Michigan Law Review

Volume 81 | Issue 4

1983

Contract as Promise: A Theory of Contractual Obligation

Michigan Law Review

CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION. By *Charles Fried*. Cambridge, Mass.: Harvard University Press. 1981. Pp. 162. $14.

In *Contract as Promise: A Theory of Contractual Obligation*, Charles Fried argues that the moral basis of contract law is lodged in the promise principle, "that principle by which persons may impose on themselves obligations where none existed before" (p. 1). Fried's argument has two objectives: to trace the complex legal institution of contract to a few basic moral principles and to reveal the underlying structure of that legal institution. In pursuing the former objective, Fried addresses his fellow legal theorists, while in pursuing the latter he directs his thesis primarily at students of contract law (Preface). Because Fried consciously addresses these two very different audiences, his work is at once rich in legal theory and accessible to those without prior exposure to legal philosophy.

Fried pursues these purposes against the background of recent legal scholarship hostile to classical theories of contractual liability. The author advocates his view of contract as a corollary of promissory morality as an alternative to reductionist claims[1] that contracts do not create new obligations. Fried meticulously concedes the appropriateness of viewing certain kinds of claims formally sounding in contract as species of tort claims. Indeed, much of Fried's defense of the classical approach depends on his argument that misguided efforts to extend contractual liability to wrongs more properly viewed as torts are responsible for discrediting contractual liability in general. But Fried insists that contracts do give rise to obligations independently of externally imposed duties, regardless of the usefulness of tort-oriented remedies as an adjunct to contract law.

Fried begins his analysis by incorporating David Hume's definition of a civilized society as one based on security of the person, stability of property, and the obligation on contract (p. 1).[2] The first two bases are encompassed by property law, which defines the boundaries of our rightful possessions, and by tort law, which attempts to make us whole when these boundaries, or those of our physical person, are violated. The respect for the person and property of others, which we cherish as the source of our own autonomy, makes other people unique in the universe by placing them beyond our exploitation. The law of contracts extends even further. While preserving the main premise of liberal individualism — that individuals have rights — the law of contracts permits individuals to dispose of their rights as they choose (pp. 1-2).

The definition of morality as respect for the person and property of others coupled with the realization that contractual obligations are basically self-imposed (pp. 2, 7-8) led to the "crucial moral discovery" that morality could be enlisted not only to assure respect for one's self and property, but

1. *See, e.g.*, P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); G. GILMORE, THE DEATH OF CONTRACT (1973).

2. D. HUME, A TREATISE OF HUMAN NATURE 526 (L. Selby-Bigge ed. 1888).

also to assure that others would serve one's own purposes (p. 8). Moreover, this assurance, when derived from the "conviction" that others will do what is "right," gave birth to trust, which thereafter became a "powerful tool for our working our mutual wills in the world" (p. 8). Fried sees this moral discovery, and the consequent development of trust, as the very foundation of promissory, and therefore contractual, obligation.

Promise, according to Fried, is the device by which trust is given its "sharpest, most palpable form" (p. 8). Promise gives us the means to accomplish our will through a moral power alone. Promise transforms a choice that was once morally neutral into one that is morally compelled, permitting us to gain the cooperation of others to achieve our purposes.

Promise implies more than a communication of intention (which we are free to change, though others may be injured); it implies a commitment to a future *course of conduct*. A mere promise commits a person to future action, Fried asserts, because promising is a "general convention" (p. 13). That is, since without a way of binding people to future conduct, all transactions would have to be present exchanges, people find it useful to accept the presumption that promises have force *in general*, and apply this conventional understanding to *particular cases*. Promising is thus an institution; it exists on the same structural level as games or language (pp. 11-14).

Fried rejects the view that a person becomes morally obligated to keep his promises merely because of external sanctions, self-interest, or considerations of utility[3] (pp. 15- 16). Instead, Fried posits that an individual is morally bound to keep a *specific* promise because he has intentionally invoked the *general* convention of promising — a convention whose sole function is to give to the promisee moral gounds to expect the promised performance. It is simply wrong, Fried asserts, to invoke that convention in order to secure a promise, and then to break the promise. One thereby betrays the trust and the respect for individual autonomy upon which the convention was founded. Furthermore, because a contract "is first of all a promise, the contract must be kept because a promise must be kept" (p. 17).

Fried thus arrives at this explanation of the origin of contractual obligation via a linear path strewn with a few rather bare assertions: From the morality of liberal individualism, to the crucial discovery that morality could be used to achieve one's own ends, to the development of trust, and finally, to the genesis of promising as a convention, he derives the legal institution of contract.

Fried then bolsters his conceptual framework of contract law by using it to illuminate concrete areas within the field. While plausible enough in the discussion of consideration and offer and acceptance principles, this exposition falters significantly regarding the important issue of damages. Fried casually endorses the expectations measure of contract damages in preference to the reliance measure, because "if a person is bound by his promise and not by the harm the promisee may have suffered in reliance on it, then what he is bound to is *just its performance*" (p. 19) (emphasis added). But contract law, modern or classical, does not entitle the promisee to perform-

3. Fried necessarily rejects the view, associated with Patrick Atiyah and Grant Gilmore, that tort and restitution of benefit principles are the foundation of contract law. *See* note 1 *supra*.

ance, only to damages. By contrast, Posner offers an elegant and comprehensive explanation of contract remedies based on economic efficiency.[4] In Fried's view, breaking an inefficient contract is morally wrong — yet the legal system, by allowing only damages for most contract claims, clearly encourages the breach of inefficient contracts. At least with respect to damage, then, other considerations appear to have superseded the promise principle in the development of contract law.

Fried makes his most interesting contributions to neoclassical contract theory when he analyzes the sources of contractual obligation, rather than the remedies for breach. This original and impressive discussion focuses on "things gone wrong" in the "promissory regime" (p. 56). In such cases, "the promissory principle either does not apply at all or must compete with rival moral principles" (p. 56). Here Fried makes his most noteworthy contribution to classical contract theory and his most significant concession to post-classical theory.

Fried begins his examination of "gaps" in the contracting process by discussing mistake, impossibility and frustration.[5] Observing that in all three cases, the parties to a contract "though they [seem] to have agreed, have not agreed in fact" (p. 59), Fried points out that these cases cannot be resolved on the basis of any agreement or promise. To resolve disputes emanating from such imperfect contracting, courts must look to principles external to the will of the parties. Fried, however, does not advocate resort to the classicists' pseudo-interpretive devices of "presumed intent" (p. 60) or the "so-called objective standard of interpretation" (p. 61). Instead, Fried would consult "residual general principles of law" (p. 69), such as the tort principle of compensation for harm done, the principle of restitution of benefits conferred, and a third "distinct" principle of sharing (pp. 69-73).[6] This last principle is itself a residual of the other two residual principles: it arises *only* where no agreement obtains, where no one in the relationship is at fault, and where no one has conferred a benefit — in short "where there are no rights to respect" (p. 71).

The doctrines of duress and unconscionability pose a dilemma for Fried, since they release parties from obligations which they *knowingly* accepted, and which *do* constitute an agreement. Fried's response, if less flexible than recent reformers might approve, is resourceful and consistent. He first examines duress, a vice in the contracting process itself. Duress entails a threat to do wrong to the promisor and thus a threat to violate the promisor's rights. Any contract entered into on such a basis, Fried maintains, is without moral force. Thus, its rescission wholly accords with his theory.

---

4. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 4.12-4.19 (1977). A further element in Posner's discussion is the relationship between the duty to mitigate damages and efficiency. Fried can offer no better explanation of mitigation than to describe the obligation to mitigate as "a kind of altruistic duty." P. 131.

5. Mistake, according to Fried, "relates to a false assumption about how things are at the time of contracting" while frustration and impossibility "relate to incorrect assumptions about how things will be later, when it comes time to perform." P. 58.

6. Fried analyzes the doctrine of good faith, defined as "honesty in fact," p. 77, in similar fashion. That is, when parties do not enter a contract on the basis of "mutual intelligibility," interpretation may fail to produce a "core of agreement," and courts must again rely on principles of resolution outside the law of contract. Pp. 85-90.

Next, Fried considers the concepts of procedural and substantive unconscionability.[7] Fried views procedural unconscionability as a cognitive flaw in the process of contracting, akin to the doctrine of mistake. He thus views gap-filling as an appropriate response. By contrast, he does not consider substantive unconscionability to be a proper subject for nonpromissory principles. Unless either a discrete market[8] or society as a whole[9] malfunctions, a court improperly engages in social redistribution when it displaces contracts that appear to be unfair in substance and effect. Fried would prefer a laissez-faire approach and the individual hardships that might result, over the court's application of collective or paternalistic values to override contracts into which the parties freely entered. Society can pursue its redistributive goals through taxation and the welfare system, Fried maintains, but courts should not allow these goals to muddy the waters of contract law or threaten the moral basis of the promissory principle.

Throughout his book, Fried remains faithful both to the classical or "will theory" of contract law and to the primacy of the promissory principle within that theory. Fried's unique contribution to the classicists' theory lies in his stimulating and undogmatic approach to the *criticisms* of that theory. That is, Fried accepts the fact that the promissory principle is not the exclusive guiding light for the resolution of contractual disputes. Where gap-filling is necessary Fried would agree with the post-classicists that traditional contract law is insufficient, and would apply noncontractual principles of law. After making this significant concession to the post-classicists, the impact of Fried's promissory approach is limited to cases for which gap-filling is unnecessary or inappropriate. In (perhaps) the vast majority of cases, in which the parties clearly have agreed, both the postclassicists and Fried would enforce the promise. Where the contracting process has broken down to the extent that there is no agreement in fact, Fried would rely on the same "residual" principles of law invoked by the postclassicists (with the possible exception of Fried's sharing principle). Only in those cases in which there is a meaningful promise that can be enforced, but for which the postclassicists would award less than full expectation damages *(e.g.*, substantive unconscionability), would Fried's approach seem to argue for a different result. The smaller the percentage of such cases, the less important is the role of Fried's promissory principle.[10]

Still, Fried's book makes an important contribution to the theory of

7. Fried directs the reader to Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967), for the distinction there introduced between procedural and substantive unconscionability. P. 151 n.1. Procedural unconscionability refers to unconscionable methods of contracting, while substantive unconscionability refers to unconscionable effects of a contracting process which may otherwise be "conscionable."

8. A market malfunctions when goods are not distributed efficiently — that is, when exchanges can be made which will make both parties better off, but fail to take place because of transaction or information costs. The paradigm case presented here is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 16 A.2d 69 (1960) (Automobile Manufacturers Association's attempted disclaimer of implied warranty of merchantability held inimical to public good and therefore invalid). P. 152 n.26.

9. Examples include shipwrecks on the high seas or chaotic conditions inhering in war-torn societies.

10. *See* Atiyah, Book Review, 95 HARV. L. REV. 509, 515-16 (1981).

contract law. Fried's critics may reevaluate their theories and consider anew the viability of the promissory principle within at least some of the vast terrain covered by the law of contracts. Students will find that the book presents a clear and unifying picture of contract law. Many of the cases one is most likely to encounter in a first year contracts course are placed within Fried's conceptual framework. The discussion of these cases will enable the student to place them within the larger context of contract theory. Finally, although of little practical utility to nonacademic attorneys, Fried's book is readable, thought-provoking, and sure to provide an afternoon of pleasurable musing on the origin of contract law in the promissory principle.[11]

11. Fried's book has also been reviewed by Atiyah, *supra* note 10; Kronman, *A New Champion for the Will Theory* (Book Review), 91 YALE L.J. 404 (1981); Book Review, 92 ETHICS 586 (1982).