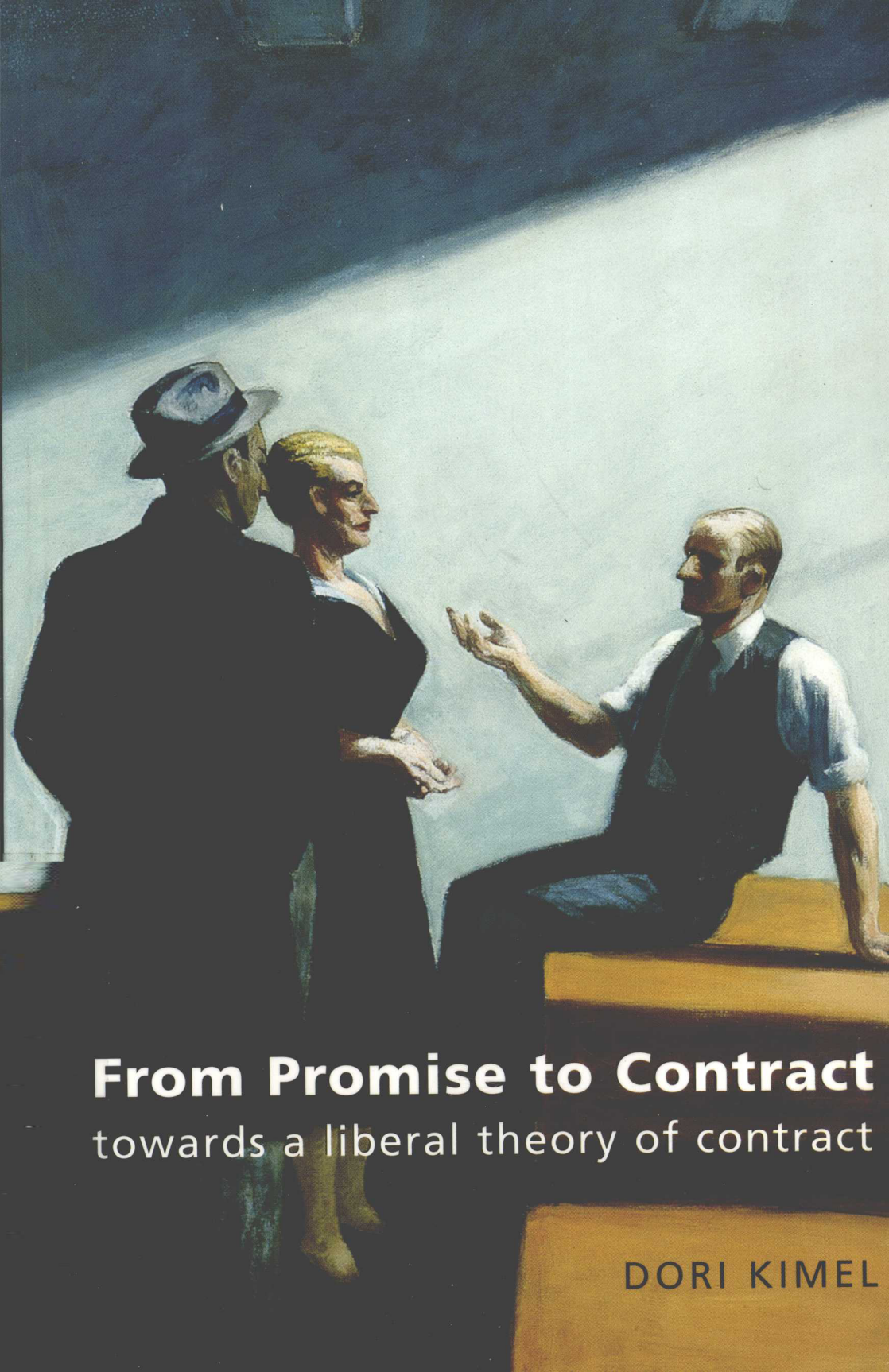

From Promise to Contract

towards a liberal theory of contract

DORI KIMEL

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Towards a Liberal Theory of Contract

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New College, Oxford

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FROM PROMISE TO CONTRACT

Liberal theory of contract is traditionally associated with the view according to which contract law can be explained simply as a mechanism for the enforcement of promises. The book bucks this trend by offering a theory of contract law based on a careful philosophical investigation of not only the similarities, but also the much-overlooked differences between contract and promise. Drawing on an analysis of a range of issues pertaining to the moral underpinnings of promissory and contractual obligations, the relationships in the context of which they typically feature, and the nature of the legal and moral institutions that support them, the book argues for the abandonment of the over-simplified notion that the law can systematically replicate existing moral or social institutions or simply enforce the rights or the obligations to which they give rise, without altering these institutions in the process and while leaving their intrinsic qualities intact. In its place the book offers an intriguing thesis concerning not only the relationship between contract and promise, but also the distinct functions and values that underlie contract law and explain contractual obligation. In turn, this thesis is shown to have an important bearing on theoretical and practical issues such as the choice of remedy for breach of contract, and broader concerns of political morality such as the appropriate scope of the freedom of contract and the role of the state in shaping and regulating contractual activity. The book's arguments on such issues, while rooted in distinctly liberal principles of political morality, often produce very different conclusions to those traditionally associated with liberal theory of contract, thus lending it a new lease of life in the face of its traditional as well as contemporary critiques.

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Introduction

ARE CONTRACTS PROMISES? When one philosophical question occupies generations of thinkers, all failing to come up with a conclusive answer, the suspicion arises that something is wrong with the question itself. I am not suggesting that this is necessarily the case with the opening question. There may be nothing intrinsically wrong with asking whether contracts are promises, just as there need not be anything intrinsically wrong with the question of whether a Jeep is a car. Clearly there is sufficient similarity between car and Jeep, contract and promise, to render such inquiries plausible. The problem, however, lies with posing these as 'yes–no' questions, expecting hard and fast 'yes' or 'no' answers. In both cases such answers, whether in the positive or in the negative, are bound to breed distortion. In both cases a more satisfactory answer would have the form of 'yes, but . . .'—or 'no, but . . .'—with the more illuminating bit being whatever comes after the 'but'. A Jeep, to pursue the simpler case, possesses some characteristics that all cars possess, and can fulfil most of the functions that cars are normally expected to fulfil and are generally capable of fulfilling. But a Jeep also possesses certain characteristics that cars do not normally possess, and is capable of fulfilling certain functions which are not normally attributed to and cannot normally be fulfilled by cars, and that at a price in terms of its proficiency in fulfilling certain functions that cars typically do fulfil. A complete analysis of the conceptual relationship between car and Jeep must not eschew such complexity. The same goes for the more intricate matter of the relationship between legal and non-legal practices that is at issue in this work.

'Legal theorists', Joseph Raz wrote, 'often create the impression that there are only two possible conceptions of the law of contract. Either its purpose is to enforce promises or a certain class of promises . . . or it is a hybrid of principles of liability based on torts and restitution, disguised so as to make their true nature obscure.'[1] My aim in this work is largely to offer a third approach to the question of the relationship between contract and promise. If pressed, I would classify my view as a 'yes, but . . .' (rather than a 'no, but . . .') type of answer. The reason for this is threefold. First, the parallel between contracts and promises—both facilitate and regulate (part of) the normative consequences of voluntary undertakings of obligations to others—serves as the starting point to my discussion of promise and informs many of my subsequent observations. Far from arguing against the notion that either contracts or promises can be characterised in such terms, much of my argument is intended to provide this

[1] 'Book Review: Promises in Morality and Law' (1982) 95 *Harvard Law Review* 916 at 933.

familiar view with further support. Secondly, theories of the 'contract as promise' variety, and particularly Charles Fried's modern rendition of the theme, have been, I believe, generally more satisfactory, or perhaps less unsatisfactory, than their alternative in the shape of a sweeping denial of the correlation between the two practices. Indeed, the reason for this may well be that the similarity between contract and promise illuminates at least as much, if not more, of the nature of contract as do the differences between them—and this may remain true even with regard to those differences which have been largely overlooked and on which I hope to shed some light. Finally, the 'contract as promise' school of thought has been customarily identified with the liberal tradition of contract analysis. And my view, although significantly different from what is commonly known as a liberal theory of contract (both in terms of the kind of liberalism by which it is underlain, and in terms of its understanding of the contract-promise equation), is intended as a development of this very tradition.

I mentioned Charles Fried as a notable advocate of the 'contract as promise' approach. For much of his career, Patrick Atiyah has established himself as perhaps the most forceful critic of this approach, and the most celebrated proponent of the kind of alternative view delineated by Raz in the above quotation. Yet in the same year Fried's *Contract as Promise* was published,[2] Atiyah, in his *Promises, Morals, and Law*,[3] added his voice to those who view contract and promise as analogous institutions. It must be said, though, that Atiyah's is no ordinary 'contract as promise' theory, for the path he took into the rival camp consisted in turning promise into what he had always argued contracts were—or, more accurately, were *not*, namely independent sources of obligation—and the methodology he followed along this path, that of using contract law as a basis for the analysis of promise, suggests that his approach should in fact be labelled 'promise as contract' rather than the other way round. Now it has been suggested (and I agree) that of the two it is Fried's endeavour which was the more successful, for whereas his analysis of contract law is (as I shall argue) based on an essentially sound understanding of promissory logic and seems strained mainly as a matter of explaining certain contract law detail, Atiyah follows a questionable methodological formula on the way to an altogether counter-intuitive and far from convincing account of promise. Yet despite the striking contrast between their respective efforts, Fried and Atiyah can be seen as grappling with the same basic difficulty: that of reconciling apparent (and, as I shall explain, inevitable) discrepancies between promissory logic and contract law reality.

The very existence of such discrepancies, and the difficulties encountered by those purporting to reconcile them, can be taken to reinforce the case for a theory that recognises not just the similarity but also the disparity between the normative foundations of contract and promise. Yet I do not intend to invest-

[2] C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Massachusetts, 1981).

[3] PS Atiyah, *Promises, Morals, and Law* (Oxford, 1981).

igate such discrepancies directly, nor expose as an end in itself the failings of known attempts to reconcile them. Mine is a positive argument to the effect that the similarity of function and value between contract and promise is but partial. As such, it does not depend for its validity on the existence of incongruity between certain aspects of the common law of contract (or the law of contract in any other jurisdiction) and promissory logic—an incongruity that, it should be recognised, could play but an evidentiary and in any event inconclusive role in this context. After all, the law itself, and not only the theory purporting to explain its normative foundations, can in certain respects be flawed, or without being flawed can incorporate to some extent (as it surely does) certain principles beside promissory ones even inasmuch as the latter lie at its heart. I do believe, however, that a more complete account of the relationship between contract and promise can provide a superior basis on which to explain some features of the law as it is, and on which to offer solutions to problems that it fails to resolve or resolves unsatisfactorily. Some such issues will be addressed in the later parts of this work, once the main theoretical argument has been set out.

I will start with an account of the normative foundations of promissory obligation. My aim here is, rather than to do full justice to the network of intricate philosophical quandaries this topic comprises, to set the stage for a comparison of promise to contract. Hence the special attention I will pay in this context to issues such as the normal background conditions for promising, the main functions this practice is suitable for fulfilling and the main values it possesses, and, in particular, the role reserved for trust in the promissory arena. Hence also my choice of Fried's analysis of promissory obligation as the starting point for this discussion.

The second chapter can largely be described as a detour, but one that will hopefully bring us back to the main road better equipped to face the rest of the journey. Here I will examine a thesis that was recently offered as a critique of HLA Hart's analysis of the way in which the law, and criminal law in particular, purports to guide behaviour. This discussion will provide me with the opportunity to explore a number of pertinent issues, such as the role of threats and coercion in the law, the relationship between these and trust, and the concept of trust itself.

In the third chapter, the focus of attention shifts to contractual relations. Drawing on earlier discussions as well as on an examination of certain features of personal relations in general, I will here introduce my main arguments concerning the similarities and dissimilarities between contract and promise. From there I will move on to examine, in the final two chapters, several issues arising in and around contract law. I will discuss, first, a number of problems concerning remedies for breach of contract, and, secondly, one familiar and one less familiar theme pertaining to the broader issue of contract law's positioning in the framework of liberal political morality, namely the freedom of contract and the freedom *from* contract. Through the final chapters' discussions I intend to illustrate some of the practical implications of the theoretical steps taken up to

this point, and in the process put into context and thus further elucidate the main arguments which were made along the way.

Finally, I would like to mention two issues that cannot be addressed directly in the confines of this work, but on which it may nevertheless have some bearing. The first is the economic analysis of contract law, and the relationship between this type of scholarship and a project such as mine. In a recent survey article on the philosophy of contract law, Jody Kraus described what he calls 'philosophical' contract scholarship (essentially, for him, theoretical analysis of contract outside the economic analysis of law school of thought) and 'economic' contract scholarship as 'two bodies of scholarship [that] have largely passed each other like ships in the night,' only rarely and irregularly taking notice of each other.[4] Though this work is by no means a conscious effort to facilitate a happier or a more interactive future for these two bodies of scholarship, it is possible that its main theses are capable of at least diffusing some of the tensions between them. My arguments to the effect that the similarity between contract and promise is but partial, and in particular the thesis according to which (by contrast to promise) the intrinsic value of contract derives from this practice's ability to facilitate not personal relations but personal detachment, may have the side-effect of creating more room—if you like, more philosophical or even more moral room—for the application of economic considerations both in the descriptive and in the normative analysis of contract law. It is possible, that is, that what I shall describe as (valuable) personal detachment is an environment the creation and maintenance of which are matters far more accommodating to brute economic analysis than are the kind of inter-personal relationships that form the environment in which promissory logic resides.

The second issue is the relationship between contract law and other—in the eyes of some competing—legal disciplines. It is not new for contract law to come under pressure as a discipline upon whose very distinct existence doubt is thrown. The main candidates for bringing about the death of contract are tort law (into which contract law could allegedly be absorbed or re-absorbed, as argued in Grant Gilmore's celebrated work[5]) and, more recently, the law of restitution, the emergence of which as a legal discipline unto itself could allegedly render contract, again, as a sub-category holding no particular interest within a much broader legal field. Of course, a complete refutation of such views necessitates not only the analysis of contract, but also the corresponding analysis of that discipline or those disciplines that supposedly threaten contract's distinct existence. Yet my endeavour on the one hand to disentangle (to some extent) contract from promise and, on the other hand, to bring to light contract's unique functions and value, could, if successful, substantially improve contract's chances of survival when the more comprehensive inter-

[4] JS Kraus, 'Philosophy of Contract Law' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, 2002) 687.

[5] See *The Death of Contract* (Columbus, 1974).

legal-disciplinary contest is embarked upon. Contract law's distinct and independent standing, that is, is much more likely to withstand such challenges when the practice's unique functions and value are seen for what they are, than as long as it is understood as either a not altogether successful or consistent version of promise or a haphazard amalgam of disparate principles of liability.

The systematic exploration of these two issues will have to await another day. For the moment, let us stay with promise, contract, and what is between them.

1

On the Nature and Value of Promises

THE NORMATIVE FOUNDATIONS of promises, and their role and value as a social practice, have been explored by generations of philosophers, political theorists and social scientists. My aim in setting out to add a few drops of my own to this ocean of literature is relatively modest. My comments are intended as a basis on which to study the relationship between promises and their alleged legal equivalents, contracts.

This narrowness of aim explains a few things about the discussion that will follow. It explains, notably, my focus on what I shall describe as the normal conditions and circumstances for promising, as opposed both to necessary conditions, and to circumstances in which or purposes for which the practice may be used but which are, in one sense or another, marginal, esoteric, atypical. For although such matters may be of significance for the study of promise per se, it is the practice's normal function and mode of operation which should serve as a basis for its comparison to contract.

My ultimate interest in this comparison also explains, in part, why I see fit to use Charles Fried's account of the normative foundations of promise as a starting point for my discussion. His *Contract as Promise*[1] is the most celebrated and probably the most influential modern defence of a thesis by that name, powerfully continuing a theoretical tradition from which my work at the same time draws inspiration and seeks to depart.

But there is another reason to launch the discussion with a look at Fried's account of promise: it is, excuse the pun, a promising starting point. I see it as such for two related reasons, both a reflection of what may be described as the 'Kantian' spirit of his argument. One, as I shall soon explain, is the strictly 'backward-looking' quality of his account of the binding force of promises. Secondly, and more specifically, his argument touches on what I believe to be the theme which holds the key not only to the nature and value of promise but, in particular, to the analogy—and, as this work is largely dedicated to establishing, dis-analogy—between promise and contract.

This theme is trust. Yet Fried's succinct account of promises incorporates, rather confusingly, *two* distinct themes: trust and convention. I will start with

[1] C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Massachusetts, 1981) (henceforth *Contract as Promise*).

an attempt to disentangle the two, calling into question the significance of the latter before further exploring the role and the significance of the former.

Fried's Argument: Convention, Social Practice, Trust

Classified in terms of the distinction between backward-looking and forward-looking normative argumentation, Fried's account of the binding force of promises clearly belongs to the former category.[2] He explains the requirement to keep a promise as arising primarily out of the very act of promise-making, rather than from the consequences that breaking or keeping a promise may entail (eg increasing or decreasing the sum of happiness or utility[3]) and, for that matter, regardless of the immediate side-effects of the making or the breaking of a promise (eg, respectively, reliance by the promisee, unjust enrichment by the promisor[4]). Indeed his account may be said to be looking strictly backwards, not even sideways.[5]

Having established that forward-looking arguments fail to elucidate the notion that promise-keeping is a *general* requirement,[6] and that sideways-looking arguments concerning the binding force of promises are circular (unjust enrichment, reliance, occur precisely because promises are assumed to be binding[7]), Fried suggests that the way forward consists in recognising what he calls 'the bootstrap quality' of the required, backward-looking, argument: 'To have force in *a particular case* promises must be assumed to have force generally.'[8] The paradoxical appearance of this proposition, he continues, evaporates once the conventional nature of the matter at stake is recognised. He goes on to describe promising as 'a very general convention,' and, more importantly, one that serves highly valuable ends.[9] And from here, '[i]ndividual obligation is only a step away.'[10]

Let us pause for a moment and clarify a preliminary point. Promising can be said to be, or involve, a convention in two distinct senses. First, there is the thesis according to which there are linguistically conventional means *by which* to promise, that is, by which to communicate an intention to undertake, by that very act of communication, an obligation.[11] If we understand conventions as

[2] For the distinction, see B Williams, *Ethics and the Limits of Philosophy* (Cambridge, Massachusetts, 1985) 8.

[3] See *Contract as Promise*, at 15–16.

[4] *Ibid* at 9–12.

[5] The terminology is again borrowed from Williams, above n 2.

[6] Above n 3.

[7] *Contract as Promise*, at 11–12. For a similar argument see also GJ Warnock, *The Object of Morality* (London, 1971) 99–101.

[8] *Ibid* at 12 (italics in original).

[9] *Ibid* at 13. Fried's account of the value of promising will be examined at a later stage.

[10] *Contract as Promise*, at 16.

[11] This formulation is borrowed from Raz. See 'Promises and Obligations' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Oxford, 1977) 210. An earlier account which influenced Raz's view as well as some of my comments on the subject is GJ Warnock's, above n 7, ch 7. For a powerful defence of an alternative, reliance-based, view of promising, see DN MacCormick, 'Voluntary

solutions to co-ordination problems, then the co-ordination problem linguistic conventions of this kind (eg using the words 'I promise') are a solution to, is *how to communicate* such an intention.[12] Then there is the thesis according to which the very practice by which people undertake obligations through acts of communication in which they state their intention to do so, regardless of the linguistic means used for this purpose, is a matter of convention. Here the co-ordination problem would be how to achieve whatever it is that the practice as a whole is thought to be a means of achieving.

Fried does not clarify which thesis he has in mind when describing promising as a convention. The first thesis, however, though correct, seems patently irrelevant for the purposes of explaining the binding force of promises. The availability (in a given linguistic community, or culture, etc) of conventional means for promising could probably make it easier—simpler, quicker—to make a promise. But it would be a different matter altogether to argue that whenever such means are available (or let alone regardless of whether or not such means happen to be available) it is impossible to promise in non-conventional ways, or that the normative implications of a promise made by conventional means would be any different from those of a promise made by non-conventional means. Fried does not provide an argument to such an effect, and I cannot think of one either.[13]

But what about the second thesis? I have already mentioned one characteristic of conventions that does not square easily with promises: conventions are solutions to co-ordination problems. As through promising a person purports to commit herself in a special way to a certain course of future action—purports to make it her obligation—promises can sometimes be said to facilitate a form of co-ordination between promisor and promisee;[14] but even as such they can hardly be described as a solution to a co-ordination *problem*, classic examples of which are what side of the road to drive on, or who should call back when a phone conversation is unexpectedly cut off. Such problems involve situations where all participants have a common interest in opting for one course of action out of several (at least two) alternatives, with the interest in uniformity greater than the reason, if any, for preferring any particular course of action to its alternatives. It seems

Obligations and Normative Powers,' Supp vol 46 *Proceedings of the Aristotelian Society* (1972) 59; and see Raz's response, 'Voluntary Obligations,' there, at 79.

[12] The classic account of conventions as solutions to co-ordination problems, to which Fried alludes specifically, is David K Lewis, *Convention* (Cambridge, Massachusetts, 1969). There may be conventions which are not solutions to co-ordination problems. In a recent article, Andrei Marmor argues that this is the case with 'conventions constituting autonomous practices' ('On Convention' (1996) 107 *Synthese* 349). This type of convention is not pertinent, however, to the analysis of promises, and at any rate is not what Fried has in mind in his discussion. I will therefore continue, for present purposes, to use 'convention' in the Lewisian, co-ordinative sense.

[13] A similar point was made by Raz in his critique of Atiyah's view. See 'Book Review: Promises in Morality and Law' (1982) 95 *Harvard Law Review* 916, at 927 (and n 21, there).

[14] And perhaps between promisor and third parties, too, subject to the possibility that the promisee, but not others and not necessarily to the knowledge of others, could release the promisor of her obligation.

very doubtful that promising is a solution to a problem with regard to which the predominant interest is uniformity of action, and even more doubtful that it is only one of several alternative solutions, so that the case for (uniformly) opting for *any* such solution is greater than the case for preferring a particular one.[15]

Other, related features of conventions, appear to be equally at odds with the practice of promise, and Fried's argument does not address such difficulties.[16] But perhaps we should not dwell on those either. All that Fried says about the social function of promises and on the basis of his understanding of it, touches on the notion that promising is, simply, a social practice. His account of the nature and the value of promising as a social practice has little do with the question as to whether the practice is conventional, and the argument he builds around this account depends little, as far as I can see, on how this question should be answered. More to the point, Fried's argument would be helped little by a positive answer to this question. From here on, accordingly, I will consider Fried's argument concerning the binding force of promises as an argument not from convention, but from social practice. How does it fare as such?

The value of promising as a social practice, according to Fried, lies in the way in which it enables participants to make use of the 'remarkable tool' which is trust.[17] Promise is '[t]he device that gives trust its sharpest, most palpable form.'[18] An important truth is captured, I believe, in this assertion (to which I shall return later); but let us concentrate for the moment on how this builds up, in the framework of Fried's argument, to an explanation of the binding force of promises. He believes, as we have seen, that it is necessary to understand promising as a social practice in order to come to terms with the 'bootstrap quality' of the argument. And the 'one step' that needs to be taken from here in order to meet that challenge is as follows:

> An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now . . . [amounts to] the abuse of a shared social institution that is intended to invoke the bonds of trust.[19]

The argument, however, is not intended to derive its force from the notion that to break a promise is to abuse, and thus possibly *undermine*, a beneficial social institution. Since it is the case that to promise is to invite the promisee to trust, and in this sense 'to make himself vulnerable,' and that to break the

[15] For a detailed analysis and examples of co-ordination problems see Lewis, above n 12, at 5–24 (and see Marmor's comments, above n 12).

[16] Eg the point of individual compliance depending on the assumption of general conformity. See *ibid.*

[17] *Contract as Promise*, at 8.

[18] *Ibid.*

[19] *Ibid* at 16 (footnote omitted).