Court Reviews

Courts and the Comparative Historical Method


Harold J. Berman

Professor Shapiro starts his book by saying that it has two purposes and therefore ought to have two prefaces. By the same token it ought to have two reviews.

One purpose of the book is to disprove certain commonly accepted propositions about courts and thus “to move toward a more general theory of the nature of judicial institutions.” The second purpose is to provide an introductory text in comparative law. Thus, the author seeks to enlist comparative law in support of legal theory and legal theory in support of comparative law.

The propositions challenged by Shapiro are four in number. Together, they are said to constitute the “conventional prototype” of courts: first, that courts are independent; second, that they decide cases on the basis of preexisting rules; third, that they operate by an adversary procedure in which one party wins and the other loses; and fourth, that justice requires that the losing party be given the right to appeal. Indeed, Professor Shapiro argues that not only the fourth proposition, but the first three as well, are commonly presented as requirements for doing justice and hence as means of inducing two parties in conflict to submit to adjudication by a third. His own analysis, on the other hand, as the subtitle suggests, is a “political” one. He contends that courts, as instruments of government, are politically dependent on the sovereign, make law as well as apply it,

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by no means restrict themselves exclusively to the adversary process, and provide for appeals not because of any requirement of justice but in order to permit the central political authority to maintain a uniform policy.

The author seeks to prove these points by the comparative method, which, as he states, is a substitute for the experimental method used in the natural sciences—"not a terribly satisfactory substitute but one pressed upon us by the impossibility of putting laws and nations in test tubes and bubble chambers." "The rationale of the book," he writes,

is simple. A number of propositions are offered. My own position toward each of the propositions is then tested against the ‘worst case,’ that is against the body of known legal phenomena most likely to falsify my position. The accumulated scholarship of comparative law is used as a catalogue for searching out these worst cases."

The proof that it is "incorrect, or at least incomplete and misleading," to say that courts are independent is drawn from English legal history. It is argued that if even in England, the country of maximum judicial independence, courts have always been subservient to the political sovereign, then the conventional prototype of courts as independent agencies is clearly erroneous. Similarly, proof that it is wrong to say that courts decide cases on the basis of preexisting legal norms is drawn from the history of continental European law ("the civil law system"). Again, this is postulated to be the "worst case" for the author's position. The "myth" that courts operate by adversary procedure, with one party winning all or nothing, is attacked on the basis of traditional Chinese law, which is generally thought to have sharply separated (adversarial) adjudication and (non-adversarial) mediation. In fact, Professor Shapiro argues, Chinese law wholly mixed the two. Finally, Professor Shapiro examines one of the few developed legal systems that does not provide for the right of appeal—the traditional Islamic system. He argues that the absence of that right does not stem from a lack of concern for justice or for satisfying the losing party but rather from a lack of concern for central political control over judicial decisions due to the absence of any central political or ecclesiastical authority.

Thus, comparative law—and more than that, comparative legal history—is enlisted in support of legal theory. This is an important contribution to the jurisprudential literature of our time, so much of which is written from the perspective of only one legal system. Even those who write about legal theory from a comparative perspective too often confine
themselves to Western legal systems. Professor Shapiro's book is of a genre that has been too much neglected since the writings of such men as Kohler, Ehrlich, and Pound.

A great difficulty, however, in such writings is to balance the breadth of the legal theories against the particularities of the individual legal systems that are being examined. Professor Shapiro's description of the "conventional prototype" of courts is an example of this difficulty. The propositions are so broad that they can as easily be proved as disproved. We may agree that it is misleading to say that courts are independent; but then again, it may be even more misleading to say that they are not. Likewise, it may be misleading to say that they decide on the basis of preexisting norms, but it may be even more misleading to say that they do not decide on the basis of preexisting norms. Indeed, much of Professor Shapiro's proof that courts are subservient to the sovereign political authority (and hence not independent) also supports the conclusion that they decide cases on the basis of legal norms previously declared by the political sovereign.

Similarly, it seems undeniable that there is an "inter-mix of conflict resolution, social control, and lawmaking in most courts," as well as a "frequent integration of judging with administrative or general political authority," so that "a substantial share of courts and judges seem to be engaging in politics." On the other hand, it seems equally undeniable that adjudication is different from running for office or lobbying or adopting a national budget. To say that judges make law is not to say that judges make statutes.

Professor Shapiro's alternative to the conventional prototype of courts, adumbrated in this book, is also framed so broadly that almost any model—even the one he attacks—can be fitted within it. Indeed, at one point the author himself suggests that even extreme formalism in adjudication, where it exists, also serves a "political" function. The trouble here is less with the word "law" than with the word "politics." By a shift in the meaning of that word, Clausewitz was able to show that war is not essentially different from peace.

The second purpose of the book is to enlist legal theory in support of comparative law. The author states that he intends to provide an introductory text that can be used in courses on comparative legal systems. The descriptions of the various systems are inevitably biased somewhat by the selective emphasis Professor Shapiro places on different aspects of the judicial process. Nevertheless, the four chapters on English, Continental European, Chinese, and Islamic law, respectively, constitute valuable

4. P. 63.
short summaries of the general secondary literature concerning adjudication in those legal systems.

It is somewhat paradoxical that Professor Shapiro has been able to use the conventional secondary literature—he disclaims resort to original sources, and does not venture very far beyond general treatises—as a basis for attack on the conventional prototype of courts. Here the chief difficulty lies with the conventional secondary literature. While I am not prepared to pass judgment on such literature in the fields of Chinese and Islamic legal history, I can say that reliance on the classic writings about English and Continental European legal history will inevitably result in profound misconceptions as to the nature of the legal systems they purport to portray. This is not to say that the authors of those classics themselves had mistaken conceptions, but only that they have presented the subject so selectively as to lead the unsuspecting general reader—who does not know what the authors chose to omit—into error. Most of the classic texts do not attempt to give a complete view of the legal history of any nation or group of nations. Their scope is generally restricted to those parts of the story that had significance for certain later developments. In short, legal history has not yet been written in a way that will support the kinds of insights that are demanded by contemporary political science.

Thus, in recounting the history of judicial institutions in England, Professor Shapiro states that ever since the Norman conquest there has been a "long-term English tendency toward extreme political centralization," and that the English courts were increasingly subjected to the political control, first of the king, and then of the king in Parliament. "The theory of the British constitution," he writes, "has always been one of complete, absolute, and unified sovereignty." From the twelfth to the sixteenth centuries there was, he asserts, a progressive increase in royal control over the judges. In the seventeenth century that control was shifted to Parliament. In the eighteenth and nineteenth centuries, to be sure, judges were given more freedom and more power (and hence could be said to be more independent). But in the twentieth century, England has become a socialist state in which most disputes are settled by some 2,000 administrative tribunals. Thus "no matter what the temporary victories of the nineteenth century, the English courts did not become independent in the seventeenth but merely exchanged a royal master for a Parliamentary one." And in the twentieth century, "the judges are again the faithful servants of the crown although the crown is now the cabinet and the bureaucracy rather than the king."

5. P. 66.
6. P. 112.
7. P. 113.

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This portrait of English legal history is presented in about fifty-five pages. The first twenty-five, devoted to the period from the eleventh to the sixteenth centuries, describe the origin and development of a royal judiciary, of jury trial, of the writ system, of the forms of action, and of equity. The creation of Star Chamber and other prerogative courts by the Tudor monarchy is seen as a natural extension of these earlier developments.

What is wrong with this picture? The answer lies less in what is presented than in what is omitted. One would suppose that the author is talking about the law by which the people of England were governed. In fact, he is talking almost exclusively about only one part of that law: the law applicable in the Courts of King's Bench and Common Pleas, called the English common law. From the twelfth through the sixteenth centuries, however, the people of England were also governed by various other kinds of law. Unfortunately, most of the standard writings on English legal history upon which Professor Shapiro relies are devoted largely to the English common law.

Thus Professor Shapiro can write, "[a]t least until the eighteenth century the central concern of English law was the land." What English law? The law applicable in the ecclesiastical courts? Certainly not. The law applicable in the English mercantile courts? Certainly not. And certainly not the law applicable in the English borough courts. As early as the thirteenth century there were approximately three hundred towns in England, each with its own urban government and urban courts. Nevertheless, urban law is not mentioned by Professor Shapiro, and it is treated only incidentally in most standard works on English legal history.

The existence prior to the sixteenth century in all countries of Western Christendom, including England, of plural concurrent jurisdictions and plural concurrent bodies of law is closely connected with the question of judicial independence. In fact, there was no possibility of "complete, absolute, and unified sovereignty" in England until Henry VIII declared himself to be supreme head of the church in 1535. Prior to that, the papal curia in Rome was the supreme court for English ecclesiastical causes, which included not only family questions and wills but also many types of crimes, contracts, property, and a host of other matters. Even apart from the church courts there were concurrent royal, feudal, urban, and mercantile jurisdictions. This competition among courts was both a foundation for, and a manifestation of, the principle that the king himself was subject to law, a principle affirmed repeatedly in those centuries not only in England but also in most other parts of Europe.

8. See pp. 387-88 infra.
9. P. 93.
The fact that royal jurisdiction in the formative era of English law, from the twelfth through the fifteenth centuries, was understood to be a limited jurisdiction acquired special significance in the seventeenth century, when that earlier history was invoked against the new royal absolutism of the Tudor-Stuart period. The English Revolution of 1640-1689 cannot be adequately described simply as a transfer of sovereignty from the crown to the Parliament. It is true that Parliament was then given, in theory, “complete, absolute, and unified sovereignty.” But that theory was linked with an accompanying theory of judicial independence. The latter theory was no more a “myth” than the former. And, in actual practice, the Bill of Rights of 1689 and other proclamations of the liberty of the subject were treated as fundamental law, binding on Parliament and judiciary alike.

Conventional legal historiography is equally inadequate, in my view, as support for the kinds of propositions Professor Shapiro seeks to establish concerning French, German, and Italian law. Here his attack is on the view that in “civil or Roman law systems,” judges decide cases according to rules set forth in codes. He starts with a brief account of the development of Roman law up to the time of the Byzantine Emperor Justinian, whose “code” was a vast “catalogue of specific solutions to specific problems.” He then turns to the rediscovery of Justinian’s texts in the West five centuries later. “No very satisfactory explanation for the enormous immediate appeal and rapid spread of the revived Roman law has been offered,” he states. (Incidentally, that is not true; but one would have to go much deeper into the historical literature than he has done in order to find such an explanation.) For whatever reasons, “the revived Roman law . . . provided the vocabulary and conceptual apparatus used in their daily work by [European] lawyers and judges.”

Professor Shapiro then jumps from the eleventh-century “revival” of Roman law to its “reception” in Germany, which he does not date, but which is usually attributed to the end of the fifteenth and the beginning of the sixteenth centuries. He states that, like the earlier “revival,” the later “reception” did not result in any formal enactment of the law contained in

10. P. 129.
11. P. 130.
12. Cf. Berman, The Origin of Western Legal Science, 90 HARV. L. REV. 894 (1977). The revival of Roman law in the late eleventh and twelfth centuries was closely connected with the revolutionary upheaval in the church, called at the time the Gregorian Reformation, which resulted in the establishment of ecclesiastical independence under the papacy, a dual ecclesiastical-secular jurisdiction, and the modern system of canon law.
13. P. 130.
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Justinian's texts but was "essentially a cultural and academic rather than a legislative movement."\textsuperscript{14}

With that, we are up to the later eighteenth century:

On the eve of the French Revolution the Roman law in Europe was not a code enacted by a sovereign legislator and applied by a judge. Instead, Roman law consisted of a body of academic commentary . . . . A judicial decision was not the result of applying a statutory rule but of finding a solution to a particular case compatible with the views of a learned legal community of which the judge was a member."\textsuperscript{15}

The author then turns to the French Civil Code of 1804 and the German Civil Code of 1900. The former is largely a set, not of rules, in the narrow sense, but of principles, or of "very general [rules] that must be explicated by legal learning."\textsuperscript{16} The latter is "not so much a complete and detailed set of laws as an incredibly elaborate textbook about law."\textsuperscript{17}

Against the background of this history, Professor Shapiro concludes that the style of Continental judicial opinions, which generally take the form of a direct commentary on and interpretation of the relevant code provisions, is misleading: "Almost invariably when a Continental judge purports to be drawing a series of definitions, doctrines, and conclusions from the code by logical exegesis, in reality he is acknowledging the body of legal doctrines built up around the bare words of the code by previous cases."\textsuperscript{18}

Thus the difference between the "civil or Roman law" system of continental Europe and the "Anglo-American" system, in which "law is made case by case by the judges themselves,"\textsuperscript{19} is found to be insubstantial. In neither system do the judges "consistently decide according to preexisting legal rules."\textsuperscript{20}

The word "consistently" introduces a material change in the argument. It suggests the possibility that in all the legal systems under consideration—the English, the American, the French, the German, the Italian, and others—courts are supposed to decide on the basis of preexisting rules to the extent that such rules do actually preexist and are applicable to the cases at hand. At the same time, however, they are supposed to decide on other grounds, including legal doctrines, basic principles, and accepted concepts of justice, if there are no preexisting rules that ought to be ap-

\textsuperscript{14} P. 132.
\textsuperscript{15} P. 133.
\textsuperscript{16} P. 134.
\textsuperscript{17} P. 135.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} P. 126.
\textsuperscript{20} \textit{Id.}

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plied. Further, in all the legal systems under consideration, judges often play a creative role in making law case by case; but that, too, implies the "pre-existence" of rules, doctrines, principles, and concepts, implicit in decided cases. After all, for a case to "make law" it must have a preexisting value for subsequent cases.

Professor Shapiro's history of the law of "Continental Europe" is confined largely to an account of the influence of Roman law or, more precisely, Romanist legal science. He only mentions the development of Germanic law in passing and says nothing of the development of the law of the Roman Catholic Church which, in fact, was the first modern legal system, built partly out of the vocabulary and concepts of the revived Roman law of the late eleventh and twelfth centuries. One is reminded of the great German journal of legal history, the *Savigny Zeitschrift*, which is divided into three parts: the Romanist division, the Germanist division, and the Canonist division, each with its own editorial board and, until recently, each published separately. In real life, of course, the same people lived under all three bodies of law; a German or Frenchman of, say, the sixteenth century, might have his rights as a merchant adjudicated under principles of Roman law, his rights as a tenant of land adjudicated under principles of Germanic or Frankish law, and his rights as an heir adjudicated under principles of canon law. A nineteenth-century law professor in the university, however, usually subscribed to—and perhaps wrote articles for—either the Romanist division or the Germanist division or the Canonist division of the *Savigny Zeitschrift*. In more recent times, much valuable work has been done to bring together Germanist and Romanist legal history. The missing link has been the history of canon law, especially in the period from the twelfth to the sixteenth century, when it served as a model or foil for all the various secular legal systems of the West.

Ultimately, Western legal historiography will have to overcome these antiquated divisions of perspective and achieve a new synthesis, before it can serve as an adequate basis for a political science, let alone a sociology, of law. Until that synthesis is achieved, books such as *Courts* will inevitably fall short of their goal.

21. See J. DAWSON, THE ORACLES OF THE LAW. This important work deals at far greater length with much of the same subject-matter as that dealt with by Professor Shapiro in his chapters on English and Continental European Law. Professor Shapiro has cited it but has not utilized its insights into the interweaving of Germanic and Romanist elements, especially in German and French law. Unfortunately, Professor Dawson, too, has neglected the influence of the canon law of the church on English legal history, especially in its formative period.

A Round Trip to Eire: Two Books on the Irish Constitution


Charles L. Black, Jr.†

From about a century before the birth of Dante until some sixty years ago, the Irish lived under a "constitution" so grotesque as hardly to rise to the tragic, though much tragedy was enacted under it—a "constitution" whose essence was the subjection of this sensitive and gifted people, prime carriers of European culture before England was England, to the kings and kingdom across the Irish Sea. That was a long time; one might have thought that authentic constitutionalism, so long postponed, would be slow to develop in Ireland after the rough justice of independence was finally attained in 1921. Not at all. These books, appearing nearly simultaneously in 1980, depict—in the realistic tones of concrete professionalism—a constitution live and healthy, questing beyond the structures of government into the field of human rights as subjects of constitutional law. An American must be proud that all of this, most especially in the human-rights component, shows here and there what O'Reilly and Redmond call in their Preface "[t]he persuasive authority in Irish law of the Supreme Court of the United States."¹

The O'Reilly and Redmond book is the first casebook on Ireland's constitutional law, with much clarifying commentary. Professor Kelly's book is an excellent systematic treatise. These works closely complement one another; together, they produce in the reader the impression, all too likely self-flattering, that he has learned a little something about the Irish constitution.

One senses in each of them that practical humaneness, that search for

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insight into the connections between constitutional law and the rest of life, that one finds in the best American writing on our own Constitution. One even begins to feel—without the great caution engendered by the knowledge that one is after all dealing with a legal system not one’s own—that these works might furnish many illuminating points of comparison in teaching American constitutional law. (Indeed, I am not going to promise that I shall never try that, for I am sure I would find the promise impossible to keep. When an Irish judge can shape his judgment explicitly around Mr. Justice Brennan’s opinion in *Abington School District v. Schempp*, what Karl Llewellyn called “reverse loadings” may be possible.)

It is natural that we should be most interested in the human-rights material presented in these works. Here the Irish material, to a significant degree, recapitulates our own strivings, though on a much shorter frame of time.

The Irish Constitution of 1922 “devoted . . . little space . . . [to human-rights material], . . . and . . . played almost no part in the maintenance of those rights.” Since the overwhelming majority of American Supreme Court holdings in support of human rights have been in respect of violations by the States, the analogy with our own pre-Fourteenth Amendment period is plain; indeed, even our national Bill of Rights produced little fruit before the Civil War. The broader and more general human-rights provisions that came with the 1937 Irish Constitution show no impressive early results; much the same can be said of our own post-Civil War amendments. In each system there set in at last an irresistible tendency toward rationalization and generalization of the human-rights material. It is interesting to compare the respective technical means found for the implementing of this tendency.

The most obvious available provision in the Constitution of Ireland is Article 40.3:

The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen . . . . The State shall, in particular, by its laws protect as best it may from unjust attack and, in case of injustice done, vindicate the life, person, good name, and property rights of every citizen.4

For nearly three decades the generalities in this section lay latent, but in

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1965, in *Ryan v. Attorney General*, the Irish Supreme Court stated that the section justified judicial review over a general range of human rights, whether or not explicitly named in the Constitution; a number of such rights have been recognized.

Again, the parallel with our own development is clear enough. The quest for a generalized law of human rights is indeed irresistible. It is ironic but revealing that in 1925 the ultra-conservative Justice McReynolds, for a unanimous Court, crossed decisively into the territory of the open-ended series of human rights. It is doubtful that any Justice on our Court since then has had a voting record that can be reconciled with rejection of the openness of this series. The parallelism of these two quests—ours and that of the Irish—is illustrated by the judgment of Mr. Justice Henchy in a contraception case wherein he approvingly discusses and in part follows *Griswold v. Connecticut*.

The thrust towards generalization of human-rights law has been irresistible, to us and to the Irish, because it is powered by the two most urgent motives for law. It expresses the foremost moral commitment of both nations, congenital to both, because the claim of each to existence and independence rested on human-rights doctrines. And it makes possible full rationality in the highest law—not the “because-it-says-so” rationality of limitation to accidental tags and scraps of specificity, nor yet the rationality of abstract “principle” impossible to form or to apply, but that working rationality of law that perpetually scrutinizes the likenesses and differences of solutions to which we are committed and new problems with which we are presented, standing perpetually ready to justify any difference in actions taken by pointing to a convincing difference—a difference that ought to make a difference—in the new problem.

The Irish have relied on their Article 40.3. Our own technical bases—“substantive due process” and “equal protection”—have so far been less satisfactory than theirs. “Substantive due process” is a paradox not made any less one by incantatory repetition; “equality” (except as against racial discrimination and any discrimination analogous thereto, wherein a pinch of rough history is worth a peck of philosophy) must be (given the fact that law is systematized inequality) a phrase that gives no push to-

5. [1965] I.R. 294 (Sup. Ct.).
6. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A companion case, decided at the same time and with the same opinion, sustained a parent’s right to send a child to military school. This latter is the more important case here, for no religious element entered, and there could thus be no slightest question of a tacit reliance on a right “named” in the First Amendment.
8. 381 U.S. 479 (1965).
ward resolution of any problem. It is one of the strangest puzzles in all legal history that our legal culture, searching for professionally sound means of legitimating the generalization of human-rights law, has never yet turned serious and sustained attention toward the text of our Ninth Amendment. From across the Atlantic, that Amendment was quite visible to Mr. Justice Walsh, in *McGee v. Attorney General*:

According to the preamble, the [Irish] people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. The development of the constitutional law of the United States of America is ample proof of this. There is a Constitution which, while not professing to be governed by the precepts of Christianity, also in the Ninth Amendment recognises the existence of rights other than those referred to expressly in it and its amendments.\(^\text{10}\)

How would one explain to Mr. Justice Walsh why it is that, in a country in quest of a legitimating base for rational development of a *corpus juris* of human rights, the Ninth Amendment is hardly mentioned in most casebooks in constitutional law?

When, someday, we decide at last to go about the task so plainly set us by the Ninth Amendment, there may be things to be learned from the Irish, as they have learned from us. For example, we might consider the saying of Justice Kenny in *Ryan v. Attorney General*.\(^\text{11}\) He intimates that a law ought to be struck down if "there is no reasonable proportion between the benefits which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."\(^\text{12}\) That one commitment would suffice to justify the results in *Griswold v. Connecticut*,\(^\text{13}\) *Moore v. City of East Cleveland*,\(^\text{14}\) *Pierce v.


\(^{12}\) Id. at 313, *J. O’REILLY & M. REDMOND* at 491.

\(^{13}\) 381 U.S. 479 (1965).

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_Society of Sisters,_15 _Frontiero v. Richardson,_16 _Skinner v. Oklahoma_,17 and many, many other cases over a vast range of fact patterns. I venture to say it would justify almost every affirmative "unnamed right" decision yet uttered in our Court; the few it would not justify are, indeed, suspect. If it had been accepted, the draft-card burning case18 would have been decided rightly.

This "gross disproportionality" criterion is, moreover, the least possible corollary to a practical, serious, and above all general attachment to "liberty." We seem to feel somehow obliged to persist in the absurd notion that the organic act creating our nation, and the language stating the purposes of its eventual organization, are to play no part in law, no part in helping us give concreteness to the generalities of the Ninth Amendment. We ought instead to see ourselves permanently committed to "liberty" as a cardinal value in law—outranking even such root-values as the so-called "sanctity" of contracts—by the Declaration of Independence and by the Preamble to our Constitution. Here is a beginning toward the task of law-finding that the Ninth Amendment both legitimates and commands.

Unlike the Irish, we have no _Pacem in Terris_ to underlie our law of human rights. But is it quite unthinkable that, in the fullness of development of our law, we should nevertheless come to see as fundamental, even in that law, the right "to the means which are necessary and suitable for the proper development of life . . . primarily food, clothing, shelter, rest, medical care, and finally the necessary social services"?19 That is not unthinkable at all, if the guarantee of a right such as "freedom of speech" implies the guarantee of a right to things without which "freedom of speech" means nothing, politically or intellectually. It is not unthinkable if the right to "the pursuit of happiness," passing into the Ninth Amendment, means not just the right to try to clamber out of a pool full of sharks with your hands tied behind your back, but the right to be vouchsafed those material things without which "the pursuit of happiness" very plainly cannot so much as begin.

Ours may seem bad times for thoughts like these. But thought must in such times prepare for better times. These are times for reordering of theory. Wrong theory can produce disastrously wrong corollaries in speech and thought. In talking of the public relief of poverty, the public redressing of grotesque economic imbalance, we have fallen into the

15. 268 U.S. 510 (1925).
17. 316 U.S. 535 (1942).
wrong way of appealing to "compassion." We ought to prepare ourselves for an insistent appeal to *justice*, the main business of the state.

Neither we nor the Irish have reached this point. *Pacem in Terris* may make it, for them, an acknowledged if not yet even a quite visible goal. But a thought of John XXIII, on the *rights*, the *entitlements*, of people as people, cannot be dismissed as preposterous, whether or not one is bound by its authority. And we can, when we are ready, reach the same point through the Ninth Amendment, informed by the Declaration and the Preamble. Readiness is all, at least for this century. Right now it is all we have. But, if we keep it, it will in the end be all we need.

I find that these books have caused me to think a little more about our own law, even as I was led to learn a little more about Ireland. I shall keep reading them.
Liberalism Without Foundations?


Gilbert Harman†

Here is an inspiring account of the perfectly liberal state, a state whose basis is not some prior conception of the good, we are told, but never-ending discussion, “neutral dialogue.” In this state, any exercise of power is subject to challenge and, if challenged, must be shown to be justified. Any challenged premises of a proposed justification must in turn be given a justification, which might then be challenged, and so on. Challenges must be principled in that they must appeal to some alternative justification for the distribution of power, and those alternative justifications are themselves subject to challenge. All proposed justifications, however, must be “neutral.” They may not rely on a privileged insight into the moral universe—that is, an insight not available to everyone. They may not assume that one conception of the good is intrinsically better than another conception of the good, and may not assume that some people are intrinsically superior to others.

Ackerman argues that many attempts to justify power relationships will fail to survive the challenge of neutral dialogue. For example, a utilitarian must confront the question why happiness, rather than (say) knowledge, should be taken as the ultimate good. A utilitarian justification of power relations is ruled out unless the utilitarian can give a neutral answer to this and similar challenges, and that seems unlikely.

It is natural to wonder whether any justification of power relationships could survive such a challenge. Ackerman’s interesting (but highly implausible) claim is that at least one sort of justification can survive. He argues that an equal distribution of power can be justified on the ground that because each person is at least as good as any other, each person is

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1. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8-12 (1981) [hereinafter cited by page number only].
2. Id.
3. Id.
4. Id.
5. P. 11.
entitled to at least as much (power, wealth, etc.) as any other person. This principle, he asserts, does not violate neutrality. It does not say that anyone is better than anyone else, only that each person is at least as good as anyone else. So, he concludes, there is a prima facie case for an equal distribution of resources in a liberal state.

According to Ackerman, then, liberalism leads to a commitment to egalitarianism. Yet Ackerman denies that liberal theory is premised on an assumption of egalitarianism. “Liberal theory,” he says, “does not begin with an ipse dixit on behalf of material equality; instead, it begins with a commitment to a process of constrained conversation.”

We shall see. First let us review Ackerman’s method and results.

Method

Ackerman’s method for bringing out the implications of such “conversation” is to consider how things would go in a highly idealized case and then to take up complications one at a time. So he begins by imagining a neutral dialogue among the inhabitants of a spaceship that is about to land on a new planet containing a single kind of valuable and highly adaptable resource, which he calls “manna.” The discussants are to propose principles for distributing this resource among themselves. There happens to be a “perfect technology of justice” available that will enforce the principles agreed upon; there are also methods of perfect communication, ways to select among messages sent in one’s direction, and ways to shield one person from another.

Ackerman discusses what might be the upshot of a dialogue concerned with a one-time distribution in these circumstances. He next considers questions that arise when the children of the original inhabitants of the planet reach the point at which they can participate in neutral dialogue. Those questions lead to an examination of genetic policy, principles of exchange, inheritance, and education.

8. P. 49.
10. Under the assumption of a “perfect technology of justice,” any substantive conclusion of a neutral dialogue can be implemented costlessly. The assumption serves “as a kind of conceptual sorter, discriminating between the problems that liberal theory must answer in all possible worlds where people struggle for power from those that arise only under one or another kind of imperfect technology of justice.” P. 22.
17. Pp. 139-67.
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So far the discussion is based on the ideal assumption of a perfect technology of justice. Ackerman goes on to consider the theory of the "second best" case, in which allowances must be made for what is feasible given actual technology. "Third best theory" would allow also for the compromises that must be made because of the existence in the actual world of entrenched power structures that cannot be defended on liberal grounds but that will not simply disappear once their illegitimacy (in that sense) is pointed out. Ackerman does not attempt in the present book to elaborate such a "third best theory."

Results

On this foundation, Ackerman builds an argument that the liberal state will have the following features: Its citizens are all those who can participate in liberal dialogue. Citizenship is restricted (for example, by immigration laws) only on "second best" grounds, that is, only if a restriction is needed to protect the very process of liberal conversation. The basic rights of the society are possessed by all citizens, and only by citizens. Animals have no rights; nor do unconceived or unborn people. Contraception and abortion are permitted.

Everyone begins life under conditions of material equality, an equality that applies both within and between generations. To the extent that it is technologically feasible, no one is "genetically dominated" by anyone else. Those, if any, who are genetically handicapped are compensated in such a way that they begin life with resources equal to those everyone else has. Everyone receives a liberal education that prepares him or her for a great range of possibilities. Everyone is able to exchange freely his or her entitlements within a "flexible transactional network." Everyone, at the moment of death, has fulfilled his or her obligations of "liberal trusteeship," passing on to the next generation a power structure no less liberal than the one he or she has enjoyed.

18. See note 10 supra.
22. P. 95.
24. P. 222.
27. Pp. 115-16.
Ackerman's vision is certainly inspiring. In fact, it seems too good to be true! Can all of this richly described society be the expected result of neutral dialogue? Can purely formal constraints yield such substantive conclusions? Can one really pull a rabbit out of an empty hat?

The answer, of course, is no. Purely formal constraints cannot by themselves suffice for a substantive conclusion. One cannot pull a rabbit out of an empty hat. If the hat is really empty to begin with, the rabbit has come from somewhere else (perhaps from under one's vest). On the other hand, if the rabbit really does come from the hat, the hat must not have been empty at the start.

**A Closer Look**

Let us take a closer look at Ackerman's argument. One crucial move occurs when he argues (A) that a view such as utilitarianism cannot be sustained in neutral dialogue because there is no way to offer a neutral defense of happiness, rather than something else (for example, knowledge), as a measure of goodness, but (B) that an egalitarian principle can be sustained on the ground that each person is "as good as" any other.

Why does Ackerman suppose an egalitarian principle can be sustained in this way? The answer, I think, is this. Someone might challenge the justification by contesting the claim that one person is just as good as another. But that would require the challenger to maintain that at least one person is better than another, a remark that is not allowed in neutral dialogue. Thus, under the neutrality constraint, the claim that one person is just as good as another cannot successfully be challenged.

But that is not the end of the matter. There is another way to challenge Ackerman's justification of egalitarianism, one that he appears to have overlooked. Why should we suppose that one person being just as good as another is a reason for the two having equal power? Why should we accept that view rather than, for example, the utilitarian view that power should be distributed so as to maximize happiness? Unless a neutral reason can be given for preferring egalitarianism to utilitarianism, Ackerman's egalitarianism does not, after all, survive the challenge of neutral dialogue, and indeed, it becomes quite unclear how any view could survive this challenge. The rabbit cannot come from an empty hat.

It might be suggested that one cannot appeal to utilitarianism to chal-

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challenge egalitarianism because a challenge can come only from a position that itself survives neutral dialogue, and utilitarianism does not. But this rejoinder will not do, for utilitarianism fails to survive only because it has no nonneutral way to meet the challenge of alternatives that themselves also do not survive. Moreover, we cannot rule out utilitarianism as a challenger on the ground that it has already been rejected by the time we have gotten to egalitarianism, because that ground could reflect nothing more than the order in which views have been considered. (I assume that Ackerman does not think we could defend utilitarianism simply by refusing to consider it until its competitors have ruled each other out in previous neutral dialogue, so that no competitor was left to challenge utilitarianism. If that assumption is correct, egalitarianism cannot be defended in that way either.)

Can the egalitarian say that one person’s being just “as good” as another is obviously a reason for the one to have as much as the other, a reason needing no further argument? On its face, that assertion would seem to violate neutrality. The egalitarian would be claiming to have a privileged insight into the moral universe. That would be so unless “as good as” simply means “as deserving as.” In that case, it would indeed be trivially true that, if one person is “as good” as another, the one deserves as much as the other; it would be true by definition. If that is so, however, to say that one person is “as good” as another would not be to give a reason for the one to have as much as another but would simply be to say that the one should have as much as the other. To offer this principle as a “reason” would simply be to beg the question against nonegalitarian views. And if this flat assertion really were licensed by the constraint on “neutral dialogue” then liberal theory would indeed “begin with an ipse dixit on behalf of material equality,” as a crucial part of its “commitment to a process of constrained conversation.”

A Related Problem

Ackerman points out that “second best theory” must allow for our imperfect technology. We do not have perfect shields; we cannot guarantee perfect transactional flexibility; we cannot offer everyone a perfect liberal education; and so on. Furthermore, he observes, committed liberals can honestly disagree about how much of society’s resources should be spent

34. Pp. 57-58, quoted at p. 398 supra.
35. Pp. 231-34.
on those various things. Any given distribution of resources, however, is subject to challenge by proponents of a different distribution. So, after all is said and done, there will remain differences of opinion that cannot be resolved by "neutral" dialogue. But then, by the reasoning that rules out utilitarianism, it would seem that all of the opinions must be rejected.

Surprisingly, Ackerman does not draw that conclusion. He argues instead that issues of distribution must be decided by majority vote. This argument appeals to certain advantages of majority vote over other methods of voting. But this argument offers no reply to the obvious challenge, by losers in the voting, that such issues should be directly decided in a certain specified way and not by any sort of voting at all. It is hard to see what response might be made to that challenge. So it would seem that the principle of majority vote cannot survive "neutral" dialogue.

It is puzzling that Ackerman does not see the problem here (if there really is a problem; perhaps I am overlooking something). He himself observes that someone might challenge his proposal that the specified issues should be decided by majority vote, with the competing proposal that they should be decided by a lottery. He says this challenge cannot be resolved by "neutral" dialogue. If that counterproposal cannot be dismissed, however, it would seem that neither proposal can serve as an adequate justification in Ackerman's framework for the power relationships they would give rise to. If so, "neutral" dialogue can offer no solution to the tradeoff problems that arise because of our imperfect technology of justice. In other words, it can offer no "theory of the second best" and is restricted to the theory of the ideal case.

Conclusion

You can't get something from nothing. Ackerman's liberal state has to have foundations after all. It cannot be constructed from purely neutral dialogue. The construction works only if participants in the dialogue are restricted to people who are already committed to certain substantive

36. P. 274.
38. On the basis of a theorem proved by K. O. May, Ackerman argues that majority rule is the only voting rule, or method of aggregating individual preferences, that can be justified by arguments that do not violate any conversational constraint. May proved that majority rule is the only decision procedure that satisfies four conditions: the "universal domain" condition, which requires that the decision procedure be complete; the "anonymity" condition, which requires that the decision procedure be indifferent to the identity of the proponents of any outcome; the "outcome indifference" condition, which requires that it be equally difficult for competing programs to be enacted as law; and the "positive responsiveness" condition, which requires that each citizen have the power to determine the outcome of tie votes prior to the counting of their own vote.

39. Non-aggregative decision procedures such as lotteries cannot fulfill May's "positive responsiveness" condition (because under such procedures tie votes never occur), but nevertheless be justified by arguments that do not violate conversational constraints.
views—egalitarianism, the principle of majority vote, and perhaps other things as well.

Ackerman's main argument fails. Even so, his book is important. It articulates a liberal political philosophy that offers a coherent alternative to utilitarianism, social contract theory, and libertarianism, the three large-scale views that seem currently to be receiving the most attention from political philosophers. Ackerman's liberalism is not the guaranteed consequence of a commitment to purely neutral dialogue, but it may be able to hold its own in the actual rough and tumble dialogue of the real world. Only time will tell.
A New Champion for the Will Theory


Anthony T. Kronman†

I

*Contract as Promise,*¹ Charles Fried's readable and provocative book on the philosophical foundations of contract law, has two attractive features. The first is its attention to legal detail. After setting out a general theory of promissory obligation, Fried discusses a number of specific topics in the law of contracts, including the doctrine of consideration, the rules of offer and acceptance, the consequences of mistake, the nature of duress and unconscionability, and the theory of conditions. The clarity with which Fried states his main thesis and the determination with which he pursues it through the labyrinth of contract doctrine give the impression that even the most technical corners of contract law may not be wholly without redeeming philosophical significance.

Fried makes a powerful case for the view that the law of contracts has a recognizable and distinctive intellectual integrity of its own. Whether he is right or wrong on this score, his book is a useful antidote to the still-prevailing realist skepticism that conceives contract law as a body of only loosely connected rules and principles defying philosophical (or any other) rationalization. "Contract law is complex, and it is easy to lose sight of its essential unity."² Beginning students will find Fried's unifying hypothesis helpful in organizing their thoughts; seasoned realists may be unpersuaded, but their convictions will be tested and their wits sharpened by his argument.

The second attractive feature of Fried's book is its undogmatic character. According to Fried, the life of contract is the promise principle, "that principle by which persons may impose on themselves obligations where

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none existed before." Fried's defense of the promise principle revives an older and now largely disfavored theory of contractual obligation, the so-called "will theory" of contract. However, unlike his nineteenth-century predecessors, Fried acknowledges that other, non-promissory principles—those centered around the notions of reliance, benefit and sharing—also play an important and legitimate role in the contractual domain. One of the central aims of his book is to show how these various non-promissory elements come into contract law without displacing the promise principle from its controlling position. In Fried's view, proponents of the classical will theory made the fatal mistake of attempting to prove too much. They assumed that the promise principle occupies an exclusive, rather than merely dominant position in the field of contract law, and must therefore provide the final explanation for every rule, down to its smallest doctrinal wrinkle. This assumption led, he claims, to "a far more rigid approach than the theory of contract as promise requires." By contrast, Fried's own ambition is to solve the "perennial conundrums" of contract law in ways that "accord with the idea of contract as promise and with decency and common sense as well." His appreciation of the limits of the promise principle and his unwillingness, beyond a certain point, to sacrifice plausibility for simplicity, give Fried's book added appeal and make his philosophical thesis easier to accept.

Fried begins by asserting that the promise principle is "the moral basis of contract law." A contract is an enforceable promise or set of promises, and whatever the legal consequences of his nonperformance, a person who has made a contract is morally obligated to keep it just because he has promised to do so. This obligation is self-imposed—it is one that the promisor voluntarily assumes by committing himself to behave in a certain way at some future time. According to Fried, neither the other party's reliance on his promise nor the benefit which the promisor himself realizes from the arrangement explains why he has a moral obligation to perform. A promisor is bound because he has promised, because he has said or done something that conventionally signals commitment, and although reliance and benefit may provide additional reasons for enforcing a promise they are not necessary conditions of promissory liability. "To enforce a promise as such is to make a defendant render a performance (or its money equivalent) just because he has promised that very thing."

Fried's defense of the promise principle is motivated by his strong com-
mitment to individualism. We must, he says, accept the promise principle in order to protect the "quintessentially individualist" domain of private contractual association from the incursion of principles "that are ineluctably collective in origin and thus readily turned to collective ends." Contract as Promise is, in fact, an anti-collectivist book in three distinct senses.

First, Fried opposes his own version of the will theory to the view (which he associates with Grant Gilmore and Patrick Atiyah) that contractual liability is based on reliance rather than promise and is therefore "a special case of tort liability." Tort law deals with the conflicts arising from involuntary transactions; as a consequence, "the role of the community in adjudicating [such] conflict[s] is particularly prominent." According to Fried, "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." In tort law, however, the will of the parties cannot be controlling; here, courts must of necessity take their cue from the "community's sense of fairness" and other collective standards. Consequently, according to Fried, the assimilation of contract to tort means "the subordination of a quintessentially individualist ground for obligation and form of social control" to a collectivist conception of liability—a result he considers morally objectionable.

A second form of collectivism, which Fried also opposes, derives from the view that "contractual relations establish ties of community between the parties," ties that "generate their own moral imperatives." According to this view, the parties to a contract are under a special duty to deal with each other in good faith and to act with a concern for one another's well-being, rather than pressing their individual advantage to the legally permitted limit. In Fried's judgment, this view (which he associates with his colleagues Duncan Kennedy and Roberto Unger) has tyrannical implications: if individuals are no longer free to define their own obligations to one another, however limited or extensive these obligations may be, but are forced, instead, to share their advantages and disappointments with others in a spirit of communal altruism, they are no longer autonomous persons. They become, instead, (in Rawls's phrase) "so many different

8. P. 5.
11. Id.
12. Id.
13. Id.
15. P. 76.
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lines along which rights and duties are to be assigned and scarce means of satisfaction allocated... so as to give the greatest fulfillment of wants.”

Fried rejects the suggestion that an “ethic of altruism” be forcibly imposed on contractual partners (although he commends sharing, both in contractual and other relationships, where it is voluntary in nature).

Finally, Contract as Promise is a brief against a third form of collectivism, one premised upon the claim that contract law is an appropriate vehicle for redistributing wealth in order to achieve a larger measure of justice in society as a whole. Fried is not opposed to forced redistribution per se—he believes that up to a point the state is justified in taking wealth from some and transferring it to others—but he argues that it is inefficient and immoral to manipulate the rules of contract law in order to achieve distributive goals.

I shall return to Fried’s attack on redistributionism later in this Review. First, however, I want to examine his general theory of promissory obligation, the theory that underlies his account of contractual liability and that provides the basis of his opposition to each of the collectivisms I have described. The soundness of Fried’s entire argument depends upon the adequacy of his answer to the question: Why is a person obliged to keep the promises he makes? There are, I think, reasons to be dissatisfied with the answer he gives.

II

Although the subject of his book is contract law, Fried begins with a more general topic: the nature and source of promissory obligation. Why does a promise bind his maker? What is the basis of the promisor’s moral duty, in the absence of excusing conditions, to keep his promise? According to Fried, a promise has an independent moral force that cannot be explained by, or reduced to, non-promissory elements like reliance (on the part of the promisee) or benefit (to the promisor). To show this, he separates these various possible grounds of obligation—reliance, benefit and promise—and examines the moral significance of each in isolation. Imagine, first, a situation in which there is reliance without any accompanying benefit to the party being relied upon or any promise by him to the one who has acted in reliance: I move in to the apartment next to yours because I enjoy listening to you practice with the other members of your string quartet and after some time, you decide to hold your practice sessions elsewhere. Although I am disappointed by your decision, I have no grounds for complaint and certainly none for compensation. If you did not

17. P. 106.
promise that you would continue to practice in your apartment you do me no wrong, no moral wrong, by upsetting my expectations. This case demonstrates that reliance alone gives rise to no obligation, legal or moral; before it can, it must be supplemented either by a promise or the failure to observe some socially recognized standard of due care.

Similarly, according to Fried, the bare fact of benefit is not sufficient, by itself, to make the benefitted party morally or legally liable to compensate the person from whom he has received the benefit. If, unrequested, you play a Beethoven sonata under my window and then present me with a bill, I have no obligation to pay you even though I have been greatly pleased by the concert and you had reason to know that I would be. Again, only if I have promised to pay (or have in some other way encouraged the belief that you would be paid) do I have a duty to compensate you for the benefit I have received.

What do these examples demonstrate? At most, they show that neither benefit nor reliance is a sufficient basis of liability. In the absence of an accompanying promise (or duty to observe a prescribed standard of care), neither element gives rise to any obligation, even a moral obligation, to make compensation. This much seems unobjectionable. The difficult case, however, is one in which there has been a promise but no reliance or benefit. Suppose I promise to deliver a ton of wheat to you next week and you promise to pay me $100 when I do. Before you have done anything in reliance on my promise and before I have reaped the benefits of our contractual arrangement, I tell you that I have no intention of performing. In breaking my promise, do I violate a moral duty even though you have not relied and I have not been benefitted? Fried's answer to this question is an emphatic yes. According to Fried, my promise, standing alone, is a sufficient ground of liability even though it is not accompanied by either of these other two elements. This does not follow, however, merely from the fact that reliance and benefit are not themselves sufficient bases of liability. If either reliance or benefit is a necessary condition of liability, then a bare promise cannot be a sufficient condition since it will have to be accompanied by one of these other two elements for liability to exist. At the very least, an independent argument of some sort is needed to show the sufficiency of promise as a ground of obligation.

Fried does offer such an argument and I shall examine it in a moment. First, however, it should be noted that whatever the philosophical merits of his argument, Fried's basic position lacks intuitive appeal. When we consider a case of pure promise, a case in which every vestige of reliance has been stripped away so that nothing but the promise remains, our intuitions flicker and fail to provide any clear support for the view Fried
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defends. Only where there has been reliance on the promise do our intuitions incline us strongly in the direction of enforcement.

To see this, consider more closely the case I described a moment ago. Suppose that after being told I no longer intend to deliver the wheat, you make a substitute purchase in the market for $125, the price of wheat having increased in the period following our original agreement. In addition, it costs you $5 (in telephone calls, brokerage fees, etc.) to arrange a substitute transaction. You then sue me for damages. How much are you entitled to recover, on the assumption that I am in breach? Clearly, $30: this is the amount needed to put you in the position you would have been in had I performed. But although the $30 represents compensation for what is usually called your lost expectation (the advantage of a favorable executory contract) in one rather obvious sense it is really your reliance interest that is being protected—here just as much as in cases like Security Stove v. American Ry. Express Co. that distinguish the plaintiff's reliance from his expectancy.18 You have been harmed by your reliance on my promise to deliver the wheat for $100; if I had not made such a promise, you would presumably have made another contract on similar terms with someone else, before the market price of wheat had risen. You are required to go back into the market and make a substitute contract at an advanced price only because you relied on my promise to perform. In short, the harm suffered here is a reliance injury—as it is in every broken contract. Consequently, if we assume that you have not been harmed in any way by your reliance on my promise to deliver the wheat, we must assume that you have not been damaged at all—that you can costlessly arrange a substitute contract at an identical price. But if that is so, your damages will be zero even if I admit the wrongfulness of my breach. Put differently, if I make a promise to you and then renege before there has been any reliance on your part, I may have wronged you in some abstract sense but I have not harmed you in a way that requires compensation. And if I owe you no duty of compensation, it makes little sense to say that my promise, by itself, is a sufficient basis of liability. Liability for what? Perhaps Fried would favor an award of punitive damages where there has been no reliance, but there is little intuitive (and even less legal) support for such a position. If anything, our intuitions support the view that a promisor should be made to "render a performance (or its money equivalent)" only where his promise is accompanied by some reliance—even if it is hidden or non-quantifiable—on the part of the promisee.19

18. 227 Mo. App. 175, 51 S.W.2d 572 (1932) (plaintiff awarded reliance, but not expectancy damages, in action against railroad for failure to transport experimental furnace to exhibition).
19. One might object that if this is so it is difficult to explain why we measure damages by the
Fried’s philosophical defense of the promise principle is likewise unconvincing. His argument, which rests upon a position known as conventionalism, begs the very question it is meant to answer. According to Fried, [t]he invocation of benefit and reliance are attempts to explain the force of a promise in terms of two of its most usual effects, but the attempts fail because these effects depend on the prior assumption of the force of the commitment. The way out of the puzzle is to recognize the bootstrap quality of the argument: To have force in a particular case promises must be assumed to have force generally. Once that general assumption is made, the effects we intentionally produce by a particular promise may be morally attributed to us. This recognition is not as paradoxical as its abstract statement here may make it seem. It lies, after all, behind every conventional structure: games, institutions and practices, and most important, language.

The convention of promising makes it possible for me to commit myself to a future course of conduct and for others to count on my behaving in the promised way. This not only facilitates mutually beneficial exchanges over time; in Fried’s view, it also increases my own freedom. “In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.” And while it is true that promising restricts the promisor, the restriction, according to Fried, is self-imposed “just in order to increase one’s options in the long run, and thus [is] perfectly consistent with the principle of autonomy—consistent with a respect for one’s own autonomy and the autonomy of others.” Fried claims that in order to commit myself in this way, to put “my future performance into your hands,” all that is required is a convention for signalling commitment, a device “which we both invoke, which you know I am invoking when I invoke it, which I know that you know I am invoking, and so on.”

Fried’s argument amounts to this: the institution or convention of promising is a kind of game, the purpose of which is to increase individual

promisee’s expectancy rather than his out-of-pocket reliance losses where both are calculable and the latter amount is the smaller of the two. The answer is that the promisee’s reliance will often be equal to his expectancy, and where it is not, can rarely be measured with the precision this objection assumes. If it could, a rule requiring compensation only for out-of-pocket losses would be both fair and efficient, and would have considerable intuitive appeal. Given these difficulties of calculation, however, a rule which in effect sets the promisee’s reliance loss equal to his expectancy is preferable on administrative grounds and because it shifts the risk of miscalculation to the party in breach.

23. Id.
freedom and facilitate exchange. A specific promise—my promise to deliver wheat to you next week—is a move within this game and is governed by the game's rules. One of the rules (indeed the central rule) in the game of promising is that a promise has independent moral force and creates an obligation to behave in a certain way even in the absence of reliance or benefit.

In assessing Fried's theory of promissory obligation, it is helpful to begin by distinguishing between justifications or explanations which attempt to provide support for a convention and those which are intended to justify particular moves within the convention itself. It may be that within the convention of promising, the obligation to keep a promise is deemed to arise from the promise itself, whether or not there has been any benefit to the promisor or reliance by the promisee. If this is in fact the case, the sufficiency of promise as a ground of liability will be one of the basic rules in the game of promising. It does not follow, however, that the game as a whole—the institution of promising—can be explained or justified without invoking one of these other elements, in particular the concept of reliance. There may be perfectly good reasons of an administrative sort for enforcing individual promises even where there has been no demonstrable reliance on the part of the promisee (perhaps one believes that in most cases of this sort there has been some reliance although it is difficult to prove). The adoption of what might be called a no-reliance rule of promissory liability is, however, entirely compatible with the view that the purpose of promising as an institution is to encourage individuals to rely on one another and that it does so by protecting their reliance interest (broadly construed to include their expectancy as well). Put differently, one may think that particular promises should be enforced whether or not there has been any reliance on the part of the promisee, but believe that promise-keeping is in general a moral or legal duty only because it is wrong to encourage the reliance of others and then disappoint their expectations. The former is a rule within the convention of promising, the latter a view about its point or purpose.

Fried's own account of the institution of promising places heavy emphasis on the notion of trust, which is closely related to the concept of reliance. According to Fried, the purpose of promising is twofold: to expand the field of individual freedom and to promote "a general regime of trust and confidence in promises" that is "deeper than and independent of the social utility it permits." Promising, in his view, is "a device that free, moral individuals have fashioned on the premise of mutual trust, and

25. P. 17.
which gathers its moral force from that premise."\textsuperscript{26} After having argued so vigorously against a reliance-based conception of promissory liability, it is striking that Fried grounds the institution of promise-making in the related notion of trust, basing his own argument on considerations that seem to support a two-level view of the sort just described.

Perhaps because he is aware of the potential inconsistency between his rejection of all reliance-based theories of contractual obligation and his own emphasis on the importance of trust, Fried makes a strenuous effort to associate trust with the concept of personal autonomy, a concept he elaborates in abstract moral terms and without any reference to reliance. According to Fried, one violates another's autonomy, uses him in a way inconsistent with his status as a moral person, by making a promise and then inexcusably failing to keep it. This general claim is, however, perfectly compatible with the view that reliance is a necessary condition of promissory liability. It is undoubtedly wrong for a promisor to disappoint the legitimate expectations of his promisee by failing to keep his promise just because he finds it more convenient to do so. But what are the promisee's legitimate expectations? May the promisee rightfully expect the promisor to keep his promise even where the promisee has not relied and the promisor will be inconvenienced by performance? Perhaps I am only entitled to trust others not to encourage my reliance on promises they subsequently refuse to keep. This is a perfectly defensible position and Fried offers no reasons for construing trust, and the duty of promise-keeping based upon it, in any other way.

His invocation of the Kantian injunction against using other persons as means for promoting our own welfare adds little to Fried's argument. Is it clear that I use another person, in a way inconsistent with his moral status, by failing to keep a promise on which he has not relied? Or is he using me in an impermissible fashion if he insists that I have a duty to keep my promise, instead of recognizing that under the circumstances he owes me a "duty of release"?\textsuperscript{27} Granted that it is in general wrong to use another person, it can plausibly be argued that my obligation not to use you is founded upon your reliance; indeed, it would be perfectly possible to construct a reliance-based theory of promissory obligation on the general Kantian principle of respect for persons that Fried invokes.

The concept of individual freedom, which Fried also emphasizes in his account of the moral foundations of promising, is similarly inconclusive. Even if we assume that "the restrictions involved in promising are restrictions undertaken just in order to increase one's options in the long run" (a

\textsuperscript{26} Id.

\textsuperscript{27} I owe this point to Jerry Mashaw.
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claim that raises what Fried himself calls "deep and difficult" problems concerning the temporal continuity of the self and the identify of persons), there does not appear to be any reason for thinking that a strict, no-reliance rule of promissory liability is more likely to promote individual freedom than a rule that recognizes a duty to keep one's promises only where there has been some reliance on the part of the promisee. In the absence of any reliance, the freedom of the promisor can be increased by permitting him to rescind his earlier promise—at no cost to the promisee. Does this nevertheless diminish the promisee's freedom or compromise his autonomy? Not obviously: like trust and respect, freedom is an indeterminate concept and can be interpreted in various ways, not all of which are inconsistent with the view Fried wishes to reject, the view that reliance is a necessary condition of promissory liability.

In sum, Fried's conventionalist argument fails to show that the institution of promising rests upon a belief in the sufficiency of promise as a ground of moral obligation. Whether it makes sense, within the convention of promising, to enforce all promises regardless of the promisee's reliance is, I reiterate, an entirely different question. However, an affirmative answer to this question is almost certain to turn upon considerations of administrative convenience rather than moral principle and thus cannot provide the ethical foundation for the promise principle that Fried seeks. The promise principle is not supported by our intuitions, and Fried's philosophical defense of it has, as he himself acknowledges, a "bootstrap" and therefore question-begging quality.

III

Not all promises are contracts. Some promises—indeed, a significant number of those we make in the ordinary course of living—are not legally enforceable; although we may have a moral obligation to keep such promises, no legal sanction attaches to their breach. Why are only some promises contracts and what determines which promises are singled out for legal enforcement? Any comprehensive theory of contract law must have an answer to this question. In the Anglo-American law of contracts, the same question has traditionally been put in different and seemingly more specific terms: which promises are supported by consideration, and which are purely gratuitous and hence legally unenforceable? The doctrine of consideration is the main intellectual tool with which lawyers in the common-law tradition have attempted to delimit the bounds of the legally enforceable within the wider domain of promissory obligation.

28. P. 14. Fried promises to address this problem later in the book but, so far as I can determine, never returns to it.
Fried devotes a chapter to the doctrine of consideration and it is here that a reader must look for his explanation of the obvious but puzzling fact that not all morally binding promises are contracts underwritten by the authoritarian powers of the state.

Fried's discussion of the consideration doctrine is sharply critical. The criticisms he offers, however, are of two different sorts—one normative, the other positive—and it is never entirely clear which of them he means to emphasize or what he conceives the relationship between them to be. For the most part, Fried uses his own concept of promissory obligation to criticize the consideration doctrine on moral grounds and to dramatize its alleged irrationalities. He also implies, however, that the promise principle best explains the evolving content of contract law and is to be preferred to the consideration doctrine on this basis as well. The latter, positivistic use of the promise principle is more pronounced elsewhere in the book (for example, in his chapter on offer and acceptance); even in his discussion of the consideration doctrine, however, Fried combines his attack on the doctrine's moral foundations with an implied criticism of its descriptive adequacy. This combination of normative and positive elements explains, perhaps, the curiously qualified conclusion that he reaches:

I conclude that the life of contract is indeed promise, but this conclusion is *not exactly* a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis [as a descriptive principle? a normative ideal?] for the force of contracts, while still treating promises as necessary to it.29

Fried's normative criticisms of the consideration doctrine are based upon his belief that it imposes "substantial if random restrictions on perfectly rational projects."30 What ought to matter, according to Fried, is the freedom with which a promise is made, not whether it is part of a bargain or exchange of economic values. By limiting the class of enforceable arrangements to bargains, the doctrine of consideration "holds that individual self-determination is not a sufficient ground of legal obligation, and so implies that collective policies may after all override individual judgments, frustrating the projects of promisees after the fact and the potential projects of promisors."31 As an alternative, Fried endorses what he calls "the liberal principle that the free arrangements of rational persons

30. P. 35.
31. *Id.*
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should be respected.” This excludes, of course, unfee or coerced arrangements and those of irrational persons such as children or the mentally incompetent. There is, however, according to Fried, no good reason for imposing the additional requirement that a promise be supported by consideration before it can be enforced at law.

Despite his antipathy to the doctrine of consideration, Fried stops short of suggesting that all promises be legally enforceable—wisely, since such a proposal would undoubtedly strike most of his readers as either pointless or impractical, and in any case unwarranted by even the most stringent conception of promissory obligation. According to Fried, for a promise to be enforceable it “must be freely made and not unfair” and in addition “[t]he promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised.” A footnote makes it clear that this last qualification is meant to deal with the problem of the so-called “social promise”—the invitation to dinner, the promise to take a walk, the agreement to visit an ailing friend in the hospital—which no one intends to be legally enforceable. These promises may give rise to a moral obligation on the part of the promisor but absent very special circumstances they do not create a corresponding legal duty. Traditionally, this has been explained by appeal to the doctrine of consideration: social promises are gratuitous and therefore legally unenforceable. Fried’s theory of promissory obligation bars him from explaining the unenforceability of social promises in this way; instead, he attempts to do so by appealing to the intentions of the parties. If A and B intend to create a legally binding relationship, their intention should be given effect (so long as their agreement is fair and fair); similarly, if they intend their relationship, whatever its moral implications, to have no legal consequences, this, too, should be recognized and respected. Thus, the decision as to which promises are contracts is left to the parties themselves, a result that is entirely consistent with Fried’s general belief that individual self-determination is the ground of all promissory obligation.

There is, however, a problem with Fried’s (very brief) explanation of the unenforceability of social promises, a problem that points to a more serious defect in his theory of contractual obligation. Fried himself acknowledges that in particular cases it may be difficult to determine whether the parties to an agreement actually intended that it have legal consequences, although he dismisses this as simply a “problem of inter-

32. Id.
33. P. 38.
34. Id.
pretation." What is striking about this interpretive difficulty, however, is that it cannot be solved by appeal to the actual intentions of the parties. Instead, to solve the difficulty, it is necessary to construct a hypothetical agreement. This is a familiar technique; it is the one which must necessarily be employed whenever a court is called upon to fill a gap in an existing contract. But it is also a technique that must be used to determine which promises are contracts, so long as one accepts Fried's suggestion that this question is to be decided by reference to the intentions of the parties. And even if the actual intent of the parties is always to be given legal effect, it will still be necessary to devise baseline rules of enforceability or nonenforceability to deal with different kinds or classes of promises. These rules themselves require the construction of hypothetical agreements of the sort I have described.

I emphasize this point for the following reason. Early in his book, Fried asserts that considerations of self-interest or utility cannot "supply the moral basis of my obligation to keep a promise"; in Fried's view, my obligation to do so rests solely on the fact that I have made a promise in some conventionally recognized form. Considerations of self-interest and utility are sure to play an important role in the construction of hypothetical agreements, however, since agreements of this sort are meant to express what it is, or would have been, rational for the parties to want. This is something that cannot be determined on the basis of the promise principle alone. Consequently, to the extent that the legal enforceability of a promise depends upon the intention of the parties and this in turn requires—at a minimum—the construction of presumptive baseline rules that reflect what the parties might rationally expect and intend under various circumstances, considerations of utility and self-interest will be important in deciding which promises are legally enforceable contracts. Fried acknowledges that considerations of this sort and other, non-promissory elements play a role within the domain of contract law; what he is less willing to acknowledge—perhaps because it would challenge his general theory of contractual obligation—is the extent to which they also help to define the boundaries or limits of this domain itself.

IV

Fried's defense of the promise principle is motivated not only by an intellectual desire to clarify the special character of contractual liability, but also by his powerful commitment to individualism and his belief that the sphere of private contractual association should be one in which indi-

35. Id.
36. P. 15.
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Individuals are permitted to pursue their own plans and projects unburdened by an overriding, positive duty to promote general social goals. Unlike certain libertarians, Fried does not deny that there are collective duties of sharing and support to which each of us is subject, independently of our voluntary engagements with others; what he does deny is that a person’s contractual opportunities and obligations—the kinds of contracts he may make and the terms on which he may make them—should be determined by these same duties and the collectivist ideals they reflect.

Fried’s anti-collectivism leads him to reject a number of currently fashionable positions in contract scholarship—the assimilation of contract to tort, the elevation of altruistic sharing to an enforceable duty, and the recommendation that contract law be used as an instrument of distributive justice, as a device for achieving a fairer distribution of resources in society as a whole. Each view, and Fried’s criticism of it, raises special problems. I shall discuss only the last—the appropriateness of using contract law as an instrument of distributive justice—since this is a position I myself have defended and for which Fried takes me to task.

Many rules of contract law are concerned with what is sometimes called “policing the bargain.” These rules, traditionally grouped together in the doctrinal trilogy of fraud, duress and unconscionability, seek to distinguish between permissible and impermissible forms of advantage-taking in the exchange process—between those types of exploitation that are thought to undermine the basic voluntariness of an agreement and those that are considered legitimate expressions of the self-interestedness which motivates people to make contracts in the first place. In a recent article in the Yale Law Journal, I claimed that seemingly neutral rules which purport merely to define the limits of permissible advantage-taking in the exchange process actually have a distributional effect insofar as they determine the conditions under which various valuable advantages may or may not be exploited by their possessors, and I argued that these same rules ought to be evaluated by the fairness of the distributional pattern they create. I concluded that rules of this sort should be designed, by courts and legislatures, with a view to their distributional consequences—that they should be framed, modified or abandoned in a deliberate effort to promote distributive justice. While Fried acknowledges that rules respecting the use of force and fraud in the exchange process are likely to have distributive effects, he denied that “redistributive aims lie behind” the judgments these rules represent. Indeed it is a nonsequitur,” Fried asserts, “to argue that because the use of force and fraud

37. See pp. 5, 83.
39. P. 76.
may confer advantages in bargaining, therefore the general purpose behind condemning them is to achieve some desired balance of advantage between contracting parties (or indeed between all citizens).”

Fried begin his attack on my redistributivist position by considering the well-known case of *Obde v. Schlemeyer.* In *Obde*, the owner of a house sold it, failing to disclose that the house was infested with termites although he knew it was. Even though the owner had done nothing to conceal the infestation, the contract of sale was declared unenforceable on the ground that the buyer had been defrauded by the owner’s failure to disclose. Fried notes that if, contrary to the actual facts of the case, the seller had lied to the buyer (by telling him, for example, that the house was free of termites when he knew it was not), the seller would have had no right to enforce the contract. He explains this on the grounds that lying is wrong, that it is a morally impermissible “way of procuring an advantage” over another. According to Fried, “the capacity to form true and rational judgments and to act on them is the heart of moral personality and the basis of a person’s claim to respect as a moral being. A liar seeks to accomplish his purpose by creating a false belief in his interlocutor, and so he may be said to do harm by touching the mind, as an assailant does harm by laying hands on his victim’s body.” Fried’s moralistic explanation is appealing, but can it be extended beyond what he himself calls the “easy case” of deliberate lying? More specifically, does it tell us how *Obde* itself should have been decided?

Fried raises this question himself, but instead of answering it directly, he puts another case to the reader. Suppose, he says, that

[a]n oil company has made extensive geological surveys seeking to identify possible oil and gas reserves. These surveys are extremely expensive. Having identified one promising site, the oil company (acting through a broker) buys a large tract of land from its prosperous farmer owner, revealing nothing about its survey, its purposes, or even its identity. The price paid is the going price for farmland of that quality in that region.

Should the farmer, upon discovering the real value of the land, be held to his promise, or should he be excused (as the buyer was in *Obde*) on the grounds that the other party owed him a duty of disclosure? According to Fried, each case involves a unilateral mistake, and where one party to a

40. *Id.*
41. 56 Wash. 2d 449, 353 P.2d 672 (1960).
42. P. 78.
43. *Id.*
44. P. 79.
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contract has given his agreement only because he has made a mistake of some sort, the mistaken party—the buyer in Obde or the farmer-seller in Fried's hypothetical—cannot be said to have assumed a promissory obligation: the duty to keep a promise “does not take hold where the promisor has not knowingly undertaken that obligation.” 45 It does not follow, however, that a unilateral mistake necessarily renders a contract unenforceable; in Fried's view, the occurrence of such a mistake represents what he calls “a contractual accident,” 46 the risk of which, like any other accident, must be allocated on the basis of non-promissory considerations. “In every mistake case,” Fried claims, “no promise but the competing equities must be used to resolve the inevitable dilemma caused by a contractual accident.” 7 He then characterizes Obde as a case in which the party seeking enforcement of the contract (the seller) not only knew of the other party's mistake but “helped to create it,” and asserts that “[w]here one of the parties causes the accident . . . the equities quite clearly do not favor him” (apparently concluding that Obde was correctly decided). 48 This last step in the argument is unconvincing, however. Is the seller in Obde any more the cause of his buyer's mistake than the oil company is the cause of the farmer's error? In both cases the mistake could have been corrected by a disclosure of the relevant information, and in neither case was the mistake the product of an outright lie: it makes as much sense, in my view, to say that the mistake was equally caused or uncaused in each case, but not caused in one and merely exploited in the other.

At this point, Fried's argument becomes somewhat difficult to follow. As we have just seen, he denies that the buyer in his hypothetical case was causally responsible for the seller's mistake concerning the value of his own property. Consequently, the buyer (unlike the seller in Obde) cannot be said to have forfeited his equitable claim “to enforce an imperfect deal.” 49 Nevertheless, there is a lack of genuine (i.e., knowing) agreement on the seller's part and according to Fried, an “imperfect agreement should not be enforced unless there is some equitable ground for enforcing it.” 50 This implies that the contract in his hypothetical example should not be enforced either, although for different reasons than those justifying nonenforcement in Obde. But Fried recognizes that “we are little inclined . . . to deny the oil company the fruits of its bargain,” and points out that “the law would generally hold for the oil company” in a case such as he

45. P. 81.
46. Id. See also pp. 69-73 (allocation of risks between parties when circumstances arise that were not contemplated at time of contract).
47. P. 81.
48. Id.
49. Id.
50. Pp. 81-82.
has described.51 "What lurking equity," he asks, "favors making a bargain for the oil company, though . . . no true agreement exists?"52

In answering his own question, Fried once again appeals to the notion of a convention: "where the better-informed party cannot compensate for the other's defects without depriving himself of an advantage on which he is conventionally entitled to count, his failure to disclose will not cause the equities to tilt against him."53 Who the equities favor in any particular case must therefore be determined by the set of "general background understandings"54 that specify which forms of advantage-taking are permissible and which are not. Fried does not tell us whether a conventionalist approach of this sort ultimately supports the farmer or the oil company—both may be able to appeal to (conflicting) background understandings to support their positions—but he seems sure that this approach, in general terms at least, is the right one.

In Fried's view, then, the line between acceptable and unacceptable forms of advantage-taking has to be drawn by referring to the background conventions that explicitly or implicitly shape the parties' expectations. This approach must be adopted, he claims, if the "past reasonable expectations"55 of the parties are to be protected; by contrast, the deliberate use of contract law to promote distributive ends is certain, in Fried's view, to frustrate these same expectations—a result he considers both unfair and inefficient.

This conventionalist argument is the heart of Fried's attack on the view that contract law may properly be used as an instrument of distributive justice; unfortunately, it does not prove what he wishes it to. The conventions that define the "past reasonable expectations" of the parties to a particular contract are, to a significant degree, the result of judicial decisions and legislative enactments. Fried himself recognizes that the relevant background conventions include those "established prospectively or gradually by courts,"56 so that the legitimate expectations of contracting parties must be defined, at least in part, by reference to judicially formulated rules specifying the permissible forms of advantage-taking in contractual relationships (the extent of a party's duty to disclose, the meaning of duress, the special rules governing fiduciary relationships, and so on). He also acknowledges that in formulating such rules, a court may, among other things, take distributive considerations into account and adopt one rule rather than another for the purpose of achieving what it believes to

51. P. 82.
52. Id.
53. P. 83.
54. P. 82.
55. P. 83.
56. P. 84.
be a legitimate and desired distributive goal. But if that is so, then the pursuit of this goal will be part of the "past reasonable expectations" of the parties to every contract governed by the rule in the sense that they can expect their particular transaction to be carried out within a framework of norms which, among other things, is designed to promote certain distributional ends.

Fried does not object to legal rules being selected on the basis of their distributive consequences; indeed, all that his conventionalism requires is that particular cases not be decided for ad hoc distributional reasons—giving the nod to the plaintiff in one case because he is poor and holding for the defendant in the next for the same reason—since this would violate the parties' right to have their dispute resolved in accordance with established conventions. In Fried's view, distributive ends may only be pursued through the establishment of general conventions; by doing so, "the collectivity acknowledges that individuals have rights and cannot just be sacrificed to collective goals." The requirement that courts decide cases on that basis of general conventions, rather than an ad hoc assessment of distributional consequences, "permits individuals to plan, to consider and pursue their own ends. And once they have made and embarked on plans against this background it would be unjust to change the rules in midcourse by requiring unexpected disclosures and sharing just in case the plans succeed." This all seems unobjectionable—but who is Fried arguing against? One can certainly believe that contract law is an appropriate vehicle for promoting distributive justice without embracing the kind of particularism that he castigates: although Fried seems to think that my own argument was intended to support an approach of this sort, it is in fact incompatible with it since the incentive effects of a rule—without which its intended distributive purpose cannot be achieved—will be undermined if the rule is applied in an ad hoc and unpredictable manner.

So in the final analysis, Fried has no argument against the type of redistributionism that I defended—the only type that seems to me to be defensible. Fried might have argued that distributive considerations should not be taken into account even in framing the general legal rules which form part of the background conventions surrounding every contractual arrangement, and if he had said this, he and I would have a genuine disagreement. Fried chooses, however, to focus his attack on redistributionism on the faithlessness to background conventions that he wrongly

57. Id.
59. P. 84.
60. Id.
believes this position entails—wrongly, because even the most ardent defender of redistributionist policies may be committed to the principle that contract cases should be decided on the basis of general rules rather than in an *ad hoc*, particularistic fashion, and accept the idea that changes in the rules should be prospective only.

Fried is therefore wrong when he claims that those who believe the law of contracts ought to be used as an instrument for promoting "policies of social betterment" will consider an inquiry into "the background understandings (including those established by prior decisions) of a particular case" to be a "vain, even foolish exercise." This assumes, in effect, that those who advocate using the law of contracts as an instrument of distributive justice are unable to distinguish between reasons that may properly be given in justification of a particular action within an established conventional framework and reasons that may be given for adopting or supporting the framework in the first place. But there is nothing about redistributionism itself which prevents its proponents from taking cognizance of this distinction. I should add that this particular line of attack on redistributionism is especially unconvincing in light of Fried’s own tendency to blur the distinction between these two sorts of reasons in his account of the conventionalist foundations of promise-keeping—if anyone is guilty of ignoring the distinction, it is Fried himself.

Like much of his book Fried’s attack on redistributionism combines, somewhat confusingly, normative and positive criticisms. Redistributionism is bad, he argues, because it subordinates the rights of individuals to the interests of the collectivity. But it is also bad, he implies, because it falsely (or at least inaccurately) describes the Anglo-American law of contracts; in Fried’s view, our law of contracts—with its various rules for policing the bargain—is better described as the elaboration of a few simple moral ideas, rooted in the concept of personal autonomy, than as a disguised effort to promote certain distributional goals. But this descriptive claim is also dubious. The prohibition on active deception in exchange relationships—on hardcore fraud—does seem best explained in moral terms of the sort Fried favors. In more difficult cases, however (those dealing, for example, with the whole problem of non-disclosure) an economic-distributionist explanation better accounts for the legal rules we actually have (or so I have argued elsewhere). This being the case, I am inclined to prefer an explanation of the latter sort even where hardcore fraud is concerned (“we prohibit fraud because the long term welfare of fraud victims—indeed, of everyone in society—would be decreased by permitting

61. P. 85.
it”) on the grounds that a unified theory of advantage-taking in exchange relations is to be preferred to several different theories of limited scope. But this may be only an aesthetic preference, and I certainly appreciate the force of Fried’s moralistic explanation of why we consider lying to be an impermissible form of advantage-taking. Here, as elsewhere, his views have forced me to reappraise, and in some cases significantly recast, my own. *Contract as Promise* is a book full of intelligent arguments, always challenging, if sometimes unconvincing. It is a book guaranteed to wake even the most dogmatic collectivist from his slumbers.