The Demands of an Interpretive Theory of Contract

A Response to Robin Kar,
Contract as Empowerment,
83 U Chi L Rev 759 (2016).

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Professor Robin Kar's *Contract as Empowerment* represents a thoughtful and ambitious effort to introduce a unified general theory of contract law that, in his words, "offers a fundamental reinterpretation of the basic principles that animate contract law"[1] and that, on this basis, can harmonize the "central doctrinal challenges for modern contract theory."[2] As Kar rightly points out, contract as empowerment goes against the current of prevailing contract theories. Unlike economic approaches, it is a noninstrumentalist theory that aims to provide a reasonable interpretation of the settled principles of contract law taken on their own terms. In doing so, the theory justifies these principles on moral grounds consistent with contracts having genuine, legally obligatory (coercive) force.[3] His conception of interpretive legal theory rejects the widely and uncritically assumed dichotomy between "descriptive" and "normative" perspectives, arguing instead that a satisfactory approach to law must be both at once.[4] In contrast to promissory theories, contract as empowerment does not rest on or even "recommend the legal enforcement of the moral obligation to keep one's promises."[5] Moreover, unlike promissory and reliance-based theories, it recognizes the centrality of the consideration requirement and seeks to explain it.[6] In doing so, Kar follows through on his fundamental contention that, ideally, any viable theory of contract law must have the resources to account for *all* of contract

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1 Robin Kar, *Contract as Empowerment*, 83 U Chi L Rev 759, 762 (2016).

2 Id at 761.

3 See id at 831–32.

4 See id at 831.

5 See Kar, 83 U Chi L Rev at 773 (cited in note 1).

6 See id at 799–804.

law's main doctrines and principles within a unified moral framework.[7] Finally, as opposed to distributive-justice approaches, contract as empowerment aims to justify the whole of contract law in light of a nondistributive conception of what is reasonable and fair as between the two contracting parties.[8] Even if, as I argue, there may be difficulties with some of the answers of the proposed theory, it does make clear the sort of inquiry that is needed if, contrary to prevailing views, there is to be a sound general interpretive theory of the main doctrines of contract law.

I. A BRIEF SUMMARY OF THE ARGUMENT

According to Professor Kar, contract law should be understood, interpreted, and assessed as aiming to "empower people to use promises as tools to influence one another's actions and thereby to meet a broad range of human needs and interests."[9] Accomplishing this goal depends, however, on promisees trusting promisors to fulfill their promises, and when informal bases for interpersonal trust are absent, enforcement by contract law can provide the assurance needed to motivate that trust and action thereon. In this way, a promisor's intent and goal of influencing promisee conduct can be effectively realized.

However, as Kar correctly observes, the foregoing analysis establishes that a promisor has only an instrumental personal interest in favoring contractual enforcement insofar as this may enable her to effectuate her goal of influencing others.[10] But, as Kar emphasizes, contract law presupposes that parties can have genuine legal obligations to perform, compliance with which can be legitimately demanded by the promisee and coercively enforced by the state.[11] Enforcement is therefore not just a tool to be used by the promisor if she views this as in her own separate interest. Taking up the well-known distinction in moral and political theory between the "rational" and the "reasonable,"[12] Kar emphasizes

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7 See id at 783–84.

8 See id at 815.

9 Kar, 83 U Chi L Rev at 761 (cited in note 1).

10 Id at 765.

11 Id at 767.

12 See id at 769–71. The most influential account of this distinction is John Rawls's. See, for example, John Rawls, *Political Liberalism: Expanded Edition* 48–54 (Columbia 2005). Rawls notes that we recognize this distinction in everyday speech when we say of certain people that, given their strong bargaining position, their proposal may be "perfectly rational" but nevertheless "highly unreasonable." Id at 48. According to Rawls, the reasonable and the rational are thus two distinct and mutually irreducible, but at the same time complementary, ideas that are both invoked in specifying just and stable principles for social relations. See id at 51–52. "Persons are *reasonable* . . . when, among equals

that whereas a party's instrumental interest in enforcement expresses the idea of the rational, the obligatory constraining nature of enforcement reflects the standpoint of the reasonable.[13] The latter is a moral ideal that embodies a notion of equal respect and fair terms of interaction as between particular contracting parties. In keeping with this standpoint, it must therefore be possible to show that promisors making promises to influence others' conduct may legitimately be held to rules of legal enforcement as genuine legal obligations that ensure fair and reasonable interaction as between them.

This further step of establishing the interpersonal reasonableness and obligation-grounded character of enforcement is accomplished via Kar's application of contractualist justification as follows:

> [C]onsider a promisor who has made a promise in order to influence another person's actions and thereby meet a real human need or interest. If a grant of legal authority to demand compliance is reasonably needed for this influence to work, then this promisor cannot both make a promise like this and reasonably reject a rule that grants the promisee the legal authority to demand compliance. . . . This is because a grant of private authority, backed by the coercive power of

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say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so." Id at 49 (emphasis added). As reasonable persons, they ground their public social relations in the "desire to engage in fair cooperation . . . on terms that others as equals might reasonably be expected to endorse." Id at 51. Whereas the reasonable has to do with relations between persons in which each side has equal moral standing for the other, the *rational*, by contrast, "applies to a single, unified agent (either an individual or corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly its own," whether these are self-interested in a narrow sense or much broader in scope and affection. Id at 50. The rational concerns how these purposes and interests are adopted, affirmed, and pursued, "as well as [ ] how they are given priority" from the standpoint of the single agent. Id at 50. In addition to "means-ends reasoning," rational agents may seek to adjust and organize their ultimate purposes in light of "their significance for their plan of life as a whole." Id at 50–51. Very importantly, Rawls says that "neither the reasonable nor the rational can stand without the other." Id at 52. Rawls also supposes that the ways in which the ideas of the reasonable and the rational are specified should "tak[e] into account the kind of social cooperation in question, the nature of the parties and their standing with respect to one another." Id. Thus, the reasonable and the rational may be specified one way for private parties mutually related via voluntary (contractual) or involuntary (tortious) transactions, a way quite different than for citizens related politically through participation in a domestic system of social cooperation, and still differently than for peoples related internationally in a society of peoples. Failure to attend to such possible differences will vitiate analysis that invokes these concepts. See also John Rawls, *Justice as Fairness: A Restatement* 6–8 (Belknap 2001); John Rawls, *The Law of Peoples* 28–30 (Harvard 1999).

[13] See Kar, 83 U Chi L Rev at 769–70 (cited in note 1).

> the state, is needed for the promisor to induce the promisee to do something of value.
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> . . . [I]n these circumstances, private contractual demands backed by the coercive power of the state are thus justifiable *to the particular subjects of the demands* in terms of *their own empowerment interests*. If these promises are legally enforced, then . . . they are also genuine legal obligations, because they are governed by a system of legal rules that no one can reasonably reject.[14]

It is these sorts of promises, enforceable in accordance with rules that are personally empowering to promisors and consistent with the equal empowerment of all, that give rise to genuine contractual obligations. They also constitute what he calls "true contracts," which require the basic yet theoretically controverted principles of contract law, including the standard expectation damages remedy for breach. Developing a justification for these principles is his central task in this article.

For this purpose, Kar specifies three core sets of doctrinal puzzles which, he suggests, any interpretative theory of contract law would do well to confront and harmonize.[15] Indeed, as already indicated, his view is that a primary task of contract theory is not only to provide a satisfactory account of each of these areas of doctrinal issues in its own right (because the relevant rules are well settled, stable, and often mandatory), but also to show how they fit together in one harmonious whole—something that, he contends, no current theory has yet been able to do.[16] As an interpretative theory, contract as empowerment seeks to explain these doctrines in light of how they are widely understood and presented within the common-law tradition and hence from a legal point of view.

The first doctrinal puzzle asks why courts enforce purely executory contracts through expectation damages (and less frequently by specific performance) independently of any detrimental reliance by or harm to the victim of a breach. Referring to the seminal article by Professor Lon Fuller and William Perdue, which challenges the compensatory character of expectation damages,[17] Kar writes that the availability of these remedies "can be puzzling because, absent some harm to the victim, it is unclear

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[14] Id at 771–72.

[15] See id at 777–83.

[16] See id at 761.

[17] See generally L.L. Fuller and William R. Perdue Jr, *The Reliance Interest in Contract Damages: 1*, 46 Yale L J 52 (1936).

why [she] deserves a remedy."[18] I refer to this as the "Absence of Harm" puzzle. The second puzzle concerns the centrality of the requirement of consideration for contract formation and the link between this requirement and the standard remedies for breach. In connection with this set of issues, he thinks it is essential to distinguish consideration-based enforceability from the qualitatively different reliance basis of enforceability in promissory estoppel.[19] I call this the "Necessity of Consideration" puzzle. Finally, a third puzzle for contract theory has to do with contract law's seemingly inconsistent treatment of parties' subjective contracting choices. According to Kar, contract law does and must show appropriate deference to parties' actual subjective (that is, intended) choices when determining the existence and scope of contractual obligations.[20] At the same time, and seemingly in tension with such "freedom of contract," there are numerous doctrines—he mentions, for instance, the modified objective test for formation and interpretation, as well as norms of contractual fairness like unconscionability—that deviate from and sometimes override party choices.[21] Are these apparent tensions real and do they reflect basic inconsistencies at the core of contract doctrine?

The stated objective of Kar's theory is to show that these constellations of doctrinal issues can be explained and harmonized with a conception of contract as empowerment that incorporates contractualist criteria, which are more or less supposed[22] rather than defended in their own right.[23] As already noted, his account is presented above all as *the* most satisfactory interpretative theory of contract law doctrines. In his discussion of different doctrines, Kar makes many points and observations that, in my view, are correct and illuminating. In keeping with his aim, I want, however, to raise certain more basic questions and difficulties that I believe are crucial to the successful elaboration of a satisfactory interpretive theory of contract law. Given limits of space, I focus primarily on the first two sets of issues, namely, the "Absence of Harm" and the "Necessity of Consideration" puzzles.

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18 See Kar, 83 U Chi L Rev at 785 (cited in note 1).

19 See id at 803–04.

20 See id at 806.

21 See id at 809–12 (discussing the modified objective test); id at 815–17 (discussing unconscionability).

22 See Kar, 83 U Chi L Rev at 771 (cited in note 1).

23 See id at 828–30 (cited in note 1).

II. A CRITICAL ANALYSIS OF THE ARGUMENT

A. The Conception of Contractual Relation

We should begin by identifying some basic premises of the theory. How it views the contractual relation is surely such a premise—for upon this, everything else turns. Professor Kar's contractualist criterion—whether anyone similarly situated and motivated could reasonably reject a proposed principle or rule in light of the available alternatives[24]—is applied to and within the parameters of the contractual relation as he understands it. What, then, is the theory's conception of this relation? We have seen that it takes contract as a mechanism or tool through which one party, the promisor, can influence the action of another, the promisee, in ways that the promisor intends.[25] This relation moves essentially in one direction only: originating with the promisor's intent to influence the promisee and culminating, if successful, in the promisee doing the intended act. While the promisor, by promising, gets the promisee to do something, the same does not hold in the other direction (for the promisee with respect to the promisor). Rather, the promisee's action counts simply as the intended and hoped-for *effect* of the promisor's act of promising. Its relevance and role lie in the fact that it is merely part of the realization of the *promisor's* purposes.

Similarly, the promisee's trust, which may be necessary to motivate her action, is simply a causally relevant factor in bringing the promisor's purpose to fruition.[26] In contrast to the role of trust in Professor Charles Fried's explanation of promissory duty,[27] the generation of trust here has no *moral* significance or implications and certainly is not made the basis of any separate, let alone legally protected, concern for the promisee vis-à-vis the promisor. If, as Kar contends, empowerment is a capability,[28] it is one that, as between promisor and promisee and in the context of their interaction, is exercised by *only* the promisor. It is true that the theory postulates a requirement of equal empowerment.[29] However, as employed in the theory, "equal empowerment" refers

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24 See id at 770.

25 See id at 771–72.

26 Kar, 83 U Chi L Rev at 763 (cited in note 1).

27 See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 16 (Oxford 2d ed 2015) ("The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust.").

28 See Kar, 83 U Chi L Rev at 764 (cited in note 1).

29 Id at 773.

to the fact that this very same capability may be exercised by the second party if and when she figures as a *promisor* vis-à-vis the first, who would then count as the promisee.[30] Both sides, in other words, have empowerment interests *qua promisors*. The unidirectional analysis of cause and effect is simply applied in the reverse direction insofar as the parties switch roles. But this presupposes a second separate transaction. Thus, there would be at most two distinct and separate unidirectional movements from promisor to promisee; and these movements, it should be emphasized, would be neither interconnected nor joined with each other and so could not form an intrinsically two-way, mutually inducing bilateral relation.

This may all seem rather abstract. But, as I will now try to show, the difficulty with this conception of the contractual relation is that it is directly at odds with the very doctrines that the theory aims to justify, thus precluding a satisfactory, let alone a unified, account of the central doctrinal puzzles.

B. The Absence of Harm Puzzle Reconsidered

To start, what exactly is the Absence of Harm puzzle with respect to expectation damages as presented by Fuller and Perdue? As the authors note, it is a fundamental and generally accepted rule of the common law that in giving damages for breach of contract, the law should, so far as can be done by money, seek to place the plaintiff in the same position as he would have been if the contract had been performed, and that, in so doing, the law is *compensating* the plaintiff for injury caused by the breach.[31] Against this view, Professor Fuller and Perdue object: "[y]et in this case we 'compensate' the plaintiff *by giving him something he never had*. This seems on the face of things a queer kind of 'compensation.'"[32] As a consequence, the authors contend that the justification for both expectation damages and specific performance "loses its self-evident quality."[33] Their question is, "[W]hy should a promise which has not been relied on ever be enforced at all, whether by a decree of specific performance or by an award of damages?"[34]

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30 See id at 774.

31 See Fuller and Perdue, 46 Yale L J at 52–53 (cited in note 17).

32 Id (emphasis added).

33 Id at 56–57.

34 Id at 57.

It is clear then that, for Fuller and Perdue, the puzzle about the standard remedies for breach is that the law's characterization of relief as compensatory seems wrong unless mere nonperformance of an un-relied-upon promise actually injures the promisee by depriving the promisee of something that she "had" as a result of contract formation and, thus, prior to the time performance was due. More precisely, the promisee must have acquired this possession through the parties' mutual assent at formation. But having rejected this possibility, Fuller and Perdue conclude that breach of an un-relied-upon contract does not harm or injure the promisee as such, and that any plausible justification for the standard remedies *must* be part of distributive justice and rest on policy considerations, both economic and reliance-based.[35]

The difficulty with Professor Kar's theory of contract as empowerment as an *interpretative account* of the law is that—far from elucidating the doctrinal understanding of contract remedies as compensation for injury caused by breach and answering the Fuller and Perdue challenge—his account, despite its claim to be nondistributive, only ensures that there can be no alternative to their objection or to a policy-based solution. This is because contract as empowerment makes the whole question of compensation for injury irrelevant.[36] Let me briefly explain.

On Kar's view, contract enforcement in general, and the standard remedies in particular, helps effectuate (in the absence of informal interpersonal trust) the *promisor's* intention to influence promisee's action via her promise. Enforcement is needed to motivate the promisee to take the promise seriously and to feel confident that the promisor will perform as promised so that, on this basis, the promisee will take the action the promisor wants. The focus is on the promisor's empowerment interests. Kar argues that, having made a promise to influence promisee conduct that needs legal enforcement to be effective, the promisor cannot reasonably reject a rule that authorizes enforcement in cases of

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[35] See Fuller and Perdue, 46 Yale L J at 59–63 (cited in note 17). Fuller and Perdue frame their point in terms of Aristotle's distinction between corrective and distributive justice. See id at 56. In contrast to other measures of contract damages—and I might add damages in tort law, which are compensatory in character and are instances of corrective justice—only the expectation measure, along with specific performance, must be explained as distributive justice. And "[w]ith the transition [to distributive justice], the justification for legal relief loses its self-evident quality." Id at 56–57.

[36] This is despite Kar's evident acknowledgement that the standard legal point of view does see contract damages as compensatory. See Kar, 83 U Chi L Rev at 780–81 & n 67 (cited in note 1). See also Restatement (Second) of Contracts § 356, comment a (1981) ("The central objective behind the system of contract remedies is compensatory, not punitive.").

noncompliance.[37] But why not? Enforcement is needed just as a means to effectuate the promisor's intention and thus presupposes that intention: If her intention changes and she regrets her promise, why should there be any question of enforcement as between the parties *in the absence of any injury, wrong, or loss* caused to the promisee?[38] However, the theory provides no basis for incorporating such consequences, which would be all on the promisee's side, as part of the protection of the promisor's empowerment interests. The idea of compensation does not apply and can have no traction. In the words of Fuller and Perdue, the justification for legal enforcement loses its self-evident quality.

This same basic difficulty also affects the theory's more specific arguments for expectation damages over reliance. Kar suggests that enforcement in accordance with expectation damages "tend[s] to give [the] promisor[ ] greater ability to choose the level of inducement that [she] seek[s] to generate by making [a] legally enforceable promise[ ]."[39] Offhand, this emphasis on greater choice and control seems misplaced when we consider that, as Fuller and Perdue themselves note, contracts are ordinarily silent about the question of damages and parties are said to contemplate performance, not breach or legally coercive responses to breach.[40] Moreover, assume that a moment after mutual promises have been exchanged and before either party has done or forgone anything of value in reliance on the contract, one of the parties regrets her promise and reneges. In these circumstances, is it clearly reasonable and fair for the other party to demand the expectancy just because the expectancy may have provided the level of assurance and inducement that we *presume* the promisor would have chosen to make her intention effective *at the time* she had this intention? In the absence of showing that expectation damages (or specific performance) correlate with and repair a genuine loss sustained by the promisee as a result of breach, there is no legal argument for awarding this measure over reliance—or indeed, any remedy at all.

Note that I have framed my objection in terms of what is reasonable and fair between the parties. This is certainly in keeping with the usual approach of contractualism. My point here—as

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37 See Kar, 83 U Chi L Rev at 771, 787 (cited in note 1).

38 Note Kar's starting assumption that the puzzle of expectation damages—and the reason a victim of a contractual breach deserves a remedy—arises "because there has not yet been *any* harm caused to the victim of the breach." Id at 785 n 84 (emphasis added).

39 Id at 790.

40 See Fuller and Perdue, 46 Yale L J at 58 (cited in note 17).

with the previous discussion of enforceability—is that Kar's empowerment argument for the nonrejectability of expectation damages does *not*, despite its aim and apparent formulation, actually incorporate the needed dimension of the reasonable.[41] It represents at most an argument for internal consistency within the standpoint of the promisor's own intention and purposes at the time she promises. In contractualist terms, it reflects nothing more than the promisor's consistent pursuit of her purposes at a certain moment under the idea of the rational. But this does not explain why her first stance should govern later when her intention changes, let alone why others have standing to respond coercively to the promisor's change of mind. Changing one's mind is an exercise of the powers of rational deliberation and decision in the pursuit of one's good.

It might be thought that the dimension of the reasonable can be incorporated by taking into account—as a norm of equal empowerment would seem to require—the second party's own empowerment interests insofar as she is a promisor in her own right. But, as I suggested earlier, this simply brings into play her own distinct standpoint in seeking to influence the first party's actions in a way that, just as we saw with the first party, does not inherently or directly incorporate the promisee's interest in performance as normatively relevant. In other words, this merely multiplies the number of exercises of empowerment, each of which separately and distinctly expresses the powers of the rational, without directly linking the two sides in a way that brings to bear the moral requirements of the reasonable. The result is just a more complex juxtaposition of distinct efforts by each side to influence the other's action.[42]

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[41] In this respect, contract as empowerment is even more lacking than Fried's theory of contract as promise. See generally Fried, *Contract as Promise* (cited in note 27). Fried's theory, in virtue of its account of trust as a distinct morally significant factor, shows how the promisee has moral interests on her side, which arguably justify, as a matter of reasonableness, some kind of obligation on the side of the promisor. See note 27 and accompanying text.

[42] In light of this complexity, it would seem arbitrary to ignore the fact that both parties may have different, relevant intentions and may engage in different kinds of relevant conduct (for example, promising, forgoing opportunities, actually performing, etc.) at different times, and not to take these different and often conflicting factors into account when applying "a system of obligations that no one who is similarly motivated could reasonably reject." Kar, 83 U Chi L Rev at 770 (cited in note 1). Equal treatment of both sides would seem to require an appropriate weighting and sequencing (if not combining) of the different instrumentally justified remedial measures along the timeline from formation to breach. Moreover, under this approach, it would also seem arbitrary to ignore the cumulative negative effects of noncompliance on the credibility and efficacy of contract as a socially available and existing tool for empowerment, quite apart from how breach may

Kar contrasts reliance theories, which focus on the reliance interests of the *promisee*, and contract as empowerment, which is concerned with the empowerment interests of *promisors*.[43] To incorporate requirements of the fair and reasonable that hold as between a particular promisor and her promisee,[44] the theory must, however, explain the contractual relevance of the *promisee's* expectation or performance interest in a way that satisfactorily answers Fuller and Perdue's challenge. By anchoring the rationale in the promisor's intention and purpose independently of any consideration of the existence and significance of nonreliance loss sustained by the *other* party, contract as empowerment cannot make sense of—and in fact simply ignores—the law's understanding of expectation damages as compensatory.[45]

C. The Necessity of Consideration Puzzle Reconsidered

With this mention of the contrast with reliance, I would like now to turn to Kar's treatment of the requirement of consideration, which he takes—rightly in my view—to be distinctive of the contractual relation[46] and intrinsically connected with the standard remedies of expectation damages and specific performance.[47] According to Kar, the centrality and necessity of consideration are explained by the fact that contract law is framed to serve the empowerment interests of both parties equally.[48] Whereas many commentators are skeptical about the coherence and the role of

affect individual interests in particular instances. However, it is not clear how the theory of contract as empowerment would handle these questions. For an instructive discussion of this complexity from an economic standpoint, see Richard Craswell, *Against Fuller and Perdue*, 67 U Chi L Rev 99, 107–11 (2000).

43 See Kar, 83 U Chi L Rev at 776 (cited in note 1).

44 Kar, rightly in my view, emphasizes that an interpretive account, particularly one that is contractualist, should apply as between the two particular parties to a contract. See, for example, id at 771–72.

45 For this reason, despite the theory's emphasis on the promisee's exclusive standing to sue, id at 798–99, it cannot account for the basic fact that damages *must* be paid *to* the promisee rather than, say, to the state by way of a fine. Contract as empowerment may be able to explain why a *sanction* should be available and imposed in order to bolster the credibility of the promisor's power to induce promisee action; but for this purpose, the only thing necessary is that the promisor pays it, irrespective of the person or entity to which it is given. Of course, it may be necessary to incentivize the promisee to sue the promisor—but this amount need not coincide with full expectation damages.

46 See id at 802.

47 See Kar, 83 U Chi L Rev at 803 (cited in note 1).

48 See id.

consideration,[49] contract as empowerment, he suggests, offers a straightforward explanation. Is this in fact the case?

The first thing to note is that the surface fit between the idea of empowerment and the requirement of consideration is *stipulated*, not necessary. The core idea of empowerment, as Kar construes it, is the capability of one person to *influence the action* of another by making a credible promise.[50] Contract enforcement is justified as conducive to fulfilling the exercise of this power. But as Kar rightly emphasizes, consideration refers to a promise or act that is requested by the promisor to be provided by the promisee *in return* for her promise—and that is so given by the promisee.[51] This is clearly a subset of the ways in which a promisor can influence the promisee by promising. For one, a promisor can certainly intend to induce promisee action without treating the action as quid pro quo. This is precisely the nature of promise-induced detrimental reliance.[52] Prima facie, then, reliance-based liability, which does not require consideration, would seem to protect empowerment interests.

Kar defines empowerment as "a capability to achieve valuable *beings* and doings" as the intended outcomes of promisor inducement.[53] At the same time, he denies that promises to reward past conduct[54] or to induce feelings[55] involve the exercise of empowerment. But why can't a promisor seek to influence the promisee's feelings in order to generate in her certain expectations and hopes that the promisor views as worthwhile, not only in themselves but also as a means to encourage the promisee to engage life opportunities in a certain way? This seems clearly to illustrate the idea of empowerment. And although such promises may ordinarily be made to promisees who already informally trust the promisor, this need not be the case. If not, there should in princi-

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49 Id at 799 n 124 (summarizing the ambivalence of commentators who subscribe to a promise-based theory of contract). See also Fried, *Contract as Promise* at 28–39 (cited in note 27).

50 See Kar, U Chi L Rev at 761 (cited in note 1).

51 See id at 799.

52 Recall here Justice Benjamin Cardozo's formulation of the (noncontractual) principle in *Glanzer v Shepard*, 135 NE 275 (NY 1922), when he held that the defendants were under a duty of care toward the plaintiffs in making representations to them "not casually nor as mere servants, but in the pursuit of an independent calling and . . . with the very end and aim of shaping the conduct of another." Id at 277.

53 Kar, 83 U Chi L Rev at 774 (cited in note 1) (emphasis added).

54 See id at 775, citing *Dougherty v Salt*, 125 NE 94, 95 (NY 1919).

55 See Kar, 83 U Chi L Rev at 797 (cited in note 1).

ple—according to Kar's own analysis—be a role for legal enforceability of the promise. In other words, a purely gratuitous promise would be enforceable.

To make even a prima facie case of fit between empowerment interests and consideration, Kar must and does limit those interests to a special subclass of promises that seek to induce a promise or performance from the promisee in return. This, I have tried to show, is a purely *stipulated*, ad hoc limit that is not entailed by the idea of empowerment itself as he conceives it. But it is only if this limit is introduced that Kar can claim that "[i]t follows—with almost mathematical elegance—that contract as empowerment recommends the legal enforcement of all and only those promises that are supported by legal consideration in the technical sense of the word."[56]

Beyond this, there seem to be even more basic difficulties with this account that arise from the way contract as empowerment conceives of the parties' interaction

First, since the late sixteenth century,[57] the doctrine of consideration has viewed return promises and acts as on a par. The law treats the return promise as the second party's complete and crystallized manifestation of choice which establishes, jointly with the first promise, the contractual relation. Juridically, the return promise counts as that party's act no differently than a return act. It is important to account for this, not only as a matter of interpretive theory, but also because it bears on the possibility of answering the Fuller and Perdue challenge. To explain expectation damages as compensatory, the parties' mutual promises must count as acts, complete and fully effectual at formation and therefore prior to actual performance, that vest each of them with rightful possession of the performance promised by the other. But the basis for viewing their mutual promises as such is by no means self-evident. And in fact, because empowerment gives a central role to a party's pursuit of her subjective interests and preferences,[58] it is even more puzzling: a promisor wants to obtain the promisee's action and, as a matter of preference satisfaction, it is the fulfillment of the promise—actual performance—rather than the promise as such that would seem to be the thing that is

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56 Id at 800.

57 For an excellent historical account, see generally David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, in John Barton, ed, *Towards a General Law of Contract* 67 (Duncker & Humblot 1990).

58 See Kar, 83 U Chi L Rev at 806–08 (cited in note 1).

sought and valued. Although Kar stipulates empowerment interests with respect to the subclass of acts *and promises* given in return,[59] the inclusion of promises needs a justification, and contract as empowerment does not seem able to provide it.

Second and in sharp contrast with the empowerment theory's unidirectional conception of relation, the crucial and distinctive hallmark of the requirement of consideration is that it necessitates the establishment of a thoroughly bilateral or two-sided relation: each side is specified in relation to the other and has no contractual relevance except in this mutual relatedness.[60] It must be emphasized that this intrinsic relatedness is not reducible to the joining of two sides each of which can be defined or be relevant apart from the other. Their joinder is an inherent defining characteristic of each. Moreover, as may clearly be seen in the paradigm case of mutual promises, the two sides required by the doctrine of consideration must each actively and identically contribute to contract formation: each simultaneously requests and is requested by the other. Doctrinally, these features are expressed in the requirements that the promises must be simultaneously and mutually related as quid pro quo and thereby be mutually inducing. The irreducibly basic unit of analysis is just this two-sided transaction: it is thus impossible to distinguish any unidirectional analysis going from one side to the other, and the interests in performance of *both* must count inseparably and at the same time or not at all. Unless they are mutually inducing in this strict sense, they are each nothing more than gratuitous promises.

CONCLUSION

In my view, the central challenge to contract as empowerment as an interpretative theory is the mismatch between the way it construes the contractual relation (namely, as unidirectional) and what that relation is, and must be, in accordance with the consideration requirement (namely, strictly two-sided and mutually inducing). Not only does this mismatch prevent the theory from providing a satisfactory account of consideration, but it also closes off the possibility of the theory harmonizing the main principles and doctrines that animate contract law in one unified interpretive view.

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[59] See id at 763.

[60] For detailed discussion, see generally Peter Benson, *The Idea of Consideration*, 61 U Toronto L J 241 (2011).

Rather than presupposing a prior normative conception (whether empowerment or some other moral[61] or economic[62] conception) with its preconceived idea of relationship and then applying it to contract law, an interpretative account of contract must try to discern and to make explicit the kind of relationship that is pervasively supposed in the settled doctrines and principles of contract law: if found, such a relationship would function as contract law's internal organizing idea, through which we could make sense of and hold together its many doctrines.[63] So far as the common law is concerned, I suggest that it is the relation consisting of the parties' mutual assents—as specified by the doctrine of consideration—that constitutes this basic contractual relation and the organizing idea of contract law. Although beyond the scope of this response, this can, I believe, be demonstrated via a thorough discussion of that doctrine and its role in the whole economy of contract law principles and doctrines.[64]

As part of this alternative interpretative approach, it would be crucial to show that the promise-for-consideration relation, consisting just of the parties' mutual promises, can reasonably be construed in its own terms as embodying a form of mutual or *transactional acquisition* that is presently and fully effective at contract formation, prior to and independent of actual (physical) performance or any detrimental reliance.[65] Only in this way can the Fuller-Perdue challenge be answered and expectation remedies be explained as compensatory within a rights-based, nondistributive account such as that presupposed by contract as empowerment.

In addition to bringing out an intrinsic connection between consideration and performance remedies, it would also be essential to explain: how the basic promise-for-consideration relation

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61 See, for example, Fried, *Contract as Promise* at 14–17 (cited in note 27) (presenting an *independently* given moral conception of promissory duty).

62 See, for example, Craswell, 67 U Chi L Rev at 107–11 (cited in note 42).

63 An interpretative account of this kind could (if properly developed) arguably satisfy the requirements of *public justification* in Rawls's sense of that term. See, for example, Rawls, *Justice as Fairness* at 26–29 (cited in note 12).

64 I try to do this to some extent in Peter Benson, *The Unity of Contract Law*, in Peter Benson, ed, *The Theory of Contract Law: New Essays* 118, 153–184 (Cambridge 2001), and more completely (and hopefully more adequately) in a forthcoming book, *Justice in Transactions: A Theory of Contract Law*. This view of consideration as defining the basic contractual relation would be consistent with Professor Kar's own view that only promises supported by consideration are "true contracts." Kar, 83 U Chi L Rev at 800–04 (cited in note 1).

65 See Benson, *The Unity of Contract* at 132 (cited in note 64) (arguing that in contract scenarios, "the entitlement is transferred at the moment of agreement").

necessarily involves an implicit dimension comprising implied obligations, excusing doctrines such as mistake and impossibility;[66] as well as why mutual promises that are not mere gratuitous promises can nevertheless be set aside under a principle of unconscionability because of grossly inadequate consideration or, in other words, because of a striking and unexplained disproportion between the values exchanged. The latter would be no easy task given that the doctrine of consideration, which we take as our starting point, is itself expressly unconcerned about and indifferent toward the very thing that raises a question of contractual fairness, namely the comparative values of the mutual promises.[67] These and many more questions of fit remain to be explored and, if possible, to be accounted for. But if we can show through this kind of analysis that contract law embodies fair and reasonable principles for persons standing to each other in a definite kind of social relation[68]—here the promise-for-consideration relation—such a theory should count not only as general and interpretive but also as contractualist in character.

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66 This whole implied dimension is unaccounted for by Professor Fried's promise principle—as Fried himself recognizes. See Fried, *Contract as Promise* at 57–73 (cited in note 27).

67 In my earlier piece, *The Unity of Contract Law*, I tried to explain how the doctrines of consideration and unconscionability can be viewed as mutually supportive even with—and partly because of—their differences. See Benson, *The Unity of Contract Law* at 193 (cited in note 64).

68 Rawls, undoubtedly the greatest modern theorist in this tradition, takes this standpoint in all his writings. See generally, for example, his early discussion in John Rawls, *Justice as Fairness*, in Samuel Freeman, ed, *John Rawls: Collected Papers* 47, 47–72 (Harvard 1999), and more recently in Rawls, *Justice as Fairness* 11–14 (cited in note 12).