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Promises, Trust, and Contract Law

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PROMISES, TRUST, AND CONTRACT LAW

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I. INTRODUCTION

What are the moral foundations of contract law? Most theories of contractual obligation agree that contract law has something to do with enforcing promises. Certainly, the Anglo-American law of contract has something to do with enforcing promises as a descriptive matter: the most recent *Restatement* essentially defines a contract as a legally enforceable promise.[1] Of course promises have "gaps," and a mature law of contract must provide appropriate default rules for filling them, but before one can answer the question of how the law should enforce promises, one must first resolve that it is appropriate for the law to enforce promises at all.[2]

Is it appropriate for the law to enforce promises? The law should enforce some promises, most would agree. Which ones? It depends on the reason why the law would enforce a promise. There are many theories that attempt to explain why the law should enforce promises. While their normative orientations vary broadly, several share a common thread. Autonomy ("will") theories argue that to be as free as possible, a person must be able to make a commitment.[3] By making a promise, a person invites another to trust, and to break a promise is to abuse that trust.[4] Autonomy theories thus justify contractual obligation on the grounds that enforcement enhances the freedom of the promisor and respects the trust of the promisee. Preference-satisfaction ("welfare economic") theories of contract justify contractual obligation on the ground that the enforcement of certain promises is necessary to maximize

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1. *Restatement (Second) of the Law of Contracts* § 1 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

2. For the distinction between the "agreement" rules and "default" rules of contract, see Richard Craswell, "Contract Laws, Default Rules, and the Philosophy of Promising," *Michigan Law Review* 88 (1989) 489 at 490. Cf. Joseph Raz, "Promises in Morality and Law," *Harvard Law Review* 95 (1982) 916 at 932 (distinguishing the question whether "the formation of promises [is] entirely within the control of the promisor" from the question whether "the content of the promissory obligation [is] entirely within the control of the promisor").

3. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass.: Harvard University Press, 1981), 13.

4. Ibid., 16.

individual "well-being," or preferences.[5] Theorists in this tradition have long argued that in order to maximize aggregate preferences, one must have some incentive to rely on certain promises. The incentive to rely on a promise exists only to the degree that a promise is trustworthy.[6] The role of a law of contract, it is argued, is "to protect the ability of individuals to trust promises in circumstances in which that trust is socially beneficial."[7] Theories of contract derived from the requirements of practical reasonableness explain that to pursue their reasonable objectives, individuals must cooperate and coordinate their activities with other individuals. The availability of coordination of constructive action is thus itself a form of good.[8] Promising is a uniquely appropriate means by which individuals coordinate their activities with others.[9] The practice of promising is an effective form of cooperation only if promises are kept. Contractual obligation thus "can be explained as the necessity of a type of means uniquely appropriate for attaining a form of good (e.g. the standing availability of co-ordination of constructive action) otherwise attainable only imperfectly if at all."[10] "Mutual

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5. This theory must be distinguished from a positive economic analysis that seeks to determine the effects of a given legal rule. Preference-satisfaction theories of contract take the normative position that "the purpose of contract law is to promote the well-being of the contracting parties." Louis Kaplow & Steven Shavell, "Fairness v. Welfare," *Harvard Law Review* 114 (2001) 961 at 1102, note 342. "Well-being" is defined with reference to what individuals prefer: "It incorporates in a positive way everything that an individual might value. . . . Similarly, an individual's well-being reflects in a negative way . . . anything . . . that the individual might find distasteful." Ibid, 980.

6. See Daniel A. Farber & John H. Matheson, "Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'," *University of Chicago Law Review* 52 (1985) 903.

7. Ibid., 905. There is a vast literature addressing what would be an efficient amount of reliance to encourage. See Richard Craswell, "Two Economic Theories of Enforcing Promises," in *The Theory of Contract Law*, Peter Benson, ed. (Cambridge: Cambridge University Press, 2001), 19 at 30 ("One goal of an economic analysis, then—and one focus of the recent economic literature—is to identify those forms of enforceability that will give parties an incentive to rely efficiently, but no further.").

8. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1981), 154-56.

9. Ibid., 303.

10. Ibid., 325. Joseph Raz provides a similar account of contractual obligation. According to Raz, the purpose of contract law is "to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice." Raz, "Promises in Morality and Law," supra, note 2 , at 933. "The moral presuppositions of this conception of promising are the desirability of special bonds between people and the desirability of special relations that are voluntarily shaped and developed by the choice of participants." Ibid., 928. See also Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), 173-76; Joseph Raz, "Promises and Obligations," in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart*, P. M. S. Hacker & J. Raz, eds. (Oxford: Clarendon Press, 1977), 210.

trustworthiness," under this theory, is "not merely a means to further distinct ends; it is itself a valuable component of any common life."[11]

What is the common thread in these divergent accounts of contractual obligation? It is that each invokes the notion of trust in explaining why it is appropriate for the law to enforce certain promises. The need for certain promises to be trustworthy is a reason why the law should enforce them. Contract law fortifies trust insofar as it provides grounds for confidence that another will perform a promise. If the law renders a certain promise enforceable, a person may trust (have good grounds for confidence) that it will be performed. A degree of trust in certain promises is necessary, contract theorists say, for the realization of the goods that each asserts justifies a law of contract.

There is an argument, however, that the enforceability of contracts undermines the ability of individuals to realize personal trust in relationships in which contracts are made. Dori Kimel recently has argued that to the extent that contract law provides grounds for assurance that a promise will be performed, it detracts from the trust that otherwise could be realized in a human relationship.[12] He claims that the intrinsic value of a promise lies in its propensity to enhance personal trust in relationships. Only upon performance of a promise is a promisor proven trustworthy; thus, to fortify trust by coercion is to diminish significantly the intrinsic value of promises

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Randy Barnett has set forth a "consent theory" of contract that attempts to ground contractual obligation in the need for a mechanism by which individuals may consensually transfer alienable rights. See Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986) 269. His theory of contract is often deemed a variation of autonomy theory, but it offers a distinct account. Barnett's theory respects manifested "consent" insofar as it effects transfers of morally cognizable rights. If "rights" are, in his words, "claims that some actual legal system will recognize as valid," Randy E. Barnett, "A Law Professor's Guide to Natural Law and Natural Rights," *Harvard Journal of Law and Public Policy* 20 (1997) 655 at 670, his theory turns not merely on the manifestation of a choice, but on the existence of a claim/right under a justified law. The function of contract law, he explains, "is to specify boundaries within which individuals may operate freely to pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity." Barnett, "A Consent Theory of Contract," at 301. As a general framework, his theory seems to have more in common with those of Finnis and Raz than with that of Fried.

11. Finnis, *Natural Law and Natural Rights*, supra, note 8, at 306. Cf. Annette Baier, "Response to Olli Lagerspetz," in *Commonality and Particularity in Ethics*, L. Alanen et al., eds. (New York: St Martin's Press, 1997) 118, at 119: "the belief that another's will toward one is good (a belief that trust involves), 'is itself a good, not merely instrumentally but in itself . . . .'"

12. Dori Kimel, "Neutrality, Autonomy, and Freedom of Contract," *Oxford Journal of Legal Studies* 21 (2001) 473 at 490-91.

and to hinder personal relationships of trust from developing.[13] If he is right, the negative effect that contractual obligation has on the development of human relationships is significant. Are not personal relationships of trust (i.e., friendships) something good to be pursued? Kimel himself views personal relationships as valuable.[14] If to fortify the trustworthiness of certain promises by rendering them enforceable is to eliminate possibilities for trust to develop in relationships, we could be faced with a difficult decision of legal policy. Would we not have to weigh the benefits of enabling individuals to pursue certain goods through promissory enforcement against the burdens that enforcement would impose upon realizing the goods of friendship?

In this paper, I will explore the relationship between the need for a law of contract to render certain promises trustworthy, and the trust that otherwise inheres in personal relationships. I will begin by explaining Kimel's theory in more detail. I will set forth the several valuable insights that his analysis provides. I will take issue, however, with the breadth of his conclusions. First, I will argue, the legal enforcement of promises cannot be said to detract categorically or even typically from their ability to enhance interpersonal relationships. In many contexts, it is the enforceability of promises that creates possibilities for relationships of lesser trust to ripen into relationships of greater trust. Second, the intrinsic value of a promise, whether unenforceable or enforceable, does not lie in its capacity to reinforce interpersonal relationships of trust. Even in relationships of "perfect" trust, there would be a need for promises, and a law of contract that supports the trustworthiness of the practice does not perforce degrade the trustworthiness of the persons who employ it.

II. PROMISSORY RELATIONSHIPS AND THE VALUE OF TRUST

I begin by summarizing Kimel's claims. Kimel explains that promises and contracts each have an instrumental and an intrinsic value.[15] Promises and contracts share the same instrumental value: they facilitate and encourage

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13. Ibid.

14. Indeed, he argues, they "are more valuable, or are likely to be more valuable, the greater the freedom people enjoy and the more selective they can be in pursuing them." Ibid., 492.

15. Ibid., 489-90. Joseph Raz distinguishes the "instrumentally" valuable from the "intrinsically" valuable as follows:

> Something is instrumentally good if its value derives from the fact that it makes certain consequences more likely, or that it can contribute to producing certain consequences. Something is intrinsically good or valuable if it is valuable independently of the value of its actual or probable consequences, and not on account of any consequences it can be used to produce or to the production of which it can contribute causally.

Raz, *The Morality of Freedom*, supra, note 10, at 200.

reliance and promote cooperation.[16] In his view, however, they have different intrinsic values. The intrinsic value of a promise, Kimel explains, lies in its propensity to reinforce personal relationships of trust. When a promise is made, the promisor invokes the promisee's trust. The promisee gives that trust by taking the promise seriously or relying on it. By keeping the promise, the promisor conveys to the promisee a message that trust and respect obtain in their relationship. Through what he calls the "completed circle of a promise," "messages can be conveyed and assurances can be given that trust and its counterpart, respect—surely two of the most important building blocks of every kind of relationship—obtain in the relationship between the promisor and the promisee."[17]

Contracts, Kimel observes, are usually made outside of the context of ongoing personal relationships. The legal enforceability of promises provides a "substitute source of reassurance" for parties who do not have a preexisting trusting relationship.[18] In his view, however, the enforceability of contracts does not merely augment "personal trust as a source of confidence"; rather, it "significantly detracts from the practice's ability to fulfil the kind of *intrinsic* function that promises fulfil: that of enhancing interpersonal relationships."[19] Indeed, he argues, "Enforceability," he argues, "casts a thick and all-encompassing veil over parties' motives and attitudes towards each other . . . ."[20] This is not to say, in Kimel's view, that contracts lack any intrinsic value. The intrinsic value of a contract, he explains, lies in its propensity to promote the value of "personal detachment": the value of being able to do certain things without having to commit to a personal relationship with others in order to do them. "Detachment," he explains, is "valuable as an option to dependence on (pre-existing, future) personal relationships."[21]

Kimel's analysis certainly provides valuable insights. First, he recognizes that contracts "promote a certain form of cooperation between people" and "facilitate and encourage reliance"; and that "mutual reliance" and "cooperation" are valuable.[22] Their value is often overlooked when the debate over whether a law of contract is justified is framed along the lines of will/promise/contract versus reliance/harm/tort.[23] As Sir Frederick Pollock

16. Kimel, supra, note 12, at 489.
17. Ibid., 490.
18. Ibid.
19. Ibid., at 491.
20. Ibid.
21. Ibid., 492.
22. Ibid., 489.
23. The classic work that framed the debate in these terms is Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974), 88 ("We may take the fact that

recognized over a century ago in his influential treatise on the Anglo-American law of contract: "He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way."[24] Kimel recognizes value not merely in giving effect to the will of promisors or of compensating actual reliance upon promises, but also in enabling mutual reliance and cooperation.

Second, Kimel's explanation of the value of detachment is quite provocative. Who among us could fulfill our reasonable goals if we were left to depend only upon those with whom we have personal relationships, or with whom we would have to build a personal relationship? If there were no law rendering certain promises enforceable, we would have to turn to alternative sources of assurance that others would perform their promises. Before I would send strangers money on their word that they would send me a product, I would need some grounds for believing they were trustworthy. Before, say, I would send money to Oxford University Press on the word of its agents that they would send me the journal issue in which Kimel's article appears, I would need some grounds for trusting that they would make good on their word. The Press, in turn, would need some grounds for believing I am trustworthy before sending the issue on my word that I will send money. Contract law, in this example, enables me to pursue the objectives of knowledge and a livelihood by providing, in Kimel's words, a "source of reassurance" that my trading partners will perform their promises. If I have no interest in pursuing a personal relationship with, say, Oxford University Press, the alternative that contract law provides to dependence on other sources of assurance is valuable.

That said, I am sure that some individuals have not only contracts with Oxford University Press, but also personal relationships with it marked by some degree of trust. Those who publish books or articles with the Press no doubt have contracts with it. Does the intrinsic value of the contract lie in the fact that it enables an author to maintain a detached relationship with the Press? I suspect that one would enter into a contract with the Press even if the editorial board were composed of one's closest friends, and that the value of doing so would not be "personal detachment."

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damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.").

24. Frederick Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England, and America* (Philadelphia: The Blackstone Publishing Co., 4th ed., 1888), 9.

There may be value in detachment when it comes to discrete, one-time contracts of exchange. I question, however, the value of detachment in contracts that contemplate ongoing relationships or that govern discrete transactions in ongoing relationships.[25] In a discrete, one-time exchange contract, if enforceability puts a damper on the personal trust that the parties could otherwise realize in a relationship of trust, so be it. My pursuit was a book, not a personal relationship. But in contracts that contemplate ongoing relationships, and in contracts that represent discrete transactions in an ongoing relationship, personal trust may matter. One might hesitate before contracting to publish a book with a publisher whom one did not personally trust, regardless of the legal enforceability of a publication contract. If, as Kimel argues, enforceability diminishes opportunities for realizing trust in interpersonal relationships, we would have to make a value judgment in deciding whether promises should be enforced. Do we value the goods that are to be realized through performance of the promises more than we value the goods of friendship that the parties who make them could realize if only the promises were unenforceable? I see no reason for legal authorities to attempt to make any such judgments. To argue that the assurance contract law provides that promises will be performed detracts from the trust that may be independently realized in interpersonal relationships is to view both human relationships and contract law from an unnecessarily constrained perspective. I will address several problems with the argument.[26]

The first problem with the argument is that it presumes that promises are made in relationships where trust exists and that contracts are made in relationships where trust is absent. The need for a promise itself may belie the existence of trust in a relationship. The more trusting an interpersonal relationship, the less need there might be for the parties in it to make certain promises.[27] Assume two dating couples. The man offers to pick up the woman for dinner. The man in the first relationship says, "I plan to come by and pick you up at 7:00 p.m." His date replies, "See you then." The man in

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25. Ian Macneil has long professed that all contracts are "relational," and should be viewed on a spectrum of discrete exchange relations at one pole to intertwined relations at the other. See, e.g., Ian R. Macneil, "Relational Contract Theory: Challenges and Queries," *Northwestern University Law Review* 94 (2000) 877 at 894-95.

26. Kimel explains that his claims here are an "admittedly incomplete" account of claims to be made in his forthcoming book, D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (forthcoming, Hart Publishing). Kimel, supra, note 12, at 489, note 52. As of the writing of this paper, his book was not yet in print.

27. As Raz has observed, "[i]t is a mark of a healthy relationship that the number of explicit promises is small and that the boundary between explicit promises and other voluntary obligations is normally invisible." Raz, "Promises in Morality and Law," supra, note 2, at 931.

the second relationship says, "I plan to come by and pick you up at 7:00 p.m." His date replies, "Do you promise?" The man replies, "I promise, 7:00 p.m." "You promise?" "Yes, I promise."[28] All else being equal, in which relationship is there a greater level of interpersonal trust? In the first, the man's mere statement of an intention to arrive at a given time sufficed for his date. In the second, there appears to be some risk not present in the first that necessitated the making of a promise to provide assurance that the risk would not come to pass. The man had to promise a specific act (arrive at 7:00) to provide assurance against some perceived preexisting risk (e.g., chronic lateness or "standing up"). A promise can provide confidence where it otherwise is lacking.[29] If the promise is performed, prospective confidence in the relationship may increase while prospective risk may subside, such that next time, the man may not have to promise to arrive at a certain time. His date will trust him to arrive at the time he says he will, or to be late only for good reason. The point is that it may be a lack of trust that gives rise to the need for commencing the so-called "circle of a promise"[30] in the first place.

Furthermore, it is possible that a lack of trust in a relationship may be so acute that a promise that the law will not enforce *(a nudum pactum)* will not suffice to commence a "circle of trust." Only a promise that the parties know the law will enforce might do. Like promises, contracts can provide assurance where there is a deficiency in trust. When the couple, now engaged to be married, asks the caterer what time it will serve dinner at the wedding reception, an unenforceable promise may not suffice to provide the assurance necessary for them to plan their affair. To gain the necessary assurance here, the couple may demand the kind of promise that the law will enforce. Promises can provide assurance through the assumption of a moral obligation to perform, while contracts can provide assurance through the additional

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28. I am distinguishing here between the mere statement of an intention to perform an act, and a promise to perform an act. See Fried, *Contract as Promise*, supra, note 3, at 9 ("Promising is more than just truthfully reporting my present intentions, for I may be free to change my mind, as I am not free to break my promise."); Finnis, *Natural Law and Natural Rights*, supra, note 8, at 299 ("[T]he giving of a promise is the making of a sign, a sign which signifies the creation of an obligation, and which is knowingly made with the intention of being taken as creative of such obligation. It is this that makes the giving of a promise distinct from the expression of an intention to perform an action. . . ."); Raz, "Promises and Obligations," supra, note 10, at 214 (If "a man communicates to another his intention to undertake by the very act of communication, an obligation to perform an action and confer a corresponding right on his interlocutor, I cannot see how we can avoid regarding his act as a promise.").

29. See Annette Baier, "Trust and Antitrust," *Ethics* 96 (1986) 231 at 245 ("Promises are puzzling because they seem to have the power, by verbal magic, to initiate real voluntary short-term trusting.").

30. Kimel, supra, note 12, at 490.

assumption of a legal obligation to perform. Assuming a legal divide between unenforceable and enforceable promises, both may be made to enhance trust where it is otherwise deficient to facilitate constructive action. Thus, it is not necessarily the case that promises are appropriate where trust exists in a relationship, and contracts are appropriate where trust is absent. Both may be appropriate when there is a deficiency in trust.

The second problem with the claim that legal enforcement of promises degrades interpersonal relationships is that it depends on a rigid and unrealistic dichotomy between interpersonal relationships, on the one hand, and detached relationships, on the other. It is true enough that the general state of trust in a personal relationship may surpass that in a detached relationship (especially if we define personal relationships as those that have trust and detached relationships as those that do not). But is it helpful or realistic to categorize our relationships in this way? Rather than draw the divide between personal relationships and detached relationships, would it not be more useful to view relationships on a continuum of trust?

At one end of the continuum could be relationships of perfect trust. I know you and you know me. I am interested in and acting for your well-being, as I know you are for mine. There is no need for you to promise that you will arrive at 7:00 p.m. because I know that only for good reason, commensurate with my need that you be here, would you ever arrive after the time at which you state that you intend to arrive. At the other end of the continuum could be relationships of no trust. All I know about you is that you say you can cater my event—nothing else. Your promise that you will cater my event is not good enough for me, because I need you there and have no basis for knowing whether your word is good. At this end of the continuum, an unenforceable promise is insufficient assurance against the risk of non-performance. Only a promise that the law will enforce will provide sufficient trust for me to arrange my affairs based on your word. At all points in between along the continuum are relationships of imperfect trust. In some things, extant personal trust may be sufficient that promises are unnecessary. In other things, trust may be insufficient to a degree that promises are necessary to facilitate constructive action. In still other things, trust may be insufficient to a degree that legally enforceable promises are necessary to facilitate constructive action.

Taking into account the complexity of human relationships, we see that the legal enforceability of a promise does not necessarily degrade the relationship in which it is made. The first time I visited my mechanic, I demanded a written estimate that by law would bind him. Why? Well, frankly, I did not trust him. I wanted a promise that the law would enforce. Today, I request no estimate. Why? Well, now he is my friend. It was in part the assurance that

the law provided that he would make good on his promise that *enabled* us to establish a more trusting interpersonal relationship. How? This leads to the third problem with the claim that legal enforcement of promises diminishes opportunities for personal trust to ripen in relationships in which they are made.

The third problem with the claim is that it assumes that the legal enforcement of promises is costless and a perfect substitute for voluntary performance.[31] It is neither. The law provides a source of confidence, not a guarantee, that a promise will be performed. If a promisor breaches a contract, the promisee does not magically receive the promised performance or even its monetary equivalent. The promisee must bear the cost and inconvenience of engaging the state to coerce a remedy.[32] To perform even a legally enforceable promise may be to enhance the promisee's trust in the relationship where the promisee prefers performance to damages. By performance, the promisor inspires confidence against the risk of future non-performance. If a promisor has discretion in performance, the promisee bears the risk of receiving barely adequate but legally sufficient performance.[33] By quality performance, the promisor inspires confidence against the future risk of minimal performance. In exchange transactions, each party bears the risk that the other will not grant a release based on unforeseen difficulties in performance that do not rise to the level of providing a legal excuse from performance.[34] By agreeing to modify rights and liabilities based on arising circumstances, the promisor inspires confidence against the future risk of circumstances unforeseen at the time of contracting. Each party also bears the risk of uncertain and unforeseeable damages that may flow from a breach.[35] By performing, the promisor inspires confidence against the future risk of losses that are real but too uncertain to be recovered in law.

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31. Oliver Wendell Holmes described the obligation of a contract as performance of the promised event *or* the payment of damages if the promise is not performed. Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Co., 1881), 301.

32. See Daniel Friedmann, "The Efficient Breach Fallacy," *Journal of Legal Studies* 18 (1989) 1 at 6-7 (explaining why the payment of damages for breach of contract entails transaction costs).

33. Barely adequate performance is that which satisfies a good faith standard. See e.g., *Omni Group, Inc. v. Seattle-First National Bank*, 32 Wash. App. 22 (1982).

34. Unforeseen difficulties that arise during the course of performance may provide grounds for parties to make an enforceable modification to a contract without consideration. See, e.g., *Angel v. Murray*, 113 R.I. 482 (1974).

35. Damages that are unforeseeable at the time of contracting, or that cannot be proven with reasonable certainty, generally cannot be recovered for breach of contract. See *Hadley v. Baxendale*, 9 Ex. 391 (1854).

The argument that legal enforcement of promises degrades interpersonal relationships accounts only for an unnecessarily restrictive view of the law. It takes into account an external view of the law: the so-called "bad man's" view.[36] The bad man who would make promises in detached relationships must know that he will be made to perform, or least to provide some monetary equivalent in damages. It also views the law from the internal perspective of the person who would use the law to keep all relationships in two categories: interpersonal relationships of trust and detached relationships of non-trust. That person can use contract law to keep detached relationships from becoming interpersonal relationships, and vice versa, by making contracts in the former, and unenforceable commitments in the latter. This person may well be able to confine relationships to these categories, but the limitation on relational possibilities is created by the person, not by contract law. We have seen that contract law does enable a "circle of trust" to develop between parties who begin from a starting point of non-trust. Should we not view contract law from the internal perspective of those whose relationships reflect a realistic imperfect trust, who are open to the possibility of developing and enhancing relationships of trust (friendship), and who might use contract law towards that end (inter alia) and not merely for protection in detached relationships?[37] The law of contract enables these persons not only to pursue their own reasonable objectives, but to create possibilities for relationships of lesser trust to ripen into relationships of greater trust.

How specifically may these persons use the law of contract to do so? Parties to a relationship may form their legal obligations based on the level of trust they have in each other. Where trust is low, the parties can enhance it by specifying their rights and obligations in minute detail. As the law is

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36. H.L.A. Hart explains the limitations of the "external" view (the bad man's perspective) of the law as follows:

> If we look at all law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty.

H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 40. An explanation of the law, Hart explains, must also account for the "internal" perspective on rules: the perspective of "the group which accepts and uses them as guides to conduct." Ibid., 86.

37. This might better approximate what Finnis calls the "central case viewpoint":

> the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and the economic and other material conditions of social interaction.

Finnis, *Natural Law and Natural Rights*, supra, note 8, at 15.

incapable of ensuring perfect performance, performance approaching perfection enables contracting parties to build relationships of trust. As trust builds with performance, parties may provide for more discretion in performance, or agree to agree to certain matters as they arise. The trust that the law initially provides allows a relationship of trust to ripen. Contract law renders promises trustworthy, not unbreakable.

The fourth problem with the claim that the legal fortification of trust in promises enshrouds relationships in which such promises are made is that it sees the value of promises for relationships of trust only in their performance and not in their making. Let us assume, contrary to what I have argued, that performance of a legally enforceable promise cannot operate to facilitate or enhance a relationship of trust. Our inquiry would not end there, for it is not only performance that may enhance trust, but the very making of a promise itself. Consider, on the one hand, the making of a promise that is legally unenforceable, and, on the other, the making of a promise that is legally enforceable. Assume that our dating couple has decided to enter into a lifelong commitment. Which act of promise-making is more likely to enhance or facilitate the trust that inheres in their relationship: I promise to love and honor you all the days of my life, though I will not make that promise legally binding in marriage; or, I promise to love and honor you all the days of my life, and I am willing to make that promise binding as far as the law will allow?

We need not rely on the unique promises of marriage to make the point. Assume an act of promise-making that represents a commitment to an ongoing relationship. Which of the following promises is more likely to generate trust: I promise to employ you, friend, for three years, though I will not give you a contract; or, I promise to employ you, friend, for three years, and here is your three-year contract? Assume an act of promise-making that represents a commitment to perform a discrete act in the context of an ongoing relationship. Which of the following is more likely to generate trust: I promise friend that next year I will sell you my cottage that you have been pestering me to sell you for years—we'll write it up next year; or I promise friend to sell you that cottage next year, and here are the papers—just sign? This may apply even in the case of donative promises. In an argument similar to that of Kimel, Melvin Eisenberg has asserted that the enforcement of donative promises in particular is bad for personal relationships.[38] But this,

38. In particular, Eisenberg has argued that the legal enforcement of donative promises generally is not morally justified because it would degrade interpersonal relationships. In his words, it "would never be clear to the promisee, or even the promisor, whether a donative promise that was made in an affective spirit of love, friendship, affection, gratitude, or comradeship, was also performed for those reasons, or instead was performed to discharge a

too, cannot categorically be the case. Which of the following is more likely to generate trust: I promise, friend, to give you that down payment for your house next month, take my word for it; or, I promise, friend, to give you that down payment for your house next month, and here is the legal form that you can bank on, literally? A focus strictly on performance of a promise as the trust-enhancing event rather than on the form of the promise itself is too restrictive.

As used in contract theory, trust denotes a degree of confidence in the promises of others. Individuals need such confidence both to pursue their own reasonable objectives and to collaborate with others in friendship. Where confidence is insufficient, risk may hamper coordinated activity. Making a legally unenforceable promise can give another grounds for confidence, as can making a legally enforceable promise. But it is a mistake to think that the confidence provided by the legal enforceability of certain promises categorically or even typically leaves diminished the trust that otherwise could result from performance of an unenforceable promise. From the internal perspective of the person who is open to the pursuit of relationships of greater trust, the making of a legally enforceable promise can be a means for facilitating or enhancing a relationship of interpersonal trust, as can be the demanding of such a promise.

III. PROMISSORY RELATIONSHIPS AND OTHER VALUES

Now that I have argued that not only promises but contracts may operate to reinforce personal relationships of trust, I must make clear that I do not believe that therein lies the intrinsic value of either.

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legal obligation or avoid a lawsuit." Melvin A. Eisenberg, "The Theory of Contracts," in *The Theory of Contract Law*, Peter Benson, ed. (Cambridge: Cambridge University Press, 2001), 206 at 230. Eisenberg would make an exception for donative promises that comply with a legal form for enforceability. If a promisor uses a legal form, Eisenberg explains, the promisor "declares by his use of the form that he is moving out of the affective world of gift and into the legal form of contract." Melvin A. Eisenberg, "The World of Contract and the World of Gift," *California Law Review* 85 (1997) 821 at 850. But is that necessarily the case? Do not legally enforceable promises in "affective" relationships abound—to transfer real estate, to give money, to employ? Granted, modern contract doctrine may require such promises to be supported by consideration, but, if consideration were not necessary, some donative promises made in affective relationships surely would be cast in the form that rendered them legally binding. Under Eisenberg's reasoning, even enforcement of donative promises cast in the requisite form for enforceability would have to degrade personal relationships, for, no matter the form, it still would not be clear to the promisee whether the promise was performed in a spirit of friendship and trust or to discharge a legal obligation and avoid a lawsuit. Ibid., at 848.

First, individuals may make promises or contracts without intending the legal enforceability or unenforceability of their acts. To argue that the legal enforcement of promises either increases or decreases opportunities for trust to develop in a relationship is to presume that individuals always intend that their promises be legally enforceable whenever they make legally enforceable promises. For enforceability to degrade a personal relationship by defiling the parties' motives towards each other, the parties must, at a minimum, be aware that their promises are enforceable. For enforceability to create opportunities for trust to develop in relationships, the parties must, at a minimum, be aware that their promises are enforceable. But it is not always the case that individuals have in mind the legal enforceabilty of their promises. Persons marrying, for example, may not intend the legal enforceability of their promises; they may intend a moral obligation of which legal enforceability is merely a side effect. A person may promise to rent an apartment or sell a car to an acquaintance, or prepare a tax return for a friend, without intending a contract, though one might in fact arise. Where individuals do not have as a purpose that their promises be legally enforceable, or are simply unaware that their promises are legally enforceable, the legal enforceability of their promises cannot be said to have any certain effect on trust in the individuals' relationship. Legal enforceability would not necessarily create opportunities for trust to develop, nor would it necessarily diminish them. Where the law merely *happens* to enforce a promise that the parties do not intend to be legally enforceable, legal enforceability may have nothing to with trust, for better or for worse.

Second, individuals may breach promises and contracts without intending to do so. Contingencies may arise to prevent performance that have nothing to do with the trustworthiness of the promisor. A promisor may be unable to perform due to death, incapacity, or some other circumstance. Short of a circumstance that renders performance of an enforceable promise impracticable, the promise remains legally enforceable. Failure to perform a promise upon the occurrence of a contingency that falls short of providing a legal excuse from performance would not necessarily render the promisor less trustworthy in the eyes of the promisee. Take death of the promisor, for example. A promisor who dies before completing performance of the promise does not close the "circle of trust." It would be strange to think, however, that the promisor is less trustworthy for having failed to perform. There is a need for promises to be legally enforceable upon the death of the promisor, but enforceability cannot be justified on grounds that it enables a relationship of trust to develop through quality performance. Nor can it be justified on grounds that it promotes a value of detachment. The promisor and the promisee may have been best friends and still have made a contract. What,

then, justifies enforcement? Would there be a need for promises or contracts in a society of individuals who had perfect trust in each other?

Suppose that our dating couple achieved a state of "perfect" trust in their relationship. They both had full confidence in the other's good will, and both valued the other's good as much as their own. Would that eliminate the need for the promises of marriage? I do not think so. It is one thing to trust a friend completely; it is another thing to make a lifelong commitment to one person to the exclusion of others. There may be many people we deeply trust; there is only one whom we can marry. I may value your good as much as my own, but be unwilling to make the promises of marriage to you for good reason (e.g., you are my mother, other obligations in my life preclude it, I have only hours to live).

We need not rely on the unique promises of marriage to prove that promises have value even in relationships of full friendship. Suppose I have one truck and relationships of perfect trust with two friends who would like to use it to move belongings on Saturday. To promise it to one, rather than to the other, even on a coin flip, is to make a choice that is not necessitated by any lack of trust or need for trust in my relationship with the promisee. If I am so trustworthy with these two friends, why would I need to assume a promissory obligation to lend one of them the truck (as opposed to stating an intent to give it to one), and why would the friend to whom I promise it need some sort of entitlement to delivery of the truck? Suppose that I merely state an intent to give the truck to one friend for his use on Saturday. Before Saturday arrives, a charity requests the use of my truck on Saturday to transport clothing to the poor. I may be trying to promote my friend's good as much as my own and still (or *therefore*) change my mind and give the truck to the poor. Now suppose that I promise the truck to my friend. The same charity requests it. May I still change my mind? Before I do anything, I inform my friend of the charity's request. He proceeds to inform me for the first time that the purpose for which he has requested the truck is to move a destitute relative who is being evicted. If I had not promised the truck to my friend, I might act based on what I conclude to be the "better" use for the truck in this situation. But since I have promised it to him, his claim to the truck has priority over mine because when I promised him the use of it I chose to limit my options in a way that pertained not only to my future but to his as well.

This all derives from the "instrumental" value that Kimel sees in promises and contracts. It is appropriate for the law to enforce certain promises because it promotes mutual reliance and cooperation. The need for individuals to be able to make reliable arrangements with one another obtains even in situations where enforceability has nothing to do with the level of trust that exists in a relationship. In the example I have laid out, it is conceivable that performance

of the promise to deliver the truck to my friend in order to prove myself trustworthy would degrade rather than reinforce trust in the relationship. Imagine that I perform my promise to him in the face of the charity's request because I want to close the circle of trust in order to prove *myself* trustworthy in his eyes. My actions could strike him as egomaniacal and actually lessen his trust in me.

The point is simply that even in a "society of angels" with perfect trust in each other there would not be perfect unity of interest as individuals pursued different forms of good. There is a need in any society for an institution that enables individuals to be able to make reliable arrangements with each other. And it simply cannot be asserted as a general proposition that performance of a promise that, to meet this need, is legally enforceable degrades the trust that otherwise would inhere in the relationship between the promisor and the promisee.

IV. CONCLUSION

The need for individuals to be able to trust that promises will be performed is central to justifying a law that renders certain promises enforceable. For a law of contract to enforce certain promises to meet this need is not necessarily to diminish the personal relationships of trust in which they are made. Rather, the making and performance of legally enforceable promises can assist individuals in building relationships of trust. The intrinsic value of enforceable promises thus lies not in their ability to facilitate detachment from personal relationships. The trustworthiness of promises is valuable to the pursuit of myriad goods, even among friends.