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A CRITIQUE OF THE PROMISE MODEL OF CONTRACT

WALLACE K. LIGHTSEY*

Lawyers and most contract scholars assume that a contract is simply a promise that the law will enforce.¹ This concept of contracts as a subset of promises, a concept referred to in this Article as the "promise model" of contract, is implicit in most legal thinking about contracts, but receives an explicit, rigorous treatment in a recent work by Professor Charles Fried.² Professor Fried begins his book by drawing upon basic liberal notions of respect for individual autonomy to develop the principle that a promise is morally binding on the promisor. From this principle he fashions the central thesis of his book: "[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept."³ The remainder of the book uses this thesis to explain and criticize contract doctrine.

In a book published the same year as Professor Fried's work, Professor P.S. Atiyah also compares promise philosophy and contract doctrine.⁴ Like Fried, Atiyah predicates his analysis upon the promise model of contract. Professor Atiyah, however, proceeds from this predicate to develop a methodology and to reach conclusions diametrically opposed to those of Professor Fried. Often referring to legal doctrine and to the principles and values underlying that doctrine, Professor Atiyah criticizes the principal philosophical accounts of promising and decides that promises, *per se*, do not create moral obligations.⁵ He then develops his theory

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1. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) [hereinafter cited as RESTATEMENT]; C. FRIED, *CONTRACT AS PROMISE* 17 (1981); F. POLLOCK, *PRINCIPLES OF CONTRACT* 1 (12th ed. 1946); 1 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1 (W. Jaeger 3d ed. 1957).

2. See C. FRIED, *supra* note 1.

3. *Id.* at 17.

4. See P. ATIYAH, *PROMISES, MORALS, AND LAW* (1981).

5. See *id.* at 123-29.

that a promise is an admission of a preexisting obligation on the part of the promisor. This obligation results from either the harm to the promisee or the unjust enrichment of the promisor that would occur if the promise is not kept.⁶ Thus, he concludes, if there has been no reliance by the promisee and no conferral of benefit upon the promisor, there is no immorality in the promisor's revocation of his promise.⁷

Although Professors Fried and Atiyah reach opposite conclusions, both scholars derive their theories from discrepancies between contract doctrine and the promise principle (the principle that promises are morally binding). These discrepancies fall into two related general categories. The first category concerns the legal doctrine of consideration. Because of this doctrine, contract law traditionally has not considered a mere promise to be a sufficient basis for contractual obligation; instead, the promise must have been given in exchange for a valid consideration. This is true even in the bilateral executory contract, in which one promise is exchanged for another promise. In a wholly executory contract, neither reliance nor conferral of benefit has occurred. Thus the promise principle seems to be the sole reason for regarding the contract as legally enforceable. Yet even in this situation the element of exchange is a prerequisite to legal enforceability: contract law will not enforce a unilateral promise.⁸ This result is irreconcilable with the promise principle. Accordingly, Professor Fried finds the doctrine of consideration "anomalous" and "internally inconsistent."⁹ Conversely, Professor Atiyah sees consideration as "a profoundly moral doctrine" reflecting the judgment that a promise alone creates no moral obligation.¹⁰

A second and related set of discrepancies between the promise principle and contract doctrine concerns the role of the community

6. *See id.* at 184-202.

7. *See id.* at 202-15.

8. This statement is subject to the qualification that, in some circumstances, a unilateral promise that has been relied upon may be legally enforceable. *See* RESTATEMENT, *supra* note 1, § 90. In such cases of promissory estoppel, however, the basis for enforcement is not the promise, but the reliance. *See id.* comment a. *See infra* text accompanying notes 114-17 for a discussion of the question whether contract law should enforce unilateral promises that have been relied upon.

9. C. FRIED, *supra* note 1, at 35.

10. P. ATIYAH, *supra* note 4, at 3-4.

in augmenting, overriding, or modifying the obligations assumed by contracting parties. If, as Professor Fried argues, the basis of contractual obligation is the morally binding nature of promises, then contract law should accord a high degree of deference to the will of the parties as expressed in their respective promises.¹¹ This ideal finds but imperfect expression in contemporary contract doctrine. For example, the law often imposes certain duties without regard to the wishes of the parties—notably, the duty to mitigate damages and the duty of good faith in bargaining and in performance. In addition, courts dealing with form contracts or unconscionable contracts have been increasingly willing to disregard terms of the contract found to be against public policy or otherwise contrary to societal understandings of fairness.¹²

Other questions regarding the role of the community vis-a-vis the will of the parties arise when the terms of a contract fail to address subsequent problems of performance. These “contractual accidents” include contracts predicated on mistaken assumptions and contracts in which unanticipated difficulties have arisen. Professor Fried concedes that, in these circumstances, the promise principle provides inadequate guidance.¹³ He proposes that the law deal with these situations by using a “gap-filling” approach of turning to “residuary principles of civil obligation.”¹⁴ By emphasizing the degree to which contractual planning can avoid accidents, and thus implicitly downplaying the prevalence of accidents, Fried concludes that the necessity for gap-filling does not threaten the promissory principle.¹⁵ Conversely, Professor Atiyah emphasizes the frequency of accidents to demonstrate the paramount role of community values in shaping contractual obligations.¹⁶

Professors Fried and Atiyah deserve praise for their efforts. They have expended much energy disputing the morally obligatory nature of promises in attempting to clarify the implications of

11. See C. FRIED, *supra* note 1, at 17.

12. In a radical extension of this trend, a recent article by Professor Todd Rakoff argues that contracts of adhesion should be presumptively unenforceable. See Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983).

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

14. *Id.*

15. See *id.* at 69-73.

16. See Atiyah, Book Review, 95 HARV. L. REV. 509, 516-20 (1981).

their respective positions. In the end, however, the reader interested in understanding and further developing contract theory is left with the nagging feeling that all of this energy has been expended in vain. Both scholars build their theories from the promise model of contract; both discover profound discrepancies between promise philosophy and contract doctrine. Fried uses these discrepancies to criticize contract law while Atiyah uses them to criticize promise philosophy. Neither scholar, however, explores the conclusion that seems most obvious from the existence of the discrepancies—the simple proposition that contracts are not promises.¹⁷

This Article examines the validity of that proposition by criticizing the promise model of contract and suggesting an alternative model. Part I of the Article discusses three related inadequacies of the promise model: (1) abstraction and oversimplification; (2) focus on the fact of obligation rather than the content of obligation; and (3) unilateralism. Because the criticisms presented in Part I are developed with a more accurate and desirable contract model in mind, Part II describes the general contours of this alternative model, which is developed around the relationship between parties to an exchange. The Article concludes by commenting on the broad implications of the differences between the two models.

I. INADEQUACIES OF THE PROMISE MODEL

A. *Abstraction and Oversimplification*

An ineluctable result of viewing contracts as promises is to abstract and oversimplify the formation and performance of contracts, and thereby to skeletonize the rights and obligations that flow between contractual partners. Promise philosophy typically focuses on a promise by *A* to *B* to do *phi*.¹⁸ Although this simple transaction may be suitable for developing the moral implications generated by a promise, alone or abstract, it represents an atrophied model of contract—a model incapable of dealing with the issues presented by the complex relations among parties to

17. Cf. Raz, Book Review, 95 HARV. L. REV. 916, 921 (1982) (suggesting this conclusion).

18. See, e.g., MacCormick & Raz, *Voluntary Obligations and Normative Powers*, ARISTOTELIAN Soc'y, supp. vol. 46, at 59, 60 (1972).

contemporary contracts. In particular, abstraction and oversimplification cause the three primary inadequacies of the promise model: discreteness, discontinuity, and presentation.

1. *Discreteness*

Modeling contract on a simple promise from one abstract individual to another emphasizes the discreteness of a contractual transaction.¹⁹ Discreteness leads one to view the transaction separately from its surrounding social context and to ignore the identities and relations of the parties.²⁰ This perspective in turn produces perhaps the most serious shortcoming of the promise model: the model operates within a vacuum that induces a gross and often complete deemphasis of the nonpromissory factors that may shape contractual rights. Promise theories concentrate on the promise itself or the actual or likely effects of the promise as the fount of the promisor's duties and the promisee's rights. Actually, however, these duties and rights are created, restrained, and molded by the interplay between the contract and the surrounding social context, as well as by the development of the contractual relationship itself.

A relatively stable, developed society is a necessary precondition to the genesis of the institutions of contract²¹ and promising.²² Indeed, it is an historico-anthropological truth that contracting does not occur until division of labor and a concomitant system of ex-

19. See I. MACNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS* 12 (2d ed. 1978).

20. See L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20 (1965); I. MACNEIL, *THE NEW SOCIAL CONTRACT* 60-61 (1980); Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. ECON. ISSUES 45, 49 (1976).

21. "The fundamental root, the base, of contract is society. Never has contract occurred without society; never will it occur without society; and never can its functioning be understood isolated from its *particular* society." I. MACNEIL, *supra* note 20, at 1-2 (emphasis in original) (footnote omitted).

22. [I]t is wrong to think that social co-operation will not occur without the institution of promising. Indeed, as we have seen, the institution of promising is a relatively late arrival in the development of modern societies. The fact is that much social co-operation can take place without promising, so long as there is a sufficient degree of trust.

P. ATIYAH, *supra* note 4, at 135. As Professor Atiyah argues, any institution of promising presupposes a societal decision that promisees are entitled to the performance of promises and that promisors are not entitled to change their minds. See *id.* at 127-28; Atiyah, *supra* note 16, at 526.

change have been established.²³ Persons who choose to form a contract thus approach each other not as isolated, abstract individuals, but as social actors who are already linked by the general interdependence that results from specialization of labor and exchange.²⁴ Their expectations are profoundly influenced by the social context of their transaction. Their agreement cannot be understood meaningfully without reference to trade custom,²⁵ positive law,²⁶ and general societal norms.²⁷ Moreover, these external factors will often control the rights and obligations of the parties without regard to the terms of their promises.

The contractual relationship itself generates additional non-promissory sources of rights and obligations. Prior dealings between the parties may generate strong feelings of trust or expectation that trump the terms of a party's promise.²⁸ Furthermore, obligations beyond the promise itself may emerge as a contractual relationship develops. As Lon Fuller illustrates:

In a written contract an employer promises the employee at the end of the year a bonus in addition to his regular salary. This promise is accompanied by the words: 'It is expressly understood by the parties hereto that the provision for a bonus herein contained shall impose no legal liability whatsoever on the employer, and that no action at law shall be brought for its recovery, it being understood that the payment of the bonus rests entirely in the uncontrolled discretion of the employer.' There are a considerable number of cases in the United States where courts have ordered the employer to pay the bonus notwithstanding language like that just quoted. However it may be qualified by words, the expectation that the bonus will be paid enters into and conditions the parties' conduct toward one another²⁹

In short, the discreteness of the promise model hides the fact

23. See, e.g., E. DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY 206 (Simpson trans. 1933); see *infra* text accompanying notes 84-88.

24. See E. DURKHEIM, *supra* note 23, at 200.

25. See U.C.C. §§ 1-205(3)-(5), 2-202 (1978); see also E. DURKHEIM, *supra* note 23, at 215.

26. Many areas of non-contract law—antitrust law or federal anti-discrimination law, for example—may determine contractual rights and obligations.

27. See, e.g., U.C.C. § 2-302 (1978).

28. See, e.g., *id.* §§ 1-205(3), 2-207(3).

29. L. FULLER, ANATOMY OF THE LAW 81 (1968).

that trust, expectations, and accompanying obligations may arise from a variety of sources other than the parties' promises, such as the general interdependence between members of a developed society, the customs and norms of the particular business or social community, similar or previous transactions, or the developing relationship between the parties.³⁰ One might be able to force a promissory structure upon such expectations, but this structure would be artificial and frequently fictitious. Alternatively, asserting that these sources of right and obligation are noncontractual because they are nonpromissory entails explaining contemporary contract doctrine through some "gap-filling" approach such as that propounded by Professor Fried.³¹ Any approach along these lines is doomed ultimately to demonstrate the relatively insignificant role of promise in contract law.³²

The discreteness of promises is also responsible for the "infinite regress" problem in promise philosophy. This problem concerns the question why a promisee is *entitled* to the promised performance and why his expectation of receiving the promised performance is a legitimate one. H.A. Prichard provides the classic statement of the problem: "[P]romising to do this or that action, in the ordinary sense of promising, can only exist among individuals between whom there has already been something which looks like an agreement to keep agreements"³³ If one seeks to determine how promising can get underway between abstract individuals in a state of nature, the infinite regress is an insurmountable obstacle.³⁴

30. I. MACNEIL, *supra* note 20, at 74-75; cf. Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 604-05 (1969) (quoting W. GOLDSCHMIDT, SEBEI LAW 221 (1967):

[Within the Sebei tribe, s]uch force as promises have is "ensured by mutual interdependence, by the operation of a market in which each party to the contract had an ultimate interest in preserving his public reputation; his very survival in the community, and certainly his social and economic advancement, depended on his fulfilling the legitimate obligations he had incurred.")

31. See, e.g., C. FRIED, *supra* note 1, at 69-73, 89-90.

32. See Atiyah, *supra* note 16, at 516; see *infra* text accompanying notes 49-50.

33. H.A. PRICHARD, *MORAL OBLIGATION* 179 (1949); see also Robins, *The Primacy of Promising*, 85 MIND 321, 336 (1976) (expectations that a promisor will conform to the practice of promising cannot be basis for promissory obligation because "any such expectations . . . presuppose an antecedent motivation to conform to the practice").

34. See P. ATIYAH, *supra* note 4, at 128 ("[A] vicious circle is inescapable so long as we confine our attention to the promisor himself.").

If one's inquiry concerns contractual obligation, however, the problem is irrelevant. Once one assumes the prior existence of specialization of labor, mutual interdependence, and a system of exchange governed by the norm of reciprocity,³⁵ it is not difficult to envision the emergence of a practice of making contracts without any antecedent "agreement to keep agreements." Parties to a contract will entertain expectations of performance that are *prior to* and *independent of* any belief in the moral obligation to keep promises. This critical sociological fact is hopelessly obscured by the discrete view of contracts under the promise model.

2. *Discontinuity*

The abstraction and simplicity of the promise paradigm create a model of contract as a transaction with rigid and easily discernible boundaries, a transaction that "commences sharply by clear, instantaneous agreement and terminates sharply by clear, instantaneous performance."³⁶ This vision may be appropriate for highly discrete contracts, which closely resemble the promise paradigm. Often in modern contractual relationships, however, neither the commencement nor the performance of the contract occurs with one specific, identifiable event.³⁷ Regarding the formation of a contract, the distinction between a promise and a set of assurances given in contract negotiations is difficult to demarcate: when a party makes one assurance after another, exactly when has that party consented to a contractual relationship?³⁸ Similarly,

35. The primal role of the norm of reciprocity is discussed below. See *infra* text accompanying notes 70-77.

36. I. MACNEIL, *supra* note 20, at 15; see C. FRIED, *supra* note 1, at 113 ("Whether or not a person has promised is a yes or no question."); *id.* at 120-21.

37. Cf. Atiyah, *supra* note 16, at 520 (Fried's justification of discontinuities "falls back on the oversimple paradigm . . . and neglects cases of interpretation and difficulty").

38. The example in the text derives from *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965). In that case, the plaintiffs sold their previous business and incurred other expenses at the request of the defendant, who repeatedly assured them that it would establish the plaintiffs as one of its franchisees. The parties eventually terminated their negotiations without completing the transaction. The Wisconsin Supreme Court affirmed a verdict for the plaintiffs on the basis of the doctrine of promissory estoppel: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* at 694, 133 N.W.2d at 273 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932)). Professor Fried agrees with the court's result, but finds its reasoning incorrect:

promises and statements of intent differ only in degree.³⁹ Regarding performance of a contract, only gradual differences exist between what constitutes "substantial performance" (entitling the performer to insist on his rights under the contract) and what does not.⁴⁰ These distinctions become especially blurred in an ongoing contractual relationship. Yet, under the promise model, these distinctions trigger drastically different legal consequences, a result that can hardly be defended as rational when the controlling facts differ by only a slight degree.⁴¹ Lines must occasionally be drawn, but there should be flexibility in the lines. The promise model is incapable of generating this flexibility.

3. *Presentiation*

By deemphasizing or even disregarding nonpromissory sources of rights and obligations, the promise model requires that the future duties of the parties be determined in the present act of promising. The promise model thus seeks to bring all future contract relations into the present—to presentiate the contract.⁴² Because it is im-

The award of reliance damages was not a case of enforcement of a promise at all, since the parties had not reached the stage where clearly determined promises had been made. Reliance damages were awarded because Red Owl had not dealt fairly with Hoffman. It had allowed him to incur expenses based on hopes that Red Owl knew or should have known were imprudent and that Red Owl was not prepared to permit him to realize.

C. FRIED, *supra* note 1, at 24. Professor Fried neglects to explain the distinction between a promise and Red Owl's specific representations that it would establish the plaintiffs as a franchise operator of a Red Owl store in a particular location by a particular time. Any such distinction is at best elusive, at worst disingenuous.

39. P. ATIYAH, *supra* note 4, at 165-66; see S. WILLISTON, *supra* note 1, § 1A; cf. Greiner v. Greiner, 131 Kan. 760, 764, 293 P. 759, 762 (1930) ("Ritual scrupulousness is not required [to make a promise] and, generally, any manifestation, by words or conduct or both, which the promisee is justified in understanding as an expression of intention to make a promise, is sufficient.").

40. See C. FRIED, *supra* note 1, at 120.

41. Professor Fried's response—that there is no irrationality in this outcome because we are within the realm of deontological morality, see *id.* at 132, 154 n.1—is symptomatic of the abstraction and oversimplicity of the promise model. It is totally artificial to posit any discrete moral difference between the actions of the defendant in *Red Owl* and those of any common promise-breaker. See *supra* note 38.

42. I. MACNEIL, *supra* note 20, at 19; see Goldberg, *supra* note 20, at 49; see also C. FRIED, *supra* note 1, at 13-14 ("Your commitment puts your future performance into my hands in the present just as my commitment puts my future performance into your hands. A future exchange is transformed into a present exchange.").

possible for contracting parties to predict and account for all future contingencies,⁴³ a promise can embody only a fragment of any contractual relationship.⁴⁴ As a result, the promise model is incapable of dealing satisfactorily with long-term, ongoing contractual relationships and with unanticipated circumstances.

Because it combines presentation with discreteness, the promise model tends to address all questions of performance under the rubric of consent:⁴⁵ discreteness sifts out nonconsensual determinants of contractual responsibility, and presentation collects all future duties into a neat package to which each party can give present assent. Consent may be an adequate basis for determining the duties of parties to a short-term, limited contract. As the length and complexity of the contractual relationship increase, however, the limited availability of information about the future and the constant state of flux that characterizes contemporary society take their toll. In such long-term relationships, "consent can play no more than some kind of a triggering role[;] equating consent to the full scope of complex planning is downright silly."⁴⁶

Likewise, the promise model encounters difficulty in resolving issues raised by unforeseen situations, even in the context of short-term contracts. Presentation requires all future contingencies to be anticipated by the parties' promises.⁴⁷ To allow contract law to

43. See E. DURKHEIM, *supra* note 23, at 213; I. MACNEIL, *supra* note 20, at 8.

44. See I. MACNEIL, *supra* note 20, at 8-9; cf. E. DURKHEIM, *supra* note 23, at 214 ("[I]f we were linked only by the terms of our contracts, as they are agreed upon, only a precarious solidarity would result.").

45. This tendency is well illustrated by Professor Fried's treatment of mistake and frustration. Under Fried's analysis, both of these problems result from a failure of agreement between the parties. See C. FRIED, *supra* note 1, at 59-60. The presentation of contractual duties and the consequently bloated role of consent in promissory analysis cause Fried to overlook a fundamental difference between the two problems: mistake concerns a factual assumption that is erroneous at the time of contract formation; frustration relates to a difficulty arising after contract formation that was not foreseen when the contract was made. This distinction implicates differences in analysis of the two problems. Generally, because a mistaken agreement is really no agreement, resolution of a mistake situation should be influenced more by notions of fairness than by the terms of the parties' contract. Conversely, because contractual relationships are aimed at planning future action, a situation of frustration may be resolved more appropriately according to the risk allocation of the parties' contract.

46. I. MACNEIL, *supra* note 20, at 49-50; see P. ATIYAH, *supra* note 4, at 150-51.

47. See I. MACNEIL, *supra* note 20, at 19, 62.

depart from the terms of the promises in resolving unforeseen situations would be to admit the influence of nonpromissory factors and thereby to undermine the basis of the promise model. Thus, unanticipated circumstances can be addressed within the promise model in two ways. One approach brings the circumstances within the promises through the use of some legal fiction—for example, presuming that the parties would have intended a certain result had they considered the situation at hand. This method, fictionalizing intent, has been discredited.⁴⁸ The other approach denies that resolving this type of problem is a matter of contract law. Professor Fried employs this method:

The further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the promise principle and the more palpably are they imposing an agreement.

. . . .

[W]hen relations between parties are not governed by the actual promises they have made, they are governed by residual general principles of law.⁴⁹

Though logically coherent, such a “gap-filling” methodology is an unacceptable approach to contract law. If one concedes that contemporary contracts are generally long-term, complicated arrangements, one must recognize that unforeseen situations are a normal occurrence in contractual relationships. Disavowing the applicability of contract law in these situations relegates that law to a subsidiary role in contractual relationships.⁵⁰ Furthermore, the gap-filling approach ignores the possibility that, because parties have formed a contractual relationship, it may be inappropriate to apply, for example, tort rules to an admittedly unanticipated situation.⁵¹ Professor Fried recognizes as much in discussing the role of

48. See C. FRIED, *supra* note 1, at 60-61.

49. *Id.* at 61, 69.

50. See Atiyah, *supra* note 16, at 516.

51. See Note, *Disengaging Sales Law from the Sale Construct: A Proposal to Extend the Scope of Article 2 of the UCC*, 96 HARV. L. REV. 470, 477 n.42 (1982) (criticizing application of strict tort liability, rather than implied warranty provisions of article 2, to lease of defective goods). General tort rules may be inappropriate or may require modification in the context of other, noncontractual relationships as well. For example, the rules concerning assault and battery cannot be applied straightforwardly to the situation of a parent's disci-

the principle of sharing:

By engaging in a contractual relation A and B become no longer strangers to each other. They stand closer than those who are merely members of the same political community. . . . they are joined in a common enterprise, and therefore they have some obligation to share unexpected benefits and losses in the case of an accident in the course of that enterprise.⁵²

The sentiment expressed in this passage is sound, but not true to the promise model.

In short, "promise" is just too simple and abstract an idea to serve meaningfully as the primary conceptual tool for analyzing contractual relationships. Thinking of contracts as promises leads one to ignore nonpromissory sources of rights and obligations, to assume that contracts begin and end with specific, identifiable events, and to force all future contractual duties into the present act of consent. The resulting view of contracts is unrealistic when compared with most modern contractual relationships. It is too rigid and simplified a view to serve as a foundation for the development of contract theory and doctrine.

B. Focus on the Fact, Rather than the Content, of Obligation

Instead of examining the substance of the obligation that results from a binding promise, promissory analysis tends to focus exclusively on the issue whether a binding promise has been made.⁵³ The analysis assumes that the content of the obligation simply mirrors the promise.⁵⁴ For two reasons, this aspect of promissory

plining a child.

52. C. FRIED, *supra* note 1, at 72.

53. For example, Professor Atiyah's conception of promise as admission relates only to the binding nature of the promise and the conclusive nature of its terms. See P. ATIYAH, *supra* note 4, at 178-79. The conception provides no guidance in dealing with many difficult issues that arise after the formation of a contract, such as the scope of good faith in performance.

54. See, e.g., C. FRIED, *supra* note 1, at 19, 113; H.A. PRICHARD, *supra* note 33, at 169. This assumption is a result of the discreteness that is characteristic of promissory analysis:

In determining the content of a transaction, discreteness calls for strictly limiting the sources of . . . the substantive content of the transaction, in order to sharpen the focus as much as possible. . . .

Closely related to the foregoing is the need to equate the substance of the transaction with the promises, the consensual planning, creating it.

I. MACNEIL, *supra* note 20, at 61-62.

analysis makes the promise model an undesirable basis for contract theory. First, as a general matter, the significance of the fact of obligation is wholly contingent on the content of the obligation. Second, in shifting from promise (a philosophical notion) to contract (a legal creation), the promise model fallaciously assumes that particular legal rights logically imply particular legal remedies.

A binding promise signifies nothing until one knows the consequences of being bound. Even if one concedes that a simple promise by *A* to *B* to do *phi* entails an obligation to do *phi*,⁵⁵ the content of the obligation becomes increasingly unclear as one departs from this simple paradigm. With impossible promises,⁵⁶ promises of fact,⁵⁷ and promises about the future conduct of a third party,⁵⁸ the content of the promissory obligation cannot be extracted as a necessary logical implication of the terms of the promise. Moreover, the content of the promise itself is indeterminate in some instances, such as when extremely long and complicated written contracts are imperfectly understood by one or even both parties.⁵⁹ Finally, promises alone inadequately delineate contractual obligations both in nondiscrete contractual relationships and in unanticipated contractual situations.⁶⁰ In all of these circumstances, the content of obligation takes priority over the fact of obligation. The truth of this assertion is especially apparent in situations in which there is little or no content to a party's promissory obligations. For example, when a party breaches an executory contract but there has been no change in the market, the nonbreaching party has suffered no economic injury and can recover only nominal damages. In such a case, whether a binding promise has been made is simply irrelevant.

In shifting from the realm of philosophical discourse to the realm of legal doctrine, a more fundamental error arises in the no-

55. Even this simple assertion is, of course, a subject of intense debate. See, e.g., H.A. PRICHARD, *supra* note 33; MacCormick & Raz, *supra* note 18; Robins, *supra* note 33.

56. See P. ATIYAH, *supra* note 4, at 155-57.

57. See *id.* at 161-64; O.W. HOLMES, *THE COMMON LAW* 299 (1881).

58. See P. ATIYAH, *supra* note 4, at 164-65; O.W. HOLMES, *supra* note 57, at 299.

59. See P. ATIYAH, *supra* note 4, at 148-49; Atiyah, *supra* note 16, at 516-17.

60. See *supra* notes 18-52 and accompanying text.

tion that the content of obligation mirrors the promise. This notion is the traditional justification for the expectation measure of damages; the measure is seen as the monetary equivalent of the promised performance.⁶¹ But contract is a legal creation and, therefore, the rights and obligations that emanate from a contract cannot be articulated without reference to the legal remedies protecting those rights and enforcing those obligations.⁶² Hence it is fallacious to argue that a particular remedy flows naturally from a particular right. For example, a person who contracts that it will rain tomorrow has clearly "promised" that, if it does not rain, he will submit to whatever sanction the law imposes.⁶³ This is a simple case, but every contracting party intends in a very loose sense the legal consequences of a breach on his part.⁶⁴

Furthermore, the law imposes many obligations and ignores many promises without regard to the intentions of the contracting parties. For instance, a manufacturer's disclaimer of liability for a personal injury caused by a defect in his product is ineffective in most jurisdictions.⁶⁵ Thus, a buyer's "promise" not to sue for such

61. See, e.g., C. FRIED, *supra* note 1, at 17.

62. See Fuller & Perdue, *The Reliance Interest in Contract Damages* (Pt. 1), 46 YALE L.J. 52, 52-53 (1936); Atiyah, *supra* note 16, at 519. As Professor Atiyah has noted, American Legal Realism is generally credited with having demonstrated that concepts used by lawyers have no 'natural' meaning or delimitation. If the law uses the concept of 'promise' then what is a promise is a matter for legal definition. . . . [O]ne cannot draw from a concept, even though it is in current use, necessary legal conclusions unless one has first put the premisses into the concept.

P. ATIYAH, *supra* note 4, at 27. Similarly, whereas Professor Fried asserts that "[t]he moral force of a promise cannot depend on whether the promisee chooses to 'enforce' the promise," C. FRIED, *supra* note 1, at 41, he fails to see that the moral content of the promise will depend on what society considers satisfaction of the obligation.

63. P. ATIYAH, *supra* note 4, at 57 n.36; O.W. HOLMES, *supra* note 57, at 299. The positive role of remedy in defining contractual right is especially strong because of the doctrine of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), which limits consequential damages for breach of contract to reasonably foreseeable damages. See Fuller & Perdue, *supra* note 62, at 85; cf. G. GILMORE, *THE DEATH OF CONTRACT* 53 (1974) (discussing manipulability of the *Hadley* standard of foreseeability).

64. See C. FRIED, *supra* note 1, at 38 ("[For a promise to be binding, the] promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised.") (footnote omitted); cf. P. ATIYAH, *supra* note 4, at 151 ("[T]he total consequences of the promise are an elaborate mesh of the actual words used (particularly written words) and of the law.").

65. See RESTATEMENT (SECOND) OF TORTS § 402A comment m (1963-1964).

an injury is often, legally, no promise at all. Because of its simplistic notion that the content of contractual obligation mirrors the terms of the contract, the promise model focuses all attention on the fact of obligation rather than the substance of obligation. For this reason, the model is an unserviceable tool for identifying the rights and duties that a contract creates.

C. *Unilateralism*

The promise model emphasizes the individual, isolated promise as the basic unit from which contracts are constructed. Because it combines this emphasis with the unidirectional flow of obligation under a promise, the promise model produces a unilateralistic vision of contractual duty. This vision is undesirable for two reasons: it obscures reciprocity, the central norm of contractual relationships; and it induces a fragmented view of the obligations of contracting parties.

Any theory that views contracts as composed of separable promises relies upon a complementarity, rather than a reciprocity, of rights and obligations. The distinction between complementarity and reciprocity can be summarized in the following manner:⁶⁶

In a situation of complementarity—

1. a right (x) of A against B implies a duty (x') of B to A;
or
2. a duty (x') of B to A implies a right (x) of A against B.

In a situation of reciprocity)

1. a right (x) of A against B implies a duty (y') of A to B;
or
2. a duty (x') of B to A implies a right (y) of B against A.

Thus, in a scheme of complementarity "one [party's] rights are [the other party's] obligations, and *vice-versa*."⁶⁷ Complementarity is the basis of contractual obligation under the promise model because the structure of a promise is one of obligation by promisor in

66. What follows in the text is a paraphrase of Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 168-69 (1960).

67. *Id.* at 169.

favor of promisee.⁶⁸ In contrast, a relationship based upon reciprocity posits that each party has rights and obligations; receipt and delivery of performance are mutually contingent.⁶⁹

Reliance on complementarity rather than reciprocity is another serious defect of the promise model. Reciprocity is a critically important social norm⁷⁰ underlying and enabling the development of specialization of labor and an accompanying system of exchange.⁷¹ As the conception of contract crystallized around the relationship between parties to an exchange,⁷² the norm of reciprocity continued to remain at the heart of the relationship. From that position reciprocity exercises a key role in stabilizing the relationship, for it makes the gratification of each party's needs contingent upon satisfaction of the other party's needs.⁷³ Additionally, reciprocity furnishes a basis upon which a contractual relationship can adjust to contingencies that could not have been foreseen at the time of contract formation.⁷⁴ Complementarity, on the other hand, exerts a destabilizing influence:

If assumptions about egoistic dispositions are valid . . . a complementarity of rights and obligations should be exposed to a persistent strain, in which each party is somewhat more actively concerned to defend or extend his own rights than those of others. There is nothing in complementarity as such which would seem able to control egoism.⁷⁵

The norm of reciprocity finds expression in numerous areas of

68. See H.A. PRICHARD, *supra* note 33, at 169.

69. Gouldner, *supra* note 66, at 169.

70. See, e.g., L. FULLER, *THE MORALITY OF LAW* 20 (1964) (society is "held together by a pervasive bond of reciprocity"); L. HOBHOUSE, *MORALS IN EVOLUTION: A STUDY IN COMPARATIVE ETHICS* 12 (1906) ("[R]eciprocity . . . is the vital principle of society."); G. SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 387 (Wolff trans. & ed. 1950) (social equilibrium and cohesion could not exist without "reciprocity of service and return service").

71. Gouldner, *supra* note 66, at 169-70.

72. See *infra* text accompanying notes 84-100.

73. See Gouldner, *supra* note 66, at 167-68.

74. Fuller notes that parties sometimes deliberately leave contractual terms ambiguous with the expectation that those terms will become more definite as the relationship develops. "This they do because they cannot in advance foresee just what kind of reciprocal accommodation on the matters in issue will best serve their respective interests and advance their shared desire to achieve a workable frame of collaboration." L. FULLER, *supra* note 29, at 77.

75. Gouldner, *supra* note 66, at 173; see also I. MACNEIL, *supra* note 20, at 45.

contract law. The most obvious expression is the doctrine of consideration. According to Holmes,

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of *reciprocal conventional inducement*, each for the other, between consideration and promise.⁷⁶

Perhaps because of the stabilizing role of the norm of reciprocity, the law generally has not recognized a mere promise, absent consideration, as capable of generating contractual obligations. Rather, the law has always required that the promise be part of a mutual exchange.⁷⁷ Related doctrines, such as the requirement of mutuality of obligation and the refusal to enforce a "nude pact," echo this theme. The duty to mitigate damages and other duties of cooperation also embody the norm of reciprocity. Although these two sets of doctrine—consideration and cooperation—are both central to the law of contracts, they are anomalous to the promise model. The doctrine of consideration reflects the principle that a promise alone is not enough to create contractual obligations. Duties of cooperation show that the law imposes obligations beyond the parties' promises in order to strengthen and stabilize the contractual relationship.

Another shortcoming of the promise model that results from unilateralism is the model's tendency to separate and isolate the duties of contracting parties, rather than to view the contractual relationship as a single organic unit. Professor Fried's conception of good faith in performance demonstrates this tendency: "[G]ood faith requires not loyalty to some undefined relationship but only loyalty to the promise itself—the faithful carrying out of the mutual promises that the parties, having come to understand their *separate* purposes, choose to exchange."⁷⁸ Such an attitude creates

76. O.W. HOLMES, *supra* note 57, at 293-94 (emphasis added).

77. See P. ATIYAH, *supra* note 4, at 2-3 (English common law); H. MAINE, *Ancient Law* 320-37 (16th ed. 1897) (Roman law); see also T. HOBBS, *LEVIATHAN* 87 (Oakeshott ed. 1957) (distinguishing contract from promise on basis that contract involves mutual exchange).

78. C. FRIED, *supra* note 1, at 88 (emphasis in original).

difficulties for the promise model when unforeseen obstacles arise to inhibit performance. Consider the highly criticized rule that unilateral modification of a contract in light of unanticipated difficulties requires "fresh" consideration.⁷⁹ Critics often lay the blame for this rule on the doctrine of consideration.⁸⁰ The chief culprit, however, may not be consideration but rather the fragmentation of contractual duties induced by the promise model. This fragmentary attitude toward contractual duties makes the modification appear as a separate promise rather than as an adjustment within the contractual relationship. A holistic view of contract as a unitary relationship would not require new consideration for such an adjustment; it would find consideration in the exchange upon which the relationship was based.⁸¹

To summarize Part I of this Article, it is worth emphasizing the significant degree to which the three inadequacies discussed in this Part reinforce each other. Abstraction and oversimplification screen out nonpromissory determinants of contractual rights and obligations and thus cause the promise model to focus on promise as the sole determinant of obligation. This focus causes the model not only to adopt the simplistic and fallacious notion that content of obligation mirrors the promise, but also to conceive of contract in terms of component promises. These two effects in turn lead the promise model to view contractual obligations as characterized by rigidity and discontinuity, a view which supports presentiation and further simplification of rights and duties.

II. AN ALTERNATIVE MODEL: CONTRACT AS EXCHANGE RELATIONSHIP

The promise model of contract is an abstract and simplistic con-

79. See *Levine v. Blumenthal*, 117 N.J.L. 23, 186 A. 457 (Sup. Ct. 1936), *aff'd per curiam*, 117 N.J.L. 389, 189 A. 54 (1937). The *Restatement (Second) of Contracts* repudiates this rule. See *RESTATEMENT*, *supra* note 1, § 89.

80. See, e.g., C. FRIED, *supra* note 1, at 33-36.

81. Fragmentation can also be found in the doctrines summarized in §§ 73-77 of the *Restatement (Second) of Contracts*. These sections enumerate rules for determining when a particular act—e.g., performance of a legal duty—constitutes consideration. See *RESTATEMENT*, *supra* note 1, §§ 73-77. Rather than focusing on such discrete acts, contract law should inquire whether there is consideration (and therefore a reciprocity of relations) in the relationship as a whole.

struct that implies rigidly defined rights and obligations and that fails to account for reciprocal relations among contracting parties. The model cannot deal with the complex and ongoing nature of most contemporary contractual relationships and is a defective conceptual tool for understanding much of current contract doctrine. This Part describes a more accurate conception of contract—contract as the relationship that exists and develops among parties who have made a commitment to a future exchange.⁸²

As used here, “exchange” does not signify discrete exchange, but exchange in the broad sense, encompassing any form of contemplated collaboration that involves a reciprocity of rights and obligations.⁸³ The paradigm of this model is an ongoing, developing relationship—such as the relationship between a union and a corporate management, or between two merchants engaging in continuous business dealings. This kind of relationship has boundaries that are both porous and continuous and an obligational structure that is shaped not only by the parties’ wills but also by nonconsensual factors. Section A of this Part reviews the historical development of contract to demonstrate the origin of contract in exchange. Section B then outlines the general characteristics of the exchange-relationship model. Section C concludes this Part by noting a few limitations of this model.

A. *The Development of Contract*

The legal concept of contract is rooted in the exchange relationship. In Roman law the contractual transaction emerged as a variation of the sale transaction. As traced in Sir Henry Sumner Maine’s *Ancient Law*, this emergence occurred in three stages.⁸⁴

82. French law has a similar concept, “*achalandage*,” which embraces “the sum of all relations created between a business man and his customers.” Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 AM. J. COMP. L. 1, 4 (1955) (quoting Waelbroeck, *COURS DE DROIT INDUSTRIAL* (1863-1867)). This concept, however, is used not to regulate the relations between the businessman and his customers, but to protect those relations from interference from other merchants. See *id.* The analogy to the exchange-relationship model of contract is therefore imperfect.

83. See L. FULLER, *supra* note 29, at 72; see also I. MACNEIL, *supra* note 20, at 86 (modern contractual relationships “involve a flow of exchanges, or often many flows at the same time, occurring in complex patterns not lending themselves to divisions into discrete periods”).

84. See H. MAINE, *supra* note 77, at 315-37.

Early Roman law conflated contract and sale. Both were conceptualized as the same transaction; they were seen as a simple and simultaneous exchange of property for money. The second stage marked the beginning of the divergence between contract and sale. In this stage the law came to recognize the credit transaction, a conveyance of property in return for a promise to pay. As Maine notes, "Contract was long regarded as an incomplete conveyance."⁸⁵ The culmination of the law of contract occurred in the third stage, in which legal enforceability was conferred upon the bilateral executory contract.

The English common law of contract developed not from the incomplete conveyance but from the tort action of trespass on the case.⁸⁶ Despite this tort background, the basis of the contractual action was exchange: the special action of assumpsit (a variety of trespass on the case) was predicated upon misfeasance in the performance of an undertaking.⁸⁷ By the second half of the fifteenth century, assumpsit had been expanded to allow suit for nonfeasance, and at the end of the sixteenth century the action came to include bilateral executory agreements.⁸⁸

The wholly executory contract is the closest that contract law has come to embracing the promise principle.⁸⁹ Thus, when wholly executory contracts became legally enforceable, contract appeared to be on the verge of slipping its exchange moorings: the next logical step would have been legal recognition of unitary promises. In both Roman and English law, however, consideration became a basic requirement of enforceability precisely at this time.⁹⁰

This development was no coincidence, for exchange is the essence of the doctrine of consideration.⁹¹ A traditional formulation of the doctrine defines consideration in terms of benefit to promisor or detriment to promisee.⁹² This bifurcated definition is a bas-

85. *Id.* at 321 (emphasis omitted).

86. See G. GILMORE, *supra* note 63, at 140 n.228; Farnsworth, *supra* note 30, at 594-95.

87. Farnsworth, *supra* note 30, at 594.

88. See *id.* at 594-96.

89. See *supra* text accompanying notes 8-9.

90. See H. MAINE, *supra* note 77, at 337 (Roman law); Farnsworth, *supra* note 30, at 598 (English law).

91. See J. DAWSON, *GIFTS AND PROMISES* (1980); Farnsworth, *supra* note 30, at 598.

92. *E.g.*, S. WILLISTON, *supra* note 1, §§ 99-100, 102-104.

tardization of the core notion of consideration as exchange⁹³ insofar as the definition acknowledges consideration in unbargained-for reliance stemming from a non-exchange situation.⁹⁴ Similarly, use of the doctrine of consideration to exclude options and modifications of existing arrangements has been correctly identified as an inappropriate extension of the doctrine, because both options and modifications occur in the context of an exchange.⁹⁵

Professor Fried's criticism of the doctrine turns on the inconsistency between the requirement of an exchange and the proposition that "[t]he law is not at all interested in the adequacy of the consideration."⁹⁶ But the latter proposition is not a logical outgrowth of the notion of consideration; rather, it is the accomplishment of the movement of late-nineteenth-century jurists (notably Holmes) to objectify legal doctrine.⁹⁷ It conflicts fundamentally with the exchange basis of contract and should be discarded. By making exchange the basis of contractual obligation,⁹⁸ the doctrine of consideration restricts legal enforceability to situations of reciprocity.⁹⁹ This restriction necessitates inquiry into the substantiality of the

93. Cf. Farnsworth, *supra* note 30, at 598 (bifurcated formulation has proved less durable than notion of exchange).

94. See, e.g., *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 373-74, 159 N.E. 173, 175 (1927) ("[T]here has grown up . . . a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel.' . . . [W]e have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions."). The *Restatement* has wisely avoided the bifurcated definition of consideration in favor of a notion of consideration as exchange. See *RESTATEMENT*, *supra* note 1, §§ 71, 79. Promissory estoppel, which allows enforcement of a promise that has been relied upon even if the promise is not part of an exchange, is treated under the topic "Contracts Without Consideration." See *id.* §§ 82-94.

95. *RESTATEMENT*, *supra* note 1, § 87 comment b, § 89 comment a.

96. C. FRIED, *supra* note 1, at 29; see *id.* at 35. But see *RESTATEMENT*, *supra* note 1, § 71 comment b ("[A] mere pretense of bargain does not suffice, as where . . . the purported consideration is merely nominal."); *id.* § 79 comment c ("Ordinarily, therefore, courts do not inquire into the adequacy of consideration. . . . Gross inadequacy of consideration may be relevant to issues of capacity, fraud and the like, but the requirement of consideration is not a safeguard against imprudent and improvident contracts *except in cases where it appears that there is no bargain in fact.*") (emphasis added).

97. See G. GILMORE, *supra* note 63, at 41-45.

98. See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 456-57, 491 (1975); cf. P. ATIYAH, *supra* note 4, at 193 ("[T]he promise is usually evidence that the transaction is an exchange and not a gift. . . .").

99. See *supra* text accompanying notes 76-77.

exchange.¹⁰⁰

*B. Characteristics of the Exchange-Relationship Model*¹⁰¹

In contrast to the rigidity and simplicity of the promise model, the exchange-relationship model views contractual relationships as flexible, adaptable, and capable of incorporating rights and obligations from sources other than the promises of the parties. This alternative model not only presents a more accurate picture of modern contracts, but also provides a more powerful vehicle for the creation and sustenance of contractual relationships in contemporary society. This Section outlines the structural characteristics of the alternative model and then briefly discusses the sources of obligation under that model.

The exchange-relationship model focuses on the long-term contract as the paradigm of contractual relationships. Because of the limited availability of information about the future and the tendency of socioeconomic conditions to fluctuate, the model recognizes that a contractual relationship, to survive, must incorporate a capacity for adapting to changing conditions.¹⁰² The model consequently posits a two-staged process for the delineation of rights

100. For example, in *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964), a furniture company had structured the installment sales contract between it and a welfare mother in such a way that the company retained title to all goods purchased from it as long as there was an outstanding balance due on any one item. The company's agents also permitted Mrs. Williams to purchase an expensive stereo system, which they knew she could not afford, at a time when she was close to eliminating her outstanding balance. After Mrs. Williams defaulted on her installment payments, the company brought a replevin action to repossess all of the goods she had purchased from the company. The court of appeals condemned the company's conduct, but affirmed the trial court's judgment for the company nonetheless.

This holding is unfaithful to the doctrine of consideration and the principle of exchange upon which that doctrine rests. The court should have scrutinized the substantiality of the purported exchange. Although at a purely formal level the contract appeared to contain consideration, the relationship between seller and buyer was really one of bald exploitation rather than one of reciprocity based on exchange. The court should have voided the contract for lack of sufficient consideration.

101. As with much of the criticism presented in the first Section of Part I, discussion of the characteristics of this model of contract draws heavily from the work of Ian Macneil. See I. MACNEIL, *supra* note 19; I. MACNEIL, *supra* note 20; Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). This Section is deliberately abbreviated to avoid repetition of points examined in the first Part of the Article.

102. See I. MACNEIL, *supra* note 20, at 50-51.

and obligations: (1) the initial, tentative definition; and (2) the continual adjustment of the relationship to unanticipated circumstances that occur as the future unfolds.¹⁰³ The model also recognizes that in many long-term contractual relationships, such as that created among stockholders by a corporate charter, individuals or entities may enter and exit the relationship while the relationship continues. This view of contract requires that the law take a flexible approach to contractual duties and, thus, that the rigidity and discontinuity of rights under the promise model be rejected.

Whereas the promise model treats the wills of the parties as the nearly exclusive source of obligation under contract, the exchange-relationship model recognizes three general sources of obligation: sources external to the relationship, the consent of the parties, and the relationship itself. Because the alternative model treats contract as a socio-legal relationship, it easily accounts for the controlling manner in which society and law shape contractual relationships. The model recognizes that general societal norms of fairness and reciprocity, positive law, and trade custom will qualify and even vitiate obligations assumed by contracting parties, and will impose obligations beyond those assumed by the parties.¹⁰⁴

Although the exchange-relationship model thus accords a diminished role to consent as a determinant of rights and obligations, consent still performs a vital function in triggering obligation.¹⁰⁵ The alternative model sees the contractual relationship as essentially voluntary, in contrast with pure status relationships. In a pure status relationship, such as that between parent and child,¹⁰⁶ duties are based wholly on a position that cannot be divested vol-

103. See *id.* at 24-26; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 639-40 (1983). Of course, the initial definition may embrace procedures for structuring future adjustments. An example of such an arrangement is the establishment of an arbitration procedure.

104. See generally P. ATIYAH, *supra* note 4, at 130 ("We thus find a decline in the belief that the individual has the right to determine what obligations he is going to assume, and an increased strength in the belief that the social group has the right to impose its own solution on its members, dissent as they may.").

105. See I. MACNEIL, *supra* note 20, at 50; cf. P. ATIYAH, *supra* note 4, at 177 ("[P]romising may be reducible to a species of consent . . .").

106. See E. DURKHEIM, *supra* note 23, at 207; L. FULLER, *supra* note 70, at 24.

untarily.¹⁰⁷ Besides triggering obligation, consent may also shape the content of that obligation.¹⁰⁸ This shaping function, however, is not a necessary characteristic of a contractual relationship. Because the exchange-relationship model recognizes the influence of external sources in defining contractual obligation, it must assert that no sharp distinction exists between a contract in which the parties have significant freedom to define their obligations and one in which the obligations are defined almost entirely (though *not* triggered) by nonconsensual factors. An example of the latter type of contractual relationship is marriage in nineteenth-century Anglo-American society. Consent was required to become married; yet, once married, the responsibilities of each partner were defined by law and custom.¹⁰⁹ Thus, consent played a vital role in triggering obligation but a trivial role in shaping it. In this respect, then, the exchange-relationship model downplays the shaping function of consent. Nevertheless, the emphasis that the model places on the capacity to respond to unforeseen circumstances dictates that consent play a significant shaping role in most contractual relationships.¹¹⁰

The relationship itself may also be a source of contractual obli-

107. See Gouldner, *supra* note 66, at 170; Pound, *The End of Law as Developed in Juristic Thought* (Pt. 2), 30 HARV. L. REV. 201, 211 (1917). Sir Henry Maine's thesis is that, as a society progresses, individual obligation becomes decreasingly status-based (one's status being defined largely by family and social position) and increasingly contract-based. See H. MAINE, *supra* note 77, at 168-70.

108. The distinction between triggering obligation and shaping obligation may underlie Joseph Raz's distinction between promises and other voluntary obligations. See Raz, *supra* note 17, at 930-33.

109. Similarly, Durkheim has described cultures in which individuals could freely enter into and exit from various family relationships. See E. DURKHEIM, *supra* note 23, at 207-10.

The recent history of the relationship between contract and marriage is an interesting one. In the 19th century, law and custom rigidly defined the obligations of husband and wife: the husband was required to support, the wife to serve. Johnson, *Contract Love*, STUDENT LAW., Feb. 1983, at 12, 14-15. Courts of this period were therefore unwilling to allow marital duties to be varied by contract. See *id.* at 16. Over the last fifty years, as the duties of married persons have become less status-oriented, courts have become increasingly receptive to contractual variation of marital obligations. See *id.* at 16-17.

110. Flexibility is further enhanced by the bifurcated focus of consent in complex contractual relationships. Rather than defining only the substance of exchange, consent is directed also toward shaping the structures and processes by which the contractual relationship will adjust to unforeseen circumstances. See I. MACNEIL, *supra* note 20, at 24-25, 47-50; *supra* note 103. Examples of such bifurcation may be found in corporate charters and collective bargaining agreements.

gation. A longstanding contractual relationship must be judged by standards different from those that apply to a brief or newly formed relationship. For example, in some jurisdictions, a contract between persons who have a history of close and trusted dealings may not be subject to the usual requirement that the contract be in writing.¹¹¹ As a contractual relationship develops, the collaboration gives rise to ties of community between the parties, which may generate additional obligations. Maine notes that

[a]t the earliest dawn of . . . [Roman] jurisprudence, the term in use for a Contract was . . . *nexum*, and the parties to the contract were said to be *nexi*. . . . The notion that persons under a contractual engagement are connected together by a strong *bond* or *chain*, continued to the last to influence the Roman jurisprudence of Contract; and flowing thence it has mixed itself with modern ideas.¹¹²

Additionally, because contemporary contracts often involve ongoing relationships, maintenance of the relationship becomes an important constraint upon both parties¹¹³ and thus implicates duties of loyalty and cooperation.

C. *Limitations of the Alternative Model*

Just as the promise model's focus on the discrete and abstract transaction creates weaknesses in that model, the exchange-relationship model has several limitations that arise because of its emphasis on the ongoing, nondiscrete contractual relationship. Specifically, the model has difficulty dealing with three problems of contract theory: the enforceability of wholly executory contracts,

111. See, e.g., *Harris v. Sentry Title Co.*, 715 F.2d 941, 945-48 (5th Cir. 1983) (imposing a constructive trust).

112. H. MAINE, *supra* note 77, at 314; see also Farnsworth, *supra* note 30, at 582 (in two African tribes, ongoing trading relationships are considered to be relationships of quasi-kinship); cf. *United States Steelworkers of Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 580-82 (1960) ("collective bargaining agreement" means the whole collective bargaining relation, not just the written contract); E. DURKHEIM, *supra* note 23, at 217 ("[E]xchange, as we have seen, is not all there is to a contract. There is also the proper harmony of functions concurring. They are not only in contact for the short time during which things pass from one hand to another; but more extensive relations necessarily result from them, in the course of which it is important that their solidarity be not troubled.").

113. I. MACNEIL, *supra* note 20, at 66.

rights and obligations under highly discrete contracts, and rights and obligations under unilateral promises.

1. *Executory Contracts*

The exchange-relationship model accords a significant influence to the role of nonpromissory factors in creating contractual obligations, and thus recognizes that expectations of performance may exist without any belief in the morally obligatory nature of promises. Similarly, by founding the doctrine of consideration on the norm of reciprocity rather than on the separate elements of benefit, reliance, and promise, the model need not rely on the binding nature of promises to justify enforcing executory agreements.

Nonetheless, it is not clear that the model supports the enforcement of wholly executory contracts. The norm of reciprocity obviously entails a duty not to disappoint the legitimate expectations of a contractual partner. But in a wholly executory situation, the norm itself cannot be the basis for determining whether an expectation of performance is legitimate, because the norm requires a *prior* right or duty upon which to operate. Thus, it is unclear whether this norm comes into play before there has been any reliance or conferral of benefit.

Because the exchange-relationship model focuses on ongoing relations, the characteristics of the model are not particularly useful in generating a reasoned response to the question whether purely executory contracts should be binding. The question simply does not arise in the context of an ongoing contractual relationship. In an ongoing relationship, reliance and conferral of benefit have already occurred and are occurring continuously. The best the model can do in addressing this question is to refer to actual practice as expressed through societal norms, law, and trade custom. If these sources of rights and obligations recognize wholly executory agreements as binding agreements, a contractual relationship will incorporate that proposition.

2. *Discrete Contracts*

Although one may fault the promise model for failing to deal adequately with complex and ongoing contractual relationships, one must nevertheless recognize that short-term, simple, discrete

contracts play a significant role in contemporary society. Because the exchange-relationship model broadens the field of obligational sources and relies heavily on cooperative adjustment of the contractual relationship over time, it does not provide great certainty. Indeed, a principal strength of the model is its emphasis of flexibility over certainty. The exchange-relationship model may therefore be inappropriate in many situations. For example, in a dispute over a contract for a sale of stock on a national exchange, legal inquiry into the "relationship" between buyer and seller not only would be a waste of time, but also would undermine the certainty and predictability vital to the operation of the exchange.

3. *Unilateral Promises*

The alternative model places contract in exchange and therefore cannot offer any reason to enforce a promise that is not part of an exchange. This incapacity exists even when a promisee has relied on a promise, as long as the reliance did not occur in the context of an exchange relationship.¹¹⁴ This failure is difficult to justify theoretically, and is an embarrassing shortcoming in light of the fervor with which contemporary contract doctrine embraces the notion of promissory estoppel.¹¹⁵

One could perhaps argue that contract law should be concerned only with relations of reciprocity or, more specifically, with protecting the mutual trust necessary to the continuance of such relationships. A unilateral promise creates a relationship of complementary rights and obligations, whereas a relationship of reciprocity is both more stable and more adaptable than one of

114. If the promise occurs within an exchange relationship, it is not really unilateral. Many purported examples of promissory estoppel actually involve promises occurring within exchange situations. For example:

A has been employed by B for 40 years. B promises to pay A a pension of \$200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding.

RESTATEMENT, *supra* note 1, § 90 illustration 4. Similarly, the situation in *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), was that of negotiations preliminary to an exchange. See *supra* note 38.

115. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT, *supra* note 1, § 90(1).

complementarity.¹¹⁶ But that distinction furnishes no reason for reciprocity to define the limits of contractual obligation. As Professor Fried asks,

[W]hy is my enforceable promise to sell my brother-in-law my automobile less sterile than my promise to give it to my nephew? The law recognizes the *completed* transaction (after I actually hand over or sign over the automobile), presumably in recognition of my right to do with my property as I choose.¹¹⁷

One might also argue that promises are unlikely to occur in non-exchange situations. A person will rarely make a promise to another from whom the promisor neither has received some past benefit nor expects some future reciprocation. In such rare instances, the law can prevent injustice by turning to some other source of legal obligation. This argument seems to stretch the notion of "exchange" too far.

The only response to these criticisms may be that the characteristics of exchange relationships are sufficiently determinate and are sufficiently distinct from the characteristics of promise relationships that the two types of relationships should be dealt with by different branches of legal doctrine. Contract scholars and lawyers should be concerned with developing rules that encourage and strengthen exchange relationships. Furthermore, these rules should enable such relationships to adapt to unforeseen circumstances and to withstand the pressures of adverse conditions. The results of such a doctrinal development are likely to be very different from the rules that would be constructed in response only to a concern for protecting justifiable reliance on unilateral promises.

III. CONCLUSION: IMPLICATIONS OF THE CONTRAST

The two models of contract contrasted in this Article embody drastically conflicting visions of the relation between contract and community. The promise model envisions a marked antithesis between contractual relationships and community relationships. Contractual rights and obligations are rigidly defined by the promises of the contracting parties, and trust between the parties is confined

116. See *supra* notes 66-77 and accompanying text.

117. C. FRIED, *supra* note 1, at 37 (emphasis in original).

to the explicit terms of the promises. Structuring contract as unilateral obligations running in opposite directions focuses attention on the zero-sum aspects of exchange and thereby accentuates and justifies divisiveness and selfishness.¹¹⁸ Emphasizing discreteness and abstraction further constricts personal involvement in the contractual relationship.¹¹⁹ Community relationships would be disrupted by such a regime of rigidity, selfishness, and limited personal involvement, for "[c]ommunal life needs to maintain the lines of right and duty fluid in attention to an untrammelled trust. It must subordinate the jealous defense of individualistic prerogative to the promotion of shared purpose and the reinforcement of mutual involvement."¹²⁰ Accordingly, the promise model would maintain a sharp division between contractual relationships and community relationships.

In contrast, the exchange-relationship model seeks to heighten the interaction between contract and community. It underscores the flexibility and porosity of contractual obligation, stresses mutual dependence and cooperation between contracting parties, protects and encourages intense personal involvement. This model rejects the simplistic dichotomy of community as altruistic sentimentalism and contract as self-interested materialism.¹²¹ It recognizes that contractual solidarity derives largely from the permeation of societal norms¹²² and that social solidarity is enhanced by furthering contractual relationships.¹²³ It envisions contract and community intermingling, with each realm richer for its association with the other.

118. See I. MACNEIL, *supra* note 20, at 17-18.

119. Discrete transactions . . . are nonprimary relations. They involve only a small part of the personality, are very limited in scope, are nonunique in personal terms, and hence can be transferred readily. . . . The satisfactions derived are limited to the narrow economic exchange being accomplished. Buying gasoline for cash at a busy self-service station in a strange town is a fairly good modern example.

Id. at 13.

120. Unger, *supra* note 103, at 624.

121. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Unger, *supra* note 103, at 641-42.

122. See I. MACNEIL, *supra* note 20, at 14, 58.

123. See *id.* at 93-94, 120 n.4.