Scout's Honor: Ethical Contours of Promise and Contract Law

An Honors Thesis (HONRS 499)

By

Adam D. Baron

Thesis Advisors:

Dr. David B. Annis

Dr. Donald Gilman

Ball State University

Muncie, Indiana

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Abstract

Is Anglo-American contract law based on promise as its ethical basis? Fried in his book *Contract as Promise* argues that indeed contract is based on promise, and he proceeds to show how the various areas of contract law such as acceptance, agreement, bargain, are analogous to the framework of the ethics of promise. Atiyah, along with others, finds fault in this. In particular, Atiyah examines detrimental reliance as proof that the moral underpinnings of contract law extend beyond promise into social and economic considerations. Atiyah’s side seems to complicate Fried’s position. However, if one is willing to become more Friedian than Fried and to utilize a more extensive definition of promise, such as Melden’s, Fried’s case retains coherence. However, does this definition become too cumbersome for common understanding? Can such distinction be held onto as an absolute starting point for law? What is mechanism and what is principled ruling?

There is an epilogue to this first polemic. The questions of linguistic order and the development of contract are further discussed. The epilogue is in a much different spirit than the central argument. Instead of careful discussion of philosophers, it intends to paint, by broad strokes, a picture, as Faust does, into the troubling and problematic notion of promise and self in modernity. This is at the same time a tributary of thought from the main argument and a meta-questioning of the ideals upon which that this essay is grounded.
Outline

Introduction
   A. Start Problem

B. Beginnings and Goals

I. A Liberal Ideal/ Contract’s Moral Underpinnings

II. What Fried Says
   A. Kant
   B. Form of Contract
      1. Offer and Acceptance/ Agreement
      2. Consideration/ Bargain
      3. Legality/ Remedies

III. What Others Say

IV. A Response to what Others Say
   A. Gap Issues
   B. Duress/ Unconscionability
   C. Bad and Good Samaritans
   D. Restitution

V. Add a Little Melden

VI. More Friedian than Fried

VII. Remedies and Test Cases
   A. Basis of Remedies
   B. Breech of Contract and what Happens
      1. Impossibility/Personal Inability
      2. Impossibility after Breach has already occurred
      3. Effect of Unexpected Difficulties and Unprofitableness
      4. Unconscionability
      5. What if?

VII. To where do the Remedies Point?

VIII. Is Promise Rich Enough?

Epilogue: Faust, Mephistopheles, Order, and the Language of Promise: An Essay
Suppose the following cases.

Harold, an automobile designer, is contracted by Track Motors to design a new sports car. Harold agrees also to provide supervision over its construction in the assembly line to ensure that the design is followed accurately. The agreement between them is that Harold will receive 10% of the manufacturing costs for the first year of production, projected as $250,000, as payment for his services of design and supervision.

(1) Suppose that Track Motors repudiates the agreement with Harold and hires Phil as a substitute designer. Track Motors communicates this to Harold before Harold begins work on the plans. To what damages is Harold entitled?

(2) Suppose that Harold has completed 60% of his design work, but has not yet began any construction or supervision of the assembly line when the owner communicates the same repudiation of the contract. Harold has already received $50,000 as a down payment towards his fees. To what damages is Harold entitled?

(3) Suppose that Harold is completely finished with his end of the bargain but Track Motors refuses to pay the last $100,000 due Harold under the contract. To what damages is Harold entitled?

How one addresses these cases and to what remedies one would ascribe to each is based on a combination of intuition and principled rationale. But which reasoning is more natural? To which does contract law “actually” attribute as its basis? Some may say that a promise is an absolute principle that society must guard even when the repercussions are not comfortable, because the idea of promise is fundamental to numerous transactions in modern social intercourse. Others would argue solely on the basis of damages sustained or wrongful benefits occurred, and all the facets that are therein contained. This problem was first set out so as to bring the case to a clear confrontation, for the distinctions in these cases are such that depending
on the principles one is using, the answers will waiver greatly. This is the ideological interplay that serves as the point of tension for the rest of the paper.

**Beginnings and Goals**

What issues should a court consider essential when trying to find a ruling on issues dealing with contract law? Charles Fried has argued that promise gives contract its most substantial moral force. He sees contract law as being concretely based upon a promise between two autonomous individuals; and, as long as basic issues of offer, acceptance, good faith, duress, bargain, and unconscionability are duly satisfied, the court should always rule in respect to that promise in accordance to the wills of the parties. On the other hand, P.S. Atiyah would persuade one to look at issues such as reliance on the offer and social policy in relation to court rulings. After such an exploration, Atiyah believes that the end would result in an explication that contract law does not begin and end with a promise. Rather, the base and development of contract is contained more in social contract theory. Other legal and philosophical minds have argued a more pragmatic approach, putting more stress on a consequentialist sort of reasoning. Others, like Howard Kahane, have attributed Contract Ethics to a moral sentiment as developed on an evolutionary biological basis (Kahane 42). Others still have said that contract law has a stronger basis in ideas of fairness, detrimental reliance, or economic efficiency.

There then lies a heavy burden of proof for Fried to show that what actually happens in contract law rulings are somehow generated and consistent with promise as contract. Can the features of the morality of promise explain contract law fully? Do the fundamental issues of contract law such as consideration, offer, acceptance, approaches to remedies, unconscionability, agreement, and unilateral misunderstanding find grounding in promise? Where does a moral basis for law end and pragmatic or institutional considerations begin? It is in these issues that
several of these rationales cross paths, and their different implications must be more clearly
observed, delineated, and differentiated. All of these questions must be asked in all seriousness to
see if promise is really the moral basis for contract law, and that is where this paper shall begin.

I. Discussion of Fried’s Liberal Ideal as Contract’s Moral
Underpinnings

It is curious that simply by saying “I promise to do X” one would create upon oneself a
moral obligation to X. Is that pressure of obligation coming from within or outside of oneself?
This is a central question in dealing with the question of promise as contract. If this obligation
comes from within, it is evidence of a sentiment to be in the “right” above and beyond social ties.
It is a will to be consistent in one’s word and future deed. Probably, one would freely
acknowledge such an urge for integrity, such a pursuit of trust. But another question ensues: Was
this search for trust for trust’s sake really an abstraction that finds its original roots in social
contract as a response to environmental pressures? If this is the case, then that pressure original
intentions would come from the outside despite what one might prima facie intuit one’s
motivations to be. And so begins the debate the ethics of promise.

In order to understand Fried’s position on contract as promise, one must first be familiar
with Fried’s grounding in his interpretation of the “liberal ideal.” Simply put, this liberal ideal
states that all human beings are free to proceed in their projects, and in those projects all objects
of the universe are acceptable for use. However, other agents also have that freedom. Morality,
then, requires one, out of an understanding of one’s own autonomy, to respect other moral agents
in their personhood as well as property, leaving them to their respective deserved liberty. This
ideal demands that one’s achievements are absolutely one’s own, and they include both successes
and failures. That ownership is necessitated by the Kantian idea of the lawgiver’s autonomy. By
defining oneself as self-determining, one gives oneself to a certain number of moral obligations:
the most primary, being that of a responsibility in choices as a result of that freedom. This responsibility relates to consequences from one's actions on one's own projects as well as on the projects of others. Humankind is societal by nature. In order to form a society, humans must be able to engage and share in projects with others. The only way this can be done is to provide one's rights in exchange for another's rights. I will give you my right to a portion of the rhubarb I grew in exchange for your right to a certain portion of the ants in your sandbox. Such is the convention of a promise, and it is consecrated by an element of trust often symbolized by a hearty handshake. Humans do things cooperatively to function as a society, and this cooperation is expressed most palpably in the form of a promise.

With this "liberal ideal" in mind, it can be more clearly understood what exactly happens when individual A makes a promise to individual B. First, it is apparent that a promise is something that is communicated, thereby demonstrating the intrinsic social nature of a promise. Second, this promise is an obligation created, that is to say an obligation that did not previously exist. The promise is self-imposed. Third, a promise now places a moral charge on a future act. (That is, a promise of a future action as opposed to a promise of the state of current affairs. After all, a promise-to-act is more than just truthfully reporting one's present intentions, for one may be free to change one's mind. But one is not free to break one's promise without moral ramifications.) Fourth, a promise invokes a convention whose function it is to give moral grounds to expect the promised performance. When promising, one invokes trust and creates expectations in others, and the promisor intends the promisee to rely upon and trust in that promise. One now has a duty just because one could have seen (indeed it was one's intention) that the promisee would rely on that promise, and that they would suffer if that action were not enacted. Fifth, both parties involved were disposing their rights as seen best fit. This is both their
freedom and responsibility as moral agents. They willingly mitigated part of their autonomy and freedom in exchange for some other benefit.¹

Humans are, however, a society whose aspirations often depend on future actions. Very few human interactions are an immediate exchange. For example, A wants to accomplish purpose L, and B wants to accomplish purpose M. Neither can exceed without the cooperation of the other over a certain period of time. Thus A wants to be able to commit herself to help B achieve M so that B will commit himself to helping A achieve L. If L and M could be transferred immediately, then a simple promise would suffice, and there would be no need for commitment. But again this is rarely the case. A device that permits a trade by promise to extend over time is required, and that device is contract.

Thus, in understanding contract law, one must understand it in terms of obligation, for to break that obligation constitutes the wrongful taking of another's autonomy. So, if contract law is to be based in and on promise, the relief must be measured by an expectation of duties to be preformed coupled with what is necessitated to make that person whole again. Fried admits that this cannot be done when contract finds its grounding in something else. Thus Fried must hold tightly to keeping people honest to their promises even in the face of unpleasant circumstances. If a promisor is not held to her obligation, and if she is not allowed to take responsibility, then in effect her personhood is being mitigated. She is not taken seriously as a person. Promise as contract rests on the traditional liberal value of free choice as free agents. So long as they are

¹ The promise in ethics and the contract in law are peculiar in respect to other institutions and conventions in that they always extend to the future. Otherwise, ethics and law restrain themselves to the analysis of the past with conclusions about X, which would then imply recommendations as to future action, but no further. As it is that the promise binds one to future action, the element of continuity over time must be examined. It must be assumed that the “I” that made the promise today will be the same “I” that acts upon the promise in three weeks or three years or whatever time element is relevant. How do I know that the future “I” will approve? Intentions, both hidden and communicated now and in the future, now take a second place to prime importance of responsibility to carry through on that thing. I am in effect trading the interest of my future self for the interests of my present self. This becomes complicated, but adheres again to the idea that in human nature there is a certain will or assumption that we are and will be somehow coherent and experiencing a sense of integrity within ourselves.
“free” and enter into contracts “willingly,” they are capable of acting on their intentions; they incur a responsibility and are culpable to deliver their side of the bargain.

II. What Fried Says

Is a promise made every time the word promise is used? The delineation of some common characteristics to promissory ethics will prove useful. One can say that when S promises P to action T, she is actually... for the moment, let’s stop right there. Notice already that fundamental to the idea of promise is the conception of a person promised to- a promisee and a promisor. Could S be a promisor and a promisee simultaneously? The case where I promise myself that I will quit over-eating on Thanksgiving seems like such an instance. However, this is more a “vow” or a “resolution” than a “promise.” A promise is something that is communal by nature. It is something said, or at least communicated, to another person. What about the statement, “I promise there will be hell to pay if you miss curfew one more time!” Though this statement uses the language of promise and involves two people, it is obvious that it is not what is intended by a promissory principle. A promise is not just information on one’s future plans, but instead a statement of commitment between two people. This is fundamental. However, the statement, “I promise that if you go to Austria the natives will treat you well if you at least attempt to speak German” is also not a promise, though it seems to a form of commitment between two people. It is not within the reasonable control of the promisor to keep her end of the bargain; therefore, she does not have the power to really evoke a promise. Moreover, the agreement between Jimmy “the guns” Atkinson and Johnny “the boss” Malone to kill Two-faced Tony for X amount of dollars cannot qualify as a promise, though it fulfills several of the other characteristics. For a promise to be ethical, it must be moral in both form and content.

A promise, then, is considerably more complicated than any cursory or superficial understanding. There is a difference between the word “promise” and the morality of promising. As already explained, promise finds its basis in, around, and through two or more moral agents.
As Melden writes, "... promise is no idle prediction, no mere expression of a wish, hope or even resolution, but a transaction between persons who are united by the bond of mutual respect in some sort of moral community" (Melden 43). It is here that an explanation is due to clarify against what ideological framework such terms as "agent" and "mutual respect" are being used.

A. Kant

Words like "agent," "mutual respect," "autonomous," "trust," and "duty" often find their roots in the ideas set forth by the foremost German production of the Enlightenment, Emmanuel Kant. This essay is not on Kant. However, a short discussion on Kantian ethics is necessitated in order to further articulate and augment Fried's discussion of promise.

The moralist of duty, however, sees promising as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise... There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectation in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it (Fried 17).

Melden also discusses Kant in relation to his central thesis.

It is, I venture to suggest, the consideration that communication is not idle talk that comes and goes without engaging the interests of those who receive it, that lies behind Kant's notion that telling the truth is to be ranked with keeping one's promises as a perfect duty, when, in Foundations, he discusses the second of the four cases in which he seeks to illustrate the manner in which the Principle of the Categorical Imperative may be employed (Melden 59).

Kant, put simply, is arguing that the human state of being is the fundamental principle of morality. Morality is not based on the force of certain motives, characteristics, or desires, but rather on the basis that all have the status of "rational being." As a rational being, one understands that she is only but a member of a community of rational beings, and therefore has no more or fewer rights, privileges, and duties than the rest of that community. Roughly stated, we are equal. Also, as a rational being, one has a will, which is both rational, and at liberty to decide and to undertake projects. There is therefore a certain lawfulness or code whereby rational beings
must operate in order to have mutual respect for other persons and their projects. Respect is fundamental to being in such a community. As Kant writes in *Foundations of the Metaphysics of Morals*, "Duty is the necessity of an action done from respect for the law" (Fried 117). All laws and conventions, then, are tied into this idea of respect for other moral agents, which is really an attempt to apply an element of universality to rational, moral decisions.

Kant provides a powerful tool for applications in promise. For Kant, to fail to meet the requirements of morality in rational applications like universality is to violate one's own nature as a rational beings as well as doing violence to other people's autonomy. Basically, when one is immoral, one demeans oneself, and with this comes a sense of shame or guilt that is a result of one's diminished worth.¹

Fried’s understanding of promise really begins and ends inside this Kantian backdrop and the "liberal ideal." He goes on to say that a promise is something (1) that must be communicated, (2) that a promisee must accept a certain responsibility as the beneficiary of that promise (a issue of acceptance), (3) that responsible behavior by both parties before, during, and after the transfer is also a part of promise, and (4) that issues of good faith and freedom must also be involved. However, the vastness of his argumentation hinges upon a single issue - autonomy. "The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be" (Fried 57). Of course such a focus on autonomy leaves him open to several counter-arguments. For example, consider the following: Is there any real sense of free agency in the majority of contract law? Does the continuation of the idea of self extend through time? Can a corporation become the single rational agent that is required to enter into a moral community? Does this Kantian ethical approach neglect issues of personhood in the

¹ There is a lot to criticize here. First, such a focus on rationality seems to be distinctly masculine in terms of suspending other parts of what it is to be human i.e. intuition, contextualization, embodiment, feeling, emotion, sentiment, action, speech, ad infinitum. We are not dealing with other common attributes in our day-to-day lives, but instead other persons. However, I believe, as does Fried and Melden, that Kant is useful in terms of a moral arrow pointing us in the right direction, but not a principle, which is right in and of itself.
individual sense? Do we need to examine the promise itself, and not just the relationship of the promisee and the promisor? In various chapters Fried partially accounts for some of these questions in *Contract as Promise*. However, his explanation remains insufficient, and two essential questions for Fried arrive: 1) Are the ethics of promise richer and more nuanced than Fried gives credit? 2) Can promise, as defined here, explain fully the different areas of contract law?

**B. Form of Contract**

Fried divides his book *Contract as Promise* into sections that roughly follow the basic areas of contract law. This section will be devoted to a terse summary of what he writes in each area. This will prove to be vital, for the language and definition he uses must supply his argument with the framework of both contract and promise. These sections will be used to explain problematic areas such as unconscionability, detrimental reliance, and impossibility.

**1. Offer and Acceptance/ Agreement**

Fried’s summary of offer and acceptance is the following.

A promises x to B, if B will promise y to A. A’s conditional promise is called in law the offer, B’s the acceptance. B’s promise serves three overlapping functions. (1) It satisfies the condition in A’s offer. (2) It is “acceptance” in the general sense that all promissory obligation is reciprocal and so all promises must be accepted, even unconditional ones. (3) It furnishes the consideration that the Anglo-American law generally requires to make a promise legally binding. A is not bound until the condition is fulfilled. Where the promisor specifies acceptance by a counterpromise, that counterpromise all by itself closes the circuit of promissory obligation. For a promise to be binding, it must be accepted, and how that acceptance is to be conveyed to the promisor, indeed whether it must be conveyed at all, is something the promisor can specify at the time he makes his offer-promise. What is necessary is that the acceptance be unequivocal or irrevocable, or else it will not close the circuit (Fried 50).

Fried points out himself that contract law is very complex and this complexity, such as the one given above, may lead one to conclude that such a primary institution of promising could not account for such technicalities. However, if stated in other terms, it will be recognizable to
ordinary understanding. For a promise to be complete it must be made to someone and that
beneficiary must, in some sense, welcome that promise. It is in essence that simple, but the
language must be nuanced enough to deal with all the possible variations of how the "making of"
and the "receiving" of a promise may look. Notice also that the need for acceptance by the
promisee show a certain willingness by both parties, for there could be a case where the benefit
could be unwanted by the promisee later. The promisee must have the chance at some point to
refuse the promise. As Fried uses as an illustration, the moral potency of a promise could be seen
as an electric current that must be completed in order to carry a current. There are two switches:
the promisor's, which is the offer; and the promisee's, which is the acceptance. Both must
voluntarily be activated for a promise to carry moral weight.

2. Consideration/ Bargain

Consideration can be defined as something given or promised in exchange for a promise.
Some use consideration to prove that promise is distinct from contract. But what challenge does
it pose? Fried analyzes consideration as the following:

(A) The consideration that in law promotes a mere promise into a contractual obligation
is something, or the promise of something, given in exchange for the promise. (B) The
law is not at all interested in the adequacy of the consideration. The goodness of the
exchange is for the parties alone to judge- the law is concerned only that there be an
exchange (Fried 29).

Such a conception of consideration attempts to validate both the freedoms of the parties while
holding onto the form of exchange. Fried bases his argument that this cannot be done; that, in
fact, these two ideas are indeed contradictory.

Fried seems asserts that the issue of consideration is "too internally inconsistent" to offer
a challenge to contract as promise. Proposition B is an attempt to stay within the bounds of the
liberal ideal, where individual parties exercise free-will to determine their own arrangements, and
those arrangements should be respected absolutely. However, proposition A immediately begins
to limit the class of arrangements to only "real," not artificial or unreasonable bargains, thereby it entails social policies that override the freedom of the individual in their potential projects of promising. Fried would argue that, if there were to be freedom of contract, it would only proceed by a freedom of promising. Consideration limits both and, as such, is an obstruction of the liberal ideal and rational projects that might therein be contained.

Fried is not actually advocating the dismissal of consideration, for he mentions that consideration is still a tool, though a very awkward one, which lends force to a multitude of arrangements that might be otherwise non-obligatory. However, despite convergent reasons for the existence of consideration, it alone offers no necessary or sufficient rationale that could be seen as a firm alternative for promise as the basis of contract. On the other hand, in this section Fried added several noteworthy amendments to his thesis. They are the following: 1) A promise must be freely made. 2) A promise cannot be unfair or unjust. 3) The promise must have been made rationally and deliberately, thus providing that subsequent legal enforcement was contemplated at the time of making the promise. Notice that these additions are in no way contradictory to his argumentation thus far, but are expansions that are not clearly logical outgrowths of this argumentation. Fried is, to an extent, qualifying his argument so as to be able to deal with a multitude of issues that will present themselves later in this paper. This is not so much a criticism as it is a simple denoting that Fried is beginning to build certain other principles into promise as contract, which may or may not have already been there.

3. Legality/ Remedies

For Fried, if contract is to be based on a promissory principle, remedies must hold to expectations as the primary consideration. However, he does admit that there are certain cases where the "natural" thing to do is to give damages for the harm that has been suffered rather than the value of the promised expectation. Nevertheless, he points out that it does not follow from
these cases that such an expectation is not a "normal and natural" principle to allocate damages as a result of breach of contract.

For his first example, there are cases where that value is impossible to measure, such as lost opportunities. In such cases, only calculable damages can be repaid as a remedy, and thus they seem to be the natural basis for a ruling. Second, there are cases such as the following. A buyer requests a manufacturer to make an inexpensive widget for a large machine. The manufacturer produces the widget, but it is made poorly. When the buyer uses the widget in the machine, it breaks down and causes damage to the machine and lost production time. Under the strict terms of expectation, the manufacturer only owes the buyer a new, better-made widget. However, this is clearly unjust. It seems more natural to say that the manufacturer induced the buyer's reasonable reliance and should therefore compensate for harm done by that reliance. In this case the promissory principle is still implied, but justice calls for other principles that go beyond expectation. It is hard to define Fried's position on exactly what other principles are included in contract and where and when they should be applied. He writes such things as the following:

...it is sufficient to introduce the notion that contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles.... Promise and restitution are distinct principles. Neither derives from the other, and so attempts to dig beneath promise in order to ground contract in restitution (or reliance, for that matter) is misconceived. Contract is based on promise, but when something goes wrong in the contract process—when people fail to reach agreement, or break their promises—there will usually be gains and losses to sort out (Fried 25-26).

This would imply that reliance and restitution are apt tools to find a principle of justice to exonerate harm. But at what point does one principle become fairer? And if one is primarily concerned about fairness, then should not a principle of fairness itself be the primary basis of contract and all other law?

Despite these questions, it is clear that in the above case reliance is not threatening to expectation because expectation simply does not go far enough is this case. It is when the
converse is true, when expectation goes beyond reliance and other such principles, that Fried must argue that rulings should still be based on expectation because contract is founded on promise. In any event, Fried still makes his point that just because reliance is used to decide a case in and around contract, it does not necessarily mean that contract as promise is not at work.

III. What Others Say

If contract is grounded in promise, then the relief must be measured by expectation. If this cannot be done, then it would mean that a contract finds its grounding elsewhere. This is the basis for Atiyah’s attack. Atiyah’s criticism, which will be the only criticisms to be looked here in some detail, is a criticism of the detail, spirit, and history of Fried’s case.

Remember Fried’s case rests invariably on the ideals of personal autonomy, free will, responsibility, and other such traditional liberal values. Atiyah, however, notes that other less desirable consequences come inescapably with such Victorian ethics.1 Such consequences would involve an immediate questioning of free agency. This code of ethics would favor those who, through aptitude, education, and financial well being, are more likely to be able to exercise their free choice, thereby extending and perpetuating the original inequalities. Thus, if one were to see holding contracts as absolutely binding as a form of risk allocation, the advantaged persons would have an edge at ascertaining future risks.

On the other hand, other stratagems of liability rest on different ideals that bring with them different consequences. For example, consider benefit-based liability, which is to say cases where the primary purpose is to remedy unjust enrichment of one party through the harm of another. Using such a legal and ethical approach, the courts are now striving to find a just reallocation or reciprocity of benefits that were incurred through a contractual relation. This sort

1 Victorian because Fried himself quotes the idea of the Victorian gentleman, who drives a hard but fair bargain.
of ruling may still reaffirm the previously mentioned advantaged individual; however, it does not
go so far as perpetuating this inequality. The premise of reliance-based liability is similar and is
even more in conflict with the traditional free-will values. According to Atiyah,

As soon as liabilities come to be placed upon a person in whom another has reposed trust
or reliance, even though there is no explicit promise or agreement to bear that liability,
the door is opened to a species of liability which does not depend upon the belief of
individual responsibility and free choice. Not only is the party relied upon held liable
without his promise, but the party relying is relieved from the consequences of his own
consequences of his own actions. The values involved in this type of liability are
therefore closely associated with a paternalist social philosophy, and a redistributive
economic system (Atiyah 10).

Thus, Atiyah seeks to strike at the heart of Fried’s ideological framework and does so by an
appeal to social philosophy and by a more contextualist approach to the issue as a whole. He
examines not only arguments specific to promise as contract but also examines the consequences
of such arguments on a broader, sociological scale.

However, Atiyah must still explain the particulars of contract law that are not reliant on
promissory ethics- issues like reliance-based and benefit-based liability. For this purpose he
makes a distinction between three cases where contract can be held legally binding:

1) A breech of contract as occurred because payment for services completed was not fully
delivered. This could be likened to case C in the beginning of this paper.
2) A breech has occurred where the promisee has fiscally relied on the promise, though
has not yet completed in totality his end of the bargain, and therefore would be in a better
position had no promise been made. This could be likened to case B in the beginning of
this paper.
3) A breech has occurred where the promisee has in no way relied upon the promise. This
could likened to case A in the beginning of this paper.

As might be expected, it is only the third situation which demands some sort of justification in the
argumentation of promise-based liability and some other sort of liability. The reason is that in the
first case expectation interests and reliance interests are normally the same. In the second, the
fact that reliance is already built into the language provides, for this essay’s purposes, an adequate
proof that damages can be seen as reliance-based liability. The third case, however, beckons for
expectation interests alone, which is to say that reliance or benefit-based liability does not \textit{prima
facia} appear to play a role. In short, it has something to do solely with the promise
Atiyah argues, however, that if the contract is to be binding and liability addressed in such a case, it is for the following reasons. (1) Inherent to promise is a sort of psychological expectation. The promisee’s rightful expectation would be violated. (2) Contracts are essentially a way of allocating risks, and such mechanisms, if they are to make any sense at all, must be binding from the onset. However, a rentee who changed his mind as soon as signing a lease would not cause the renter harm as long as there was adequate time to find a new person to fill the lease. (3) The third argument is simply that if a promissory principle is held as immediately binding in law, social custom, or morality, then people would be more likely to perform promises as a whole, especially those promises that have already been relied upon. All three of these cases are relatively weak in comparison to the justifications for benefit-based or reliance-based liability. Atiyah stresses the fact that this “wholly executory” stage of promise or contract is an extremely short phase of the relation. In fact, only the a very small minority of litigation in contract law could be considered “wholly executory.”

Atiyah devotes himself to proving that the Anglo-American legal thought’s reluctance to see contract law as anything other than promise is partially motivated by cultural heritage. It should not wholly be abandoned, but understood as at least partially misconceived and needing of modification. The tendency of modern law is away from this sort of arguments by principle that was foundational in former times, to be replace with stressing the dichotomy between, for example, the sanctity of a contract that has not yet been relied upon, and one that has. The void is a conceptual and perhaps even linguistic lack of recognition of this difference. Atiyah argues that pre-nineteenth century contractual relations where thought of as something that was a community-sanctioned relation between persons who, in the course of their dealings, relied on each other, both in cases of gain and loss. It was this gain or loss that was to be reallocated, and the explicit promise served primarily to establish that reliance on one another. After the Enlightenment and Kant, all of this was reversed, and the promise itself became that expectation.
IV. A Response to Other Problematic Areas

The Fried-Atiyah debate is more a debate of world views rather than finely calculable argumentation. It is perhaps a *non sequitur* to ask either man should there be legal force behind a contract before it is relied upon, for both men are committed to an answer long before a critical observation can be made. This is why this essay has spent an extended amount of space in reviewing the background assumptions or beliefs of both men, and perhaps it is only at an intuitive level that one can side with one or the other. Therefore the spirit of the situation is just as important as the details of the argumentation.

Perhaps, one way to appreciate the spirit of Fried’s thought is through an examination of his own remarks on Shakespeare’s *Merchant of Venice* in retaliation to Unger’s treatment of the characters Belmont and Venice. In the *Merchant of Venice*, Belmont symbolizes the domain of altruism and Venice the domain of harsh bargaining. The contrast is between commercial and family relations. The former is governed by the literal, formal doctrines of contract that must be respected. The latter is governed by a sense of sharing and sacrifice. The liberal ideal, according to Unger, forces a rigid dichotomy between these two domains. Fried asks though: Is family not a group of freely determined agents under a form of contract? In commercial relations is there a lack of sharing? The desire to maintain goodwill so as to continue business in the future would naturally generate a concern for one’s fellow man, customer, and business partner. Remember that all projects based on promise involve a common goal. Contract is latent with a sense of a communal, if not “shared,” purpose. Fried argues that the contrast between Venice and Belmont is simply artificial:

Nothing in the liberal concept of contract, nothing in the liberal concept of humanity and law makes such altruism improbable or meaningless. The disposition to view one another with kindness and forbearance is an affirmative good, which liberalism is in no way committed to deny. But, just as in the family, the enforcement of such a posture itself tends to tyranny. Parties enter into contractual relations with certain expectations;
for the state to disappoint those expectations is on its part a form of tyranny and deception (Fried 91).

It is therefore essential for Fried that in order for justice to work in the liberal ideal, expectations of rational projects by autonomous individuals must not be in any way mitigated. This is consistent with both the domains of Venice and Belmont.

A. Gap Issues/ Sharing

A problem arises placing the principle of promise as contract at such a lofty state. Can Fried explain what happens when a case cannot be defined strictly under this contract principle? For example, cases that one might call "contractual accidents." What happens when there are "gaps" in what happens and what the contract was supposed to be? Fried defines gap issues as when the relations between the parties are not governed by the actual promises they have made, but are governed by residual general principles of law. These gaps cannot be filled by the contract. But, given his views of contract law, how should these discrepancies be addressed?

Fried introduces a principle of sharing. The sharing principle comes into play when (1) both parties are harmed or benefited, (2) no agreement obtains that particular result, (3) no one in the relationship is culpable, and (4) no one has conferred a benefit. In essence, spread the wealth and the responsibility where no rights or obligations are violated or threatened. Obviously, this fills a few gaps. But why limit this resource allocation to only parties involved? If the parties must share both the harm and benefits of such contractual accidents, why not then impose a rule that the entire community will reap the burdens and benefits of all transactions? However, all would lose their autonomy in such a society as well as their personhood and, thereby, the basis for a promise.

In the end there would be full sharing, and no one would enjoy the benefits or bear the responsibility of his personal choices- indeed of his person... The present political system seeks only to reduce the extreme disparities in overall wealth that undermine the possibility of community, but at the same time protect and provide opportunities for
advancement and a guaranteed social minimum.... I affirm that this structure and its purposes are in principle sound (Fried p71-72).

The reason for limiting the principle of sharing to only involved parties is that they have already come into a contract and are thereby in a common enterprise. It is a relation freely chosen. Fried argues that one has a greater requirement for previously established personal relations than one does for an abstract ideal of fellow citizens. Further, the principle of sharing does not threaten the promissory principle for the simple reason that the parties were free to decide on different terms of meaning and the extent of their relationship in the first place.

B. Duress/ Unconscionability

Another point of contention for Fried arises when all the necessary elements of contract law are filled but are still ruled unfair. There are two legal possibilities: duress and unconscionability. The latter will be addressed first.

Unconscionable terms are those where the promisor had no real choice and the actual terms are substantially unfair to her, particularly in view of her poverty or relative powerlessness. Unconscionability concentrates on the imbalance, the “substantive unfairness” of the agreement itself. Fried asks where does the sentiment lie? What if a business cannot exist unless it hires migrant workers at low wages? They seem to be exploited. But should the owner of such a business be the representative of society’s redistributive zeal? Was the business not offering increased opportunities for the poor, though limited they may be? The misfortune of the situation is not a responsibility for which either of the contracting parties can be seen as culpable.

Redistribution can not be a burden to be bore at random or in an ad hoc fashion. It should not be

1 But does forcing others to share any responsibility threaten a loss of autonomy and the chances of gain via individual talents, efforts, and accomplishments? Is this a form of anti-social Darwinism in that the weaker is allowed to triumph over the stronger? What happens when one wins the capitalist game? One is subject to anti-trust laws and your company must start over i.e. Bill Gates. This is a sort of manifestation of the dialectic between capitalism and socialism that is the American system.
limited to only those who have an economic interaction with the poor. Fried admits that this part of the liberal ideal seems harsh and uncaring, but, as he argues, the goal of distributive justice in such a political theory is a collective action, pursued and funded by the whole. Basically, the business owner above already paid her taxes to insure that unskilled labor has sufficient means to better their position in life. To make her pay twice is unfair. The liberal ideal is a goal of an all-reaching and embracing principle of justice. Curing the poverty, not the arrangement, is the only remedy under such a goal.

Duress, as opposed to unconscionability where the injustice is in the agreement itself, is injustice in the making of the agreement. It is important that, in order to prove duress, the “victim” is aware of what is in fact transpiring and also his relative lack of freedom to do otherwise. Their assent to the agreement is not voluntary. This, of course, poses a threat to promise as contract. If a person fully appreciates the alternatives and chooses among them, how can he not be “free?” Perhaps the court would have to look to the issue of “motivation.”

However, in all contractual agreements the parties both have “motivation” or else the contract would not exist. Perhaps the courts would have to look to the relative advantages or disadvantages of the parties? However, it would seem inconsistent to hold rich but not poor people to their bargains. Fried argues that duress would then have to come to an issue of coercion.

“A proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses. It is coercive if it proposes a wrong to the object of the proposal” (Fried 97). Basically, a promise, which is brought about by a threat to violate that promisor’s natural rights, no longer has moral force and thus loses contractual force. It should be such threats that constitute the legal category of duress and, according to the definition put forward by Nozick, it is the moral category of coercion. Though both parties have an agreement and knowingly and freely made a contract, there are still limitations under duress for the simple reason that one party’s autonomy has been
diminished. Fried is then able to explain duress in a way that is completely consistent with his liberal ideal and thus promise as contract.

**C. Bad/ Good Samaritans**

Interestingly, there are bargains that meet all of the requirements laid out thus far, which can still be deemed to harsh to enforce. Fried gives the example of *Post v. Jones* where two whaling vessels happened upon a third vessel which was disabled and in need of assistance. They agreed to help the third and split the vessel's cargo between themselves for which they paid the disabled vessel's captain a small percentage of the cargo's land value as a salvage fee. The case was later overturned by the Supreme Court and the two rescuers where forced to pay a normally allowed fee for salvage. Fried argues that this is again consistent with promise as contract because the liberal ideal does not eliminate a duty to help others in distress. In fact, this is entirely consistent with an idea of autonomy: for, if one takes seriously her own autonomy, then she has certain obligations with respect to other’s autonomy.

In this case the distressed party was not disabled due to a general social dispensation but rather because of a random event for which no systematic provision could be provided. It is this element of randomness that Fried sees as putting the parties involved in a "state of nature" whereby one has a duty of humanity to help a stranger in distress. The liberal ideal is different in that it seeks to give freedom to how one attempts to accommodate this duty. The individual can pursue her own concept of good without being overwhelmed and outweighed by the needs of others. The terms mentioned in the case above, according to a Kantian ethical approach, would be immoral because they devalue one's own humanity and common humanity in their disregard for respect of another autonomous individual's natural rights. It is therefore clear that the agreement was morally degrading to all parties involved. Fried admits that legally defining what positive duties the other two vessels actually had would be difficult, but the violations of those duties and
the prescribed remedies are much clearer. "We may hesitate to grant an affirmative action against one who fails to act as a good Samaritan. We need not hesitate at all to deny the bad Samaritan his unjust profit" (Fried 111).

D. Restitution/ Conditions

Fried's conception of promise and restitution (or reliance) as distinct principles is logically necessitated by his firm belief in promise as contract. In his last chapter entitled *The Importance of Being Right*, Fried explains the sharp contrasts in remedies that result from the respective principle. In either case, the importance of being "in the right" cannot be understated. When one looks to remedies, one sees that instead of a smooth continuum in recovery allocation, there are sharp discontinuities in the awarding of damages that hinge on fine distinctions and a determination of who is "in the right." Large consequences turn on, to the non-legal mind, seemingly small and even trivial differences in language and conduct. "Such discontinuities are unavoidable, and are indeed a sign that we are dealing in the area of right and wrong, which is the domain of discontinuities.... if the domain of right and wrong is seen as autonomous, then there must be sharp breaks: between the permissible and the impermissible, between the obligatory and the optional" (Fried 132). Fried then seeks to show that the extreme variability of these consequences proves that contract law is in fact a moral issue.

Fried asks us to consider the following case.

A Builder undertakes to build a house to have certain specifications for completion by a certain date. He does not complete it in time and there are slight departures from the plan (for instance, a different but equivalent brand of waste pipe is used). The owner claims that since the specifications and the completion time were expressly denominated conditions, he is released from his obligation and may keep the house without paying for it (Fried 123).

The idea strikes one obviously as unfair and absurd. Why? Fried's doctrine of conditions does not specify that when one breeches a contract, that the person is liable for both restitution and the original obligation. As soon as the owner claims that the builder waivered from
the conditions of the agreement and thus nullified the contract, the builder (and the owner) is no longer responsible for obligations in that contract. The builder has indeed forfeited his rights under the contract and is therefore considered not to be "in the right," but he is released from its duties as well. Fried would argue that if that condition-holder (usually the promisee) chooses to retain the goods, she must still pay for them. This is indeed an application of restitution damages instead of expectation damages because the contract, and thus the promise, is now void. So what about the half-built house? After the contract is broken, there is still a conferred benefit, but that benefit cannot simply be reallocated to the correct party (One cannot return a half-built house.) The owner can refuse to pay in the contract amount, but instead she can offer to pay no more than a fair market price for the services provided, thought she is of course not obligated to make this offer. This is logical since the basis for payment is no longer contract but restitution. This distinction, though small, could mean a quite significant change is the amount paid for the house.

The possible variance between restitution and promissory principles in contract resolution is a definite sort of alternation. The monetary amount awarded can be traced to one principle or the other, but according to Fried, never to both. Fried holds these as distinct and separate entities that both play separate roles around contractual relations. As Fried argues, the restitution principle is "more primitive" and often closer to what general justice requires in contracts between two strangers. However, when a promise is made, it reflects a supplanting of a voluntary system that is created by both parties over and above this more primitive ethic of restitution. However, both ethical systems have the possibility of being used as a basis for remedy if a party fails to remain in substantial compliance with her contractual obligations. This again is proof of the invaluable attribute of being in the right. In such a system as described in this section, it can be seen that the promisee holds a superior position over the promisor because

1 Damages as a result of breaking a contract may go further than just the original sum contracted, but be extended to the damages actually incurred by the promisee i.e. as brought about by inflation. This is still consistent with promise as contract. This is the importance of being "in the right."
she is the "condition-holder." It is far easier for the promisee to claim that the promisor has broken the terms of the agreement then *vice versa*. Therefore, the doctrines of waiver, repudiation, and estoppel are safeguards of a sort against this unequal power basis. A promise may call for sacrifices that exceed the requirements of residual, background nonpromissory principles such as those of fairness and decency. At times those principles could even be seen as favorable, thus providing motivation for breach of contract. This spirit of equalization of responsibility explains also why a victim of breach of contract is required to act prudently in an attempt to mitigate the possible harm or loss incurred. Such a hypothesis reverts back to the idea of the responsible agency of both parties at all times before, during, and after the contract.

V. Add a Little Melden

This paper has covered what Fried thinks of promise, but is his discussion sufficient for other moral philosophers? Melden would argue that Fried's discussion is still simplistic. This limited definition would do violence to the complex contours of the principles of promise (let alone contract law). Within the scope of this essay, Fried would do well to embrace Melden's opinions on promise, for Fried is asking a lot of promise and must seek to find the fullest sense of what happens when S promises P to T. To bolster Fried's case for promise as contract, one could conceivably offer a stronger argument through Melden and thus become more Friedian than Fried himself by extending the morality of promise to encompass other subtleties in contract. Melden spells out the following as the "full-blooded" paradigm case of promise.

...the promise locution is employed (a) in good faith by a responsible agent, (b) freely and without constraint or duress of any form, (c) to assure the addressee that the speaker will do something clearly manageable by him without undue effort or sacrifice, something that in some strong sense is possible or manageable, (d) something that is morally acceptable and without hurt or moral damage to himself or anyone else, (e) something desired and indeed required by the person to whom the promise is given in order for him. Or someone else in whom the latter has an interest, to carry on with some program or line of action. Further, (f) the assurance thus given is accepted in good faith on the terms represented by the user of the promise-locution by an equally responsible agent, who (g) respects, and in turn is respected by the concern not only for the other
party to the promise-transaction but indeed for anyone else whose interests may be affected by what transpires in consequence of that promise...(h) The obligation incurred is an obligation to the promisee such that the recipient of the promise has a right, or is entitled by that promise, to the performance of that action in question. (i) Failure to meet that obligation, in the event that failure is willful, is a case not merely of hurting, disappointing or frustrating the promisee, but of wrongdoing him as a person, i.e. doing moral damage to him because of the violation of this right; and (j) the moral damage inflicted entitles a promisee thus wronged to demand redress from the person guilty of this transgression; and (k) the person to whom the promiser is obliged has the responsibility, if circumstances warrant it, to waive or relinquish his right, and to forgive the person who has transgressed against him given appropriate indication of the remorse felt for guilt that has been incurred (Melden 43-44).

Melden establishes that a promise in not a trivial matter, but instead a whole moral networking between the promisor, the promisee, and the promise itself. Notice that not one of these conditions in anyway mitigates or is opposed to Fried, but instead they are adding to the array. One’s goal here is not to find sufficient and necessary properties of promise. It is more probable that in every day life when S promises P to action T, that only condition (a),(b),(c),(f),(k) and (j) are satisfied (or some such combination), but one would still want to say that S has promised P to T. Does this mean that the rest are arbitrary? Indeed not. This is the definition of trying to discover an ethical principle by finding its paradigm case. As Fried point out, one could find a linguistic solution here as Wittgenstein did using a Wortspiel. All of these concepts are circles that partially interlock other circles, and somewhere in common space lies a concept of promise. However, what is really under scrutiny here is not the commonality, but the particular. To find if contract is promise, one must first know with some detail those contours of promise, and that is what Melden has provided.

Again the question is posed, “what happens when S promises action T to P?” The new answer would look something like the following.

When S successfully promises P that she will do action T, then S is intending P to believe that she will perform T, by way of some communication, and S is undertaking or creating upon herself an obligation to do action T. Therefore, P is justified and has the right to rely on S’s intent to do action T and that action T is in fact done. She also has the power to release or relieve her from this promise. P has the power to doubt that action T will actually occur because she knows that things can change, therefore she retains an element of good judgment and reasonable, responsible action in her pseudo-assumption that
action T will take place. However, her attitude does not actually affect the right that she has acquired.

In comparison to Fried's earlier discussion of promise, this is now sort of less naive model of promise, and, as such, deserves to be further analyzed. Notice that there is an element of reliance that adds moral weight. The clear delineation between reliance and expectation that Fried proposes has now become integrated out of necessity. In this model P is still understood to be a responsible agent who, as such, is culpable for the amount of reliance on action T, but retains the right to see the fulfillment of the contract under the agreed upon terms. This gives credence to an idea that relying must, itself, be justified by a right to do so, and even when this right is acquired, there must remain an element of prudence on the part of P. However, once justified reliance has been established, a breach in the promise would be even more destructive to the moral relationship of the parties, and the damages that actually are a result of such a breach would increase as well. This would also mean that the wholly unrelayed promise is somewhat weak in moral force.

VI. More Friedian than Fried

The basic elements of contract law look something like this:

A. Mutual Agreement: both parties enter into a binding relationship, and there is a "meeting of the minds" on the terms of that agreement.

B. Competent Parties/ Capacity: the parties must have legal ability to contract.

C. Consideration: something bargained for or given in exchange for a promise.

D. Legality/ Lawful Purpose: the subject matter of the contract must be legal.

1 Notice also that P has another power i.e. the power to relieve or release. What is the distinction? If P releases S from her obligation to perform action T, then the promise has been dissolved along with any sort of obligation. In a manner of speaking, "the slate as been wiped clean." On the other hand, if P where to relieve S of her end of the bargain, then there would be no culpability for non-performance, though obligation would go on (P may have other reason for performing T such as a preservation of integrity, etc.)
One can see that when compared with Melden's paradigm case, structurally contract law and promise are indeed closely related. However, if one is to supply a coherent theory of contract as promise, one must also look to remedies in past verdicts to see if, in fact, what criteria is used in court rulings. The areas of unconscionability, duress, and detrimental reliance have been noted especially to try and prove the issue problematic.

After the addition of such contours that Melden would bring into promise as applied to Fried, one might wonder if this notion of promise still falls within the common understanding of promise. In other words, what is the limit of what one could write into the ethics of promise in order to substantiate promise as contract? For example, is not the idea of responsibility already built into this notion of promise? This is a fair question and one with which this paper is deeply involved. It will be addressed primarily in the section over remedies in contract law. Notice how often other moral considerations are already built into the language of contract. This issue will be taken up later in this paper.

VII. Remedies and Test Cases

There are a variety of stratagems whereby a plaintiff can proceed in bringing suit for breach of contract. These different approaches depend upon which sort of remedies is most advantageous for her position: in some cases it could be expectation, and in others, restitution. Likewise, the court can also choose from a variety of different principled approaches to the remedies such as stated above. Certain modification of rules stated by their predecessors may be necessitated to insure that "modern" justice is enacted. An inherent and inevitable flexibility presents itself in the dealings of contract law and remedies around that law.

Fried admits that if contractual remedies are based greatly on anything other than expectation interests, his case is flawed. This, then, becomes an essential crux of the entire debate. However, consider for moment that often expectation (where the plaintiff would be if the
contract had been carried out) is a difficult, tangible entity to identify. Unfortunately, one is dealing with the issue of “lost history,” and consequently the fiscal number will always be completely hypothetical. The court is left with only certain general principles arising from the legal precedent to arrive at a sum. Armed with these principles one can make a loose distinction between “damages” and “restitution”.

A. Basis of Remedies

The remedies to breach of contract and contract law is perhaps analogous to the relationship between punishment and penal code: they are the price that one must take under consideration before breaking a contract. Without such punishment commerce as we know it could not remain the same. With respect to remedies, common law courts in the past three hundred years have formulated clear philosophies in case of breach of contract.

A. Expectation interests: the innocent party ought to be put in as good a position as if the contract has been performed.
B. Reliance interest: the innocent party ought to be reimbursed for any loss caused by a reliance on the contract.
C. Restitution interest: the innocent party ought to be restored any benefit that he has bestowed on the other party.
D. Stipulated Damages: both parties agreed to a fixed some in event of breach of contract
E. Punitive Damages: only available when the defendant is guilty of reprehensible conduct and the damages are designed to punish and discourage similar conduct.

All of these serve as distinctions that allow a court to come to a just settlement for remedies.

However, do these fit into the ideas of promise already discussed? The answer to this question is a crucial one for contract as promise. If A, B, and C are a part of promise, then the law in practice would appear to adhere to a promise paradigm. If not, it would mean that contract, though perhaps related to promise, has indeed grown or evolved into something distinctly different. Let us return to Meldon’s paradigm of promise.

...the promise locution is employed (a) in good faith by a responsible agent, (b) freely and without constraint or duress of any form, (c) to assure the addressee that the speaker will do something clearly manageable by him without undue effort or sacrifice, something that in some strong sense is possible or manageable, (d) something that is
morally acceptable and without hurt or moral damage to himself or anyone else, (e)
something desired and indeed required by the person to whom the promise is given in
order for him. Or someone else in whom the latter has an interest, to carry on with some
program or line of action. Further, (f) the assurance thus given is accepted in good faith
on the terms represented by the user of the promise-locution by an equally responsible
agent, who (g) respects, and in turn is respected by the concern not only for the other
party to the promise-transaction but indeed for anyone else whose interests may be
affected by what transpires in consequence of that promise... (h) The obligation incurred
is an obligation to the promisee such that the recipient of the promise has a right, or is
entitled by that promise, to the performance of that action in question. (i) Failure to meet
that obligation, in the event that failure is willful, is a case not merely of hurting,
disappointing or frustrating the promisee, but of wronging him as a person, i.e. doing
moral damage to him because of the violation of this right; and (j) the moral damage
inflicted entitles a promisee thus wronged to demand redress from the person guilty of
this transgression, and (k) the person to whom the promiser is obliged has the
responsibility, if circumstances warrant it, to waive or relinquish his right, and to forgive
the person who has transgressed against him given appropriate indication of the remorse
felt for guilt that has been incurred (Melden 43-44).

The complication comes in the transfer of moral philosophy into the more pragmatic and concrete
contract law. The reciprocal responsibility of the promisee to forgive the promisor, if warranted,
is something that is not so often found in the realistic business world.

B. Breech of Contract and What Happens

There are, to be sure, thousands of cases on the books where a court ruling upheld a
contract without considerations outside the stipulations of promise. Cases where the debt owed in
the case of non-performance or breach of contact was completely based on expectation and the
parties Kantian autonomy was in no way mitigated. However, these are not the cases that raise
eyebrows in relation to contract as promise. One must find a case where the court discharged or
forgave nonperformance even when the basic tenets of contract law has been fulfilled. This
greatly narrows the search.

In several instances the court can justify a breech of contract. Questions then arise as to
the viability of adherence to a notion of promise and autonomy. Are there more considerations
involved i.e. justice, economic viability, and pragmatism? Another equally important question
then would be: Are these considerations themselves outside the gambit found in promissory ethics? The tension between these two points becomes the crucial to any possible solution.

1. Impossibility/ Personal Inability

"If the performance due from one party becomes wholly impossible without any fault of his own or his employees, he is discharged" (Willston 706). This seems logical in cases where actions of the state or "acts of God" are clearly unforeseeable, and thus mitigate the mechanisms that were in place when the contract was made. Before the ramifications of this statement are examined, a real world example should be provided. _Fibrosa Spolka Akeyjna v. Fairbairn L.C._ B. as found in Corbin § 1353, shall serve nicely to prompt the needed discussion. The delivery of machines by a seller was made impossible by war. They were the agreed equivalent of the price, part of which had been paid in advance. The court judged in favor of restitution of the advance payment. The war prevented delivery by the seller and thus "frustrated" the purpose of the buyer.

Though social conscience often intrudes into the domain of promise, the inability to follow through on a promise resulted from circumstances that were completely beyond the control of the promisor or promisee. It was no fault of either party. In the law, there also resides an element of foreseeability. For if the contract was made in the face of an event that was reasonably foreseeable and likely to occur, the breaching party may not be able to pursue this defense. Inability is not an absolute. The law encompasses, as is often the case, an extension of legally definable culpability into all of a party's actions. If it were the case that this event had a high chance of occurrence, there might be legal ground that holds the defendant somewhat accountable. The whole idea is summed up here in Hogg and Bishop §261.

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an even the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless language or the circumstances indicate the contrary.
This poses no threat to contract as promise under with the addition of Melden because condition (i) calls for a willful breach of contract. Under the terms as defined above, the breach is obviously in no way willful and thus still in line with the morality of promise as set forth.

2. Impossibility after Breach has already occurred

This area of contract law is included only because it points to another aspect of remedies. Impossibility of performance caused by death of a person or by the destruction of specific subject matter is not operative as a discharge if the breach for which suit is brought occurred before there was any such impossibility. There are cases in which it has similarly been held that impossibility is no defense if the promisor would have performed before such impossibility existed if they had exercised proper diligence. These decisions are justifiable if the promisor's failure to act diligently was itself a breach going to the essence. They certainly should not be approved if the delay was not a breach in itself, and if the promisor could and would have performed as required by his contract if supervening events not reasonably foreseeable had not prevented such performance (Corbin §1341).

"Proper diligence" is italicized because it is important to see that already written into the law of contract is a certain responsible agency in the proceedings of both the promisor and the promisee. Is this appeal to the notion of “proper diligence” part of the ethics of promise?

Take for example this case of Holt Mfg. Co. v. Thornton. A contractor who delayed harvesting beyond the agreed time is not free from liability by the fact that a storm destroyed the crop and prevented him from harvesting a short time later. Or in the same spirit, unusual rains rotted a specific log to be sawed during the latter part of the contracted period. Possibly, the promisor was under a duty to act more promptly or with “proper diligence” because the rains, though unusual, could have been foreseen in Ruyon v. Culver.

The fact that this element is introduced into contract law may suggest that something above (or behind background principles) and beyond promissory ethics is being implied. Nowhere under Fried or Melden is the word “prudent” explicitly used as part of promise (though the word has been used in this essay). Rather, it seems to be in the spirit of their thinking. The
term “responsible agent” is foundational to both of their discussions. One might reasonably assume that the responsible person is also the prudent person. But must it necessarily be so? This would give rise to another entire ethical debate that is beyond the scope of this paper. What is needed here is simply the observation that the proposed discussion of promise is inextricably linked with other ethical principles if it is to be the basis of contract law.

3. Effect of Unexpected Difficulties and Unprofitableness

Sometimes, the details of cases cause utilitarian concerns to clearly surpass, in practicality, promissory ethics in resolution of breach of contract.

A supervening discovery of facts that makes the promised performance more difficult or expensive, or the occurrence of subsequent events having this effect, if they are such as are commonly foreseeable and in contemplation, has almost always been held not to discharge the contractor from his duty (Corbin §1333).

This is good news for Fried’s case because the court can be seen as unwilling or slow to intervene with commitments established by private parties and to avoid any violation of their autonomy. However, the word “almost” is what gives rise to another discussion. Again, the casebook should be examined first.

Consider Mineral Park Land Co. v. Howard. The defendant had a public contract to build a bridge out of concrete. The plaintiff agreed to sell gravel from his land at 5¢ per cubic yard. The defendant agreed to buy all needed gravel from the plaintiff in order the build the bridge. After taking the first 50,000 yards, the defendant discovered the gravel underneath was saturated, which thereby caused the gravel ill suited for concrete. He obtained another 51,000 yard from another seller. The plaintiff sued for damages. The defendant argued that he took all the gravel that was “available.” The taking of the gravel was not impossible, nor was the promised payment, but the defendant could have only used the wet gravel by drying it which would have been at a prohibitive cost. Therefore, his hope of profit was frustrated. The defendant was discharged because the use of the wet gravel was “impracticable.”
Consider another example of *Vernon v. City of Los Angeles*. Los Angeles had contracted to receive and dispose of a certain amount of sewage from the plaintiff for an agreed upon fee. Because of a judgment in an action to moderate a public nuisance, Los Angeles was required to build a new sewage disposal plant. Los Angeles was held to be discharged from its contractual duty to Vernon on the ground of increased cost of performance due to the court order. Two judges dissented because it did not appear that the court order was made necessary by the Vernon sewage or how great was the increase in cost of the promise performance (disposal of the Vernon sewage) caused by the court order. The exact figures were not available and are probably necessary to understand the reasons for descent, but they do not affect the present point. What needs to be noted is that in both cases economic pressures sufficiently mitigated the original contract, and it is these economic pressures that need to be examined in order to come to terms with promise as contract.

Is economic impracticability inside the ethics of promise? Once more, not in those terms, but if one were to examine feature (c) there is the phrase “without undue effort or sacrifice.” Can this be interpreted as economic impracticability? There is indeed a spirit of “practicality” and “reasonability” latent in the language. If this can be extended to economic impracticability, then yes, it is inside the ethics of promise. As I already stated, the spirit of the Fried and Melden’s arguments are as active as the particulars. There is a clear logical connection that could be constructed between the two, but there may well be several counter examples. This would again require argumentation beyond the scope and range of this essay.

### 4. Unconscionability

What makes unconscionability such an interesting issue is that, in such a case, a court must change the actual terms of a contract agreed upon by the parties. In effect, the court must force its will (usually bolstered by social policy) above the will of the parties involved in the
It is clear that this is a key example where social conscience comes into direct conflict with allocating absolute responsibility to the wills of the parties.

Unconscionability focuses on the inception, not the performance, of the contract. The contract can be procedurally unconscionable or substantively unconscionable. Procedural would be issues such as a lack of knowledge or understanding of contractual terms in fine print, unintelligible legal language, or lack of opportunity to read and ask questions about a contract. It could also result from a vast disparity in bargaining power. Substantive unconscionability occurs when portions of a contract are viewed as overly harsh or oppressive. An example would be a provision that leaves one party without remedy to a nonperformance of the other party. Historically, relief is not granted unless unconscionability is shown in both areas.

Hogg and Bishop (§208) give the following as possible options of recourse for the court:

If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or, may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Consider *W.L. May Co., Inc. v. Philco-Ford Corporation* in which a wholesale parts distributor is under contract with Philco to sell their parts. The plaintiff was under contractual obligation to keep an adequate inventory of Philco parts at all times. The agreement was that either party could terminate at any time upon written notice of ninety days. Upon termination the distributor would no longer be a authorized Philco distributor, and he would have to resell and deliver the Philco products that Philco elected to repurchase at a mutually agreed price, but not above Philco’s current distributor price for those products. Philco terminated and notified the plaintiff that they did not intend to repurchase any of its products that were still in possession of the plaintiff. Philco contended that the ninety days provided adequate time for the distributor to sell profitably the remaining stock. This was not the case. The plaintiff brought suit claiming that it was
impossible for him to move the remaining inventory under the terms of contract, conditions that he charged as unconscionable.

The court's ruling was that the "repurchase election condition" was an unconscionable term. It also determined that the refusal of Philco to repurchase their products at the time of termination was a breach of an implied covenant of good faith and fair dealing. The court awarded the plaintiff $6,500 in damages for breach of this implied covenant. The defendant contended though that a) the term in question was not unconscionable, b) that damages (defined by expectation) cannot be awarded by unconscionability, and c) that a breach of contract was not the alleged complaint and therefore an improper ruling.

The defense under strict legal terms was correct on all points. The Uniform Code Conduct does not define unconscionability; it only suggests the following as a standard in §2-302:

... The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract... The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

This would imply that, in reality, the term was not unconscionable. Secondly, even if it were, damages can only be awarded in case of a breach of contract (for unconscionability would nullify the contract as thus restitution would be the only governing principle), and that was never the claim of the plaintiff. The court seemed to disrupt both of these legal principles in lieu of a will for fairness. Hogg and Bishop argue that the case should have been reversed; perhaps they are correct, but that is not the point here. For promise as contract to be viable and not merely a philosophical treatise, it must not only be a clear theoretical basis, but also it must give a substantial account for what actually happens in the courtroom. If it does not, then legal minds are right to dismiss the debate as unimportant in the day-to-day proceedings of the legal community. The court here is acting in what it perceives to be the spirit of justice instead of a strictly principled approach. It goes so far as to provide a complaint of breach that was not at first
given by the plaintiff. Again, in modern law it has such a power. There is a range of stratagems, as already discussed, that a court may employ in order to appropriate and execute justice. The fact that a "breach of an implied covenant of good faith" was used demonstrates the court's efforts to apply an expectation principle in the remedy in order to ensure that the amount of relief was as just and legitimate sum for this case.

Fried would probably call this an injustice and wrongful placement of "redistributive zeal." However, under the liberal idea there is the idea of a positive duty to affirm one's own humanity as well as the humanity of others, and the terms of the contract seem to be anything but an affirmation of the party's moral equality. Fried seems to be in a position that is somewhat incoherent. As far as Melden is concerned, again feature (c) could be substituted for such a ruling, though his precise grounding would be different. Melden could say that this sacrifice would be "undue," which would be an appeal to a responsible behavior. Melden's promissory ethics could explain this case and perhaps arrive at a similar ruling, but on grounds that diverge from the court's criteria. Promise as contract becomes deluded and difficult in the face of such a ruling.

5. What If?

Let us return now to the following cases.

Harold, an automobile designer, is contracted by Track Motors to design a new sports car. Harold agrees also to provide supervision over its construction in the assembly line to ensure that the design is followed accurately. The agreement between them is that Harold will receive 10% of the manufacturing costs for the first year of production, projected as $250,000, as payment for his services of design and supervision.
(1) Suppose that Track Motors repudiates the agreement with Harold and hires Phil as a substitute designer. Track Motors communicates this to Harold before Harold begins work on the plans. To what damages is Harold entitled?

(2) Suppose that Harold has completed 60% of his design work, but has not yet began any construction or supervision of the assembly line when the owner communicates the same repudiation of the contract. Harold has already received $50,000 as a down payment towards his fees. To what damages is Harold entitled?

(3) Suppose that Harold is completely finished with his end of the bargain but Track Motors refuses to pay the last $100,000 due Harold under the contract. To what damages is Harold entitled?

One can now see what it would mean in such cases if contract were based on Fried’s definition of promise. The ruling for all three would have to be the same amount: the sum that would place Harold in as good a position as if the total contract had been performed. If one cannot accept this, then one can not accept that promise is the absolute basis for contract. If one were to add other contingencies to promise, such as specified by Melden, the answer would indeed be closer to what happens in the courtroom. However, it remains unclear if his promissory ethic provides the same reasoning as courts would use. Finally, if one were to follow Atiyah’s argumentation the remedies would perhaps emerge accordingly to the test case: (1) Little, if any harm can be proved, thereby rendering monetary restitution without a solid basis. If there was to be a ruling in favor of Harold, it would to intensify the rigidity of the social institution of keeping a promise. (2) Harm could now be proved (the cost of 60% of the design, plus copyrights). Restitution would now demand reimbursement of that sum from Track Motors. (3) Restitution and expectation would result in the same number- $100,000. Siding results from one’s own sense of justice and on the rationale of that justice. However, each principle presents its own implications for possible rectification.
VII. Where do the Remedies Point?

Is contract, then, based primarily on promise as defined by these examinations? It would be hard to deny that it has a significant role, but any concrete definition of that role is difficult. Promise as contract can be applied to unconscionability, unprofitability, and impossibility before and after breach has occurred. However, was promise the fundamental issue? The most frustrating aspect of the problem is that the attorneys that were interviewed for this essay held that a contract was a promise. However, when asked about remedies, the ability to prove damages, in the general sense, was the main consideration, one that is tied more to restitution than to expectation. For example, they wanted to know if Harold had missed an opportunity for other work in case (1), thereby creating a harm. There seemed to be no conceptual distinction in these practicing legal minds between a pure expectation-harm and a pure restitution-based harm. Which causes one to wonder if the practical or conventional does not eventually usurp the conceptual.

Because a plaintiff often has the option to choose whether to sue according to damages (restitution) or according to specifications of the contract, one must wonder if either is more fundamental to contract law or is distinct from the other.

The course of this discussion has been an attempt from varying rationales to find ultimate responsibility for law inherent in morality. Is that reasonable? It is assumed that one must find firm ideological roots in order to give the courts a justification for ruling in any systemized fashion. However, part of law reflects mechanism, and in that mechanism ethical questions become irrelevant to a degree. For example, law often proceeds in accordance with custom or precedent before moral considerations or an ethical discourse. The procedures a judge uses to determine a verdict are often technical in nature, rather than a questioning into Kantian ethics, utilitarian injunctions, or questions of what is the “good life.”
Perhaps the issue of the basis of law is doomed to be an inevitable non sequitur. Every ethical, religious, or philosophical system has been or will be argued problematic, incoherent, or dogmatic in its suppositions. Why does the Western intellect always search for an absolute starting point, when it seems none is to be found? Not that this is a case for ethical nihilism, but simply a case for an acceptance that law is more probably based on a balance of institutions and historical thought. Evolutionary forces, laws of supply and demand, quests for integrity all seem to play a role. The law that is on the books is an exaggeratedly intentional attempt to find precise language, but nevertheless the business of defining is a nebulous web of enigmas. Law is then a trust in the legal system to find an interpretation of that law that is consistent to individual needs and rights, but also endorses societal codes and norms. That is why they are called “judges,” and their job is to define that vague notion of justice.

VIII. Is Promise Rich Enough?

In sum, two approaches emerge. Clearly there are several principles at work in contract law, and explanation of the vastness, complexity and origin of contract law cannot fully be encompassed by any single ethical principle. However, there is a relevant question: Are these different principles, or secondary principles, apart from the primary principle of promise, or are they built into the language and core of promise? If the former, then one subscribes to a sort of ethical toolbox approach, where one simply applies the ethical ideal needed in order to justly appraise a situation. If the latter, then perhaps this is case for virtue ethics, which is to say that the ethical person and the ethical principal are indivisible linked.

No, promise alone is not rich enough. But can promise ever be alone? Throughout this examination it has been impossible, or at least impractical, to speak of promise without the promisor and the promisee incurring an obligation to be “reasonable” or “prudent” or
“responsible.” This was the case in both the ethical discussion and in the language of the law. What one might conclude from this is that, in fact, these principles are inseparable, and the entire debate is in some way artificial. Even Corbin, who wrote ten volumes determining distinctions in contract law, admits that all human classifications are in someway “wavering and blurred.” The close interplay of all these principles in contract law seems to constantly hint that these classifications, though pragmatically necessitated, become artificial on close inspection. This should not be taken as a drastic and deep criticism of all law. Rather, it is an affirmation of the interconnectedness that defines the nature of ethics. This nature is the very crux, which law tries to apply to our own interrelation and interaction as members of the human race.
Epilogue

Faust, Mephistopheles, Order and the Language of Promise: An Essay

Humpty Dumpty sat upon a wall.
Humpty Dumpty had a great fall.
All the king’s horses and all the king’s men
Could not put Humpty together again.

From childhood the metaphor of trying to piece together a puzzle that was once whole and is now broken plays a central role in our psyches. Some children may choose to examine the particulars very closely by drawing distinctions, and thereby trying to learn the truth of the origin and place of each piece. Others may try and imagine a blueprint of the original and then attempt to establish this model as a means to recovering what was lost. Others still may remain quiescent, accepting both as manifestations of the same thing. For them, there is little difference between the particular and the ideal. Rather, they smile instead at the marvel of the verse.

As children of the modern, we are the ones who often embrace the particular over the general, the practical above the principle, and the empirical instead of the theoretical. We argue that this is a will towards that which is “secure” in place of that seeming metaphysical “spectacle” of speculation and ungrounded faith in former times by other children. We reach to be the “good empiricists,” people who are rational, reasonable, concrete, critical, prudent, and even-minded. This is the scientific attempt at truth. But where does the sentiment lie? Where is the Hegelian synthesis of this thesis, the pieces, and antithesis, the blueprint? Surely the same rational and prudent intellect will realize that the particulars, the pieces, are without number, and thus unmanageable for the human mind. An order, in spite of its artificiality, must surface. Or else humanity is left with an infinite and unconnected chaos! There are still those, like Nietzsche, who would argue that a will to a system, any system, is simply a lack of integrity (Nietzsche 93).
However apt one is to sympathize with his views, one cannot refute the ever pervasive realm of order and irrefutability of the pieces.

Perhaps the largest piece left for us to define is that of the signification. The tyranny of the sign as language invades our existence to our deepest possible consciousness. In fact, it is impossible to prove that there is a meta-reality behind the reality of language; for, in order to do so, one is trapped in that very language. As pointed out by philosophers like Merleau-Ponty, language resembles a perfect map expanding over the exact area that is supposedly represented. Thus, there is no way to tell if the land that the map is signifying is really there at all (Merleau-Ponty 42). Yet one is left with such a strong “gut” intuition as if simply by intestinal fortitude one forces that mythical land of one-to-one correspondence into existence. Any other alternative is literally unthinkable, or at least, inexpressible.

There exists therefore an intense relationship of trust between all humanity and language, involuntary, but undeniably necessary. It is a sort of order that must be in the universe for that universe to be intelligible. Perhaps, no modern Indo-European language strives as hard as German to ensure this precarious clarity, security, and stricture. (Only modern Indo-European languages are included because ancient Greek may be even more severe. In fact, for this very reason Heidegger said that one could only do philosophy in these two languages.) It is as if German itself toils to place order in the universe as a whole, and indeed language may be the only thing other than God that is powerful enough to do so! (The question naturally arises on the nature of the creator: Did the language make the people or the people make the language?)

An appeal to linguistic philosophy was alluded to in the last section of this essay. It will be the primary focus of the epilogue. Since language is to be emphasized, there needs to be a central literary metaphor examined, and that allusion will be the pact between Faust and Mephistopheles in Goethe’s Faust. Admittedly neither Melden nor Fried nor Atiyah had the idea of using this as an example in their corresponding philosophies of promise. However, it is worthy of analysis because Goethe, in this work, seeks to question the order of the universe and thus
language through interpersonal human relationships that are governed by promise. If these interactions can be sufficiently complicated, it leaves one with the question that Thomas asked in his book *American Literary Realism and the Failed Promise of Contract*: Can we achieve a social balance in contract law without appeal to the sublime or transcendental? Since legal reasoning traditionally demands a principled approach to verdicts and proceedings (if nothing else, one should normally act in agreement with precedent), one is firmly in the sphere of mind. Where the mind is, so shall follow the body of casework and this discussion.

This is a curious sort of combination of literary theory, legal thought, the continental philosophic tradition, and analytical philosophy. The aim is a search for commonality, which will, in turn, deconstruct the strict delineation that divides various schools of thought. Promise itself encompasses all of these schools in that it is a form of societal organization. This social organization was indeed revolutionary when it came to power along with, or as a result of, a new mercantile class at the end of the Renaissance. For the first time persons of all classes could bind themselves to whomever they chose by means of an obligation. It was a new freedom. The clearly defined roles of serf and lord, nobleman and peasant, were now completely open to interpretation. The underpinnings, as well as the duties and obligations of that hierarchical society, were severely subverted. The society was now dynamic rather than static, and the self-reliant and autonomous individual was free to develop fully.

Accompanied with this new liberty is a need of another definition of self. Questions of identity plague the mind whenever such change occurs. *Faust* is deeply rooted in such a questioning. Faust’s dealing with Mephistopheles can be seen as the application of this new freedom of self and society into a formerly strict dichotomy of heaven and hell. For now Satan’s domain enters into the psychological. Some scholars have argued that this dichotomy between Faust and Mephistopheles is really a battle between Faust’s conscience and sub-conscience. In the times of the rising individual, the individual becomes a spiritual battleground, both externally and internally: according to Freud the *Id* versus the *Ego*. Of course, the psychological and sub-
conscience are common trends and currents associated with romanticism. However, what makes
Faust different from Wordsworth, Byron, or Shelley, or Arnold is, for example, the impossibility
to revert: there is no re-justification of the universe, nor salvation through an ordered vehicle,
such as the female, interpersonal love, or nature. Faust finds salvation, but Goethe still leaves one
very much on Arnold’s “darkling plain” by which there seems to be no escape from
meaninglessness and abstract language. It is a problemization of eternal justice. This principle of
justice becomes the primary, ideal thrust of law that then produces an enigma and,
simultaneously, demands thought on such legal issues as contract.1

The dilemma of Job becomes the psychological and philosophical metaphor that
structures the tragedy of Faust. However, Job’s redemption occurred by faith and trust in Jaweh.
This passivity and waiting upon God is no where to be found in the character of Faust. Faust is
the free individual of this new age, fervently chasing and daring enough to seek the order of it all.
He is undeniably brave; but, destined to be only a tortured soul, he is ensnared by a sustained
belief in co-existence of eternal justice and his own fate of salvation, both of which the Lord
affirms in the prologue. The classical “going through hell to get to heaven” metaphor as
exemplified by such characters as Aeneas, Odysseus, and Dante presents itself in Faust. Faust
explores hell and heaven and the creatures that reside therein, but the demonic and angelic remain
partially bound as part of the earthly or at least the psychological. Sartre may have said that “hell
is other people,” but for Dr. Faust hell seems to be too much in the dark recesses of himself.
However, the fundamental difference between Faust’s experience and, for example, that of Dante
is that Dante finds hell and heaven to be extremely well organized. This order implies a certain
justice in the universe. The single line “In His will is our peace” suffices. However, Goethe
writes a much different setting. His tour of the cosmos is one that is loosely fitted together and
would seem to the reader under a constant threat of collapse and chaos. The single thread

1 The same question of justice here is the most powerful motive behind an attempt to order by or through
abstraction as seen in the extreme organization of Dante or Milton.
throughout this work is that of Faust's salvation. The restitution he would owe if he were to break his deal with the Devil is the only absolute personal driving forces; the contract is the constant. This casts Faust into a man who holds on only for the hope, or promise, of a higher pleasure at a later time, thereby selling his present right to a normal, earthly tranquility in the moment for a chance at a divine consciousness.

The exact circumstance, embodiment, and language of the contract are central issues here. Mephistopheles offers Faust a sort of indentured servitude by which Mephistopheles will placate Faust's depression by the fullest pleasures imaginable on this earth. (Such an end is, of course, impossible; for if Faust stays true to character, he will only be satisfied by a divine consciousness.) The bargain is clear and absolute: If Faust ever says to a moment of time "Verweile doch! Du bist so schön!" [Don't go! You are so beautiful!], Faust will forfeit his life and become Mephistopheles's servant in the great hereafter (MacIntyre 117). The features of offer, bargain, and acceptance have therefore been duly satisfied. Though they shake hands, thus signifying a bilateral acceptance of the terms of contract, Goethe, for poetic and conventional purposes, determines the contract as one written in Faust's own blood. It is now recognizable as a full-fledged promise, entrusted with all the steadfast, moral obligations and responsibilities that are therein contained. Could this apply to Fried's understanding of the liberal ideal or to Melden full-blooded paradigm of promise? Neither could deny that the pact fulfills the basic elements of contract law: mutual agreement, competent parties, and consideration. For Fried and Melden there are two questions: if one could call either of these individuals responsible agents? Is the contract's content moral?

Goethe seems to answer affirmatively. In fact, this is quite an interesting aspect of the whole work. The character of Mephistopheles claims a certain amount of trust from both the

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1 See page 25 of the main essay for details of each.
reader and Faust, and in the Prologue, God’s purpose for Mephistopheles is one that is common
with the development of Faust as a person.

Des Menschen Tägigkeit kann allzuleicht erschaffen,
Er liebt sich bald die unbedingte Ruh;
Drum geb’ ich gern ihm den Gesellen zu,
Der reizt und wirkt und muss als Teufel schaffen.

[Mankind’s activity can languish all too easily,
A man soon loves unhampered rest;
Hence, gladly I give him a comrade such as you,
Who stirs and works and must, as devil, do] (MacIntyre 12).

There is indeed a common purpose in the relations between Faust and Mephistopheles. Their
conversations are always transparent, similar to those between two persons who hold each other
as part of their moral communities. This is not to say that Faust does not accuse Mephistopheles
of wrongdoing or evil motives; extensions of evil are more errors of misjudgment and false
pretence. It is as if both proceed from the same quest: the questioning of ultimate justice in the
universe, which is as much for Mephistopheles’s benefit as for Faust’s profit.

The relationship between Mephistopheles and Faust is that of a discourse in modern
economy. The entire relationship is one of risk-allocation of the most eternal kind, or for the
most eternal questioning of justice. There is commonality in the project, yet also an inherent
distrust of the other party as a result of the individuals searching for their own gain. The
importance of the economic aspects of Faust cannot be understated. In fact, the upheaval of the
traditional model that Satan is never to be trusted recurs, and it demonstrates that contract must
have the highest degree of mobility despite previously defined roles. Nebulous and fluid, it
transcends the categories of good and evil. This role of contract as a new form of societal
organization is an attempt to “think in fields and functions instead of trying to locate ourselves in
any fixed system of coordinates” (Burkhardt 5). Such a mobility and fierce individualism are
possible only in the advent of the modern economy. In essence, the human will, in its contract
with the transcendental, is trying to actualize within itself a sublime and, in fact, a divine essence
through contract. The Faustian yearning is that of translatability and interchangeability between
the temporal and the eternal. Faust, and to a lesser degree Mephistopheles, searches for that
single moment in time that can be eternally retained and enjoyed. It is a hunger to transmigrate
through the transitory into immortality. Faust, as the embodiment of humanity, wants to eat once
more of the tree of life, without losing the understanding gained by eating of the tree of
knowledge. He wants a return to paradise under his own authority and under his rules. Perhaps
this explains why Mephistopheles’s willingness to help, for this is essentially Satan’s own quest.

According to Brinswagner, there are three possible means for man to master time:
science, art, and economy. Through human action each of these has the ability to become
timeless. Science seeks to find principles of cause and effect, which can be established as
independent of their particulars through eternity. Art creates images from the ephemeral matter
of experience in the moment; however there is a separate reality and truth to that moment which
transcends that single point of time and becomes timeless. Economy can transform all other
materials into a value, or capital, which is consumed, but never disappears and thus can be carried
over into the future. (84-85) All of these hinge upon the human ability to act. For this reason
Faust tries to change the beginning of St. John with “Im Anfang war die Tat!” [In the beginning
was the Deed] and not “Im Anfang war das Wort” [In the beginning was the Word] (McIntyre
81). He is trying to replace the biblical ideal of God, the Good, from language to action. This
is archetypal of the human conception of power, as such colloquialisms as “actions speak louder
than words” or “talk is cheap” typify. It is an attempt to converge the timeless or the word, into
something that is temporal or the deed. Several of the great Greek and, correspondingly,
Christian philosophers conceived of God as the Prime Mover, the great mover unmoved, not as
the Prime Speaker. However, the gospel according to St. John implies that God is in the realm of
language, something beyond time or human control. God’s word, or logos, is so internally
ordered as not to be transmutable.
In the modern view of value as economy, Faust seeks a capital that he can change into immortal, eternal, divine, bliss. He is, of course, doomed to fail, and this raises more questions than it answers. Job’s serenity and acquiescence enable him to succeed, but Faust’s bravery never knows such relief. Faust is the manifestation of that great human spirit, which, at its best, launches men to the moon, but, at its roots, will be eternally a rebellion against God and a constant reminder of the failure of the tower of Babel. Faust proceeds by his own rules, the contract, and seeks to make the universe succumb to his own understanding. Through Faust, Goethe succeeds, in context of the modern spirit and economy, in seriously questioning, if not problematizing completely, the eternal order or justice of the universe, as well as the human condition and all systems of order, which includes language itself. By controlling the apparently strict dichotomies of opposing spirits, which resembles the Hegelian mode of thesis and antithesis, Faust draws the opposition between conscience and the sub-conscience, pain and pleasure, good and evil, Faust and Mephistopheles, Apollo and Dionysus, Static and Dynamic, momentary and transcendental, and freedom and fate: in sum, the pieces of Humpty Dumpty contend with the blueprint of Humpty Dumpty. Although one is left in a world of diametric opposition and human torment, there is indeed a commonality. The Hegelian term “synthesis” is not quite correct, for that would imply that the former duality was a discourse of war, which contradicts the communal spirit of Faust.

Ich bin ein Teil des Teils, des anfangs alles war.
Ein Teil der Finsternis, die sich das Licht gebar.
Das stolze Licht, das nun der Mutter Nacht,
Und doch gelingt’s ihm nicht, da es, soviel es strebt,
Verkauftet und den Köpern klebt.

[But I'm part of the Part which at the first was all,
Part of the Darkness that gave birth to Light,
The haughty Light that now with Mother Night
Disputes her ancient rank and space withal,
And yet 'twill not succeed, since, strive as strive it may,
Fettered to bodies will Light stay] (McIntyre 91).
Goethe points to a universal and thus human interconnectedness. The previous dichotomies and distinctions are always and necessarily false. As has been seen, Mephistopheles is a part of Faust as involuntarily as it may be. Indeed, the fragments of the shell left by Humpty Dumpty may appear to have distinct divisions between them, but those borders should not be the focus. They resulted from the fall, not the plan of the divine or the sublime, and are most definitely not part of mankind’s search to find purpose. There is no absolute, no transcendental, no one-to-one correspondence between the sign and meaning. In sum, there is no perfect foundation on this earth. The will towards such a will of a perfect foundation is the lack of integrity that Nietzsche was addressing.

Faust is saved, but it is a painful salvation. Much like Ivan in Dostoyevski’s *The Brothers Karamazov*, Faust finds neither serenity nor tranquility in this life. However, we simultaneously applaud his tenacity and will, for it is tenacity that enables humanity to ascend and leave footsteps on lunar bodies. Faust is justified in his disgust of the common ways of thinking and learning. Indeed his vision was ultimately expanded. Similarly, he risks all for his own form of freedom and creativity like Stephen Dedalus’ decision to reject becoming apart of the clergy in Joyce’s *Portrait of the Artist*. Faust’s insatiability is at the same time his saving grace and fatal flaw. He pits his will for understanding against the normal precedent of the masses in the hope that he will find a transforming truth. If he is wrong, Faust risks being lost for eternity, but a longing for individuation compels him. His engages in the human process of “Becoming,” and that development is not always pleasant and rewarding. The responsibility to create one’s own values is sometimes accompanied by the pain that follows failure. The ability to choose does not mean that all decisions are correct. It is the spirit of Fried’s liberal ideal where the language is allowed to govern the future.

Language, signification and embodiment are large pieces of the puzzle that comprise the system in which we have no choice to live. However, appeals to statements like “*loquor, ergo est*” by Burkhardt are yet another chapter in the saga of Western thought which attempts to find
that single absolute grounding upon which one can build and extend with assurance (15). In
*Faust*, language and meaning are sufficiently problematized, not just in the hope of actualizing a
one-to-one correspondence, but in the quest to derive a principle of human experience.

Consequently, the search for order and justice in this world seems to be an impossible goal. Faust
is in chaos because of the enormous upheaval of what was formerly thought to be the absolute
blueprint. The transcendence of the former system is now bankrupt; and there was a new search
for the sublime in reason, economy, and the demigod of intense individual freedom that becomes
the nature of contract. All of these will prove to be unstable at some point in the future just as all
of their predecessors were. Salvation is in anything except fate, and an absolute foundation is
anything but just. Language and its embodiment in human existence are similarly transitory, but
are trustworthy to degree as the points of departure for understanding human commonality. They
are indeed the system of the sign without need of foundation or ability to find foundation.²

The state of humanity appears to be a neutrality in that one can realize this obscurity in
meaning, but one cannot refute the systems of body and language by which that ideal was
formed.³ Embodiment and the speech-act deconstruct that former duality between particular and
abstraction, and they become the singular, the demarcation of a monolith unto themselves.

Reality is then actualized in the particulars: the itch of poison ivy, the tension between the sexes,
the relief of urination, the warm quiver of mother’s voice, the peculiarity of mood when reflecting
on childhood. On the other hand, reality is then actualized in the abstract: our biological
functionality, a soulful emptiness, the dissonant melody of Miles Davis, the moment of bliss at
the first whiff of apple blossoms, the demanding of meaning on our orgasms, a will to achieve the
next level, the insatiable human appetite--- all of which collide into a murky harmony that
compels one to accept the universe as a whole. It is the distinction that makes the system
artificial; the delineation that disturbs and ultimately disrupts the prospect of universal justice.

² Consider Thomas’s question if social balance in contract law can be found without appeals to the sublime.
³ Consider Dante’s “In His will is our peace.”
The failure of the Enlightenment taught us that Faust's suffering and evil can never be explained by such systems of definition or representation. "All of the king's horses and of the king's men" (human, earthly power) will never return us to our paradise lost.
Bibliography


