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Contract Law, Default Rules, and the Philosophy of Promising

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Among the topics addressed by moral philosophy is the obligation to keep one's promises. To many philosophers, there is something strange (or, at least, something calling for explanation) in the idea that moral obligations can be created simply by an individual's saying so — yet this is what seems to happen when a person makes a promise. Consequently, there is by now a large body of literature attempting to identify the exact source and nature of this moral obligation.

Contract law, too, has something to do with promises, so philosophers of law (and philosophically minded lawyers) often draw on philosophical theories about promising when writing about contract law. For example, a recent book by Charles Fried purports "to show how a complex legal institution, contract, can be traced to and is determined by a small number of basic moral principles . . . ."[1] In Fried's view, a recognition of the proper philosophical basis of contract law leads to conclusions profoundly different from those that would result from any attempt to rest contract law on other social policies, such as economic efficiency or the redistribution of wealth.[2]

My thesis is that such claims on behalf of philosophical theories of promising are greatly exaggerated. In particular, analyses such as Fried's have little or no relevance to those parts of contract law that govern the proper remedies for breach, the conditions under which the promisor is excused from her duty to perform, or the additional obligations (such as implied warranties) imputed to the promisor as an implicit part of her promise. These doctrines, which serve to define the exact scope of contractual obligations, are often referred to as

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1. C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981), at the first (unnumbered) page of the preface. *See also* Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223 (1984) (applauding what he sees as the growing recognition of the importance of normative philosophy to contract law and to legal scholarship generally).

2. C. FRIED, *supra* note 1, at 4-6, 74-85, 103-11.

"background rules" or "default rules," although the term "default rules" more commonly refers only to those rules which the parties are free to vary by appropriate language in their contract.[3] As not all contract rules can be varied in this way, I will use the term "background rules" to refer to both waivable and nonwaivable rules.

I am not asserting here that philosophical theories about promising can have no implications for any part of contract law. Such theories may well have implications for questions about the proper scope of freedom of contract — that is, questions about whether any given rule ought to be merely a default rule, or whether it ought to be mandatory for all parties. In addition, *certain* philosophical theories may have implications for the proper content of contract law's background rules. For example, theories that justify the enforceability of promises on grounds of economic efficiency, or on the special value of certain kinds of relationships, may imply that the law should adopt those background rules that are most efficient or that best promote the most highly valued kinds of relationships.

Other philosophical theories, however — including the one endorsed by Fried — have no such implications for the content of the law's background rules. These theories ground the enforceability of promises on considerations of individual freedom and autonomy, or on the principle of fidelity to one's prior statements or commitments. In a nutshell, the fidelity principle is consistent with any set of background rules because those rules merely fill out the details of what it is a person has to remain faithful to, or what a person's prior commitment is deemed to be. Thus, while fidelity may dictate that a promisor must live up to the obligations described by any set of background rules the law has adopted, it cannot guide the legal system in deciding which background rules to adopt in the first place. The principle of individual freedom is equally unhelpful, for it implies only that individuals should be left free to change whatever default rule the law adopts as a starting point. Once again, some other value must be invoked to explain why one starting point ought to be picked by the law in preference to another.

If I am right, this means that it is not enough to reject notions such as economic efficiency, or theories that value certain kinds of relationships more highly than others, as insufficient or incorrect justifications for the basic proposition that promises ought to be enforced. Even if

3. The role of "default rules" is discussed at more length in Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985), and Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

those theories are rejected at this most basic level, further argument is needed to explain why they are inadmissible bases for selecting the law's background rules or starting points, and, if so, to explain what other values ought to be used instead. Unfortunately, current writings bringing philosophical analysis to bear on contract law have focused almost entirely on the more basic question of why promises ought to be enforced at all, and have tended to overlook this second level of analysis. This frequently leads to careless or ad hoc statements concerning the proper content of contract law's background rules.

Part I of this article presents a more detailed survey of recent philosophical writings about promises, for the benefit of legal readers who may be unfamiliar with that literature. Part II then discusses the role of background rules in contract law, and shows why the content of those rules cannot be derived from philosophical theories based on individual liberty, or on ideals such as fidelity or truthfulness. Finally, Part III examines the writings of Charles Fried and Randy Barnett to illustrate the consequences of attempting to apply philosophy to contract law without addressing these problems. These two authors have supplied the most comprehensive attempts to give contract law a philosophical grounding, yet each falls into exactly this error.

I. Philosophical Theories About Promising

Broadly speaking, there are two kinds of questions that can be asked about the ethics of promising. One category consists of questions that might be asked by someone wondering whether to make a promise — for example, "Should I promise to donate money to the poor?" or "Should I promise to help a friend, if I can do so at little inconvenience to myself?" The other consists of questions facing someone who has already made a promise — for example, "Should I carry out my promise, even though my circumstances or my desires have changed?" The first class of questions asks what kinds of promises ought to be made, while the second asks what follows from having made a promise.

The first class of questions has received little attention in philosophical writings about promising as such. This should not be surprising, for the ethical theories most relevant to questions about what kind of promises to make will usually be theories with implications far beyond the topic of promising. If a person is wondering whether to promise money to the poor, the most interesting question (from the standpoint of ethics) is whether she ought to help the poor at all. The subsidiary question of whether she ought to help them by *promising* money, rather than giving them money without ever having first

promised to do so, seems much less important. Thus, ethical theories about what kind of promises to make usually derive from theories about the particular subject matter of the promise (helping the poor, etc.). They do not derive from theories about promising as such.

The same could be true of the second class of questions, concerning the ethical consequences of having made a promise. That is, there would be nothing illogical in believing that the conditions under which it is excusable to break a promise to the poor have no connection (in the sense of being linked by any common theory) with the conditions under which it is excusable to break a business promise, or a promise to a friend. If that were the case, there would be no point in asking questions about the nature of the commitment represented by promises in general. One could speak of the commitment represented by charitable promises, or business promises, but it would be useless to search for any general, unifying theory of promises.

Most people, though, would reject the idea that the obligations imposed by different kinds of promises have nothing in common. The mere fact that we classify certain speech acts as "promises" strongly suggests that they have something in common; otherwise, there would be no point to that classification. Indeed, there is a growing body of philosophical literature which attempts to describe the obligation someone accepts when she promises to do some action ϕ, regardless of how ϕ is filled in. That literature presupposes that there are at least some things that can be said about promises without discussing the specific subject matter of the promise.

Contract law, too, is traditionally concerned with the elements that all promises have in common, so it is this literature that is most often invoked by legal scholars in search of a philosophical grounding for contract law. The remainder of this Part describes this literature in more detail. One branch of the literature takes it as given that promises are morally binding and attempts to describe the exact way in which this "bindingness" should constrain the promisor's subsequent conduct. Another branch attempts to articulate the reasons why promises might be morally binding. While these two inquiries are related at many points, it will be convenient to discuss them separately.

A. *What Does It Mean To Be Bound by a Promise?*

Assume that a person has promised to do some action ϕ. Most people would agree that this does not place the promisor under an absolute duty to do ϕ — for example, if ϕ becomes impossible for reasons beyond the promisor's control, she may be excused from her obli-

gation.[4] Most people would also agree that the promisor's freedom has been constrained in some way, so she cannot decide whether or not to do ϕ with the same freedom she would have had if she had not made the promise. If asked to articulate the exact way in which her freedom is constrained, however, most people would have a great deal of difficulty.

Philosophers have taken two somewhat different approaches to articulating the way in which a promise constrains the promisor. One approach views the promise as creating additional reasons in favor of doing ϕ; the other views the promise as barring the promisor from considering certain reasons that might otherwise argue against doing ϕ. Each of these will be discussed below.

1. *Promises as Excluding Reasons for Action*

One view of the way that promises constrain a promisor's subsequent deliberations can be found in a 1955 article by John Rawls.[5] Rawls was only indirectly concerned with promises, as his main objective was to describe the distinction between justifying a social practice and justifying an individual action within such a practice. But because Rawls found the practice of promising to be a useful example, much of what he said is relevant here.

Rawls' point was that some practices, including promising, are defined so as to make certain arguments no longer available to those acting within the practice. More specifically, once a person has promised to do something, it is no longer open to that person to decide not to perform on the ground that, all things considered, nonperformance seems preferable to performance.[6] While such a preference might be a perfectly proper ground on which to refuse to make a promise in the first place, the rules of promising foreclose such an argument once the promise has been made.

Rawls recognized that this did not mean that a promisor was obliged to carry out her promise regardless of the circumstances:

> Is this to say that in particular cases one cannot deliberate whether or not to keep one's promise? Of course not. But to do so is to deliberate whether the various excuses, exceptions and defenses, which are understood by, and which constitute an important part of, the practice, apply to one's own case. Various defenses for not keeping one's promise are allowed, but among them there isn't the one that, on general utilitarian grounds, the promisor (truly) thought his action best on the whole, even

4. For convenience in the use of pronouns, all my examples will assume a female promisor and a male promisee.

5. Rawls, *Two Concepts of Rules,* 64 PHIL. REV. 3 (1955).

6. *Id.* at 16-17.

> though there may be the defense that the consequences of keeping one's promise would have been *extremely* severe.[7]

Rawls argued that the practice of promising must rule out an excuse based on a general balance of considerations — otherwise, the point of having the practice would be lost.

More recently, Joseph Raz has developed a similar theory in which promises supply what he calls "exclusionary reasons."[8] According to Raz, a promise to do ϕ constrains the promisor's options by preventing her from giving any weight to certain arguments that might be relevant if she had not promised. In other words, promises are not themselves reasons for doing ϕ, but they bar or exclude certain factors which might otherwise be reasons *not* to do ϕ.

Like Rawls, Raz recognizes that promises do not exclude *all* other considerations, thereby leaving the promisor under an absolute obligation to do ϕ. If ϕ would involve actions that were themselves immoral, for example, it might still be permissible for the promisor to choose not to do ϕ.[9] Indeed, Raz does not attempt to list the precise reasons that are excluded by a promise — though he would at least agree with Rawls that the reason, "all things considered, it seems best not to ϕ" is one of the excluded reasons.[10] A promise binds a promisor, in Raz's view, by excluding such arguments from the promisor's subsequent calculations.

2. *Promises as New Reasons for Action*

A different class of theories holds that a promise creates new reasons to perform the promised action, which must then be added to any pre-existing balance of reasons for and against the action. For example, a promise may give rise to expectations in the promisee, and the fact that nonperformance would disappoint those expectations may count as a reason favoring performance.[11] If the promisee has relied on the promise in any way, so that nonperformance would leave him worse off than if the promise had never been made, this might provide

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7. *Id.* (footnote omitted).

8. *See especially* Raz, *Promises and Obligations,* in LAW, MORALITY AND SOCIETY 210, 222 (P. Hacker & J. Raz eds. 1977). For more general discussions of the concept of "exclusionary reasons" (or "pre-emptive reasons," as he refers to them in his later work), see J. RAZ, THE MORALITY OF FREEDOM 42-69 (1986); J. RAZ, PRACTICAL REASON AND NORMS ch. 1 (1975); Raz, *Authority and Consent,* 67 VA. L. REV. 103 (1981).

9. Raz, *Promises and Obligations, supra* note 8, at 211.

10. *Id.* at 222-23.

11. For examples of this theory, see Ardal, *And That's a Promise,* 18 PHIL. Q. 225, 233-37 (1968); Narveson, *Promising, Expecting, and Utility,* 1 CANADIAN J. PHIL. 207, 213-20 (1971). *See also* Downie, *Three Accounts of Promising,* 35 PHIL. Q. 259, 263-64 (1985) (attributing this argument to Adam Smith).

an even stronger reason in favor of performing the promise.[12]

As in the case of the theories discussed in the preceding subsection, these theories do not imply that a promisor must *always* carry out the promise. While the fact that the promisee would be disappointed may be a reason in favor of doing ϕ, nothing in this theory rules out the possibility of there being other, stronger reasons against ϕ. If ϕ is an immoral action, or has become impossible, the reasons against doing ϕ might well outweigh the reasons in favor of doing ϕ. Thus, both sets of theories are consistent with the belief that a promise is not binding in all circumstances.

Similarly, both sets of theories are consistent with the belief that a promise somehow militates in favor of performance, in the sense of requiring the promisor to choose ϕ in at least some cases where, absent the promise, she would otherwise have chosen not to do so. The first set of theories explains such cases by saying that the promise excludes certain reasons that might otherwise have counseled against doing ϕ, so the promise will have a decisive effect in any case where those excluded reasons would otherwise have been dispositive. The second set explains the promisor's decision by saying that all the old reasons for and against ϕ remain relevant, but the promise creates new reasons in favor of ϕ. On this view, the promise will make a difference whenever the balance of old reasons would have counseled against ϕ, but the addition of the new reasons is enough to tip that balance in favor of ϕ.

Finally, neither of these theories attempts to explain *why* a promisor is morally bound to limit her subsequent behavior in the way postulated by the theory. Instead, the goal of these theories is simply to illuminate the ordinary understanding of what it means to be under a promissory obligation, by explaining precisely what it is that a promisor is thought to be bound to do. The question of whether (or why) anyone is morally obliged to follow that ordinary understanding is a separate question which requires a separate analysis. Accordingly, the following section surveys some recent philosophical theories addressed to the question of why the rules of promising are or ought to be morally binding.

B. *Why Should Anyone Obey the Rules of Promising?*

The question of why the rules of promising are morally binding is easily confused with the question addressed in the preceding section,

12. Theorists who focus on the promisee's reliance, rather than the bare expectation of performance, include MacCormick, *Voluntary Obligations and Normative Powers*, 46 ARISTOTELIAN SOCY. 59, 62-63 (Supp. Vol. 1972), and Hanfling, *Promises, Games and Institutions*, 75 PROC. ARISTOTELIAN SOCY. 13, 15-18 (1975).

concerning exactly what it is that the rules of promising require. Some of this confusion was unintentionally introduced by a 1964 article by John Searle, provocatively entitled *How to Derive "Ought" from "Is."*[13] Searle's point was that certain kinds of descriptive assertions, or "is" statements, are statements describing "institutional facts." For example, the statement that someone has hit a home run — as distinct from the statement that someone has hit a round object over a fence with a piece of wood — makes sense only within the institutional framework created by the rules of baseball.[14] Similarly (in Searle's view), the statement that someone has made a promise makes sense only within the framework created by the rules of promising. Thus, to say that a person has promised is to describe that person with reference to the rules of promising, and those rules include the normative or "ought" statement that people who promise are bound to act differently in some way as a result of their promise.[15] In this sense, Searle argued, it is possible to move from certain kinds of "is" statements to certain kinds of "oughts."

A number of writers responded by pointing out that this argument, standing alone, does not really show that anyone who promises ought therefore to accept the rules of the practice of promising, or ought to regard those rules as morally binding.[16] As Searle later clarified, the only kind of "ought" that he was discussing was one that was internal to the practice of promising.[17] It would still be open for someone to reject the entire practice of promising, or to argue that some or all of that practice's rules were unjust. Searle's derivation of "ought" from "is" was never intended to supply the answer to this kind of "ought" question.

In consequence, writers have had to look elsewhere for the source of the moral obligation to respect the rules of promising. Here, too, the various explanations can be grouped into two categories, which correspond in some ways to the two theories discussed in the preceding section concerning what the rules of promising actually require. Some writers have argued that the obligations created by a promise can only be explained by positing that individual promisors possess

13. 73 PHIL. REV. 43 (1964).

14. *Id.* at 54-55.

15. *Id.* at 55-56.

16. *See, e.g.*, Carey, *How to Confuse Commitment with Obligation*, 72 J. PHIL. 276 (1975); Hare, *The Promising Game*, 70 REVUE INTERNATIONALE DE PHILOSOPHIE 398 (1964); Jones, *Making and Keeping Promises*, 76 ETHICS 287 (1966); Miller, *Constitutive Rules and Essential Rules*, 39 PHIL. STUD. 183 (1981); Robins, *The Primacy of Promising*, 85 MIND 321, 329-30 (1976).

17. J. SEARLE, SPEECH ACTS 188-89 (1969).

"norm-creating powers," under which they are authorized to create new moral obligations merely by agreeing to do so. Others have argued that no such powers are necessary, and that the moral obligation to keep a promise is merely a particular instance of a more general obligation, such as the obligation not to cause harm to others or the obligation to tell the truth. Each theory will be discussed below.

1. *Promises and Norm-Creating Powers*

Joseph Raz has offered the most complete defense of the position that the moral obligation to respect the rules of promising must rest on some norm-creating power possessed by the promisor.[18] Without being quite as explicit, and without necessarily agreeing with other aspects of Raz's theory, other writers have taken an essentially similar position. For example, Charles Fried has argued that notions of individual freedom and autonomy require that individuals be allowed to bind themselves by promising.[19] Economists have pointed to the social utility of allowing individuals to bind themselves to a future course of conduct, to make it easier for others to arrange their lives in reliance on the promise.[20] In Raz's terms, all of these are arguments that individuals ought to have at least one norm-creating power: the power to create a moral obligation by making a promise.

In a somewhat similar vein, Randy Barnett has argued that promises are best viewed as marking the promisor's consent to the transfer of part of her bundle of property rights.[21] "Property rights" are meant here in the broadest possible sense; they thus include future rights such as "the right to fifty bushels of wheat on August 1," or even disjunctive rights such as "the right to fifty bushels of wheat or their equivalent in money." On this view, if a seller has consented to transfer to a buyer the right to "fifty bushels of wheat on August 1," the seller no longer has any right to control those bushels when August 1 arrives, so her retention of those bushels would constitute the taking of another's property. Barnett's account of promising might seem more parsimonious than Raz's, as Barnett grounds the force of a promise in an already recognized power — the power to transfer prop-

18. Raz, *Voluntary Obligations and Normative Powers,* 46 ARISTOTELIAN SOCY. 79 (Supp. Vol. 1972). For a somewhat similar position, see Robins, *supra* note 16.

19. C. FRIED, *supra* note 1, at 14-17.

20. *See, e.g.,* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract,* 89 YALE L.J. 1261 (1980).

21. Barnett, *A Consent Theory of Contract,* 86 COLUM. L. REV. 269 (1986). As Barnett notes, this view of contract law dates back at least as far as Blackstone's Commentaries. *Id.* at 292 n.98; *see also* P. ATIYAH, PROMISES, MORALS, AND LAW 179 (1981) (attributing this view of promising to Hobbes).

erty — rather than having to posit a separate normative power for promising. Notice, though, that the power to transfer title to property is itself an instance of what Raz would term a norm-creating power. In this sense, Barnett's theory is merely a particular example of the kind of theory that Raz believes necessary to account for the moral force of the rules of promising.[22]

Of course, positing a norm-creating power of this sort merely pushes the normative question back one step: What justifies the existence of this norm-creating power? To this question, many different answers can be and have been given. Economists usually rely on utilitarian justifications, arguing that a rule letting people make enforceable promises is likely (under certain conditions) to lead to the best use of resources. As noted above, Fried justifies the power to bind oneself as a corollary of respect for autonomy and individual freedom. Raz tentatively suggests a somewhat different answer: since promises create a special relationship between the promisor and promisee, the power to create such relationships is morally justified only if those relationships are themselves desirable.[23]

I will argue below that, when it comes to deriving legal implications, it may well make a difference which argument is used to justify these norm-creating powers.[24] In the philosophical literature on promising, though, these differences are less important (and receive less discussion) because all of these arguments lead to the same conclusion: that individuals ought to have the norm-creating power represented by promising. Thus, all of these theorists find themselves on one side of a divide, with the other side occupied by the theorists to be discussed in the next two sections.

2. *Promises and Harm to Others*

A different approach to explaining the moral force of the rules of promising begins with the observation that breaking a promise will

22. Raz occasionally distinguishes between consenting and promising, but his examples suggest that he is simply using "consent" in a sense that is narrower than Barnett's usage. For example, Raz argues that one can consent to give someone a right to some action, but cannot consent to give someone a mere right of recipience, such as the right to be paid a sum of money. Raz, *Authority and Consent, supra* note 8, at 121-22. Thus, where Barnett would say that a tenant has consented to transfer to her landlord the right to $1000 per month for each of the next 12 months, Raz would simply say that the tenant has promised to pay that sum. As nearly as I can tell, nothing turns on this difference in usage.

23. Raz, *Promises and Obligations, supra* note 8, at 227-28. In another context (while discussing consent generally), Raz has also noted the traditional instrumental arguments that letting people make their own promises is likely to lead to the best use of resources, or that promises develop peoples' characters and train them in such useful virtues as cooperation and careful planning. Raz, *Authority and Consent, supra* note 8, at 123-25.

24. *See infra* notes 48-57 and accompanying text.

often harm the promisee, especially if he has relied on the promise in any way. If there is a general principle that one ought not cause harm to others, that might be enough to justify some sort of rule against promise-breaking, at least when breaking the promise would in fact cause harm. In particular, this justification would fit well with the view that the only obligation imposed by a promise is an obligation to take this harm into account, as one reason — not necessarily the only one, or even a dispositive one — in favor of performing the promised action.[25]

Most people, though, are unwilling to equate a general obligation not to harm others with the specific obligation imposed by a promise. Imagine, for example, that a complete stranger walks up to you and says that he has formed the belief that you are about to give him $50,000 — and, moreover, that he has relied on this expectation by incurring various debts and obligations, none of which he would have incurred had he not believed that you were about to give him the money. The stranger's predicament in this case might provide a slight reason for you to help him out by giving him the $50,000 — after all, helping a fellow citizen is almost always a good reason for action — but it will not be a very strong one. Moreover, none of the writers cited above would say that preventing harm to the stranger is as strong a reason for action in this case as it would be if you had *promised* to give him $50,000, and your promise was what led him to incur his additional debts. Thus, some further argument is necessary to explain the particular force of the reason for action that is generated once a promise has been made.[26]

Some writers have tried to explain the additional force generated by a promise by pointing to the fact that a person who makes a promise has thereby *caused* the rise in the other party's expectations, and has likewise been a cause of the other party's reliance on the promise.[27] By contrast, the example in the preceding paragraph involved expectations and reliance which could not be causally attributed to any action of the person charged with the obligation. Thus, these writers rest the moral force of promissory obligations on a narrower form of the harm principle. While there is no obligation, or at best a very weak obligation, to take steps to *prevent* harm to others (these

25. *See supra* note 12.

26. For other criticisms of the bare-reliance argument, using examples similar to the one in the text, see C. FRIED, *supra* note 1, at 10-11; Raz, *Promises in Morality and Law* (Book Review), 95 HARV. L. REV. 916, 924-25 (1982).

27. *E.g.*, MacCormick, *supra* note 12, at 66-67.

writers would say), there is a much stronger obligation not actively to *cause* that harm.

Even this principle may be too broad, however. As a number of writers have pointed out, it is easy to imagine cases where one person has *caused* another to rely in some way, but the resulting obligation does not seem as strong as if the first person had made a promise to the second. Raz suggests the example of someone who informs a friend that she will almost certainly be able to offer the friend a ride into town, and that the likelihood of her being able to do so is sufficiently high that it makes perfect sense for the friend to rely on her rather than making alternative arrangements — but who warns, "remember — I do not promise anything, I am merely advising you."[28] In such a case, the friend presumably would be perfectly justified in relying on the statement by forgoing any alternative arrangements. The friend's lack of alternative arrangements may even be a factor that the speaker ought to consider in subsequently deciding whether to change her plans in some way that would prevent her from offering the ride. However, the force of this reason for going through with the offered ride still does not seem as strong as if the speaker had offered the ride and said, "I promise I'll be there." Thus, a promise still seems to add something to the force of the reasons for action over and above the force that can be attributed to the principle of not causing harm to others.

A closely related objection notes that the notion of "cause" employed in this argument is more than a little problematic.[29] Reliance on a promise is always caused (in a "but for" sense) by the promisee as well as by the promisor, for it is the promisee who chooses to rely. Thus, some further argument is needed to explain why we quickly attribute moral responsibility for another person's reliance to someone who has *promised* a particular action, but are less quick to attribute as much responsibility to someone who has made clear that she is not promising anything. To say that the person who relies assumes the risk of being disappointed if the other person's statement falls short of being a promise, but does not assume that risk if the other person has made an actual promise, is no answer. Such a response simply posits a difference in the extent of the speaker's responsibility in each case, when it is precisely that difference that needs a moral justification.[30]

28. Raz, *supra* note 18, at 99.

29. For an exceptionally clear statement of this objection, see P. ATIYAH, *supra* note 21, at 63-69; *see also* G. WARNOCK, THE OBJECT OF MORALITY 98-100 (1971); Robins, *supra* note 16.

30. Occasionally, the objection discussed in this paragraph is made by asserting that we cannot determine whether the promisee's reliance is reasonable without knowing whether the promise is binding on the promisor. *E.g.*, Barnett, *supra* note 21, at 275. However, Raz's example of

Patrick Atiyah suggested that the greater responsibility of a promisor might be explained by treating the promise as a conclusive admission that responsibility properly rested on the promisor. That is, Atiyah viewed the allocation of responsibility for the promisee's reliance as a question of social policy, which would normally have to be settled by a court or legislature or other lawmaking institution.[31] He then suggested that if an individual promisor *admits* that she should be responsible for the other party's reliance, by making an explicit promise, that sort of admission against interest should usually be treated as conclusively settling the social policy issue.[32] Notice, though, that this argument grants to individual promisors exactly the sort of norm-creating power for which Joseph Raz has argued.[33] If individual promisors have the sovereign-like authority to determine conclusively who should bear responsibility for certain losses, they are exercising a power whose existence must be justified by some principle beyond the general notion of not causing harm to others.

3. *Promises and Misrepresentation*

The attempt to explain why a speaker's responsibility seems greater if she has made a definite promise — even if the harm to the other party is no greater than in an otherwise similar case where no promise has been made — is one of the factors that led many writers to posit a separate, norm-creating power which individuals can exercise by making a promise. Other writers, however, have responded by narrowing the harm principle still further, saying that there is a particularly strong obligation not to cause harm to others *by making false statements.* Alternatively, the "harm" element can be eliminated entirely, if there is an obligation not to misrepresent the truth regardless of whether the misrepresentation causes any actual harm. Under either of these views, which I will refer to collectively as the "misrepresentation theory," the key fact is not that breaking a promise causes harm, but that breaking a promise violates the obligation to tell the truth.[34]

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one friend informing another of a possible ride into town is enough to refute this proposition, by showing that there can be cases where it is reasonable for the promisee to rely regardless of whether the promise is binding. For further discussions of this issue, see McNeilly, *Promises Demoralized,* 81 PHIL. REV. 63 (1971); Narveson, *supra* note 11. Assertions such as Barnett's are probably better interpreted as making the argument discussed in the text: that we cannot know whether it is reasonable *to attribute responsibility for the reliance to the promisor* without first deciding whether the promise is binding.

31. P. ATIYAH, *supra* note 21, at 68-69.

32. *Id.* at 184-202.

33. Raz, *supra* note 26, at 926-27.

34. For examples of this approach, see G. WARNOCK, *supra* note 29, at 101-11; Ardal, *Ought*

The misrepresentation theory reaches this conclusion by interpreting all promises as representations about the promisor's future conduct. A person who promises to give a friend a ride has made a definite statement about what will happen in the future. If she then fails to come through with the ride, her failure makes this statement about the future a false one, thereby violating the obligation to tell the truth (in addition to causing harm). By contrast, a person who says that she will probably give her friend a ride, but who reserves the right to change her mind, has made a much weaker probabilistic statement about the future. That person's failure to perform would not make her previous statement false, and therefore would not violate the obligation to tell the truth, even though it might cause the same amount of harm to her friend. According to the misrepresentation theory, this is why a person who promises to give her friend a ride has a stronger reason to do so than does a person who has merely said that she is likely to give her friend a ride, without actually promising.

Admittedly, the obligation to tell the truth appears here in what may be an unfamiliar guise. The obligation has some elements of strict liability, for it is no defense to say that at the time of promising the speaker *thought* that her statement would come true.[35] In addition, the obligation to tell the truth is perhaps more usually thought of as an obligation limiting what one is allowed to say, by obliging people not to say anything that is false. Under this theory, though, the obligation limits what speakers can *do,* by forbidding people from doing anything that will make their prior statements turn out to be false. Rather than requiring people to conform their statements to reality, the misrepresentation theory of promising requires people to act in such a way that reality will conform to their prior statements.[36]

In some respects, then, the misrepresentation theory is not that different from theories based on the notion of norm-creating powers, as discussed above. If the obligation to tell the truth means that an individual, by choosing to making a definite statement about the future, can thereby place herself under an obligation to make sure that her statement comes true, then that individual certainly has the power to create an obligation of some sort. This obligation need not be of the sort discussed above in section I.A.1, however, which obliged the

We To Keep Contracts Because They Are Promises?, 17 VAL. U. L. REV. 655 (1983); Ardal, *supra* note 11, at 225; Fogelin, *Richard Price on Promising: A Limited Defense,* 21 J. HIST. PHIL. 289 (1983); Hanfling, *supra* note 12, at 24-25.

35. Compare the position of Charles Fried, discussed *infra* at note 68.

36. For a more extended discussion of this aspect of the theory, see Fogelin, *supra* note 34, at 296-97.

speaker not to consider certain reasons which might otherwise counsel against doing the promised act. The misrepresentation theory is equally consistent with obligations of the sort described in section I.A.2, which merely add the value of telling the truth as an additional reason in favor of performing the promised action.

II. The Needs of Contract Law

The rules of contract law can be divided into two categories: "background rules" and "agreement rules." As discussed earlier, background rules define the exact substance of a party's obligation, by specifying (among other things) the conditions under which her nonperformance will be excused, and the sanctions which will be applied to any unexcused nonperformance. By contrast, agreement rules specify the conditions and procedures the parties must satisfy in order to change an otherwise applicable background rule. Agreement rules thus include most of the rules governing offer and acceptance, as well as such doctrines as fraud or undue influence, which define the conditions necessary for a party's apparent consent to be counted as truly valid.[37] To be sure, these two categories are not mutually exclusive, for some rules serve both functions simultaneously. For example, the "mailbox rule" defines a procedure by which parties can agree to a contract changing any otherwise applicable background rule. It also provides a background rule of its own, by providing that the offeror's power to retract her offer ends as soon as an acceptance is posted (unless the offer itself provided otherwise). Notwithstanding such instances of overlap, the distinction between background rules and agreement rules is still useful in understanding the relationship between the philosophical theories of promising and the content of contract law.

The philosophical theories discussed above may well have some relevance for contract law's agreement rules. For example, theories that ground the enforceability of promises on individual liberty might argue that the parties should be allowed to overturn nearly all of contract law's background rules by an appropriate agreement, thereby affording a much wider scope for the operation of whatever agreement rules the law adopts. Different philosophical theories might even have different implications for the content of those agreement rules — for example, the degree of force needed to make an individual's consent no longer voluntary, or the amount of information needed to make an

37. If the law does not permit a particular background rule to be varied by the parties, then the set of "agreement rules" available to change that background is of course the null set. For a slightly different classification of contract rules, see Ayres & Gertner, *supra* note 3.

individual's consent sufficiently informed. In this article, I am not concerned with the content of contract law's agreement rules, so I will not explore these implications further.

It is less clear that the philosophical literature discussed above has any implications for the content of contract law's background rules. All of the authors discussed above recognize that any real system of promising would have to include some set of rules governing excuses, remedies, and other details of the promisor's obligation.[38] Their purpose, however, was to analyze the practice of promising at a higher level of abstraction. They were interested in the elements all promises had in common, regardless of the action ϕ that was promised, and largely regardless of the background rules governing such topics as remedies or excuses. Granted, a sufficiently extreme background rule — *e.g.,* one excusing nonperformance whenever the promisor no longer felt like performing — might deprive a so-called "promise" of any binding force at all, thereby eliminating the very aspect of promising that interested these philosophers, and excluding the practice governed by such a rule from the scope of their analysis. Within those limits, though, the rules governing such topics as remedies and excuses could effectively be treated as just a more complete definition of the exact obligation undertaken by the promisor — in other words, as just another aspect of ϕ. The goal of the writings described above was to explain how and why a promisor could be bound to live up to any ϕ, regardless of exactly what that particular ϕ required.

This indifference to the content of ϕ should not be taken to mean that these authors believed that the appropriate background rules could be determined simply by looking to the explicit content of a party's promise. At a minimum, the parties' specifications would be relevant only if the rule were one the parties were free to vary — a "default rule" in the terminology I have used here. Not all of the writers discussed above are willing to grant the parties that much power over every aspect of their obligation.[39]

Even when a background rule concerns a topic that everyone agrees the parties should be allowed to vary — say, the extent of the warranty in the sale of a used automobile by a private individual — many parties simply will not address that topic in their agreement, so there will be nothing in the agreement's explicit content to resolve this issue. As a result, some method must be found to *interpret* the parties' agreement, to provide rules governing any topic not explicitly settled

38. See, for example, the passage from Rawls quoted in the text *supra* at note 7.

39. *See, e.g.,* Raz, *supra* note 26, at 932.

by the parties. Indeed, creative interpretation is often needed to determine whether there has been any binding promise at all, for even this fundamental question is not always explicitly settled by the parties.[40] While it is perhaps more common to speak of "interpretation" in cases where parties attempt to resolve an issue but do so with insufficient clarity, and to speak of applying default rules in cases where the parties made no attempt to address an issue, the principle is much the same in either case.[41] Both require an outside agency, such as a court, to choose the exact rules defining the parties' obligations where the parties have not unmistakably chosen some rule of their own.

A. *Possible Sources of Law*

The philosophical literature discussed above does not address these issues of interpretation and appropriate default rules. As that literature is concerned with the question of how promises could bind even in the best of circumstances, its focus is implicitly limited to cases where there is no question that a promise has been made, and no difficulty in determining the exact content of the promised action ø. That literature may still contribute, however, to the law's resolution of these issues. There are many possible ways of resolving questions of interpretation or background rules, and at least two are perfectly consistent with many of the philosophical positions described above. The first involves a sociological inquiry into the actual practices and customs that exist in any particular community, as a guide to interpreting particular utterances and filling in appropriate background rules. The second involves an appeal to the deeper philosophical values used to justify the institution of promising — that is, values such as social utility or individual freedom or encouraging valuable relationships (depending on the theory of promising employed). Each of these will be discussed below.

1. *Existing Expectations*

The frequent references in the philosophical literature to the "practice" or "institution" of promising could be taken to suggest that the exact scope of any promissory obligation is a matter of sociological fact, to be discovered by careful investigation into the practice of

40. For some famous instances of ambiguity in this respect, see United Steel Workers, Local 1330 v. United States Steel Corp., 492 F. Supp. 1, 5-6 (N.D. Ohio), *affd. in part and vacated in part,* 631 F.2d 1264 (6th Cir. 1980); Embry v. Hargadine-McKittrick Dry Goods Co., 127 Mo. App. 383, 387-92, 105 S.W. 777 (1907).

41. For a more extended discussion of the similarities between interpretation and the selection of default rules, see Goetz & Scott, *supra* note 3, at 264-86.

promising as it exists in the relevant community.[42] For instance, an inquiry into the use of promises in late twentieth-century America might show that promisors were regularly excused whenever performance became commercially impracticable, or it might show that promisors were never excused no matter how difficult performance had become. In either case, the results of that inquiry would define the exact scope of the obligation that any late twentieth-century American had accepted when she made a promise.

Of course, any serious sociological inquiry would very likely identify several different forms of promising, each with different background rules and assumptions, even within a single community.[43] At the very least, it would certainly be *possible* for a society to recognize several different kinds of promises, each with a different set of rules defining the exact scope of the obligation. For example, a society could have one kind of promise that imposes an absolute obligation to perform (in legal terms, one that exposes the promisor to a suit for "specific performance"), another that imposes an obligation to perform or to pay the equivalent in money ("expectation damages"), and a third that imposes an obligation to perform or to make good any losses the promisee may have suffered by relying on the promise ("reliance damages"). The community could also use promises that impose an obligation to perform unless performance became extremely difficult in some unexpected way (in legal terms, promises subject to the defense of commercial impracticability), and promises that permit no such excuse.

The possibility of more than one kind of promise greatly complicates the difficulties involved in interpreting the sociological data about a society's practices. For example, obvious questions arise concerning the number of people who must follow any set of rules for those rules to be accepted as a legally relevant practice. Must an institution be recognized in the community prior to its invocation in any particular transaction, or can any two parties create a custom-made form of promising on the spur of the moment?[44] A related question involves the way we conceive of an individual who appears to be violating the rules of an existing practice: Is she merely an ordinary rule-breaker, or a pathbreaking pioneer in the creation of a new, perhaps

42. I use "sociological" here in its broadest possible sense, to include existing rules of contract law as well as any extra-legal or private promissory practices.

43. As a number of authors have recognized — *e.g.*, J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 308-10 (1980); Jones, *supra* note 16, at 296; Raz, *Promises and Obligations, supra* note 8, at 227-28.

44. The latter position is suggested by Raz, *Promises and Obligations, supra* note 8, at 214-15.

more desirable form of promising? Other difficulties include the problem of conflicting expectations at different levels of generality — for example, if people expect written contracts to be binding, but they also expect goods to be sold at a fair price, what is their expectation regarding the force of a written contract that sets an unfair price? And what of the potential for circularity that arises when people's expectations are themselves affected by existing legal rules?[45]

These problems in inferring morally relevant categories from purely empirical data are well-known, so I will not pursue them here. Instead, for the remainder of this section I will assume that sociologists can identify the set of promises — call them promise_1, promise_2, . . . promise_n — available to members of any particular society. However, this identification of the relevant choice set does not exhaust the possible uses of sociology. In order to reach a decision about any particular case, the courts must have some method of determining which kind of promise was actually made by the parties to any given transaction.

One can imagine societies in which this second question would be easy to answer — *e.g.*, societies with a system of formal devices by which individuals could signal their choice of institutions. For example, the society might require all binding promises to be signed with a seal (ignoring for the moment the possibility of different kinds of binding promises), while treating any promises not made under seal as nonbinding. In such a society, the problem of interpreting the parties' utterances would deserve the lack of attention it received in the philosophical writings about promises, for it would be, quite literally, nothing but a formality.

The difficulty, of course, is that most societies do not use this method of interpreting parties' utterances, and for good reason. Even when there are only two kinds of promises from which to choose, many writers have commented on the difficulties of expecting all lay people to understand the use of the seal, and the apparent harshness of enforcing one set of rules against parties who clearly intended a different set to apply but who forgot to use the appropriate formality.[46]

45. *See, e.g.*, Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 837 (1983) ("The law presumably is one factor shaping standards of social and especially commercial behavior. People's 'expectations' and merchants' notions of 'good faith' are to some extent dependent on the positive, public expression of norms by contract law itself."). *But see id.* at 844-45 ("Contemporary and historical research suggests that people generally don't know or don't care much about the rules of contract law and generally carry out their affairs with little regard for them.").

46. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1697 (1976).

These difficulties multiply rapidly if there are more than two kinds of promises — that is, more than two permissible sets of background rules — from which to choose. It would be very difficult to design a different seal for each of one hundred possible sets of promissory rules — and even more difficult to expect everybody to remember which seal they should use for each purpose. As a consequence, courts following this approach may have to appeal to sociology not only to identify the set of promises recognized in any particular society, but also to identify the more complex signals by which different kinds of promises are invoked. For example, a survey to determine what people usually mean when they say "I promise" or "I intend" might tell us what kind of commitment people usually have in mind when they make those noises — or, if the inquiry becomes more particularized, when they make those noises in particular contexts. Indeed, this is part of what courts do under current contract law when they inquire into the "reasonable interpretation" of the parties' language.[47]

Notice, though, that this kind of inquiry takes judges far beyond the "small number of basic moral principles" referred to in the introduction to this article. If we must rely on sociological investigation to identify the set of possible background rules, and also to tell us which set of rules applies in any particular case, then sociology is doing virtually all of the work involved in fulfilling the needs of contract law. This alone is enough to defeat the claim referred to in the introduction that the philosophy of promising can by itself yield definite implications for the content of contract law.

2. *Substantive Moral Values*

A more serious objection to this total reliance on sociological data is that it provides no perspective from which to criticize existing promissory practices, or to propose reforms in those practices. One might criticize particular legal rules for not properly conforming to those practices, but there would be no way to criticize the practices themselves. However, sociology is not the only possible source of content for contract law's background rules. An alternative is to look to the substantive values which justify the binding force of promises in the first place (according to one of the philosophical theories discussed earlier), to see if those values have implications for contract law's background rules.

Economic analysis is the most familiar instance of this method of determining the content of contract law's background rules. From an

47. But not the whole part — see *infra* note 57 and accompanying text.

economic perspective, if society is justified in giving individuals the power to make morally binding promises, it is because such promises will, under certain conditions, lead to the most efficient satisfaction of human wants. This notion of efficiency (or some variant of it) can then be used to choose among various possible background rules, by identifying the rule that would contribute most to efficiency. For example, there is an extensive body of literature analyzing different contract remedies to determine which remedies are most efficient in which situations.[48] Economists have also addressed the question of the most efficient rule for excusing promisors who fail to perform because of unexpected difficulties in performance,[49] and the conditions under which individuals' promises should not be treated as binding because of "market failures" that distort the promisor's incentives.[50]

John Rawls provides another example of how background rules might be chosen in order best to serve the substantive values that justify the binding force of promises in the first place. Rawls argued that the binding force of promises is justified if and only if the rules of promising — the background rules, in the terminology used here — are themselves consistent with principles of justice. For Rawls, this meant that they must lead to an equal distribution of all "primary

48. For nontechnical introductions to this literature, see A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS ch. 5 (1983); Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach,* 61 S. CAL. L. REV. 629 (1988); Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies,* 57 U. COLO. L. REV. 683 (1986). More technical analyses include Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution,* 73 CALIF. L. REV. 1 (1985); Craswell, *Performance, Reliance, and One-Sided Information,* 18 J. LEGAL STUD. 365 (1989); Craswell, *Precontractual Investigation as an Optimal Precaution Problem,* 17 J. LEGAL STUD. 401 (1988); Kornhauser, *Reliance, Reputation, and Breach of Contract,* 26 J.L. & ECON. 691 (1983); Polinsky, *Risk Sharing Through Breach of Contract Remedies,* 12 J. LEGAL STUD. 427 (1983); Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract,* 15 RAND J. ECON. 39 (1984); Shavell, *The Design of Contracts and Remedies for Breach,* 99 Q.J. ECON. 121 (1984); Shavell, *Damage Measures for Breach of Contract,* 11 BELL J. ECON. 466 (1980).

49. *See, e.g.,* Bruce, *An Economic Analysis of the Impossibility Doctrine,* 11 J. LEGAL STUD. 311 (1982); Goldberg, *Impossibility and Related Excuses,* 144 J. INST. & THEOR. ECON. 100 (1988); Joskow, *Commercial Impossibility, the Uranium Market and the* Westinghouse *Case,* 6 J. LEGAL STUD. 119 (1977); Perloff, *The Effects of Breaches of Forward Contracts Due to Unanticipated Price Changes,* 10 J. LEGAL STUD. 221 (1981); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83 (1977); Sykes, *Increased Cost of Performance and the Doctrine of Commercial Impracticability,* 19 J. LEGAL STUD. (forthcoming Jan. 1990); White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory,* 17 J. LEGAL STUD. 353 (1988).

50. *E.g.,* Kornhauser, *Unconscionability in Standard Forms,* 64 CALIF. L. REV. 1151 (1976); Ordover & Weiss, *Information and the Law: Evaluating Legal Restrictions on Competitive Contracts,* 71 AM. ECON. REV. PAPERS & PROC. 399 (1981); Rea, *Arm-Breaking, Consumer Credit, and Personal Bankruptcy,* 22 ECON. INQUIRY 188 (1984); Rose-Ackerman, *Inalienability and the Theory of Property Rights,* 85 COLUM. L. REV. 931 (1985); Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis,* 127 U. PA. L. REV. 630 (1979); Schwartz, *A Reexamination of Nonsubstantive Unconscionability,* 63 VA. L. REV. 1053 (1977).

social goods" (liberty, wealth, etc.), except to the extent that an unequal distribution would benefit every member of society.[51] This provides a slightly different criterion for judging possible background rules — although one that will overlap with economic analysis when assessing the ways in which different rules benefit the contracting parties.[52]

Other writers have focused on other substantive values, which could lead them to different conclusions about the proper background rules. For example, John Finnis has argued that the binding force of promises is justified because of the way promises can solve coordination problems.[53] This enables him to endorse whatever background rules are most likely to serve this coordination goal.[54] Still another example can be found in Joseph Raz's suggestion that the binding force of promises is justified by the value of the special relationships which promises create.[55] Though Raz does not develop this theory at any length, it might be possible to decide which of all possible relationships were the most valuable and to adopt the background rules that best facilitated those relationships. For example, if relationships that can be terminated at will are less desirable than those that are more difficult to terminate, that might justify a background rule providing for a relatively large measure of damages for breach of contract.

It is important to realize that the selection of background rules designed to promote the substantive values that justify making promises binding is not necessarily inconsistent with freedom of contract. Under a strong version of this approach — that is, a version arguing that the selected background rules should be *mandatory* — freedom of contract would indeed be restricted.[56] But this approach can also be used in a milder version, endorsing the preferred back-

51. J. RAWLS, A THEORY OF JUSTICE 344-48 (1971). The principles of justice themselves are discussed at more length in *id.* at 54-117.

52. *See id.* at 67-83.

53. J. FINNIS, *supra* note 43, at 298-308. See also the discussion of coordination problems in J. RAWLS, *supra* note 51, at 346-48.

54. *See* J. FINNIS, *supra* note 43, at 320-25 (discussing whether contractual obligations should be viewed as giving the promisor a free election between performing and paying damages).

55. *See* Raz, *Promises and Obligations, supra* note 8, at 227-28; *see also supra* note 23 and accompanying text.

56. For various perspectives on arguments that might justify the strong version of one of these theories, see Barnett, *Contract Remedies and Inalienable Rights,* 4 SOC. PHIL. & POLY. Autumn 1986, at 179; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power,* 41 MD. L. REV. 563 (1982); Kronman, *Paternalism and the Law of Contracts,* 92 YALE L.J. 763 (1983); Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849 (1987). See also the previously cited economics articles, *supra* note 50.

ground rules merely as default rules or methods of interpretation for those cases where the parties have not specified a preference for some other rule.[57] Any system of law, however committed it may be to the idea of freedom of contract, must have some way of resolving those issues on which the parties' contract is silent or ambiguous. A rebuttable presumption in favor of the rule that best serves some substantive moral value is one way to resolve such cases.

B. *Unhelpful Substantive Values*

The preceding section argued that background rules could sometimes be derived from whatever substantive values justified the binding force of promises in the first place. However, only some of the philosophical theories discussed in section I.B rest on substantive values that are of any help in selecting background rules. In this section, I argue that theories which justify the binding force of promises on the basis of the obligation to tell the truth, or on considerations of individual liberty and autonomy, are of no help at all in such an enterprise. Part III then documents this claim by examining writers who attempt to derive implications for contract law from theories based on individual autonomy or the obligation to tell the truth.

1. *Preventing Misrepresentation*

One of the philosophical theories discussed earlier held that promises derive their binding force from the fact that failing to carry out a promise would falsify the promise as a definite statement about the future, thereby violating the obligation to tell the truth.[58] Assume, for the moment, that this theory is sound. The question is what, if anything, it tells us about the proper background rules of contract law.

With respect to the rules governing implied obligations, such as implied warranties, the misrepresentation theory tells us very little. For example, suppose that someone says, "I promise to give you my car in exchange for $5000," and then delivers a car that doesn't run. The misrepresentation theory says that if the speaker can properly be interpreted as saying "I will definitely give you my car, and it will be in good running condition," then the speaker's failure to do so will make her statement false, thereby violating her obligation to tell the truth. On the other hand, the misrepresentation theory also says that

57. *See, e.g.*, Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 242, 129 N.E. 889, 891 (1921) ("From the conclusion that promises may not be treated [as one of the parties had urged] without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention.").

58. *See supra* section I.B.3.

if the speaker is more properly interpreted as saying "I will definitely give you my car, but I guarantee nothing about its condition," the speaker's failure to deliver a working car will not falsify her earlier statement. In other words, the misrepresentation theory leaves the proper outcome entirely dependent on the proper interpretation of the speaker's promise.

There are, of course, any number of ways to resolve this interpretation question. We could look to sociology to tell us how much responsibility most people expect sellers to assume under these circumstances. Alternatively, we could look to other substantive values to try to resolve the interpretation question. For example, if it is more efficient to put responsibility for such problems on the seller, or if relationships that continue over time are for some reason considered more desirable than relationships where each side's involvement ends as soon as the goods change hands, that might justify interpreting such statements as committing the seller to an implied warranty, at least in the absence of explicit statements to the contrary.

Notice, though, that nothing about the misrepresentation theory tells us which method of interpretation we ought to use. The misrepresentation theory is consistent with interpreting promises in accord with whatever default rule most people already expect, or whatever default rule would be most efficient, or whatever default rule best serves some substantive value other than economic efficiency. While the misrepresentation theory of promising tells us that people must live up to the proper interpretation of their promise, it is equally consistent with any of the ways in which the proper interpretation might be identified.[59] Thus, knowing that contracts should be enforced in order to prevent misrepresentation tells us nothing about which method of interpretation ought to be employed, or anything else relevant to deciding whether there should be an implied warranty in this transaction.

For similar reasons, the misrepresentation theory also tells us little about the background rules governing the proper remedy for nonperformance. If the speaker's promise is interpreted as saying, "I will definitely give you this car, rather than any substitute," then only the delivery of the actual car could avoid falsifying that statement, suggesting that a remedy of specific performance would be most appropriate. But other interpretations are also possible — for example, "I will give you this car, or else give you enough money to let you buy an-

59. For a more extensive discussion of this point, with reference to the law of false advertising, see Craswell, *Interpreting Deceptive Advertising,* 65 B.U. L. REV. 657 (1985).

other car just like it." If this is the proper interpretation to place on the speaker's remarks, ordinary market-value damages would be enough to avoid falsifying her statement. Other interpretations are equally possible — *e.g.*, ". . . or else I'll return your purchase price," ". . . or else I'll make good your reliance expenses," or even ". . . or else I'll pay you *X* dollars to make up for it," where *X* could be any number under the sun.

It might be argued that the misrepresentation theory at least establishes that the seller's failure to deliver the car is wrong, and therefore deserves at least *some* sanction. That is, the misrepresentation theory might seem to point us to punishment theory — to principles of deterrence or retribution, or arguments that the severity of the punishment ought to be proportional to the gravity of the offense — to determine the appropriate sanction for nonperformance. However, even this conclusion depends on an implicit resolution of the interpretation issue discussed in the preceding paragraph. If the seller's statement is best interpreted in one of the ways discussed above — say, "I will definitely give you this car, or else I'll return your purchase price" — then there is nothing wrong with the seller's failure to deliver the car, so long as she is at least willing to return the purchase price. Thus, if the quoted language represents the best interpretation of the seller's statement (according to some theory of what makes for the best interpretation), the question of the proper remedy for nondelivery is settled without any need to appeal to punishment theory. To justify looking to punishment theory to determine the sanction, a misrepresentation theorist would first have to establish that the seller's remarks ought to be interpreted as something other than any of the quoted propositions suggested above.

Admittedly, most promisors probably do not explicitly have in mind anything like those quoted propositions.[60] This may be why it seems inherently correct or natural to treat the question of an appropriate remedy as a question for punishment theory, rather than as a question of interpretation. If most promisors have in mind only something like "I will definitely give you this car," then that certainly *could* be interpreted as an agreement that it would be wrong for the seller to fail to turn over the car, thereby calling on punishment theory to determine the appropriate response. At a minimum, it could be argued that such a construction ought to be adopted as the default rule, thereby shifting to any seller who wanted some other remedy the burden of making a more explicit statement to the contrary.

60. *See* O.W. HOLMES, THE COMMON LAW 237 (1963 ed.) ("when people make contracts, they usually contemplate the performance rather than the breach").

My argument is simply that this construction — the construction that makes the appropriate sanction turn on some theory of punishment — is not in any way entailed by the misrepresentation theory of promising. The value of telling the truth would in no way be compromised by adopting any of the other constructions discussed above, thereby putting the burden of stating otherwise on sellers who object to the chosen construction. Thus, if there is any reason for preferring one possible construction over the others, that reason has to be something more than just the value of telling the truth. It must rest on some belief about what most people already expect, and some argument about why the law ought to fulfill existing expectations; or a belief about what default rule is most efficient, and some argument about why the law should be concerned with efficiency (to cite just two of the possibilities). In other words, the misrepresentation theory settles none of the possible questions about what values the law ought to look to in selecting its background rules.

2. *Individual Autonomy*

Another view of promising justifies the moral force of a promise as a necessary corollary of individual liberty or autonomy.[61] If promises were not binding, it is argued, individual freedom would be unjustifiably restricted, as individuals would be deprived of the freedom to place themselves under a moral obligation respecting their future conduct. While there may be a slight paradox in the notion that freedom must include the freedom to limit one's freedom in the future, advocates of this theory resolve that paradox in favor of allowing individuals to make binding promises.[62]

Autonomy-based theories may well have implications for what I have called "agreement rules," or rules concerning the conditions under which individuals will be allowed to vary the background rules that would otherwise govern their relations. For example, these theorists generally oppose the restrictions on freedom of contract represented by the rule denying enforceability to promises unsupported by consideration, or to promises that are deemed unconscionable.[63] More precisely, they oppose restrictions on the enforceability of promises unless true consent is lacking (*e.g.*, cases of duress), or unless the sub-

61. *E.g.*, C. FRIED, *supra* note 1.

62. *Id.* at 14. *But cf.* 1 M. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 153-55 (1962) (offering a libertarian argument that contracts for personal services should never be legally enforceable); *see also infra* note 64.

63. C. FRIED, *supra* note 1, at 28-39, 103-09; Barnett, *supra* note 21, at 313-14.

ject of the promise is not the promisor's to give away.[64] Thus, one necessary part of these theories is a specification of the conditions under which a party's apparent consent will be recognized as valid. As long as these conditions are satisfied, autonomy-based theories hold that any rule or obligation agreed to by the parties should be allowed to govern their relationship.

In cases where the parties have not specified the rule they prefer, however, autonomy-based theories have much less to tell us. In these cases, autonomy-based theories run into the same problem as the misrepresentation theory. Just as any default rule would be consistent with the obligation to tell the truth, any default rule would also be consistent with individual freedom, as long as the parties are allowed to change the rule by appropriate language. Consequently, some other principle must be invoked to decide which of the many possible default rules to adopt. The rule could be chosen by looking to sociological data to determine which rule most parties already expect in various circumstances; it could also be chosen by appealing to some substantive value such as economic efficiency, or Rawls' difference principle, or any other view about what makes some kinds of contractual relationships more valuable than others. Thus, even if those principles have been rejected as valid justifications for the binding force of promises, one or more of them must still be selected to provide the default rules for parties who have not unambiguously specified some other rule in their contract.

The reason that misrepresentation and autonomy-based theories are unhelpful in the selection of default rules is that, of all the philosophical theories discussed earlier in section I.B, these two share the characteristic of being completely content-neutral.[65] They give rea-

64. *Cf.* Barnett, *supra* note 56, at 185-95, 197 (arguing that individuals cannot alienate control over their persons, and thus have no right to provide for the remedy of specific performance in contracts for personal services). Barnett would, however, allow individuals to alienate the disjunctive right to "my personal services or their value in monetary damages, if I subsequently choose not to perform"; he thus would not render contracts for personal services completely unenforceable. *Id.* at 197.

65. A similar concept, "content independence," is employed by Raz, *Authority and Consent, supra* note 8, at 114-16 (discussing examples of content-independent reasons for action or belief, including promises); *see also* J. RAZ, PRACTICAL REASON AND NORMS, *supra* note 8, at 70 ("[B]oth [decisions and promises] are content-independent reasons: regardless what you promise or decide to do you have a reason to do it because you have promised or decided.").

Raz argued that theories describing the way in which promises constrain a promisor's subsequent deliberations — that is, theories of the sort discussed earlier in section I.A — had to be content-neutral, or else they could not explain the constraint generated by the promise, as opposed to constraints that might argue in favor of doing ϕ even if no promise had ever been made. However, Raz in no way suggested that theories explaining the moral force of those constraints (theories of the sort discussed *supra* in section I.B) had to be neutral or indifferent with respect to the content of ϕ. If anything, his suggestions about the special value of certain kinds of relationships suggest the contrary. Raz, *Promises and Obligations, supra* note 8, at 228.

sons why an individual who has promised to do ø thereby incurs some form of obligation to do ø, regardless of how ø is filled in. The reason for this neutrality is understandable: To do anything more requires a theory that would tell people what kinds of promises they ought to make. Unfortunately, the theorists' reluctance to advise individuals as to how they ought to exercise their freedom to fill in the content of ø leaves them equally unable to give legal systems any guidance about how to fill in the content of ø when contracting parties fail to specify their preferred content. As a result, these two theories have nothing to contribute to the selection of default rules governing such important topics as implied terms and conditions, excuses, and remedies for breach.

I should stress that this shortcoming in no way undercuts whatever validity these misrepresentation or autonomy-based theories may have in their original capacity, as justifications for the morally binding force of promises. It simply means that if one of these theories is accepted as the justification for the force of promises, some other theory or theories must then be added to provide a basis for selecting appropriate background rules. This other theory must be a theory that is not neutral between the different ways of filling in the exact scope of the parties' obligation — for example, it must provide some reason for preferring promises with an implied warranty to promises without an implied warranty, or vice versa. In other words, this other theory must rely on more than the value of individual autonomy or the value of telling the truth.

III. Two Examples

Part II demonstrated that even if one accepts any of the misrepresentation or autonomy-based theories as justifications for the moral force of promises, there are still important choices to be made concerning the values used to select the law's background rules. Unfortunately, these choices usually receive much less attention from those who write about contract law from the standpoint of misrepresentation or autonomy-based theories. As a result, those authors often end up defending their choice of default rules on an indefensibly ad hoc basis. At other times, they are led to oppose certain default rules unnecessarily, simply because those default rules are supported by certain values that were rivals to the misrepresentation or autonomy-based theory at the level of a justification for the moral force of promises. The final part of this article illustrates the difficulties that such theorists encounter by considering the theories of Charles Fried and Randy Barnett. These two authors have provided the most care-

ful and comprehensive of recent attempts to give contract law a solid philosophical grounding. In addition, each rests his theory of why promises are binding on some version of the value of individual freedom or the obligation to tell the truth.

A. *Charles Fried*

As noted earlier, Fried justifies the obligation to keep a promise primarily by viewing it as a necessary corollary of individual autonomy. "If we decline to take seriously the assumption of an obligation . . . , to that extent we do not take [the promisor] seriously as a person."[66] To be sure, Fried is somewhat ambiguous on this point, for he also emphasizes the injury done to the promisee by the breaking of a promise. For example, he argues that promise-breaking abuses the promisee's trust in the promise, thereby violating the Kantian injunction against treating other people as means rather than as ends.[67] This moves Fried much closer to the misrepresentation theorists: as Fried himself puts it, promise-breaking "is like (but only *like*) lying."[68] But since the autonomy-based and misrepresentation theories are equally unhelpful when it comes to the selection of default rules, an exact classification of Fried's position as between these two theories is unnecessary to my analysis.

1. *Expectation Damages*

On the question of the appropriate remedy for breach, Fried supports the expectation measure of damages, which is designed to give the promisee the same benefits he would have received had the promise been kept. According to Fried, "[i]f I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance."[69]

A moment's consideration, however, will show that this conclusion cannot be derived solely from the value of individual freedom and autonomy. Fried may well be correct that, in order to give free rein to an

66. C. FRIED, *supra* note 1, at 20-21.

67. *Id.* at 16. I am indebted to John Gardner for pointing out this ambiguity in Fried's position.

68. *Id.* Fried refuses to join the misrepresentation theorists entirely because he interprets the obligation to tell the truth as an obligation not to lie knowingly, thereby imposing no restriction at all on a promisor who at the time of her promise intended to keep the promise. *Id.* at 17. Under the broader version of that obligation endorsed by most misrepresentation theorists, the difference between their theory and Fried's would become very small. *See supra* note 35 and accompanying text.

69. C. FRIED, *supra* note 1, at 17.

individual's autonomy, "[i]t is necessary that I be able to make non-optional a course of conduct that would otherwise be optional for me."[70] But almost any remedy — reliance damages, punitive damages, specific performance, etc. — makes the promised course of conduct non-optional to some degree, depending on the severity of the threatened penalty. There is surely nothing in the idea of individual autonomy that requires the exact degree of non-optionality provided by the expectation measure. The idea of individual autonomy does suggest that individuals should be allowed to make their conduct nonoptional to any extent they choose, by specifying one of these remedies in their contract. But the law must still select one of these remedies as the default rule, and nothing in the notion of individual autonomy gives any reason for favoring the expectation measure over any of the others.[71]

Fried might, of course, have some other value in mind which explains why the expectation measure is to be preferred (unless the parties specify otherwise) over any of the other possible measures. For example, Fried might believe that the expectation measure promotes economic efficiency, or better satisfies Rawls' difference principle, or would better solve most coordination problems. However, no such argument is made anywhere in his book.

Alternatively, Fried might be appealing to data about people's existing beliefs to justify his preference for the expectation measure. He cannot be relying on existing nonlegal practices, for studies of those practices show that people often do not demand (or offer) expectation damages in cases of unexcused nonperformance.[72] However, Fried might be taking existing *legal* practices as his normative benchmark, for Anglo-American law often does employ the expectation measure of damages. That is, Fried's argument might be that because the law adopts liability for expectation damages as one incident of the obligation of promising, anyone who promises thereby accepts that liability as one of the rules of the game. If this is Fried's argument, though, his theory cannot be what *justifies* the law's choice of the expectation measure. The same argument would work equally well to explain why an individual was obliged to respect any other damage rule the law happened to have adopted.

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70. *Id.* at 13.

71. For similar criticisms of Fried's autonomy-based argument for expectation damages, see Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 106-08 (1989); Farber, Book Review, 66 MINN. L. REV. 561, 564-65 (1982).

72. *E.g.*, Epstein, *supra* note 71, at 112-21; Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

Fried's only other argument in favor of the expectation measure is really an argument against one of the possible alternatives, the reliance measure of damages. When addressing the possible justifications for the binding force of promises, Fried argues against the theory that promises are binding only because promise-breaking would injure those who relied on the promise. Fried goes on, however, to treat his argument against that justification for the binding force of promises as also being an argument against adopting the reliance measure of damages as a default rule.[73] That is, he seems to assume that the reliance measure of damages could only be justified as a default rule if one first accepted the promisee's reliance as an explanation for the binding force of a promise.

If this is Fried's argument, it rests on a *non sequitur.* Granted, one way of arguing for the reliance measure of damages would be to argue that the reason promises are binding is because promise-breaking injures those who rely on the promise. However, it hardly follows that this is the *only* way that the reliance measure of damages can be supported, or that rejection of the reliance justification for the binding force of promises also entails rejection of the reliance measure of damages. This error becomes even more obvious when it is recalled that we are considering the reliance measure of damages as a default rule, which would still leave the parties free to specify the expectation measure (or any other measure of damages) in its place. Adopting the reliance measure merely as a default rule is in some ways inconsistent with the theory that promises are binding only in order to prevent reliance losses, for a default rule lets the parties agree to other damage rules which would effectively make their promise binding even in the absence of any reliance losses. The notion of reliance damages as a default rule seems much more compatible with the views of someone like Fried, who believes that the binding force of promises derives entirely from the freedom of the individual promisors.

In a nutshell, then, the difficulty with Fried's position on expectation damages is the difficulty identified earlier in Part II of this article. Any damage measure is consistent with the ideal of individual autonomy, as long as it is adopted solely as a default rule, since any default rule expands the promisor's options by making it easier for her to make a certain kind of promise. Fried must therefore invoke some other value in order to decide which of the many damage rules to select as a starting point. Moreover, that value will necessarily be one which Fried rejected as a possible justification for the binding force of

73. C. FRIED, *supra* note 1, at 18-19.

promises, for the only value serving that role for Fried — the value of individual autonomy — is equally consistent with all default rules. To choose a default rule, then, Fried has to let one of the other values back into the analysis, and the only question is which one.

2. *Rescission*

Fried encounters a similar problem when he addresses the question of whether a promisee's *only* remedy for nonperformance is to sue for expectation damages, or whether the promisee should also have the option of rescinding the contract and recovering any advance payments. Such an option could be extremely important to the promisee if, for example, the market price of the promised goods had fallen since the time of the contract. In such a case, the promisee would much prefer to get his money back and buy the goods elsewhere (at their new, lower price), rather than merely being allowed to recover from the promisor the market value of any goods that were defective or were not delivered.

Fried initially seems to regard the promisee's right to rescind the contract as being a natural corollary of the binding force of promising. "Parties bind themselves reciprocally. If one party treats himself as not bound, the other may also treat himself as not bound. By breaking his contract, a contractual partner not only opens himself up to claims for damages but releases his opposite number."[74] This argument, though, is subject to the same objections as Fried's argument about the expectation measure. While a system of promising with that default rule would certainly expand a promisor's freedom, so too would an institution of promising with any other rule as its default rule. The quoted passage merely asserts that our system of promising contains rescission as one of its default remedies, without doing anything to justify that rule.

Interestingly, in this case Fried anticipates this very criticism. That is, he acknowledges that it is possible for contracting parties to provide either (a) that nonperformance by one party releases the other party from the contract (in legal terms, making the promises conditional) or (b) that nonperformance by one party does not release the other party from the contract, but only exposes the first party to a suit for damages (in legal terms, making the promises independent). He also notes that such provisions need not be explicitly stated to be effective.[75] In other words, Fried recognizes that there are (at least?) two

74. *Id.* at 117.

75. *Id.* at 118-23.

possible damage rules which parties should be free to invoke, and that the law must somehow decide which rule to treat as invoked in any particular case. As he puts it much earlier in the book, "does your breaking your promise cancel my reciprocal obligation to you or just give me a remedy for my disappointment? There is no obvious a priori reason for one or the other response."[76]

In this case, Fried resolves the dilemma by an explicit appeal to existing expectations, which he reads as supporting a default rule that includes the remedy of rescission. In his words, "[a]ny other outcome would disturb the expectations on which contractual terms *are usually established.*"[77] Unfortunately, Fried says nothing to explain why the expectations of most people in the community should necessarily be dispositive in any individual case. Indeed, at other points in his analysis Fried seems to view the enforcement of community expectations as somehow inconsistent with promissory principles, belonging more to the realm of tort.[78] The problem, of course, is that Fried has to look to *some* outside value to decide whether rescission ought to be accepted as a normal default remedy. In this instance, he "solves" that problem simply by asserting that community expectations ought to govern the matter, without attempting any defense of that position.

3. *Other Default Rules*

Similar difficulties resurface when Fried turns to the rules governing excuse for impracticability, frustration, or mistake. However, Fried takes a somewhat different approach to the selection of the appropriate default rules for these subjects. Fried sees these rules as necessary to fill the "gaps" in the parties' agreement concerning problems which in some sense were unexpected, and for which neither party had agreed to assume responsibility. Because these rules relate to issues outside the scope of the parties' agreement, Fried argues that their justification need not rest on his theory of promises as exercises of individual autonomy. Instead, Fried views these rules as justified by nonpromissory principles such as fault (responsibility for negligently inflicted losses), or what he calls altruism (sharing among members of

76. *Id.* at 46 n.*.

77. *Id.* at 118 (emphasis added). Fried cites no sociological data to support this claim.

78. *Cf. id.* at 4:

> 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. . . . 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.

a community).[79] In this context, then, Fried clearly recognizes that he must appeal to substantive, non-content-neutral values.

Fried also believes that many of the rules governing contract formation must depend on values other than individual autonomy. Examples include the common law's "mailbox rule," which provides that an offer cannot be revoked after an acceptance has been posted by the offeree; or the rule that an offer is deemed to lapse (and cannot later be accepted) if it has once been rejected by the offeree. In this area, Fried explicitly recognizes that any number of different default rules are consistent with his theory of promises, and that the offeror should be permitted to specify in her offer whatever rules she wants to apply.[80] Indeed, on the question of which default rule to adopt, he states that "there are no reasons in principle, nothing entailed by the concepts themselves, only considerations of fairness and convenience."[81] In analyzing particular rules, he usually takes the position that the most sensible default rule would be whichever one most offerors would prefer, for that rule saves a majority of offerors the trouble of having to specify a different rule. He then embarks on an analysis of the costs and benefits of each rule to try to determine which rule most offerors would prefer.[82]

In each of these areas, then, Fried is perfectly willing to appeal to some non-content-neutral value such as "fairness and convenience," even though those may not be the values which justify the binding force of promises. Once again, though, Fried never explains why he chooses the particular values he does. For example, why do the rules governing contract formation rest on arguments of "convenience" about the rule that most promisors would prefer, while the rules governing impracticability and mistake rests on principles of "fairness" such as equal sharing? The rules governing impracticability and mistake are always subject to variation by the parties' agreement, so the argument that the law should adopt whatever rule most parties would prefer (in order to save them the trouble of specifying otherwise) would seem just as strong when applied to those issues. Alternatively, if considerations of fairness trump the convenience of the promisor in contracts involving unanticipated risks, why should they not also

79. *Id.* at ch. 5; *see also id.* at ch. 6 (taking a similar approach to the implied obligation of "good faith"). For criticisms of this aspect of Fried's theory, see Atiyah, Book Review, 95 HARV. L. REV. 509, 520-23 (1981), and Reiter, *Good Faith in Contracts,* 17 VAL. U. L. REV. 705, 719-23 (1983).

80. C. FRIED, *supra* note 1, at 47-51.

81. *Id.* at 49.

82. *See id.* at 49 n.* (discussing the rule that an offer lapses once it is rejected by the offeree); *id.* at 52 (discussing the mailbox rule).

trump the convenience of offerors in cases of offers that are delayed in the mail? Without any explicit theory explaining when each of these different values is an appropriate guide, Fried's appeal to different values in different contexts looks more like an *ex post* rationalization of the rules of contract law than a philosophical justification of those rules.

Fried is also on weak ground in explaining his willingness in the areas of impracticability and mistake to make an explicit appeal to values other than individual autonomy, when he was unwilling to allow such appeals in considering the expectation measure of damages. Fried's only justification for looking beyond considerations of individual autonomy when deciding on the rules governing impracticability and mistake is his belief that most parties do not consciously consider the rules they wish to apply to such unexpected contingencies, so enforcing any particular rule can only be justified as a form of involuntary liability.[83] The same is true, however, of parties who make promises without consciously considering what remedies would be available if the promisor fails to perform without an acceptable excuse.[84] If values other than individual freedom and autonomy can be invoked to set the default rules governing impracticability and mistake, it is hard to see why they cannot also be invoked to set the default rules governing remedies for nonperformance.

When all is said and done, then, Fried's theory about what justifies the binding force of promises — the theory which derives promises' force from considerations of individual freedom and autonomy — plays very little role in his derivation of any of the relevant default rules. Unfortunately, Fried's preoccupation with his theory of promising seems to prevent him from developing a coherent theory of the values that *should* play a role in selecting default rules. Sometimes Fried relies on people's existing expectations; sometimes he uses economic arguments; sometimes he rests on principles of "fault" or "altruism"; and sometimes, as in the case of expectation damages, he advances no justification at all. Such a scattershot approach to the selection of default rules does little to advance our understanding of contract law.

B. *Randy E. Barnett*

As noted earlier, Barnett views promises as transferring to the

83. *Id.* at 60.

84. *See supra* note 60. A similar point has been made by Atiyah, *Misrepresentation, Warranty, and Estoppel*, 9 ALBERTA L. REV. 347, 353 (1971).

promisee the promisor's property right in the promised good or service. He therefore treats the obligation to carry out a promise as a specific instance of the more general obligation to respect property rights.[85] While this explanation of the binding force of promises differs from Fried's in some respects, Fried and Barnett are actually very close on the underlying question of why anyone is obliged to respect property rights (in Barnett's case) or promises (in Fried's). Just as Fried defended the obligation to keep a promise on the ground that the power to make binding promises is a necessary corollary of individual liberty, Barnett sees the power to make binding transfers of property as justifiable on essentially libertarian grounds.[86]

Unlike Fried, however, Barnett does not view the obligation to carry out one's promise as binding only when the promisor truly and subjectively agrees to undertake that obligation. Barnett argues that any workable system of property rights must make use of clear signals of entitlement — boundary markers and title recordation in the case of real estate; objective manifestations of consent in the case of contracts — in order to give maximal guidance to those who need to know what their rights are.[87] Thus, in Barnett's view it is not inconsistent with individual liberty to hold individuals liable whenever they manifest their consent to an obligation, even if they subjectively intended to consent to no such thing. According to Barnett, a contrary rule would be inconsistent with the equal liberty of others, who may need to know whether the individual is subject to an obligation or not.[88]

Thus, an important operational difference between Barnett and Fried lies in Barnett's willingness to endorse the objective theory of interpretation as applied to contract law.[89] This frees Barnett from at least one of the difficulties faced by Fried. Fried believed that any background rules pertaining to promissory matters could rest only on

85. *See supra* notes 21-22 and accompanying text.

86. Barnett, *supra* note 21, at 297-99. At least, if one asks why individuals should have the authority to decide whether and when to transfer away their property rights, Barnett's answer is libertarian: Such a right is the best way of "facilitating freedom of human action . . . ." *Id.* at 297. If one asks why freedom of action is itself a desirable thing, his answer sounds closer to economic or utilitarian notions of preference-satisfaction: Liberty is the best way of facilitating individuals' "pursuit of survival and happiness." Barnett, *Pursuing Justice in a Free Society: Part I — Power v. Liberty*, 4 CRIM. JUST. ETHICS 50, 57 (Summer/Fall 1985). Barnett differs from most economists, however, in his willingness to endorse a particular "vision of the good life for men," rather than relying solely on empirical observations about what people happen to prefer. *Id.* at 71 n.49. Since freedom itself is the only aspect of Barnett's vision of the good life that he invokes in his writings about contract law, it seems appropriate to describe his position as resting ultimately on the value of individual freedom.

87. Barnett, *supra* note 21, at 301-07.

88. *Id.* at 305-06.

89. *Id.* at 300-09; *cf.* C. FRIED, *supra* note 1, at 61-67 (criticizing the objective theory of interpretation as inconsistent with individual liberty).

the value of individual autonomy; he therefore had to exclude large areas of contract law (*e.g.*, mistake, impracticability, and offer and acceptance) from the promissory sphere, in order to accept default rules in those areas which were based on other values.[90] Barnett faces no such obstacle to the acceptance of default rules based on other values, for an "objective" interpretation of any given promise will necessarily depend on factors other than the promisor's subjective act of will.

However, Barnett still faces the task of figuring out just which values *should* inform the objective interpretation of any particular action or agreement. Under Barnett's view of promises as marking consent to the transfer of property rights, the rules governing each party's obligations can be described by specifying exactly which rights have been transferred. To use one of Barnett's examples, if a person who agrees to a sale of a car is best viewed as making an unconditional transfer of the right to that car, the buyer would be entitled to specific performance if the seller fails to hand over the property. If the seller is instead viewed as making a conditional transfer of the right to the car *or* the right to damages for nonperformance, the buyer could not sue for specific performance, but only for monetary damages.[91] As Barnett puts it elsewhere, "[m]ost 'real world' contractual disputes involve determining precisely which rights were intended to be transferred by the parties."[92] While this passage could be read as referring to the actual, subjective intentions of the parties, his other writing makes it clear that the only relevant intentions are those indicated by all the objective markers of consent.[93]

Unfortunately, Barnett does not tell us how to decide which rights we should deem transferred by any particular set of objective indicators. In some cases, he looks solely to existing expectations about the obligations normally assumed by parties in similar circumstances. For example, Barnett would usually resolve the issue discussed in the preceding paragraph in favor of the specific performance remedy, treating the parties as agreeing to an absolute transfer of rights (unless the contract specifies otherwise). His principal rationale for this result is that "most people would expect that when the contract is executed [the buyer] has a right to the specified land or car."[94]

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90. *See supra* notes 79-84 and accompanying text.

91. Barnett, *supra* note 56, at 195-96.

92. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969, 1979 (1987).

93. Barnett, *supra* note 21, at 301-07.

94. Barnett, *supra* note 56, at 195. *But cf. infra* note 95. Barnett also argues that his preferred rule would properly place the burden of arguing against specific performance on the guilty breacher, rather than on the innocent plaintiff. *See* Barnett, *supra* note 56, at 182. However, this

At other times, Barnett relies on economic arguments about the efficiency of various rules. For example, he suggests that his presumption in favor of specific performance might be reversed in cases where specific performance would be extremely difficult for the seller and a fungible replacement good is easily available to the buyer.[95] On another topic, he argues that an employer who hires an employee but then dismisses him before the job has even begun should normally be treated as having assumed responsibility for any reliance losses the employee suffers — for example, if the employee has given up his prior job or incurred significant moving expenses. Barnett's rationale is a straightforward economic one: employers usually have better information about the risk that the employee will not be needed, so employers will usually be the better risk bearer.[96] At other times, though, Barnett seems to view his theory as not requiring any explicit recourse to economic analysis. For example, he asserts that even if his consent theory is consistent with the dictates of economic efficiency, it is still superior because its outcomes can often be determined "without resorting to an explicit efficiency analysis."[97]

Even more troubling, on other occasions Barnett (like Fried) seems to believe that certain default rules are somehow inherent in the concepts employed by his theory and therefore do not require normative justification of any sort. As an example, consider Barnett's analysis of the undisclosed agency problem which arises when an agent *A* buys goods from a third party *T* and turns them over to his undisclosed principal *UP,* whereupon *UP* gives *A* money to pay *T* for the goods, but *A* becomes insolvent and *T* never receives his payment.[98] Barnett concludes that *T* can sue *UP* to collect his payment, even though this will make *UP* pay twice, once to the now-insolvent *A* and once to *T.* Barnett's argument is that the agency agreement between *UP* and *A* authorized *A* to transfer to *T* any of *UP*'s rights. Once *A* entered into the purchase agreement with *T,* then, the transfer to *T* of *UP*'s owner-

argument is clearly incorrect, for we cannot decide whether the seller is guilty of a breach until after we decide how to interpret the transaction. If the transaction is best interpreted as transferring the right to the specified good or to its equivalent in monetary damages, there is nothing "guilty" in the seller paying monetary damages instead of handing over the good.

95. Barnett, *supra* note 56, at 196 n.59 ("Where these circumstances can be shown to exist... it may no longer be safe to presume that sellers would have consented to specific relief."). Barnett would also refuse to allow specific performance in contracts for personal services. *See supra* note 64 and accompanying text. But this is because he believes people should not have the authority to limit their future freedom to this extent.

96. Barnett & Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations,* 15 HOFSTRA L. REV. 443, 478-80 (1987).

97. Barnett, *supra* note 92, at 1976.

98. *Id.* at 1984.

ship of the purchase price became an accomplished fact, and *UP* therefore had no right to resist *T*'s demand for payment.[99]

While this description of the transaction may be consistent with the rules of agency law, it in no way *justifies* or explains those rules. The problem is that Barnett never justifies his construction of the underlying agency agreement between *UP* and *A,* which he reads as empowering *A* to make an unconditional transfer of *UP*'s rights. At least as a matter of logic, that agency agreement could equally well be interpreted as giving *A* the more limited power to make a conditional transfer of *UP*'s rights (conditional on *A*'s not becoming insolvent), thereby putting the risk of *A*'s insolvency on *T* rather than on *UP.* Either arrangement is perfectly consistent with the principle of giving fair notice to *T,* as long as the legal rule is clear in advance so that *T* knows the degree of risk he is being asked to assume. To put the same point slightly differently, either rule would represent a perfectly "objective" interpretation of the agreement. To argue for one rule over the other, Barnett would have to point to some other reason — efficiency, existing expectations, etc. — to explain why it was better to put the risk of *A*'s insolvency on *UP* rather than on *T,* at least as a presumptive matter. He would then have to explain why the reason he selected (efficiency, or whatever) was the appropriate principle to look to in selecting a default rule.

In discussing a more complex problem of undisclosed agency law, Barnett does suggest an awareness of some of these difficulties. In a footnote, he states:

> Developing a consent theory's approach to construing contractual intent when parties are silent on an issue would require a lengthy and separate treatment. Such an effort would involve, among other topics: (1) a discussion of tacit versus expressed knowledge; (2) the presumption that the parties intended what most similarly situated parties would have intended ex ante, thus putting the onus on a minority of parties to express their dissent from the majority by an express term; and (3) the likely incentive effects of the principles of construction on the bargaining behavior of other parties.[100]

Other topics for discussion could easily be added to this list — for example, (4) the conditions under which transaction costs make it difficult for parties to vary the default rule by an express term to the contrary, and (5) the principle that ought to be used to select the default rule in those cases where whatever rule the law selects is likely to

99. *Id.* at 1984-85.

100. *Id.* at 1986 n.71.

remain in force for most parties.[101]

What Barnett does not seem to realize, however, is how little can be accomplished with respect to the content of the law's background rules until this "lengthy and separate treatment" has been completed. Without a theory of interpretation, the only guidance we are left with in selecting default rules is that the law should take an objective approach to interpretation. But to endorse an objective approach is merely to identify one factor — the secret, subjective intention of either party — which should *not* be used as a reason for preferring one rule over another. It says nothing about which factors *should* be considered. It thus leaves unresolved all the debates concerning the role of efficiency as a goal of contract law, or the extent to which contract law should be shaped by redistributional concerns or other values. Barnett may have rejected those values as inadequate explanations for the binding force of promises, but their role in the selection of default rules remains completely open.

CONCLUSION

Debates over the question of why promises are binding will no doubt continue to occupy the attention of philosophers and legal scholars. Such debates raise issues that are fundamental to western political thought — issues such as individual freedom versus collective control, economic efficiency versus non-economic values, or (more generally) consequentialist systems of ethics versus deontological ones. Any question that offers such a tempting array of topics will always be the subject of frequent visits by scholars, and the question of why promises are binding is no exception.

My thesis is that debates over the question of why promises are binding do much less than is commonly supposed to settle the role to be played by efficiency, non-economic values, or ethical theories generally in selecting contract law's background rules. More precisely, I have argued that certain answers to the question of why promises are binding do nothing to settle these larger issues. Theories that explain the binding force of promises by pointing to the value of individual freedom, or the obligation to tell the truth, may well be valid answers to the question of why promises are binding. But truth and freedom can usually be served equally well by any background rule, so some other value must be introduced to explain why any one rule ought to be chosen over any other. And when we ask *which* values ought to be

101. For a discussion of these issues from an economic perspective, see the articles cited *supra* in note 3.

introduced for this purpose, we thereby reopen the entire debate about the role of efficiency, non-economic values, and other ethical theories. Even if we have rejected any particular value as an explanation of why promises are binding in the first place, that does not settle the question of whether that value can or should be used in selecting a default rule.

In short, much of the current philosophical debate about the binding force of promises is simply irrelevant to contract law's choice of background rules. Legal philosophers who are interested in the content of contract law should direct their energies to this question, and not solely to the question of why promises ought to be binding.