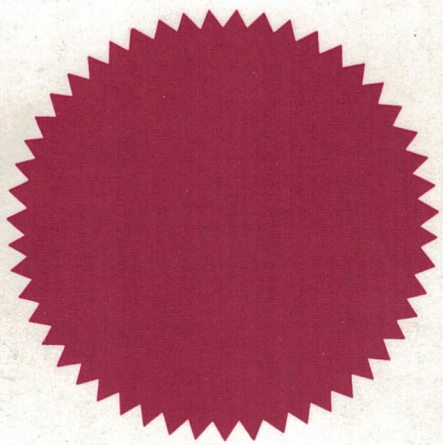
CONTRACT AS PROMISE

A Theory of Contractual Obligation

CHARLES FRIED



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INTRODUCTION THE LIFE OF CONTRACT

The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.

Security of the person, stability of property, and the obligation of contract were for David Hume the bases of a civilized society.[1] Hume expressed the liberal, individualistic temper of his time and place in treating respect for person, property, and contract as the self-evident foundations of law and justice. Through the greater part of our history, our constitutional law and politics have proceeded on these same premises. In private law particularly these premises have taken root and ramified in the countless particulars necessary to give them substance. The law of property defines the

boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person.[2] Contract law ratifies and enforces our joint ventures beyond those boundaries. Thus the law of torts and the law of property recognize our rights as individuals in our persons, in our labor, and in some definite portion of the external world, while the law of contracts facilitates our disposing of these rights on terms that seem best to us. The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights.[3] And the will theory of contract, which sees contractual obligations as essentially self-imposed,[4] is a fair implication of liberal individualism.

This conception of contractual obligation as essentially self-imposed has been under increasing pressure over the last fifty years. One essentially historicist line of attack points out that until the eighteenth century communal controls, whether of families, guilds, local communities, or of the general government, hardly conceded enough discretion to individuals over their labor or property to give the liberal conception much to work on. And beginning in the last century and proceeding apace since, the state, unions, corporations, and other intermediate institutions have again withdrawn large areas of concern from individual control and thus from the scope of purely contractual arrangements.[5] That there has been such an ebb and flow of collective control seems fairly clear. But from the fact that contract emerged only in modern times as a principal form of social organization, it does not follow that therefore the concept of contract as promise (which is indeed a centerpiece of nineteenth-century economic liberalism) was itself the invention of the industrial revolution; whatever the accepted scope for contract, the principle of fidelity to one's word is an ancient one.[6] Still less does it follow that the validity, the rightness of the promise principle, of self-imposed obligation, depended on its acceptance in that earlier period, or that now, as the acceptance is in doubt, the validity of the principle is under a cloud. The validity of a moral, like that of a mathematical truth, does not depend on fashion or favor.

A more insidious set of criticisms denies the coherence or the independent viability of the promise principle. Legal obligation can be imposed only by the community, and so in imposing it the community must be pursuing its goals and imposing its standards, rather

than neutrally endorsing those of the contracting parties. These lines of attack—found recently in the writings of legal scholars such as Patrick Atiyah, Lawrence Friedman, Grant Gilmore, Morton Horwitz, Duncan Kennedy, Anthony Kronman, and Ian Macneil,[7] as well as in philosophical writings—will provide the foil for much of my affirmative argument. Here I shall just set out their main thrust so that my readers may be clear what I am reacting against.

Not all promises are legally enforced, and of those which are, different categories receive differing degrees of legal recognition: some only if in writing, others between certain kinds of parties, still others only to the extent that they have been relied on and that reliance has caused measurable injury. And some arrangements that are not promissory at all—preliminary negotiations, words mistakenly understood as promises, schemes of cooperation—are assimilated to the contractual regime. Finally, even among legally binding arrangements that are initiated by agreement, certain ones are singled out and made subject to a set of rules that often have little to do with that agreement. Marriage is the most obvious example, but contracts of employment, insurance, or carriage exhibit these features as well. Thus the conception of the will binding itself—the conception at the heart of the promise principle—is neither necessary nor sufficient to contractual obligation. Indeed it is a point of some of these critics (for example, Friedman, Gilmore, Macneil) that the search for a central or unifying principle of contract is a will-o'-the-wisp, an illusion typical of the ill-defined but much excoriated vice of conceptualism.* These critics hold that the law fashions contractual obligation as a way to do justice between, and impose social policy through, parties who have come into a variety of relations with each other. Only some of these relations start in an explicit agreement, and even if they do, the governing considerations of justice and policy are not bound by the terms or implications of that agreement.

Though the bases of contract law on this view are as many and shifting as the politics of the judicial and legislative process, two quite general considerations of justice have figured prominently in the attack on the conception of contract as promise: benefit and reliance. The benefit principle holds that where a person has received a benefit at another's expense and that other has acted reasonably and with no intention of making a gift, fairness requires

*On formalism and conceptualism, see chapter 6 infra, at 87-88, and chapter 7 infra, at 102-103.

that the benefit be returned or paid for. I discuss this idea in detail in subsequent chapters. Here I shall make my point by the more pervasive notion of reliance. Proceeding from a theme established in Lon Fuller and William Perdue's influential 1936 article,[8] a number of writers have argued that often what is taken as enforcement of a promise is in reality the compensation of an injury sustained by the plaintiff because he relied on the defendant's promise. At first glance the distinction between promissory obligation and obligation based on reliance may seem too thin to notice, but indeed large theoretical and practical matters turn on that distinction. To enforce a promise as such is to make a defendant render a performance (or its money equivalent) just because he has promised that very thing. The reliance view, by contrast, focuses on an injury suffered by the plaintiff and asks if the defendant is somehow sufficiently responsible for that injury that he should be made to pay compensation.

The latter basis of liability, the compensation of injury suffered through reliance, is a special case of tort liability. For the law of torts is concerned with just the question of compensation for harm caused by another: physical harm caused by willful or negligent conduct, pecuniary harm caused by careless or deceitful representations, injury to reputation caused by untrue statements. Now tort law typically deals with involuntary transactions—if a punch in the nose, a traffic accident, or a malicious piece of gossip may be called a transaction—so that the role of the community in adjudicating the conflict is particularly prominent: What is a safe speed on a rainy evening, what may a former employer say in response to a request for a reference? In contrast, so long as we see contractual obligation as based on promise, on obligations that the parties have themselves assumed, the focus of the inquiry is on the will of the parties. If we assimilate contractual obligation to the law of torts,[9] our focus shifts to the injury suffered by the plaintiff and to the fairness of saddling the defendant with some or all of it. So, for instance, if there has been no palpable injury because the promisee has not yet relied on the promise there seems to be nothing to compensate, while at other times a generalized standard of fair compensation may move us to go beyond anything that the parties have agreed. The promise and its sequellae are seen as a kind of encounter, like a traffic accident or a street altercation or a journalistic exchange, giving rise to losses to be apportioned by the community's sense of fairness. This assimilation of contract to tort is (and for writers like Gilmore, Horwitz, and

Atiyah is intended to be) the subordination of a quintessentially individualist ground for obligation and form of social control, one that refers to the will of the parties, to a set of standards that are ineluctably collective in origin and thus readily turned to collective ends.*

Another line of attack on contract as promise denies the coherence of the central idea of self-imposed obligation. Some writers argue that obligation must always be imposed from outside.[10] Others work from within: For promissory obligations to be truly self-imposed, the promise must have been freely given. If this means no more than that the promisor acted intentionally, then even an undertaking in response to a gunman's threat is binding. If, as we must, we insist that there be a *fair* choice to promise or not, we have imported external standards of fairness into the very heart of the obligation after all. Having said, for instance, that a promise to pay an exorbitant price for a vital medicine is not freely undertaken, while a promise to pay a reasonable price is, why not dispense with the element of promise altogether and just hold that there is an obligation to supply the medicine at an externally fixed price to all who need it? This and more subtle related suggestions have been put forward by writers who are particularly concerned about the connection between contract as promise and the market as a form of economic organization. Some like Robert Hale, Duncan Kennedy, and Anthony Kronman[11] see in the concepts of duress and unconscionability the undoing of the arguments for the free market and for the autonomy of contract law. Others, most particularly Richard Posner,[12] also denying any independent force to promissory obligation, derive such force as the law gives to contracts from social policies such as wealth maximization and efficiency, which are usually associated with the operation of the market.

I begin with a statement of the central conception of contract as

*The two ideas—obligation based on promise and obligation based on fair compensation of injury suffered through reliance—can be run together. One may say that a disappointed expectation is a compensable injury without more, and that the giving of a promise is a sufficient (perhaps even a necessary) ground for holding a promisor responsible for such an injury. This is obviously not what the "Death of Contract" theorists have in mind. For them a cognizable injury must be a palpable loss identifiable apart from the expectation that the promise will be kept: for instance some expense that would not otherwise have been undertaken and that cannot be recouped, or some precaution omitted with ensuing loss. The distinction becomes rather thin when we consider opportunity costs—profitable bargains we might have made had we not relied on this one being kept—especially since those alternative bargains might themselves have been cast in promissory form (but those promises in turn might or might not have been honored).

promise. This is my version of the classical view of contract proposed by the will theory and implicit in the assertion that contract offers a distinct and compelling ground of obligation. In subsequent chapters I show how this conception generates the structure and accounts for the complexities of contract doctrine. Contract law is complex, and it is easy to lose sight of its essential unity. The adherents of the "Death of Contract" school have been left too free a rein to exploit these complexities. But exponents of the view I embrace have often adopted a far more rigid approach than the theory of contract as promise requires. For instance, they have typically tended to view contractual liability as an exclusive principle of fairness, as if relief had to be either based on a promise or denied altogether. These rigidities and excesses have also been exploited as if they proved the whole conception of contract as promise false. In developing my affirmative thesis I show why classical theory may have betrayed itself into such errors, and I propose to perennial conundrums solutions that accord with the idea of contract as promise and with decency and common sense as well.

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It is a first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world. By these powers we may create good things or low, useful articles or luxuries, things extraordinary or banal, and we will be judged accordingly—as saintly or mean, skillful or ordinary, industrious and fortunate or debased, friendly and kind or cold and inhuman. But whatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal. This is the