

2012

Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried

Brian H. Bix
University of Minnesota Law School, bixxx002@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719 (2012), available at https://scholarship.law.umn.edu/faculty_articles/204.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried

Brian H. Bix*

INTRODUCTION

Charles Fried's 1981 book, *Contract as Promise*, started the modern discussion in the United States and many other places on contract theory, and remains an influential view to which all contract theorists who have come later must respond. This Article will consider two important themes connected with Fried's project: first, the nature of the theoretical claims in *Contract as Promise*; and second, the question of whether contract law, especially when this area is equated with the enforcement of promises, is in tension with John Stuart Mill's "Harm Principle."¹

Part I of this Article looks at Fried's book from the perspective of theory construction, evaluating Fried's claims in the context of the project of offering a theory of contract law. Part II looks at the way that *Contract as Promise* has become the center of a question about whether contract law "enforces morality" in an inappropriate way.

I. THEORIES OF CONTRACT LAW

Theories about doctrinal areas of law—theories of property, contract, or tort—are common and well-known.² Most of these theories sit uneasily between description and prescription/evaluation. On one hand, they purport to fit most of the existing rules and practices; on the other hand, they re-characterize the practices to make them as coherent and/or as morally attractive as possible.³ This sort of approach to theorizing comes under various titles:

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota. A small portion of Part I will be published as part of Chapter 8 in BRIAN BIX, *CONTRACT LAW* (forthcoming 2012). An earlier version of a portion of Part II of this Article was presented at the Georgetown Law School Workshop on Promise and Contract. I am grateful for the comments and suggestions received at that workshop.

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

2. See GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* (2007); PHILosophical FOUNDATIONS OF TORT LAW (David Owen ed., 1995).

3. Michael Moore points out that theories of a line of cases or a whole area of doctrine can never be entirely descriptive, for there are an indefinite number of alternative theories that completely fit (or, assuming the possibility of dismissing some cases as mistaken, fit adequately) the relevant cases; to choose among those alternative theories one must have an evaluative standard. Michael S. Moore, *A Theory of Criminal Law Theories*, 10 TEL AVIV STUD. L. 115, 124-29 (1990).

rational reconstruction, “philosophical foundations of the common law,” and constructive interpretation.⁴ As both Ronald Dworkin and Michael Moore have argued, there is a strong connection between theories of law understood this way, and the way (Anglo-American) judges and advocates argue about what the law requires in some novel cases.⁵

The subtitle of Charles Fried’s enormously influential book, *Contract as Promise*, is “A Theory of Contractual Obligation.” However, the extent to which the book presents a theory of contract law remains controversial and unsettled. In the book, Fried proclaims that “the promise principle” is “the moral basis of contract law.”⁶ Does this mean that the enforcement of promises is the moral basis for having contract law, or perhaps for shaping contract-law doctrine one way rather than another? The question of whether there is something problematic about having the enforcement of promises as the primary justification of contract law will be explored at greater length in Part II.

Fried wrote in a more recent piece that he saw “contract as rooted in, and underwritten by, the morality of promising. . . .”⁷ Fried presents his promissory theory of contract law as a variation of the will theory of contracts,⁸ which has deep roots, especially in Continental European theories about contract law.⁹ Will theories and their promissory-theory variations have a long history and have been subject to detailed criticism before,¹⁰ though Fried’s book does not tarry long to reconsider those old debates, considering them mostly in passing, while concentrating more on contemporary alternative theories of contract law.

A question first about the scope of the claim Fried makes in *Contract as Promise*: Is Fried’s theory of contract law “as promise” a general and universal theory, covering not only all past and current contract-law systems, but all possible ones? Or is it less ambitious, perhaps a theory only of *American* contract law—or, given that contract law is primarily a matter of state law and that it changes significantly over time—perhaps *Contract as Promise* should be seen only as a theory of *Massachusetts* contract law circa 1981?

While there is little textual support for that last, most-narrow reading—there are plentiful citations from jurisdictions other than Massachusetts—the book contains relatively few citations to non-United States contract-law cases, and

4. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

5. See *id.*; Moore, *supra* note 3, at 128-29.

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

7. Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 3 (2007) [hereinafter C. Fried, *Convergence*].

8. FRIED, *supra* note 1, at 2, 6.

9. See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 161-229 (1991) (summarizing European will theories of contract law).

10. See Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 571-78 (1933) (criticizing will and promissory theories of contract). Cohen’s article is mentioned only briefly and in passing in *Contract as Promise*. FRIED, *supra* note 1, at 136 n.11. For a more detailed critique of will theories that appeared after *Contract as Promise*, see GORDLEY, *supra* note 9, at 230-48.

these are mostly older English cases, which American courts have usually accepted as highly persuasive, and, at times, as paradigm cases (for certain doctrines). One finds few, if any, references to contract-law cases—or statutes or regulations—from other non-United States sources.

Thus, on one hand, from the cases and doctrinal rules cited and discussed, the theory appears to be one whose subject is contemporary American contract law. On the other hand, much of the general language implies something even more ambitious: a (general) theory of (all) contract law. After all, the title of the book is *not* “*American Contract as Promise*,” nor is the subtitle “*A Theory of American Contractual Obligation*.” There are passing references to the way in which the contract law from other jurisdictions might vary from American contract law, but no indication that Fried considers American law as distinctive in its connection to promising.¹¹

This uncertainty about the scope and nature of the claim(s) being made is by no means unique to *Contract and Promise*. The question of whether a theory of contract law is confined to a single jurisdiction (or a small number of jurisdictions with similar laws, and perhaps an overlapping history, like the United States and England) is rarely discussed.¹² Nor is the problem often considered from the other end of the discussion: how one *could* ground the claim that one’s theory was meant to explain not just a single legal system’s rule for contract law, or rules from a group of legal systems, but rather to explain the contract law *of all current, past, and hypothetical legal systems*.

There is a different, and perhaps even more basic, issue relating to theorizing about doctrinal areas of law. Contract law, like most social practices and social institutions, is complex and varies across different instances and over time. Does it even make sense to speak of a single nature of something so complex and changeable? As already indicated, *Contract as Promise* does not spend a lot of time on such methodological or meta-theoretical questions, but there are some scattered comments relating to the issue. At one point, Fried wrote: “Contract law is complex, and it is easy to lose sight of its essential unity.”¹³ Certainly, it would be too easy for a skeptic simply to note the variety of contract rules—within the contract law of any single jurisdiction, across different American states, and (if relevant) from one country to another—and assume from that fact that a general and universal theory of contract law was untenable. Variety, on its own, does not foreclose that there is some unitary essence common to all the different instances. However, it would be helpful to have more discussion of what is gained and lost, either by emphasizing unity

11. See FRIED, *supra* note 1, at 36, 45 (noting differences in foreign law on consideration and offer and acceptance).

12. For example, the topic is rarely if ever touched upon in the six different approaches to contract theory collected in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* (Peter Benson ed., 2001).

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

while downplaying variety, or, by doing the opposite, emphasizing variety while downplaying unity.¹⁴

In *Contract as Promise*, Fried characterizes his thesis as being that “the basis of contract is promise”¹⁵ And in his response at this conference, he has characterized his position, and that of *Contract as Promise*, as being that contract law is “built on” the enforcement of promises.¹⁶ While almost all theoretical claims regarding a whole area of law are somewhat amorphous and difficult to verify or falsify, a claim that an area of law is “built on” some concept or ideal, or that this concept or ideal is “the basis” of the area, seems especially difficult to pin down as to what it might mean or how one would go about verifying or falsifying it if one chose. Perhaps these metaphors mean nothing more than that keeping promises is an important component to understanding why we have rules of contract law and why we offer state enforcement to (most) contracts—an argument Fried makes forcefully throughout *Contract as Promise*.¹⁷

From the start, *Contract as Promise* notes the gaps between the promissory principle and (American) contract law. After a long critique of consideration doctrine, noting its internal inconsistencies and its poor functional fit with its purposes as well as its tension with the promissory principle, Fried writes: “I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement.”¹⁸ Fried rejects as mistaken the consideration doctrine in general,¹⁹ as well as its application specifically to keeping offers open.²⁰ Fried also offers a partial dissent from American contract law’s treatment of unilateral contracts,²¹ arguing that contracts contain significant gaps that are filled by principles other than the promissory principle,²² and observing that there are equitable principles other

14. I try to offer a discussion of the tradeoffs in BIX, *supra* note *, ch. 9, coming out against a unitary theory. For a discussion of the same tradeoffs that comes to the opposite conclusion, see Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77 (2009).

15. See FRIED, *supra* note 1, at 36 (emphasis added).

16. Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961, 978 (2011) [hereinafter C. Fried, *Thirty*]. Even more metaphorically: “the life of contract is . . . promise” FRIED, *supra* note 1, at 37 (emphasis added).

17. Morris Cohen’s article remains one of the clearest analyses of the foundational point: contract law entails the state’s making enforcement resources available to private parties, so society needs to be convinced that contract enforcement generally works for the common good, and society is justified in withholding enforcement for those arrangements (for example, involving duress, unconscionable terms, or arrangements contrary to public policy) when it concludes that enforcement no longer serves the common good. See Cohen, *supra* note 10. *Contract as Promise* offers a comparable analysis, if in different terminology. See FRIED, *supra* note 1.

18. FRIED, *supra* note 1, at 37-38.

19. *Id.* at 28-39.

20. *Id.* at 48.

21. *Id.* at 55-56.

22. See FRIED, *supra* note 1, at 57-73. To be fair, from the beginning, Fried indicated that “a small

than the promissory principle that govern issues of disclosure in negotiation and good faith in performance.²³

In general, there is little doubt that the promissory principle fails to explain (account for) large parts of “contract law” as defined by *Restatements*, treatises, casebooks, etc.²⁴ This is especially true if one focuses on contract *law*—that is, the rules that are taught in contract-law cases, and interpreted, applied, and contested in litigation about contracts.²⁵ In response to the limitations of Fried’s contract-as-promise theory as a descriptive or conceptual theory, some commentators have even suggested that it might be best understood as (primarily) a normative theory, not (primarily) an explanatory theory.²⁶

In what sense *is* Fried offering us a theory of contract law? As noted, by the author’s own account, large segments of the rules governing the regulation of transactions (which promises or exchanges are enforceable, how the terms are to be construed, and when will performance be deemed a breach of the agreement) fall outside the promissory-principle theory, as well as certain forms of obligation often associated with contract law.²⁷

Barbara Fried has pointed out that the way American contract law works, what is central to contract law is not morality, or even promising, in any thick sense of that term.²⁸ Her point is that one can agree to what one likes, including limitations on remedies (whether characterized in those terms or as options or alternatives, like “play or pay” contracts). This is a point Charles Fried has endorsed in his Response,²⁹ though he rejects one possible follow-up conclusion, Randy Barnett’s view that contract law should be seen as essentially about consent (to legally enforceable relationships).³⁰ One begins to see in these competing theories not so much disagreements about the one right answer regarding “essence,” but rather the emphasis or foregrounding of different aspects of a complex social practice.

Where does all of this leave us? There is little reason to deny that the cluster of overlapping values that are variously named will, autonomy, promise, and consent, is an important underlying motivation and justification for contract

number of basic moral principles” determine contract law, not just one. *Id.* at i (emphasis added).

23. *Id.* at 74-91.

24. In Fried’s response to the conference papers, he concedes that *Contract as Promise* “overstate[s]” the role enforcement of promises has in contract law. C. Fried, *Thirty*, *supra* note 16, at 974-75.

25. See Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 649-54 (2012).

26. See Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 703-07 (Jules L. Coleman & Scott Shapiro eds., 2002).

27. FRIED, *supra* note 1, at 3, 24.

28. Barbara Fried, *What’s Morality Got to Do with It*, 120 HARV. L. REV. F. 53, 60 (2007) [hereinafter B. Fried, *Morality*]; see also Barbara Fried, *The Holmesian Bad Man Flubs His Entrance*, 45 SUFFOLK U. L. REV. 627 (2012).

29. C. Fried, *Thirty*, *supra* note 16, at 968-71.

30. See Barnett, *supra* note 25; C. Fried, *Thirty*, *supra* note 16, at 972-75.

law.³¹ And if there was a tendency at the time *Contract as Promise* was published, among the communitarian, critical, relational,³² or “contorts,”³³ scholars, to deny or discount the importance of that cluster of values, then the book clearly served (and continues to serve) an important purpose.

As a corrective, *Contract as Promise* understandably emphasizes some things while downplaying—or at least not emphasizing—others. Throughout the book, Fried is careful to note the many values the rules and practices of contract law promote or protect (for example, tort principles of responding to intentional and negligent harm, sharing of gains and losses in a joint venture, protection of reasonable expectations, etc.), while avoiding what seems the obvious conclusion: that contract law is not essentially any one thing or any one value, but rather reflects a large number of values and interests. Additionally, one should add that to the extent that a theory of contract law purports to *explain* what the rules currently are, and not just to offer post-hoc rationalizations for them (and criticisms for those rules that inevitably cannot be comfortably rationalized), the theory needs to refer to history even more than *Contract as Promise* does. For example, when it takes an eminent historian of contract law over 170 dense pages to describe how we came to have the doctrine of consideration we now have, it seems likely that historical (causal) explanation must remain a part of any good theory of (American) contract law.³⁴

II. HARM PRINCIPLE AND ENFORCING PROMISES

In responding to Fried’s theory and other promise-based theories of contract law, a number of prominent commentators on contract law have put forward the provocative argument, based on John Stuart Mill’s “Harm Principle,” that contract law may involve the state in inappropriately enforcing morality in circumstances where there is no concern about third-party harms.

Mill famously declared that society cannot justify coercing the behavior of any individual,³⁵ except to prevent harm to others.³⁶ By coercion, Mill meant

31. On the role, and limits, of consent in American contract law, see Brian H. Bix, *Contracts, in THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251, 251-79 (Alan Wertheimer & Franklin G. Miller eds., 2010) [hereinafter Bix, *Consent*].

32. Fried is referring here to Ian Macneil. See FRIED, *supra* note 1, at 147 n.3. Many of Macneil’s important writings were subsequently collected in IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT* (David Campbell ed., 2001).

33. See GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (Ronald K.L. Collins ed., 2d ed. 1995) (“Speaking descriptively, we might say that what is happening is that ‘contract’ is being reabsorbed into the mainstream of ‘tort.’”).

34. See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 316-488 (1975) (examining the historical development of the modern-day doctrine of consideration).

35. At least if the individual in question is an adult and competent. JOHN STUART MILL, *ON LIBERTY* ch. 1, at 69 (Gertrude Himmelfarb ed., Pelican Books 1974) (1859).

36. Mill wrote:

both legal prohibition and strong social sanctions, though later discussions of Mill's idea have tended to focus exclusively on the legal side. Mill expressly authorized attempts to *persuade* other people on self-regarding matters, as long as those acts of persuasion fell short of coercion.³⁷

By limiting coercion to preventing harm to others, Mill rejected justifications based on protecting individuals from harming themselves (paternalism) and justifications based on morality (legal moralism). There is significant controversy within the philosophical literature both as to how to understand the Harm Principle (What is to count as a harm? Do offensive actions count as harms under this standard?), and as to the merits of that principle.³⁸ This Article will not enter these discussions about the best understanding and proper evaluation of the Harm Principle, but will take it as a general starting point and consider what implications, if any, it has for contract law and theory.

The Harm Principle, or something close to it, has been brought up by theorists who argue *against* a promise-based justification for contract law (justification for the state enforcement of contracts), and in favor of a reliance or prevention-of-harm justification, or for some sort of property theory of contract law.³⁹ For example, a recent discussion of the Harm Principle in contract theory⁴⁰ cites to the important article on reliance theory by Fuller and Perdue,⁴¹ and the reliance theorist, Patrick Atiyah.⁴² In the course of reviewing

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Id. ch. 1, at 68.

37. *See id.* That it is judged that some action would be better for a person or the wise thing to do: "These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him." *Id.*

38. The most comprehensive discussion of the Harm Principle occurs in Joel Feinberg's four volumes. *See* 1-4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984-1988). There is also extensive literature on the subject beyond Feinberg's volumes.

39. Reliance theories are associated with Patrick Atiyah and Grant Gilmore. *See generally* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); GILMORE, *supra* note 33. The most prominent property theorist is arguably Peter Benson. *See generally* Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007) [hereinafter Benson, *Transfer*].

40. STEPHEN A. SMITH, *CONTRACT THEORY* 69 (2004).

41. L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52 (1936) [hereinafter Fuller & Perdue, *Part 1*]; L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages* (pt. 2), 46 YALE L.J. 373 (1937) [hereinafter Fuller & Perdue, *Part 2*]. Fuller and Perdue refer to "expectation damages" as a "queer kind of compensation," compensating a party for something it never had. *See* Fuller & Perdue, *Part 1, supra*, at 53; *see also* Peter Benson, *Contract*, in *A COMPANION TO THE*

a book by Patrick Atiyah, Joseph Raz writes: "Those who, like myself, accept Mill's harm principle . . . will doubt the legitimacy of the law's adoption of a general policy of enforcing voluntary obligations. . . . It follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law."⁴³ However, the connection between the Harm Principle and the enforcement of contracts is not immediate or self-evident. After all, the breaching of a contract certainly seems like harm to the nonbreaching party. Why would the Harm Principle ground an objection to such a process?

Among the arguments that have been offered for the relevance of the Harm Principle is that enforcing a contract is enforcing a promise, which in turn is like enforcing the obligation to be charitable.⁴⁴ Raz writes: "To enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals."⁴⁵ Raz argues that the harm that justifies enforcement of promises is the harm broken promises do to the social practice of voluntary obligations (of which promising is but one example).⁴⁶ One can agree that this is a social interest justifying enforcing promises (or, to the extent this is different, enforcing contracts) without seeing it as an adequate response to the objection based on the Harm Principle. The problem is that were actions that undermine social practices or traditions to be considered "harms" for purposes of the Harm Principle, there would be little left to the principle: little by way of state interference with individual liberty that could not be justified. Attention to social conventions, traditions, and practices is more the emphasis of the cultural-conservative opponent of Mill's position, not that of an advocate of Millian libertarianism.⁴⁷

PHILOSOPHY OF LAW AND LEGAL THEORY 24, 27 (Dennis Patterson ed., 1996) (summarizing Fuller and Perdue's view as reflecting a "basic and distinctive premise of private law," that it is for redressing harms, not enforcing obligations to benefit others).

42. See generally ATIYAH, *supra* note 39.

43. Joseph Raz, Book Review, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)) [hereinafter Raz, *Promises*]. Raz himself elsewhere takes a position that could be seen as a significant modification of the Harm Principle, arguing that the state *should* be in the business of promoting the good, but arguing that this perspective leads to positions comparable to those advocated by the traditional Harm Principle, as regards toleration of a significant range of views and lifestyles. See Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 313, 313-33 (Ruth Gavison ed., 1987).

44. This view is reported (but not necessarily endorsed) in SMITH, *supra* note 40, at 69-70. Here, one might note the differences between the state's enforcing an obligation to be charitable and its enforcing a particular promise to give money to a certain charity. Of course, whether this difference is sufficient to overcome the objection based on the Harm Principle is itself the question to be determined.

45. Raz, *Promises*, *supra* note 43, at 937.

46. See *id.* at 936-38.

47. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993); JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (Univ. of Chi. Press 1991) (1873). Raz's response is that "[h]arm' includes institutional harm." Raz, *Promises*, *supra* note 43, at 937 (citing JOEL FEINBERG, *SOCIAL PHILOSOPHY* 33-35 (1973)); cf. SMITH, *supra* note 40, at 71-72 (violation of social convention, here of promising, is not "harm" for purpose of Harm Principle).

Note that the above discussion assumes a matter that is highly controversial among contract theorists: the question of how the promisee is harmed when a contract is breached. And this, in turn, also returns us to a basic issue in talking about the Harm Principle: how one delimits the category of “harm” for these purposes. One could argue that contract law is part of what *defines* what is (or what “counts as”) harm, for the Harm Principle and for other purposes.⁴⁸ And here one’s theory of the nature of contract law may come (back) into the picture: some theories are built on the idea that a valid contract gives each party a property-like right to the other party’s performance, or at least a monetary equivalent.⁴⁹ If one accepts this view, then the Harm Principle has no bite against contract law: contract law both helps to define the harm, and thus justifies state coercion to prevent or remedy the “harm to others,” and also determines which remedies will be available when harm occurs.

Some further clarification is thus required regarding the nature of the claimed connection between the Harm Principle and theories of contract law. Stephen Smith summarizes the Harm Principle objection as follows: “[I]t is illegitimate for the state to enforce promises *qua* promises, and thus the state must be doing something other than enforcing promises when it enforces contracts. It is for this reason . . . that promissory theories supply an inappropriate answer to the analytic question.”⁵⁰

Recall that the Harm Principle is basically a prescriptive theory about government action (and also about social interaction): suggesting a reform of current practices, to exclude a large category of activities from social and legal coercion (actions that do not cause harm to others), and, as a connected matter, excluding two or more potential forms of justification for legal and social coercion (paternalism and legal moralism). The Harm Principle is distinctly *not* a descriptive or interpretive theory; it does not claim that this restrictive view of legitimate state (and social) coercion is a viable interpretation of current practices—whether in England, at the time Mill wrote, or in the United States, Canada, the United Kingdom, or practically anywhere else, today. There is little doubt that government and social coercion contrary to the Harm Principle was and is common (for example, in various forms of safety regulation and regulation of the professions).

The Smith quotation above seems at least to invite a confusion of the descriptive (or explanatory or interpretive) and the prescriptive. Theories of contract law generally purport to say something about the doctrinal rules we have, not those we might want. To be sure, theories of this sort commonly

48. An argument along these lines was offered by Randy Barnett at the Georgetown University Workshop at which this part of the Article was first presented.

49. See generally Benson, *Transfer*, *supra* note 39; Andrew Gold, *A Property Theory of Contract*, 103 Nw. U. L. REV. 1 (2009).

50. SMITH, *supra* note 40, at 69 (footnote omitted).

claim certain rules and decisions of the system to be mistakes, and in need of reform. However, at some point, if the deviation between theory and practice is too great, then the theory must be re-characterized as being not a description or explanation of contract, but rather a prescription for a radical change in the law we have.⁵¹

To complain to the effect that “contract law cannot be about the enforcement of promises because that would violate the harm principle” is to assume either (1) that law in general or contract law in particular is, in practice, consistent with the Harm Principle; (2) that theories of contract law should be prescriptive, rather than descriptive or explanatory; or (3) that a descriptive or analytical theory is to be rejected, even if it fits the practice, if the theories reflect a view that is politically or morally unattractive.⁵²

There certainly is some merit to the claim that Anglo-American private law has a significant libertarian or anti-paternalistic theme to it. Common-law tort law famously refused to find a legal obligation to rescue others.⁵³ Similarly, contract law has always been clear that it would leave many moral obligations to keep one’s promises and agreements to individual conscience.⁵⁴ On the other hand, the amorality of Anglo-American contract law (like the related claim of the no-fault aspect of Anglo-American contract law) is easy to overstate. This can be seen not only in the equitable remedies and defenses of (and adjoining) contract law, but also in the way judges interpret contractual terms and rules of formation.⁵⁵

One might also note a basic point not often noted: the liberty (or “autonomy”⁵⁶) interest underlying the Harm Principle may not be in play in any

51. Raz is clearer in his argument about the Harm Principle and contract law that he *is* making a prescriptive claim. See Raz, *Promises*, *supra* note 43, at 933 (“The purpose of contract law *should* be not to enforce promises . . .”).

52. Smith does consider the objection that his analysis confuses prescription and description, but rejects it, on two grounds. First, he argues that moral value (moral attractiveness) does play a part in choosing among explanatory theories; and second, that although paternalistic laws may be common in other areas of the law, they are rare in private-law areas like contract law. See SMITH, *supra* note 40, at 70-71.

53. See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

54. See *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 211 (1825) (“A deliberate promise, in writing, made freely and without any mistake . . . cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it.”).

55. See FRIED, *supra* note 1, at 57-111 (discussing role of moral principles in implied terms, mistake, good faith, frustration, and other contract doctrines); George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 MICH. L. REV. 1445 (2009).

56. In a commentary presented at the Conference, T.M. Scanlon raised incisive arguments against what he argues is the overuse of the concept “autonomy” in reference to contract law and theory and, indeed, generally in legal and political theory. (Scanlon’s Comment is on file with the author and is also available in recorded form, at <http://itunes.apple.com/institution/suffolk-university/id388450120>.) Scanlon wrote: “The problems with [autonomy] are, first, that it is subject to multiple, shifting interpretations and, second, that its aura of great significance makes it a standing invitation to high-minded vagueness.” Manuscript at 3. He argued that most of the interests associated with “autonomy” can be restated in more specific ways. *Id.* at 3-4.

significant way when the contracting parties are large corporations.⁵⁷ Corporations and other large businesses may be individuals for legal purposes, but that does not mean that we need to confuse them with natural persons for all purposes. To whatever extent that it even makes sense to speak of the liberty or autonomy interests of Microsoft or Exxon, it seems clear that society's interest in protecting the liberty or autonomy of large companies⁵⁸ is significantly less than its interest in protecting liberty or autonomy for natural persons.⁵⁹

One can read the Harm Principle objection differently: as a *prescriptive* claim relating to contract-law damages. This reading, in turn, has been raised in (at least) two different ways: challenging the availability of expectation damages generally, and offering grounds for selecting among available damages remedies in given cases.

First, it has been argued that the Harm Principle raises a challenge to the expectation damages available as the default measure for breach of contract. It is a question that goes back to Fuller and Perdue's famous article⁶⁰: What can justify the award of expectation damages, particularly in cases where the promisee has not been harmed in any obvious way? The standard example involves some variation of a person agreeing to buy some object or service, thus entering into a valid contract, but then immediately changing her mind. An objection based on the Harm Principle would be that any remedies that go beyond redressing direct harm would be inappropriate. Along these lines, Fuller and Perdue tried to show how expectation damages, in fact, could be understood as generally protective of interests in reliance and restitution, broadly understood.⁶¹ Property theorists are making a parallel claim: that expectation damages for breach of contract are appropriate because they are redressing harm to a property interest of the other contracting party.⁶²

Second, at least one theorist, Dori Kimel, has argued that the Harm Principle can organize our thinking about the choice among alternative damages measures in individual cases.⁶³ Kimel argues that the reasons behind the Harm

57. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

58. Smaller companies may provide a harder case, as there may be a more direct connection in such cases between the interests of the business and that of the natural persons who own and run those companies.

59. However, this factor need not be conclusive on the question of whether business-to-business agreements should be treated differently from business-to-consumer contracts for all purposes. See Martijn Hesselink, *Unfair Terms in Contracts Between Businesses* 1 (Ctr. for the Study of European Contract Law Working Paper Series, Paper No. 07, 2011), available at <http://ssrn.com/abstract=1871130>.

60. See Fuller & Perdue, *supra* note 41.

61. See *id.*

62. See Benson, *Transfer*, *supra* note 39; Gold, *supra* note 49.

63. See DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF PROMISE 100-15 (2003); Dori Kimel, *Fault and Harm in Breach of Contract*, in FAULT IN AMERICAN CONTRACT LAW, 271, 271-88 (Omri Ben-Shahar & Ariel Porat eds., 2010) [hereinafter Kimel, *Fault and Harm*].

Principle continue in force even once it is conceded that state use of coercion is justified. In particular, where other things are equal, the state should choose the means that are least intrusive on individual liberty. Thus, it may be that state coercion is justified in protecting a contracting party's interest (based on an entitlement to the other party's performance), but if that interest is equally protected by money damages and specific performance, then the courts should select money damages, as that remedy is far less intrusive on the liberty of the breaching party.⁶⁴

One might consider another way of responding to the Harm Principle objection, a response grounded on a different characterization of contract law. With limited exceptions, American contract law⁶⁵ does not enforce promises as such;⁶⁶ enforcement is available only where there has been an exchange, a bargain, with something of value going in both directions. This is the doctrinal requirement of consideration.⁶⁷ Those who are concerned about the relationship between the Harm Principle and promissory theories of contract law base their arguments on a view that contract law is about enforcing promises. While I do not want to go too deeply here into the question of the relationship between contract and promise (on which there is already a rich literature,⁶⁸ including at this conference), I think that it can be unhelpful to equate contract law with the enforcement of promises. Instead of seeing contract law as being about the enforcement of promises or about the support of an independent practice of voluntary obligations, one might offer a different (if, admittedly, related and overlapping) characterization, one clearly connected with the approach of *Contract as Promise*: seeing contract law as providing a state enforcement mechanism to private parties if they choose to invoke it.

Under this view, contract enforcement is a service made available by the state to allow people to make binding commitments (of a certain kind).⁶⁹ No one is required to enter into (legally binding) contracts, and no one is required to seek enforcement of any breaches of the legally binding agreements they do

64. See KIMEL, *supra* note 63, at 100-15; Kimel, *Fault and Harm*, *supra* note 63, at 271-88.

65. This is generally true for common-law contract law countries (countries whose legal system derives in some way from the English common law). This Article makes no claims regarding civil-law (Code) countries.

66. And the exceptions are themselves noteworthy: the most prominent is promissory estoppel based on section 90 of the *Restatement (Second) of Contracts*. Here, a promise is enforced when, and only when, the promisee has reasonably relied upon the promise to the extent that "injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

67. See *id.* §§ 17, 71-86.

68. See generally Margaret Gilbert, *Is an Agreement an Exchange of Promises?*, 60 J. PHIL. 627 (1993); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119 (2003); Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801 (2008).

69. There are circumstances where commitments are supported or imposed by social norms, and the availability of, or recourse to, legal enforcement would actually undermine the commitment. See generally Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

enter. In a sense, it is a parallel with civil marriage⁷⁰: certain benefits and duties follow from entering civil marriage, and a certain level of administrative and judicial enforcement is made available by the state, but no one is required to marry.

This view echoes the idea of “freedom of contract,” as well as core aspects of *Contract as Promise*⁷¹: that contract law is—or at least strives to be—an arena where the obligations we have are those we choose to impose upon ourselves, as contrasted with tort law, criminal law, and the like, where duties are imposed upon us separate from any choice we have made.⁷² As will be discussed below, there is a danger in many types of transactions (especially consumer and more informal transactions) of people entering into contractual obligations they did not intend (and may not have foreseen); some of the most significant contracts require formalities or protections—such as requirements of a writing (the Statute of Frauds), mandatory or prohibited terms, waiting periods, etc.—that make “falling into” contractual obligations somewhat less likely.⁷³ However, even if “freedom of contract” is potentially misleading as a description of contract law and practice because it overstates matters, the power of contracting parties to alter the terms of their arrangements, including remedial terms, and not to enter binding agreements at all, remains central to (Anglo-American) contract law.⁷⁴

This view of contract law also shows why it is not in tension with the Harm Principle. Mill’s principle is grounded on a very high valuation of individual liberty, and the related view that the state must have a strong reason to interfere with that liberty. If contract enforcement is (at least much of the time) a process voluntarily invoked by parties, rather than something imposed upon them against their will, then the Harm Principle has no application here.⁷⁵ Mill

70. Civil marriage is also sometimes thought of as a kind of contract, though the extent to which marriage is or is not best thought of in contractual terms would get us far beyond the current topic.

71. See FRIED, *supra* note 1, at 1-2, 13-14, 20-21.

72. This is a little too quick. We *do* affect the collection of tort-law or criminal-law duties by our choices, albeit indirectly. For example, by moving to a city, we are subject to certain city laws and taxes that we would not be subject to if we lived elsewhere. However, with few exceptions, one does not move to a city *in order* to be able to be subject to those taxes and duties the way we use, for example, contracts, wills, and trusts in order to achieve certain goals. For a good discussion of the issue and its resolution, see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1738-43 (2008).

73. As was pointed out by Nathan Oman at the Georgetown University workshop, this approach is also consistent with one important historical strand of contract law. In both medieval Anglo-American contract law and ancient Roman Law, enforcement of (contractual) transactions was often not available without the use of significant formal acts (for example, the requirement of a sealed deed for the English writ of Covenant). See DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 24-30 (1999). Under Roman Law, *Stipulatio* were required for certain oral contracts. See ANDREW BORKOWSKI & PAUL DU PLESSIS, *TEXTBOOK ON ROMAN LAW* 291-97 (3d ed. 2005).

74. See generally B. Fried, *Morality*, *supra* note 28; cf. Curtis Bridgeman, *Contracts as Plans*, 2009 ILL. U. L. REV. 341 (offering a theory of contract law that emphasizes the ability of parties to make enforceable commitments).

75. When Mill writes of the area in which society has only an “indirect interest” (and thus compulsion is

writes:

[T]he liberty of an individual, in things wherein the individual is alone concerned, implies a corresponding liberty in any number of individuals to regulate by mutual agreement such things as regards them jointly, and regards no persons but themselves. This question presents no difficulty so long as the will of all the persons implicated remains unaltered; but since that will may change, it is often necessary, even in things in which they alone are concerned, that they should enter engagements with one another; and when they do, it is fit, as a general rule, that those engagements be kept.⁷⁶

Contractual obligations can easily be seen under this rubric as an engagement between two parties, with the added twist (of significance to be determined) that they are availing themselves of a state offer of judicial enforcement, along with some state coercive support to back up decisions regarding who owes what to whom.

As earlier noted, one useful parallel is civil marriage. No one is required to marry. However, those who choose to marry are then subject to significant legal obligations. And if one or both partners change their mind about their marriage later, they can get out of it, but it is frequently lengthy, difficult, and costly, and a (former) spouse may be subject to a long-term, perhaps even life-long, monetary obligation (alimony, also known as spousal support).⁷⁷

Of course, there are problems and limitations associated with this approach. While it is true that many people consciously make use of contract law, and others consciously opt out of the contract-law system (either by choosing mandatory arbitration of disputes, or simply by including provisions stating that some or all terms are *not* intended to be legally enforceable), there are many who are enmeshed in contract-law rights and duties without conscious choice. For them, contract law may only be a “trap for the unwary.” These parties want to make exchanges, or enforceable pledges, and may be unaware that they are creating potentially large legal liabilities for themselves.⁷⁸ And even when

inappropriate), he describes “a sphere of action . . . comprehending all that portion of a person’s life and conduct which affects only himself or, *if it also affects others, only with their free, voluntary, and undeceived consent and participation.*” MILL, *supra* note 35, at 71 (emphasis added).

76. *Id.* at 172.

77. Child-support obligations are imposed far more frequently than alimony under current laws, but current laws also clarify that child-support obligations are no longer dependent on marital status: it is the fact of parenthood, not the current or former marital status that grounds the obligation. Parents who were never married are subjected to the same obligation, and the same level of obligation, as formerly married parents. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW CASES AND MATERIALS* 418-19 (2d ed. 2002).

78. Perhaps even more common are the circumstances where parties overestimate the legal consequences of their actions, and are surprised at how little law will do for them if and when the other party fails to meet its part of a bargain. *See* Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of*

parties are to some extent aware that they are invoking the machinery of state contract enforcement, there may be serious questions about the extent to which they are assenting to all the terms.⁷⁹ Gregory Klass has shown why it might be useful to see (American) contract law not as purely elective—that is, not as purely power-conferring—but also as imposing obligations on parties, whether they have elected this path or not—that is, as partly duty-imposing.⁸⁰ One might also object that there is a significant moral difference between present consent to an action now, and consent now that purports to authorize future or ongoing activities or to assent to future losses, coercion, or harm. Even Mill distinguished between consent to a current activity (for example, a boxing match) and consent to being a slave.⁸¹

I am certainly not arguing for any sort of moral view in which consent is the ultimate value, such that any wrong or risk is morally acceptable if only there be sufficiently clear consent to it. Under the perspective I advocate (and for which I claim no originality⁸²), consent adds significant moral weight, but there are other moral considerations as well. These other moral considerations may frequently justify forbidding, restricting, or regulating certain activities (certainly slavery, but perhaps also prostitution, surrogacy, or medical surgery by untrained surgeons), even when all parties consent fully and knowingly. How does all of this apply to contracting? Can one reasonably say that someone who consents to enter a contract consents (also) to all of the remedial regime? This may be a justifiable conclusion, especially for contract systems where the remedies are reasonable, but the issue requires careful analysis (beyond the limited present discussion), not just a blanket and conclusory reply.⁸³

CONCLUSION

Charles Fried's *Contract as Promise*, a slim text though it is, has remained a remarkably rich and potent source for reflection, not only on the nature of contract law and the relationship between contract and promise, but also on the nature of theorizing about law generally, and the relationship between law and the enforcement of morality.

Contract Law in Action, 45 SUFFOLK U. L. REV. 667 (2012).

79. See generally Bix, *Consent*, *supra* note 31.

80. See Klass, *supra* note 72, at 1727.

81. See MILL, *supra* note 35, at 172-73.

82. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 162-64 (Larry Alexander ed., 1998) (describing limits of consent as justification); see also FRIED, *supra* note 1. Fried is also consistent throughout the book in indicating the ways in which the promissory principle, and its underlying values of liberty and autonomy, coexists and is sometimes balanced against (other) moral obligations we have to other human beings and to the common good.

83. Cf. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).

While, in the end, I do not think that the book makes out its apparent ambition of a promissory theory of contract law (or of *American* contract law), this is largely because the claim, when more carefully scrutinized, was never that ambitious to begin with. What *Contract as Promise* does (this more restrictive reading seems justified both by the book's own arguments and by the author's reflections thirty years on⁸⁴) is offer an important corrective for those who would disparage the role that the connected values of autonomy, will, consent, and promise play in (American) contract law.

The second part of this Article explored the implications of the Harm Principle for contract law. There are limits to which the prescriptive Harm Principle could be directly relevant to contract theory, as theories of contract law are best understood as descriptive, explanatory, or interpretive, though the Harm Principle might justify the law's approach to contract remedies.

Additionally, the applicability of the Harm Principle is less clear when contract law is viewed through the lens of *Contract as Promise*, seeing contract enforcement (at its best) as a resource available to people to increase their liberty, allowing people to make a certain kind of commitment that would otherwise not be possible, rather than as a duty imposed upon them.

84. See C. Fried, *Thirty*, *supra* note 16.