket, or a loan of money. Is it really sensible to characterize these transactions as agreements or exchanges of promises? Is it meaningful or useful to claim that a person who boards a bus is promising to pay his fare?

*Id.* at 19.

4. See generally Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 *OXFORD J. LEGAL STUD.* 233, 235-36 (2007).

5. GILMORE, *supra* note 2, at 15 (arguing that under the traditional contract theory, courts "refus[ed] to intervene affirmatively to see that justice or anything of that sort was done").

whole.”<sup>6</sup> The fact that *D* harms *P* by breaking their deal rather than by breaking *P*’s nose is of no consequence.

Against the contract-as-tort movement, Fried insisted that contract stands apart from tort because, unlike tort, it is built on promise.<sup>7</sup> He acknowledged that some courts had blurred the line between the two fields by, for example, mistakenly treating claims based on foreseeable detrimental reliance as contract claims.<sup>8</sup> But these decisions, he insisted, were mistakes at the margin that do not undermine the basic interpretive point that contractual obligations presuppose a promise in a way that tort duties do not.<sup>9</sup>

To emphasize the centrality of promise to contract was not enough, however, to fend off the contract-as-tort scholars. After all, they could concede that “contract” claims are claims for broken promises yet still insist that such claims fall within the larger category of tort. To deem harms caused by the failure to fulfill a promise as “breaches of contract” is no different—the argument would go—than assigning the name “battery” to intentional physical attacks or “slander” to spoken reputational attacks. A contract breach might be a distinctive kind of wrongful harming, but it is still a wrongful harming.

So Fried pushed further. Breaking a promise, he argued, is not merely one way of harming another. The utterance of a promise is not just an act akin to the deliberate movement of one’s arm. It is a *voluntary assumption of an obligation*.<sup>10</sup> To promise, under the right conditions, is to obligate oneself voluntarily to another. For Fried, it is the voluntary nature of promissory obligations that distinguishes contract from tort and other branches of private law. That promises stand at the root of contract also explains why contractual obligations are enforceable: “[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept.”<sup>11</sup> The centrality of promise to contract in addition provides the key to understanding why contract law is, and should be, a pillar of our legal system. A liberal form of government does right by its citizens when it promotes individual choice. By enabling individuals credibly to commit themselves, contract law enables individuals to exercise their capacities as self-determining agents.<sup>12</sup>

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6. FRIED, *supra* note 1, at 10.

7. *See id.* at 1.

8. *Id.* at 23-25 (arguing redress based on reliance does not negate promise as underlying foundation of contract law). Fried addresses the emergence of redress based on reasonable reliance, but suggests that promissory estoppel cases are an attempt to compensate for a gap in enforcement doctrine, rather than showing that harm—as opposed to breach of contract—is the basis for redress. *Id.*

9. Fried acknowledges that contract law is prepared to enforce agreements so long as there is an objective manifestation by the parties of an intention to reach an agreement. *Id.* at 3. We will not explore here whether this aspect of contract doctrine creates a difficulty for his theory.

10. FRIED, *supra* note 1, at 16 (arguing that the obligatory force of contract and promise derives from the promisor’s deliberate invocation of a social convention through which obligations are recognized).

11. *Id.* at 17.

12. *Id.* at 13-14.

We share Fried's judgment that contract is importantly distinct from tort. In what follows, however, we will begin with criticism. Specifically, we argue that the contract-as-promise thesis admits of two interpretations, that only one of these interpretations can generate a sharp distinction between tort and contract, and that Fried can only accept this interpretation at a significant cost to certain ambitions he has for his theory. After offering this critique, we turn to reconstruction, suggesting an interpretation of Fried's argument that, in our view, renders it both illuminating and highly plausible.

Our criticism will turn on a distinction between an individual's undertaking a *moral* obligation and her undertaking a *legal* obligation.<sup>13</sup> The question is this: Supposing that promises are the essence of contract, how should contract law deal with an agreement based on a promise that is meant to be morally binding but not legally binding? This question, we suggest, places Fried in a bind. If contract law is to be understood as a means of holding people to their promises, then it would seem that these promises should be legally enforceable, even though the parties to the contract agreed at the time of contracting that the promise is not to be legally enforced. If, by contrast, contract law is concerned first and foremost with enabling individuals to make the arrangements they wish to make, then presumably the law should not enforce such a promise.

Our guess is that, as between these two options, Fried would choose the latter and allow parties to avoid legal liability even as they assume promissory moral obligations. If that proves to be the case, however, then there is reason to doubt the fitness of the promise principle for serving as the moral basis of contract law, especially in a liberal society. At its core, the promise principle seems to stand for the idea that contract law is ready to enforce the solemn moral obligation that attends the serious business of a promise. Why, then, allow promisors to avoid being held to their moral obligations simply by specifying that their promises are not to be legally enforced? The moral obligation incurred by the making of a promise no longer seems important enough to provide the the moral basis of contract law.

Even if the foregoing arguments have some force, there remains in Fried's deservedly influential book a deep insight into the relationship of contract to promise. The key, we believe, is to read the book as primarily offering a theory of contract *interpretation*. To emphasize the similarities between contract and promise is to observe that parties to contracts ordinarily understand themselves to be taking on the sort of commitments one takes on when making an ordinary promise outside of the contractual setting. Given this understanding, courts should read contracts to incorporate the everyday morality of promising unless there is good reason to conclude that a particular contract does not. In most

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13. Jody Kraus has previously noted that this distinction points to a dilemma for Fried's argument. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1612 n.21 (2009). We develop the point further and in a somewhat different direction.

cases, then, courts should enforce promissory morality at least in broad outline not because morality demands it, but because the agreement demands it. In this sense, promise really is central to contract law.

#### I. CONTRACT LAW: POWER-CONFERRING OR DUTY-IMPOSING?

H.L.A. Hart famously distinguished between two broad categories of legal rules: duty-imposing rules and power-conferring rules.<sup>14</sup> Duty-imposing rules are rules that apply to citizens whether the citizens wish them to or not.<sup>15</sup> The rules that define crimes such as murder and theft are perhaps the canonical examples of duty-imposing rules. By contrast, some rules confer a power on actors to effect legal change if and when they choose to invoke them.<sup>16</sup> Legislators have the power to enact laws so long as they do so in accordance with the rules of enactment; individuals can form corporations so long as they do so in accordance with formation rules; and individuals may marry or execute wills if they so desire if they follow the proper formalities. The law does not require individuals to form corporations, marry, or make wills, and indeed the law may be largely indifferent to whether anyone wishes to do so or not. But if individuals do wish to make these sorts of arrangements, the law provides a mechanism that empowers people to make them.

Although Hart did not discuss the point in detail, he seems to have regarded contract law as mainly a set of power-conferring rules.<sup>17</sup> On this view, contract law empowers individuals jointly to create “legislation” that is specially tailored to their own circumstances. Randy Barnett likewise has described contract law as conferring on individuals a power to enact private legislation.<sup>18</sup> The position taken by Hart (if it is, in fact, the position he took) and Barnett is by no means uncontroversial. Contract-as-tort scholars obviously take the view that contract law imposes tort-like duties not to injure and to repair. Moreover, as Greg Klass has noted in a recent paper, it is not always easy to distinguish duty-imposing rules from power-conferring rules in controversial cases.<sup>19</sup>

One way to explore the central claims of *Contract as Promise* is to ask what stance, if any, it takes on these issues. Because Fried focuses on the importance of freedom of choice in the liberal state,<sup>20</sup> and because he argues that contract law is different from tort law precisely because contract

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14. See H.L.A. HART, *THE CONCEPT OF LAW* 27-28 (2d ed. 1994).

15. *Id.* at 27.

16. *Id.* at 27-28.

17. See *id.*

18. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *Consent Theory*]; see also Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1175-76 (1992).

19. Greg Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1729 (2008).

20. See FRIED, *supra* note 1, at 7-8.

obligations are freely undertaken,<sup>21</sup> it is tempting to suppose that he regards contract law as containing primarily power-conferring rules. On the other hand, Klass plausibly attributes to Fried the view that contract law consists of duty-imposing rules.<sup>22</sup> In contrast to inheritance law—which allows people a nearly unconstrained choice as to how their property will be distributed upon death<sup>23</sup>—contract law, according to Fried, enforces moral obligations, and moral obligations do not “depend on fashion or favor.”<sup>24</sup> Arguably, then, Fried’s view is that contract is a mechanism for enforcing the moral duty to keep one’s promises. If this view is correctly attributable to Fried, his theory of contract may best be understood as a theory that treats contract law as generating duty-imposing rules.<sup>25</sup>

In assessing Fried’s theory along this jurisprudential dimension, it is important to recognize that the mere fact that a rule governs voluntary acts is not enough to render it a power-conferring rule. The actions that trigger criminal and tort liability are voluntary actions.<sup>26</sup> When *A* punches *B* in the nose, *A* generates in *B* a legal power to bring suit against *A* for battery. However, the rule prohibiting battery is clearly not power-conferring.<sup>27</sup> It enjoins battery, period. It does not exist to enable *A* to incur a legal duty to refrain from striking *B*.<sup>28</sup>

Likewise, to posit, with Fried, that promises are at the center of contract does not settle the question of whether contract is comprised primarily of power-conferring or duty-imposing rules. The law of tort is nothing if not capacious, and includes many different categories of wrongs with distinct behavioral triggers. For example, fraud requires the defendant to have made a knowing misrepresentation;<sup>29</sup> trespass requires a touching of land;<sup>30</sup> libel

21. *Id.* at 21 (discussing contract as voluntary obligation).

22. Gregory Klass, *Promise Etc.*, 45 SUFFOLK U. L. REV. 695, 696 (2012).

23. Forced-heir statutes may be one example of an element of duty-imposing rules in the law of trusts and estates.

24. FRIED, *supra* note 1, at 2.

25. Ernest Weinrib thus construes Fried to have offered an “instrumental” account of contract law as a “means of enforcing [a moral] obligation that arises independently of it.” ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 52 (1995).

26. This is certainly true for the intentional torts we have mentioned like battery and fraud, but it is equally true for most cases of negligence as well. Texting while driving is typically a voluntary act, even though the injury it accidentally causes sounds in negligence rather than battery.

27. The rule that allows *B* to recover from *A* if he wishes to do so may well be power-conferring in Hart’s sense. See generally Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998). The rules at issue here, however, are the primary rules that prohibit wronging in the first place.

28. It is possible to imagine *A* hitting *B* in order to accomplish the legal result, e.g., if *A* were to do so as part of a plan to obtain the food and shelter that comes with being put in jail. See Klass, *supra* note 19, at 1740. As Klass points out, despite the possibility of such cases, the rules of criminal law are not power-conferring in Hart’s sense because they do not exist in order to allow citizens to choose to go to jail.

29. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 252 (2010).

30. *Id.* at 231-36.

requires publication of a defamatory statement;<sup>31</sup> and so on. Breach of contract, one might add, requires a promise made, then broken. While the law of contract is perhaps more complex than the law of trespass, its complexity is not enough to explain why “breach of contract” is not an entry in a first-year law student’s Torts outline.<sup>32</sup>

This helps us to grasp why Klass argues that Fried’s view—even though tied to a claim about the importance of empowering individuals to make choices—is nonetheless a duty-imposing view. On Klass’s interpretation, Fried treats contract law as a means of enforcing moral obligations: “Contracts are enforced not because the parties have chosen the legal obligation, but because they have a moral obligation to perform.”<sup>33</sup> Although we may choose to make promises or not make promises, once we make them, promises create moral obligations, and the presence of moral obligation is sufficient (on this understanding of Fried’s view) for legal obligation.

For the reasons just canvassed, distinctions between voluntary and involuntary acts, or between promissory and nonpromissory obligations, do not, of themselves, offer a clean distinction between contract and tort. Hart’s jurisprudential distinction potentially does. *If* contract law is really power-conferring, then it is, like the law of wills, available to individuals should they wish to make binding agreements, but is not forced upon them if they do not wish for it to govern their arrangements. By contrast, torts such as fraud, battery, and defamation are all instances of the law recognizing duties not to mistreat others that apply even to those who do not voluntarily accept them. Barnett’s theory of contract relies on just this distinction to explain the distinctiveness of contract. In contract, he says, the parties must choose not only to make promises, but also must agree to incur a legal obligation.<sup>34</sup> So understood, contract law is power-conferring.

Is Klass right to treat Fried as embracing a duty-imposing conception of contract law, or does Fried embrace a power-conferring conception akin to Barnett’s? *Contract as Promise* is not clear on this question, in part because it was written with other problems in mind. The question it most directly addressed is whether there can be contracts *without* promises. Fried took the view, of course, that, although there are plenty of cases of legal liability without promises, there are no genuine cases of contractual liability without promises.<sup>35</sup> Others, such as Michael Pratt, have argued that parties may enter into legally

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31. *Id.* at 310.

32. The “mystery” deepens when one recalls that contract law grew out of the tort-like concept of assumpsit. See generally A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

33. See Klass, *supra* note 22, at 696.

34. See Barnett, *Consent Theory*, *supra* note 18, at 297 (outlining distinction between moral and contract obligation).

35. FRIED, *supra* note 1, 23-24 (arguing that reliance-based liability sounds in tort, not contract).

enforceable contracts without promising.<sup>36</sup> Atiyah went so far as to argue that promise is not only unnecessary for contractual liability, but that promise-based liability is not even the central case in contract law.<sup>37</sup> What is at stake in these arguments is whether contracts always, or at least usually, involve promises.

By contrast, Fried was less concerned with the question of whether the promise principle requires legal enforcement of all freely undertaken promissory obligations. In other words, he focused on the question of whether a promise is *necessary* for a claim to sound in contract, not the question of whether a promise is *sufficient* for legal enforcement. Yet the latter question is crucially important if we are to determine whether—on Fried’s view or as a matter of sound interpretation—contract law consists primarily of power-conferring rules, or whether, like tort law, it is primarily a matter of duty-imposing rules.

## II. MUST BARGAINED-FOR PROMISES CREATE LEGAL OBLIGATIONS?

In an attempt to show that morally binding promises are not necessary for contractual liability, Michael Pratt ingeniously imagined the case of Rudy the Electrician.<sup>38</sup> Rudy is an “eccentric, earnest, solitary sort who takes pains to minimize the moral claims others have on him.”<sup>39</sup> Thus, Rudy would only work with customers who accepted his disavowal of any moral obligation to complete the agreed-upon work. Instead, the obligation was purely legal. In Pratt’s example, a customer named Eliza signs an agreement with Rudy plainly stating that the two intend to enter into a legally binding exchange agreement but do “not intend to bind [themselves] morally . . . ; these are contractual undertakings, not promises.”<sup>40</sup> The point, according to Pratt, is that this agreement should be understood as a binding contract even though there is no promise-based moral obligation underwriting it.

Imagine now Rudy’s cousin Judy the Journalist. Judy is working on a story about political corruption. She has a source, Tom, who is in possession of important information but who does not want his name associated with a story revealing that information. He agrees to give Judy the information, but only in exchange for her promise not to reveal his name as a source for the story.<sup>41</sup> Judy promises not to reveal Tom’s name, but she does so in a very careful manner. She tells Tom that she regards her promise of confidentiality to be a

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36. Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801, 802 (2008).

37. Atiyah, *supra* note 3, at 10-21.

38. Pratt, *supra* note 36, at 807-11.

39. *Id.* at 807.

40. *Id.* at 808.

41. If Tom does not gain anything from the information being made public and only agrees to give the information because asked to do so, then the case presents an interesting consideration question. However, that question need not trouble us here, as it will not be present in all such cases. As will become clear, we begin with this example because of a famous line of journalism cases, but nothing turns on that context.

solemn, and indeed unbreakable, moral obligation. She adds that, if she were to break it, she would consider herself a wretched human being who deserves to lose her job and to be condemned and ostracized. Still, she is emphatic that her promise will be morally binding only, not legally binding. (We can imagine several reasons for her insistence: she may not trust the justice system, for example, or she may be prohibited by her employer from making legally binding commitments.) In any event, Judy indicates that she is prepared to make a morally binding promise of confidentiality so long as Tom agrees that the promise will *not* constitute a legally enforceable promise. Tom knowingly and voluntarily agrees that the confidentiality promise is moral only.

What do we make of Judy and Tom's agreement? Although they agreed that their agreement would not give rise to a legal obligation, Judy did make a promise: one that generated for her a serious moral obligation, as she will readily admit. Thus, if Judy were to break her promise, one might think her conduct should be actionable at law despite their agreement that it not be.<sup>42</sup>

We can begin by inquiring whether contract law actually does enforce such promises, though it turns out that the answer is not as clear as one might like. At first glance, the Second Contracts Restatement seems to suggest that the agreement is enforceable. Section 21, titled "Intention to Be Legally Bound," says that "[n]either real nor apparent intention that a promise be legally binding is essential to the formation of a contract . . ."<sup>43</sup> Section 21 thus appears to reverse the central message of its predecessor provision in the First Restatement. According to that provision—section 20—"a] manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts . . ."<sup>44</sup> Thus, it seems that, under the First Restatement, an intent to be legally bound was required, while under the Second it is not.

But on closer examination, section 21 of the Second Restatement is not so clear. After denying that intent is required to enforce promises as legally binding, it continues, "but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."<sup>45</sup>

b. *Agreement not to be legally bound.* Parties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected by the law like any other term, but such an agreement may present difficult questions of interpretation: it may mean that no bargain has been reached, or

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42. If the reader doubts that Tom's action would generate a claim for anything but nominal damages, we can suppose that Tom loses his job because of Judy's breach, a risk of which Judy was well aware when she breached.

43. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

44. RESTATEMENT (FIRST) OF CONTRACTS § 20 (1932).

45. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).



that a particular manifestation of intention is not a promise; it may reserve a power to revoke or terminate a promise under certain circumstances but not others.<sup>46</sup>

We have attempted to craft the example of Judy the Journalist to avoid any “difficult questions of interpretation.”<sup>47</sup> Thus it appears that, even under the Second Restatement, the contract between Judy and Tom would not be legally enforceable after all. It also seems that the shift from the First to the Second Restatement effected a shift merely in the default rule (from presumptively unenforceable to presumptively enforceable) rather than in substantive law. Few actual agreements are as clearly stated as Judy and Tom’s contract, and the law must decide what the default rules should be for less clear cases.<sup>48</sup> But the default rules may say more about what we expect people will normally want than whether we will respect their wishes even in cases like Judy and Tom’s.

Turning from the Restatement to case law, we find, not surprisingly, only a handful of authorities. To be sure, there are plenty of cases that present the “difficult problems of interpretation” forecast by the Restatement.<sup>49</sup> Drafters often put clauses into contracts that eschew legal liability for an agreement. Letters of intent and employee handbooks are two common examples. But such cases are usually quite distinct from Judy’s case, since in those cases the one seeking to avoid legal liability will deny that a morally binding promise was ever made in the first place.<sup>50</sup> The ideal test case for our purposes is one in which the promisor explicitly makes a promise and accepts moral responsibility, but at the same time explicitly disavows legal liability.

In fact, there are some cases that fit this description. Not coincidentally, some involve promises by journalists to keep a source confidential. The most well-known among contracts scholars is *Cohen v. Cowles Media Co.*, which eventually made its way to the U.S. Supreme Court.<sup>51</sup> In *Cohen* the parties did not explicitly agree that their agreement was morally—but not legally—enforceable. Still, the Minnesota Supreme Court, in deciding whether Cohen could recover damages for the breach of the promise of confidentiality, clearly regarded the agreement to be only “ethically” but not legally enforceable.<sup>52</sup>

First, the *Cohen* court emphasized that the promise was meant to be kept, and was meant to be morally binding:

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46. *Id.* § 21 cmt. b.

47. *Id.*

48. See Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437 (2009).

49. RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. b (1981).

50. Drafters of letters of intent claim that they have expressed an intention to perform the relevant act without explicitly or implicitly promising to perform. Likewise, employee handbooks typically state that nothing within them constitutes a promise.

51. 457 N.W.2d 199 (Minn. 1990), *rev’d on other grounds*, 501 U.S. 663 (1991).

52. *Id.* at 203.

Unquestionably, the promises given in this case were intended by the promisors to be kept. The record is replete with the unanimous testimony of reporters, editors, and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of “honor,” of “morality,” and required by professional ethics.<sup>53</sup>

But an intention that the agreement be morally binding was not sufficient for legal obligation, according to the court:

The law, however, does not create a contract where the parties intended none. Nor does the law consider binding every exchange of promises. We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter’s promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract.<sup>54</sup>

Subsequent journalism cases have followed *Cohen*’s reasoning.<sup>55</sup>

The court in *Cohen* did eventually allow the plaintiff to recover on the basis of promissory estoppel. But this may just demonstrate that promissory estoppel—at least when functioning as a cause of action, rather than a “shield”<sup>56</sup>—is more of a duty-imposing, tort-like rule than a rule of contract law. Indeed, the *Cohen* court expressly denied that recovery under promissory estoppel could be understood as a recovery grounded in contract.<sup>57</sup> It thus supports the claim that contract law is power-conferring, not duty-imposing, and that when promises are enforced against the wishes of the parties, one must resort to noncontractual variants of the doctrine of promissory estoppel to explain their enforcement.

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53. *Id.* at 202.

54. *Id.* at 203 (internal citations omitted).

55. See, e.g., *Pierce v. Clarion Ledger*, 452 F. Supp. 2d 661 (S.D. Miss. 2006); *Steele v. Isikoff*, 130 F. Supp. 2d 23 (D.D.C. 2000).

56. It is often said that when promissory estoppel is used merely as a defense to a defense, e.g., as a response to a defendant’s claim that a promise lacked consideration, then it is used merely as a shield. This was its earliest use and is still where the doctrine finds the most success. When it is used as an independent cause of action it is sometimes said to be used as a sword. Recent work shows that such claims usually fail, especially in the context of precontractual agreements. See Alan Schwartz & Robert E. Scott, *Precontractual Liabilities and Preliminary Agreements*, 120 HARV. L. REV. 661, 669-71 (2007).

57. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203-05 (Minn. 1990), *rev’d on other grounds*, 501 U.S. 663 (1991). Plenty of other cases have found liability in promissory estoppel while denying liability in contract. See *First Nat’l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991) (“A plaintiff may recover on a theory of promissory estoppel even in the absence of a contract.”); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (Wis. 1965) (“We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action.”).

One can also occasionally find the issue of moral-but-not-legal enforceability in promises made within families. For example, a Florida case, *Madson v. Madson*, involved a settlement agreement between a divorcing couple.<sup>58</sup> The agreement stated: “The Husband expressly has a moral obligation, which he fully intends to fulfill, to provide a college education for each of his children should they so desire and should they be so qualified.”<sup>59</sup>

The court pointed out that because the father had no freestanding legal obligation to pay for the college education as child support, any legal obligation had to arise out of the agreement. Because it only spoke of a moral obligation and the husband’s intentions, the court held that the agreement did not give rise to a legal obligation.<sup>60</sup>

*Balfour v. Balfour*, a famous English case, similarly involved a promise of monthly support made by a husband to his estranged wife.<sup>61</sup> The case discusses whether there was consideration for such a promise, whether it was part of an exchange in the first place, and whether the husband had a moral duty to make such a promise. Lord Justice Atkin’s opinion speaks directly to the point under consideration, and is worth quoting at length:

[I]t is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. . . . To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. . . . [I]t constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises . . . . Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences.<sup>62</sup>

The degree to which the reasoning in *Balfour* has been adopted into United States law is unclear.<sup>63</sup> Part of the problem is that our issue—whether parties can as a general matter agree that their agreement is morally but not legally

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58. 636 So. 2d 759 (Fla. Dist. Ct. App. 1994).

59. *Id.* at 760.

60. *Id.* at 761.

61. *Balfour v. Balfour*, [1919] 2 K.B. 571 (Eng.).

62. *Id.* at 578-79.

63. See *Klass*, *supra* note 48, at 1447-48.

binding—rarely arises in isolation from other issues. Cases like *Madson* support the reasoning in *Balfour* even though they seldom discuss it in detail. Such cases, however, usually involve domestic agreements in which it is difficult to disentangle the issue of the necessity of the parties' agreeing to be legally bound from the issue of whether there was consideration for an agreement, or whether family law concerns override contract doctrine.

In general, though, it seems fair to say that the cases and Restatements lend support to the supposition that parties can fashion an agreement that is morally binding but not legally binding, such that courts will not enforce the agreement as a binding contract. This is doctrinal evidence that contract law really is a body of power-conferring rules. The law does not seem eager to enforce agreements in cases in which the parties did not wish them to be legally binding, even though the agreements are acknowledged to be morally binding.

It is perhaps possible to make sense of the law's apparent refusal to enforce agreements that the parties did not intend to be legally enforceable from within a duty-imposing conception of contract. In particular, one might suppose that the making of a contract creates a genuine legal duty, but that the parties in these cases have waived their legal rights.<sup>64</sup> Waivers are sometimes honored in tort law—for example, under the negligence doctrine of express assumption of risk.<sup>65</sup> And tort law, we have suggested, is paradigmatically duty-imposing. On this “waiver” view, the correct way to understand the legal unenforceability of the agreement between Judy and Tom is to see in their agreement an *ex ante* waiver by Tom of his legal right to the performance of Judy's promise.

We have our doubts about this envisioned elaboration of a duty-imposing conception of contract, though we cannot pursue them here. For one thing, it seems odd to treat an agreement such as Judy and Tom's to be *simultaneously, by the same act*, creating and waiving Tom's legal right to Judy's promise of confidentiality. In tort, by contrast, the duty being waived exists prior to, and independently of, the actions that constitute the waiver. In any event, the ability of a duty-imposing view to make sense of legally unenforceable contracts is in this context somewhat beside the point. We will suggest below that the contrast between duty-imposing and power-conferring rules provides a powerful analytic device for exposing a basic tension in Fried's use of the promise principle. In a nutshell, his use of the promise principle uncomfortably straddles the line between these two views. But even if Fried turns out to fall squarely within the duty-imposing camp—and thereby fails in his quest to distinguish contract from tort—the book's argument would still be left to

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64. We are grateful to Greg Klass for pointing out this possibility.

65. Although they reserve the power to void waivers of negligence liability on public policy grounds, courts sometimes uphold them, particularly with respect to risks that attend optional, high-risk, recreational activities. See, e.g., *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (upholding skydiver's waiver of liability for injuries caused by skydiving company's negligence).

address a version of this same puzzle, namely, why a theory that insists on the solemnity of promises so readily permits parties to waive them.

### III. THE CHALLENGE FOR *CONTRACT AS PROMISE*

At first blush, the existence of exclusively morally-obligatory agreements seems to create a problem for Fried as self-proclaimed “moralist of duty.”<sup>66</sup> We do not mean to overstate the point. For one thing, there are only a few cases directly on point. Secondly, because there are so few cases, a theory would not necessarily fail just because it was unable to account for marginal decisions or doctrines. Third, and most important, Fried probably, at the end of the day, embraces this aspect of contract law.<sup>67</sup> Certainly, it would be consistent with his presentation of contract-as-promise as a “liberal” account of contract that he would endorse the proposition that individuals are entitled to agree that their agreements will not to be legally enforceable.

Nonetheless, a potential problem lurks for Fried’s theory. The problem arises from the familiar fact that many moral obligations do not give rise to legal obligations. For example, suppose that Jones causes his colleague Smith emotional distress by using a business meeting as an occasion to reveal to fellow employees an embarrassing but nondefamatory story about Smith that Smith had previously told Jones in confidence. Jones has wronged Smith, but the law probably offers Smith no response, either through criminal sanctions or by empowering Smith to bring a civil suit against Jones. For various reasons, our legal system does not render all forms of wrongful conduct illegal.<sup>68</sup> In offering promise as the moral basis of contract law, Fried’s theory seems to suppose that promise-breaking is a serious enough moral wrong to warrant the attention of the law.

Now it may seem obvious that promise-breaking is a serious enough wrong to warrant the edifice of contract law. But it is not clear that Fried is entitled to treat this point as obvious. In particular, if he grants that contractual liability can be avoided simply by agreement—that Tom cannot invoke the courts to hold Judy the journalist accountable for breach of her promise of confidentiality just because they agreed it would not be legally binding—then promises start to look less impressive as a candidate for the law’s attention. On the one hand, the moral obligation that attends promises is said by Fried to be so significant that an entire body of law must be erected to enable promisees to

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66. FRIED, *supra* note 1, at 17.

67. Fried gives a passing endorsement to this position in a footnote. *Id.* at 38 n.\* (“[T]he parties should in principle be free to *exclude* legal enforcement so long as this is not a fraudulent device to trap the unwary.”).

68. We are leaving aside moral wrongs that do not harm others, if there are such things. Liberal societies tend to want to avoid imposing moral judgments on citizens so long as citizens do not harm others. Our example here is carefully chosen both to be a case of one individual wrongfully harming another, and to be a clear case of moral wrongdoing.

enlist the coercive force of the state to hold promisors to their promises. On the other hand, he also seems to suppose that the moral obligation that attends promises is sufficiently *unimportant* that individuals have free reign to opt out of legal enforcement. If the moral obligation to keep one's promises really is at the heart of contract law, then it would seem that contract law ought to be a system of duty-imposing rules that does not so readily allow opt-outs.

Fried might at this point claim kinship with Barnett's "consent theory of contract."<sup>69</sup> That is, he might argue that it is unproblematic to enforce standard contracts because whatever the moral force of promises, parties have consented to their enforcement, at least when given in the context of bargained-for exchanges. By the same token, it would be unproblematic *not* to enforce them in cases like Judy and Tom's because the promisee (Tom) has consented to the promise not being legally enforceable. In other words, it is proper for the state to defer to the wishes of the parties before interfering in private matters.

Unfortunately, this envisioned response fails to address the problem at hand. Fried's most basic claim is that contract law embodies the moral principle that promises are to be kept. And of course, promises must be freely made in order to be genuine promises. But consent, as opposed to promise, does not answer the question of what justifies the apparatus of contract law. To be sure, consent sometimes is a side-constraint on what can count as legitimate state action. But it is not of itself a reason for state intervention.

Even if the parties to a contract actively wish (at the time of contract formation) for the state to treat their agreement as binding, that fact is not enough to justify enforcement through the courts, especially considering that it is not costless for the state to enforce contracts. To use an analogy, it may be sound public policy for the government to immunize against certain diseases. It may further be the case that the government can only legitimately do so when individuals consent to be immunized. But it would be odd to explain *why* the government immunizes by pointing out that those being immunized had consented to the treatment. The government goes to the expense of immunizing for the benefit of public health, and a "consent theory of immunization" would not explain the practice, however necessary consent may be to its legitimacy. This is presumably why, in more recent work, Barnett has emphasized that "the main reason we enforce consensual bargains is that such commitments tend to enhance the welfare of those who make them."<sup>70</sup> Consent plays a crucial role in upholding the legitimacy of contracts and in shaping many of its doctrines. But consent cannot explain why we bother to have a body of law that enforces contracts any more than it can explain why we immunize citizens.<sup>71</sup>

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69. See generally Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647 (2012) (explaining consent theory of contract).

70. RANDY E. BARNETT, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS* xv (2010).

71. Richard Craswell made a similar objection some time ago, questioning the ability of "autonomy"

Additionally, Fried cannot explain the waivability of enforcement by an appeal to welfarist considerations. True, he grants that promise-keeping is useful.<sup>72</sup> But it is crucial to his argument that promise-keeping is not merely useful but obligatory<sup>73</sup>:

The utilitarian counting the advantages affirms the general importance of enforcing *contracts*. The moralist of duty, however, sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will only be a special case—that special case in which certain promises have attained legal as well as moral force. But since a contract is first of all a promise, the contract must be kept because a promise must be kept.

To summarize: there exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.<sup>74</sup>

For Fried, the fact that promises are useful does not explain why they bind. Promises are binding because there is a moral duty to keep them, and they are legally enforceable because of that moral duty. One might find it useful to be able to bind oneself legally with a vow, for example, by vowing to oneself never again to drink alcohol. Fried argues, however, it is not morally wrong to break a vow. Unlike a promise, a vow is not made *to anyone*, hence it is not morally wrong to break the vow.<sup>75</sup> If what we cared about were simply the usefulness of binding ourselves, then the government should enforce vows under some circumstances. Instead, it only enforces promises.

The foregoing considerations shed further light on why Klass supposes that Fried has a duty-imposing, rather than a power-conferring, theory. It also explains why, on this interpretation, Fried's view is that contract law, like tort

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theories to provide principled grounds for contract interpretation or the selection of gap-filling default rules. See generally Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

72. FRIED, *supra* note 1, at 12-17.

73. *See id.* at 16.

The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust. Autonomy and trust are grounds for the institution of promising as well, but the argument for *individual* obligation is not the same. Individual obligation is only a step away, but that step must be taken.

*Id.*

74. *Id.* at 17.

75. *Id.* at 41-42.

law, holds people to their promises even when they don't want to be bound. As noted above, however, this interpretation would, at a jurisprudential level, seem to align Fried with the very contract-as-tort theorists whose views he sought to defeat. There is no doubt he would insist that there is still a distinction to be drawn between different kinds of duty-imposing rules: that contract is different from tort because contractual duties are voluntarily assumed moral obligations, even if not voluntarily assumed legal obligations. This envisioned response concedes, however, that there is a way in which Fried really is on the same page as those whose views he meant to reject.

Our own supposition is that Fried, if faced with the choice, would opt for a power-conferring account of contract law that empowers citizens to bind themselves when, and only when, they want to be bound. In doing so, he would succeed in his goal of drawing a qualitative distinction between contract and tort. However, he would then face the challenge of explaining how one can view contract law as based on moral obligations without conceding that contract law is duty-imposing. How can contract be power-conferring, yet still be organized around the moral duty to keep promises?

One possibility would be to move away from Fried's tendency to treat the moral obligation to keep one's promise as a freestanding or foundational principle, untethered to other values or considerations. Recent work by Seana Shiffrin may point in this direction.<sup>76</sup> Very roughly, Shiffrin argues that the power to enter into morally binding commitments is central to the establishment of relationships that affirm the equal moral standing of each person.<sup>77</sup> For parties to enter into morally binding agreements is in part for them to "reaffirm their equal moral status and respect for each other under conditions . . . [of] vulnerability."<sup>78</sup> The practice of promising is itself power-conferring: by making a promise to another, I confer power on the promisee to have a say in what I am morally allowed to do. If I change my mind and do not want to perform, the promisee has the power—because I have given it to him—to release me or not. By keeping the promise unless released, even when I do not wish to do so, I confirm the promisee's status as a moral equal. And the law, in turn, allows us to confer legal as well as moral power. To the extent that contract law re-affirms and reinforces the morality of promising, it helps us to form the kind of personal relationships necessary for human flourishing. Therefore, it is proper for even a liberal state to enforce contracts.<sup>79</sup> Indeed, Shiffrin argues that contract law is to be criticized to the extent that it diverges

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76. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) [hereinafter Shiffrin, *Divergence*]; Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 499 (2008) [hereinafter Shiffrin, *Promising*].

77. Shiffrin, *Promising*, *supra* note 76, at 498-519.

78. Shiffrin, *Divergence*, *supra* note 76, at 750; see also *id.* at 713-19 (suggesting morality and legal obligation need not be entirely divorced).

79. *Id.* at 713-19 (discussing benefits of enforcing contracts regardless of political outlook).



from and undermines those same moral values,<sup>80</sup> as she argues our current law of contract sometimes does.<sup>81</sup>

It is possible, then, to have a theory of contract that is both power-conferring and also grounded in the morality of promising, even from within a nonconsequentialist moral justification for promising. The success of such a theory depends on the details of one's explanation of the moral basis of promissory obligations, and whether that explanation fits with the idea of power-conferring rules.<sup>82</sup> This is not the place to evaluate Shiffrin's view, or related but competing theories of the relationship between contract and promise.<sup>83</sup> Suffice it to say that these theories depart from Fried's (admittedly limited) remarks on the nature of promissory obligations.

At the end of the day, we suspect that Fried would be inclined to accept that contract law is a system of power-conferring rules and that it is this feature that most sharply distinguishes contract from tort. Were he to do so, he would—in our view—need to explain more fully how the morality of promising fits into such an account. However, rather than continuing to press a point that Fried himself was not centrally concerned to explore, we will conclude with some observations that we mean to be friendly to Fried's project. These observations do not bear on the nature of promissory obligations. Instead, they focus on some intuitions about promissory obligations that Fried offers, and that we share, at least in rough outline. In sum, our concluding suggestion is that, irrespective of whether Fried's "promise principle" provides an adequate account of the moral foundations of contract law, it rightly highlights three other ideas, each of which is centrally important to an adequate understanding of contract: that contractual obligations are defined by agreement rather than law; that contracts typically generate genuine obligations; and that contracts should ordinarily be interpreted as embodying moral commitments.<sup>84</sup>

#### IV. INTERPRETING CONTRACTS IN LIGHT OF THE MORALITY OF PROMISING

We have thus far raised what we consider to be difficulties with the argument of *Contract as Promise*, understood as an account of the moral foundations of contract law. These points notwithstanding, we readily grant that there is much that is intuitive and attractive about Fried's invocation of the promise principle. Contract law surely has *something* to do with holding

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80. *Id.* at 729-49.

81. *Id.* at 719-29.

82. Fried himself says little about the moral basis of promissory obligations in his book, other than a couple of quick references to Kantian notions of the will binding itself. FRIED, *supra* note 1, at 110.

83. Compare DORI KIMEL, FROM CONTRACT TO PROMISE: TOWARDS A LIBERAL THEORY OF CONTRACT (2003), with Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

84. Note that, on this rendition, the promise principle is fully consistent with a power-conferring conception of contract. The morality of promising is incorporated into the law by the choice of the parties. That morality is then enforced not for its own sake, but as a feature of parties' agreements.

people to their promises. In this section, we identify three ways in which Fried's emphasis on promise contributes to the understanding of contract.

First, Fried's invocation of promise of course emphasizes the distinct nature of contractual obligations. Obligations of contract—like obligations generated by promises and unlike tort obligations—are primarily *self-defined* rather than defined by law. To deem medical malpractice a tort is, in part, to deny physicians and patients the liberty to determine for themselves which duties of noninjury are owed by physician to patient. A surgeon cannot by agreement disavow her obligation to avoid injuring her patient through incompetent care. Likewise, the absence of a promise by *D* to avoid injuring *P* does not necessarily bar *P* from establishing that she has been wrongfully injured by *D*. As Cardozo so memorably asserted when shedding the privity limitation on the duty of care owed by manufacturers to consumers:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought not be. We have put its source in the law.<sup>85</sup>

Second, Fried's invocation of promise highlights that contracts generate *obligations of conduct*, not just threats of liability. When the death-of-contract scholars sought to assimilate contract to tort, they did so with a Holmesian, liability-rule conception of tort (and thus contract) in mind. On this view, to say that a person is under a "duty" is merely to say that, if certain consequences follow from her actions, she faces the prospect of being held liable to another.<sup>86</sup> Absent from this picture is the idea that the duties identified by tort and contract law carry injunctive force; they enjoin those to whom they apply to act or refrain of acting in certain ways.

Precisely because it is counterintuitive to think of standard promissory obligations on these terms, Fried offered a powerful rejoinder to Holmesian accounts of civil liability. Negligence, the tort that has been center stage since the late 1800s, has features that give a certain amount of aid and comfort to liability-rule renditions of tort. Both Holmes and Posner, for example, argued that the unforgiving aspects of the "objective" ordinary care standard were incompatible with its being a genuine duty of conduct.<sup>87</sup> By contrast, the

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85. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). Of course, the right to complain about breaches of duties to avoid carelessly injuring another can sometimes be waived. An analysis of the nature of such waivers is beyond the scope of this paper. Suffice it to say that a person's waiver of a power to exact a remedy for breach of a duty owed to her need not be understood as a denial of the underlying duty.

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

87. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108-09 (Am. Bar Ass'n 2009) (1881); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31-32 (1972). If it really were a duty of conduct, they

notion that one ought to perform the promises one makes—that they should not be broken out of mere regret, because it has become inconvenient to perform, or because a better opportunity has come along—is a powerful pre-legal intuition that most of us act on in our daily lives. We feel the *weight* of promises; they induce the moral and psychological pressure that is characteristic of true obligations, and the breaking of promises corresponds with embarrassment, guilt, and perhaps shame. By linking contract to promise, Fried put front and center the idea that contract law is a law of genuine obligations.

Some contemporary contracts scholars who downplay the obligatory nature of contractual duties place less reliance on the sort of jurisprudential arguments offered by Holmes. Instead, they rely on a sociological claim about how parties understand their contracts. They might concede that it is possible for contract law to impose obligations of conduct. But, they add, that is not *our* contract law. In the modern world, contracting parties and courts have come to realize that everyone is better off making deals that identify and put a price on a set of perform-or-pay options.<sup>88</sup> At a minimum, the argument continues, this is true of sophisticated business actors who, being economically rational, decouple the coolly pragmatic business of deal-making from the emotion-laden, inflexible morality of personal interaction.

There is something to this way of thinking. On a power-conferring view, contract law empowers persons to make cooperative arrangements with one another, and there are doubtlessly important instances in which parties make perform-or-pay deals. In the event of litigation, those deals ought to be interpreted and enforced as such. But insofar as the sociological argument is offered as a generalization about all agreements, or even all agreements between sophisticated parties, it is implausible. Its implausibility might, in turn, suggest that the argument is really the old Holmesian jurisprudential argument, now dressed in sociological garb.

Consider a deal struck by two ultra-sophisticated parties, though admittedly under unusual conditions.<sup>89</sup> In the midst of the panic surrounding the 2008 financial meltdown, with Wachovia about to fail, it reached a preliminary agreement with Citibank to have Citibank purchase Wachovia. That agreement included an exclusivity provision that barred Wachovia from dealing with other potential buyers for a certain period of time. The exclusivity provision

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argue, it would be more responsive to individuals' capacities to discharge the duty. See HOLMES, *supra*; Posner, *supra*, at 32.

88. See generally Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1428 (2004) (arguing contracts should be understood as conferring options on parties).

89. The following example is drawn from ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009).

notwithstanding, Wachovia's management and board—with the blessing of federal officials—promptly entered into a competing purchase agreement with Wells Fargo.

Dick Kovacevich, Wells Fargo's CEO, was anxious to inform Citibank CEO Vikram Pandit of this development before it went public. He thus arranged with Sheila Bair, Chairwoman of the FDIC, to call Pandit in the middle of the night. Upon being awakened, Pandit reacted with understandable confusion, then outrage: "We have a deal. You know that you can't do this, because we actually have an exclusive arrangement with you. You are not allowed to sign."<sup>90</sup> A moment later, Pandit exclaimed to Bair: "This is not right."<sup>91</sup>

Pandit's reaction is telling. He understood the purchase agreement to have generated obligations of conduct. "[Y]ou *can't do this*," he said to Kovacevich. "You are *not allowed to sign*." Nor did Pandit conceive of Wachovia's acceptance of Wells Fargo's offer as the exercise of an option. If he had, his reaction would have to have been different. He could have sputtered and shouted, or perhaps complained that Wachovia had acted irrationally or unprofessionally. But he could not have justifiably accused Wachovia of having done something it was not entitled to do. Instead, he could only have insisted that Wachovia pay over the agreed-upon price for exercising its option. The bottom-line: even hard-headed business sophisticates enter into contracts that, like promises, are understood to be binding.<sup>92</sup>

The third salutary aspect of Fried's emphasis on promise is closely related to the second; it resides in the idea that promissory obligations are not just duties of conduct, but in addition carry with them what might be called a *modest internal morality*.

Promises, or at least some promises, create a relationship that is not exhausted by the bare obligation to perform. For example, suppose someone promises his friend a competitive early-morning tennis game. By doing so, he incurs an obligation to show up and make a real effort. But he is also obligated to refrain from indulging in the temptation to drink too much the night before, even if it means forsaking a glass of a particularly fine wine being served at the party he is attending. Similarly, if a person promises to help another move out of her apartment, it would be wrong for that person to arrive, move objects for fifteen minutes, and then quit, complaining of boredom. Quitting after only fifteen minutes would be wrong even if it is not inconsistent with her promise,

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90. *Id.* at 506.

91. *Id.* at 507.

92. See David Benoit, *Jilted in Deal, Citi Will Get \$100 Million*, WALL ST. J. (Nov. 20, 2010), <http://online.wsj.com/article/SB10001424052748704170404575624671103856454.html>. Obviously this example has some special features, including the crisis atmosphere in which the deal was struck and the federal government's active support of Citibank's deal with Wachovia, and then, its support for Wells Fargo. Citigroup and Wells Fargo later settled Citibank's breach of contract action. *Id.*

strictly construed. There is *rectitude* in promising, Fried observed. So too is there rectitude in contract.<sup>93</sup>

And yet the morality of contract is a limited morality. It is primarily the morality of good-faith, of living up to the spirit of an arrangement, not bargaining too sharply, and not standing oppressively on one's rights. Only a limited morality is consistent with Fried's insistence on contract law's connection to individual autonomy. Whenever courts interpret a contract, there is a risk of shifting from the task of filling out the contours of the agreement to the very different task of identifying a resolution that will further some value(s) or end(s) apart from those contemplated by the agreement. Some death-of-contract theorists went so far as to treat this risk as an opportunity; a chance for judges to use the occasion of a private dispute to advance fairness writ large. Fried, however, supposed that it is alien to the enterprise of contract law for judges to use contract disputes as a means of achieving a goal external to the parties' agreement. In this domain, he insisted, the job of the judge is to do justice between the parties. To do this, Fried argued, a court should presume, absent contrary indications, that the parties understood their arrangements morally, as something more than a purely instrumental arrangement—as carrying with it ancillary obligations of the sort that ordinarily attend a promise.

In this regard, Fried is very much on the same page as Cardozo, whose notable contracts opinions famously include several that “fill out” contractual agreements by reading them to incorporate background norms. For example, when Mary Yates Johnston promised to give Allegheny College money upon her death to fund a scholarship in her name, Cardozo read into the college's acceptance of partial payment a promise to use her name as she requested, with this unstated promise being given in exchange for Johnston's promise.<sup>94</sup> Similarly, when Lady Duff-Gordon promised Wood that he would have the exclusive rights to serve as her business agent, Cardozo read into the arrangement a return promise by Wood to use best efforts in representing her.<sup>95</sup> These cases and others show Cardozo working to understand contracts so that they make sense in their individual contexts as agreements among presumably decent people whose contracts ought to be read against a backdrop of ordinary

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93. We share Fried's view that there is rectitude in promising and contracting, but part ways with him insofar as he would suggest that rectitude is a feature that distinguishes promising and contracting from other forms of human interaction. Indeed, his discussion of *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965), suggests otherwise. Following Fried's view of contract, the suit in *Hoffman* cannot be for breach of contract because no promise was made. FRIED, *supra* note 1, at 24. However, Fried is open to the idea that Red Owl was subject to liability in *tort* for causing Hoffman to suffer a loss by opportunistically abusing conventions of good faith in business dealings. *Id.* This would suggest that rectitude in the form of good faith is not a distinguishing feature of promising or contract, but rather a feature common to a broader array of interactions and to other bodies of law.

94. *Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank of Jamestown*, 159 N.E. 173, 176 (N.Y. 1927).

95. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (N.Y. 1917).

morality.<sup>96</sup> One finds this same idea at work in Fried's discussion of how principles of good faith can guide judicial interpretation. "In each case a reasonable interpretation of the parties' agreement, of their original intentions, against the background of normal practices and understandings in that kind of transaction, [will] be quite sufficient to provide a satisfactory resolution."<sup>97</sup>

Some of Fried's criticisms of the doctrine of consideration reflect similar sentiments. He offers the example of a subcontractor who invites a general contractor to use its bid as part of an overall bid, then reneges and asks for more money.<sup>98</sup> In this instance, Fried suggests, the consideration requirement invites game-playing by allowing the subcontractor to disavow the implicit obligation that attends a decision to enter into a transaction such as this one. By submitting its bid, the subcontractor had committed itself, morally, and would be behaving immorally if it were to back out. According to Fried, courts should interpret the arrangement so as not to allow the subcontractor to back out.

Of course in ordinary morality, and in law, disclosure and knowledge make a huge difference. If two people want to make minimal commitments to one another, they can. In day-to-day human interactions, a person can avoid promising altogether ("I'll try to make it, but no guarantees"). Alternatively, they can make a promise that strips away the implicit commitments that would otherwise attend the promise. For example, a colleague asks you to review a draft paper. You promise to do so, but emphasize that you are swamped and therefore not in a position to offer detailed feedback. Even if detailed feedback is the norm, the terms of your promise justify a departure from the norm. Likewise, parties to a contract can strip away many of the implicit moral commitments that would ordinarily accompany their agreement. But they have to do so with sufficient clarity to overcome the presumption that those commitments are being made.

That agreements tend to "incorporate morality by reference" is evidenced by the counterintuitiveness of examples such as those of Rudy the Electrician and Judy the Journalist. In everyday life, agreements for the purchase and provision of goods and services tend to be understood by the parties as morally *and* legally obligatory. The point, of course, is not that every service provider who promises to complete a job behaves morally. Homeowners should not be in high dudgeon any time a service provider breaks a morally obligatory promise (such as a promise to show up more or less on time, prepared to do the

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96. See Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005) (discussing in detail this aspect of Cardozo's jurisprudence).

97. FRIED, *supra* note 1, at 86. Fried then reinforces the idea of implicit moral limitations on ambiguous agreements by invoking Wittgenstein's famous example, where one adult directs another to "show the children a game," and the other promptly teaches the children to gamble. *Id.* at 87. The impropriety of this response attests to an unstated condition within the directive that the children be taught an *appropriate* game. *Id.*

98. *Id.* at 55-56.

job at hand). Nor should a service provider necessarily explode in indignation over a moral failure of the purchaser (such as late payment for services). Most of us fail at times in our everyday moral obligations, and it is a virtue—and probably prudent—to recognize this about ourselves and to demonstrate a certain degree of understanding of others' failures. Certainly we hope that others will be understanding of our own failures. The point, instead, is that agreements tend to be made with morality in mind, including the morality of promise-keeping. Insofar as contract law is power-conferring, it allows for the possibility of agreements that do not reflect background morality. Ordinarily, however, agreements should be interpreted on the assumption that they do reflect it. This we take to be one of the main and most salutary lessons of *Contract as Promise*.

## V. CONCLUSION

We began with the suggestion that there is an ambivalence in *Contract as Promise* between a duty-imposing and a power-conferring conception of contract. In turn, we suggested that this ambivalence entails a less sharp distinction between contract and tort than Fried had hoped to achieve, but that it might nonetheless be resolved in ways that would permit such a distinction. Finally, we have offered a friendly, if somewhat impertinent, reformulation of the book's core claim. On this reformulation, the central achievement of *Contract as Promise* is not to establish that contract is promise, or that contracts must be kept simply because promises must be kept. Rather, it is to remind us, forcefully and correctly, that contracts typically incorporate the morality commonly on display when people make promises to one another. For this reason, contract interpretation is usually done rightly when it is done with promissory morality in mind.