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Title
The Divergence of Contract and Promise

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Journal
Harvard Law Review, 120(3)

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Publication Date
2007

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THE DIVERGENCE OF CONTRACT AND PROMISE

Seana Valentine Shiffrin[*]

In U.S. law, a contract is described as a legally enforceable promise. So to make a contract, one must make a promise. The legal norms regulating these promises diverge in substance from the moral norms that apply to them. This divergence raises questions about how the moral agent is to navigate both the legal and moral systems. This Article provides a new framework to evaluate the divergence between legal norms and moral norms generally and applies it to the case of contracts and promises. It introduces and defends an approach to the relationship between morality and law that adopts the perspective of moral agents subject to both sets of norms and argues that the law should accommodate the needs of moral agency. Although the law should not aim to enforce interpersonal morality as such, the law's content should be compatible with the conditions necessary for moral agency to flourish. Some aspects of contract not only fail to support the morally decent person, but also contribute to a legal and social culture that is difficult for the morally decent person to accept. Indeed, U.S. contract law may sometimes make it harder for the morally decent person to behave decently.

INTRODUCTION

In U.S. law, a contract is described as a legally enforceable promise. So to make a contract, one must make a promise. One is thereby simultaneously subject to two sets of norms — legal and moral. As I argue, the legal norms regulating these promises diverge in substance from the moral norms that apply to them. This divergence raises questions about how the moral agent is to navigate both the legal and moral systems. In this Article, I provide a new framework to evaluate the divergence between legal norms and moral norms generally and apply it to the case of contracts and promises.

By claiming that contract diverges from promise, I mean that although the legal doctrines of contract associate legal obligations with morally binding promises, the contents of the legal obligations and the legal significance of their breach do not correspond to the moral obligations and the moral significance of their breach.[1] For instance, the

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* Professor of Philosophy and Law, University of California, Los Angeles. I am grateful for help and critical comments from Iman Anabtawi, Sarah Coolidge, Richard Craswell, Meir Dan-Cohen, Ronald Dworkin, Melvin Eisenberg, Barbara Fried, James Gordley, Mark Greenberg, Tom Grey, Jeffrey Helmreich, Barbara Herman, Doug Kysar, Stephen Munzer, Liam Murphy, Thomas Nagel, Melanie Phillips, Todd Rakoff, Jennifer Roche, William Rubenstein, Steven Shiffrin, and audience members at the Analytical Legal Philosophy Conference, Boalt Hall, the Harvard Law School Faculty Colloquium, the NYU Law and Philosophy Colloquium, the September Group, and the Stanford Legal Studies Colloquium. This Article began as the Kadish Lecture at Boalt Hall and I am especially grateful to Sandy Kadish for its instigation.

[1] Although this Article discusses those aspects of contract that diverge from promissory norms, other parts of contract law depend fairly explicitly upon a variety of moral judgments and

moral rules of promise typically require that one keep a unilateral promise, even if nothing is received in exchange. By contrast, contract law only regards as enforceable promises that are exchanged for something or on which the promisee has reasonably relied to her detriment. When breach occurs, the legal doctrine of mitigation, unlike morality, places the burden on the promisee to make positive efforts to find alternative providers instead of presumptively locating that burden fully on the breaching promisor. Morality classifies intentional promissory breach as a wrong that, in addition to requiring compensation, may merit punitive reactions, albeit sometimes minor ones; these may include proportionate expressions of reprobation, distrust, and self-inflicted reproofs, such as guilt. Contract law's stance on the wrongfulness of promissory breach is equivocal at best, manifested most clearly by its general prohibition of punitive damages.

To analyze this substantive divergence between legal and moral norms, I introduce and defend an approach to the relationship between morality and law that adopts the perspective of moral agents subject to both sets of norms and argue that the law should accommodate the needs of moral agency. Although the law should not aim to enforce interpersonal morality as such, the law's content should be compatible with the conditions necessary for moral agency to flourish. Some aspects of U.S. contract law not only fail to support the morally decent person, but also contribute to a legal and social culture that is difficult for the morally decent person to accept. Indeed, U.S. contract law may sometimes make it harder for the morally decent person to behave decently.

For some, the divergence between contract and morality calls for a direct condemnation of contract law's content. If contract law's business is to enforce promises, its structure, as a whole, should reflect the moral structure of promises.[2] Others regard the divergence between

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concepts, not to mention the concept of a promise itself. For instance, the past consideration doctrine contains an exception for cases in which there is an independent moral obligation to do what one has promised. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 2.7–2.8, at 56–63 (4th ed. 2004). Some cases and doctrines involve appeal to moral concepts of fairness or reasonableness. Not all of these cases and doctrines can be recast more narrowly as judgments about what *justice* requires. Aspects of the immorality doctrine, for instance, may not be reducible to efforts to enforce the spirit or the letter of other aspects of public policy. This partial convergence between morality and contract would call for justification if one took the position that contract and promise are entirely separate domains.

[2] *See, e.g.*, Peter Linzer, *On the Amorality of Contract Remedies — Efficacy, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111 (1981); Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859, 879–80 (2000). Professor Charles Fried seems to take this position in *Contract As Promise*. *See* CHARLES FRIED, CONTRACT AS PROMISE 1–3, 17–21 (1981); *see also id.* at 17 ("The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case — that special case in which certain promises have attained legal as well as moral force."). At

contract norms and moral norms as not significant per se, whether because the law, especially private law, should not directly enforce morality as such, or because promise and contract occupy different realms with independent purposes: promise establishes rules for formalizing trust in interpersonal interactions; contract establishes rules that help to enable a flourishing system of economic cooperation for mutual advantage.[3]

My own view does not fit neatly into either of these camps, which I see as marking two poles of a broader, but artificial, dichotomy. This dichotomy seems to be the product of a set of familiar but overly general, overly blunt questions, such as whether law should reflect interpersonal morality and, in particular, whether contract should mirror the moral rules of promising. These questions frame the issues in ways that obscure an important position about the relation between legal and moral norms that maintains that the law should accommodate moral agency, but neither directly reflect nor entirely ignore interpersonal morality. The law must be attentive to the full range of normative positions because law represents a special form of normative cooperative activity. Yet, because law is a cooperative activity of mutual governance that takes institutional form, its normative values and

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points, though, Professor Fried's position is more qualified and ambiguous. It may well be compatible with the ideas I develop below.

Professor Fried's substantive criticisms of contract's moral content, however, are limited to the consideration doctrine. Interestingly, Professor Fried does not discuss punitive damages. He endorses the mitigation doctrine, characterizing it as an altruistic duty toward the promisor that is without cost to the promisee. *See id.* at 131. Oddly, given his methodology, he does not consider whether the norms of promising in fact include this duty. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 161 n.18 (2002) (mentioning Professor Fried's puzzling endorsement of expectation damages rather than specific performance); DORI KIMEL, FROM PROMISE TO CONTRACT 110–11 (2003) (discussing Professor Fried's treatment of mitigation).

[3] *See* FRIED, *supra* note 2, at 2–3 (citing PATRICK ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA (1965); GRANT GILMORE, THE DEATH OF CONTRACT (1974); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 160–210 (1977); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 356 (1979); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974)); *see also* KAPLOW & SHAVELL, *supra* note 2, at 162–65, 182–85, 190–97 (arguing that promise-keeping notions conflict with a welfare-maximizing view of contract and advocating the latter); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) [hereinafter Craswell, *Contract Law*] (arguing that theories of promise have little relevance for the "background rules" of contract); Richard Craswell, *Two Economic Theories of Enforcing Promises*, *in* THE THEORY OF CONTRACT LAW 19 (Peter Benson ed., 2001) [hereinafter Craswell, *Two Economic Theories*]; Anne de Moor, *Are Contracts Promises?*, *in* OXFORD ESSAYS IN JURISPRUDENCE 103 (John Eekelaar & John Bell eds., 3d series 1987) (casting doubt on the equation of contract with promise).

principles may well be distinct from, though informed by, those comprising interpersonal morality.[4]

This Article approaches these topics by exploring the demands and tensions to which contract law, in particular, subjects moral agents. It starts from the more general premise that law must be made compatible with the conditions for moral agency to flourish — both because of the intrinsic importance of moral agency to the person and because a just political and legal culture depends upon a social culture in which moral agency thrives. The content and normative justifications of a legal practice — at least one that is pervasive and involves simultaneous participation in a moral relationship or practice — should be capable of being known and accepted by a self-consciously moral agent.[5] Legal rules must be constructed and justified in ways that take into account the fact that law embodies a system of rules and practices that moral agents inhabit, enforce, and are subject to alongside other aspects of their lives, especially their moral agency. Although I provide some motivation for these premises from a liberal perspective, for the most part I take them as starting points.

Part I expands briefly on these premises and on the distinctive liberal approach they offer to problems concerning the intersection of law and morality. The remainder of the Article applies this approach to the specific problems raised by the divergence between contract and promise. The overarching aim is to explore how an accommodationist approach would frame some issues in contract and to identify some new questions it would raise. This Article does not champion particular positions about the proper content of contract law, although toward the end it gestures at an alternative theoretical conception of contract informed by an accommodationist approach.

Part II argues that contract and promise do indeed diverge. Part III argues that the divergence is problematic. Although the divergence may not yield contradictory requirements, some prominent justifications for the divergent aspects of contract could not be known and accepted by moral agents. Further, the divergence raises the concern that the culture created by contract law and its justifications might

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[4] *See* Barbara Herman, *Reasoning to Obligation*, 49 INQUIRY 44, 60 (2006) (observing that coercion may be morally permissible and even required within a legal institutional context even though it would not be justified in interpersonal contexts); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1181–84 (2003) (discussing the general point in the context of the First Amendment and rules that govern intentions).

[5] In a prior work, I used the perspective of our collective role as moral agents engaged in enforcement to justify the unconscionability doctrine. *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205 (2000). Such arguments might extend to some applications of the immorality doctrine as well. In this Article, I consider our role as subjects of contractual rules, albeit subjects who have a role in the authorship of the rules to which we are subject.

make it more difficult to nurture and sustain moral agency, in particular the virtues associated with fidelity. Part IV rejects the suggestion that these difficulties could be bypassed by disentangling promise and contract through an explicit reconception of contract law as a normative system utterly distinct from promises. Contract law must at least be constrained by some of the needs and rationales of the system of promising. Part V closes with preliminary thoughts about how contract theory could be continuous with (rather than merely cabined by) these constraints.

I. MAKING ROOM FOR MORAL AGENCY

Two standard strains of argument address the relationship between contract and promise. Reflective approaches take interpersonal morality as a template for legal rules, sometimes implicitly. Such approaches operate as though the law should reflect everyday moral judgments whenever possible, whether because this is the nature of law or because, as a matter of political philosophy, it is what law should aim to do. A reflective approach may be particularly tempting in contract law because contracts and promises are so closely intertwined.

By contrast, separatist approaches treat law and morality generally, or contract and promise in particular, as independent domains. Some separatists regard reflective approaches as illiberal. For normative, political reasons, they regard it as inappropriate for the law to incorporate or enforce the rules of interpersonal morality as such. Other separatists have different, positive reasons for treating the domains as distinct. They believe that law, or perhaps specifically contract, has its own goals and purposes, such as establishing the foundation for a maximally efficient system of exchange. Their pursuit does not require engagement with other moral concerns. So, it is not the business of contract law per se to reflect or respond to the norms of interpersonal morality. Separatists acknowledge that individuals may be subject to moral demands that regulate their behavior, but separatists nonetheless maintain that compliance with these demands is each individual's responsibility. Since contract law's purpose is not to enforce interpersonal morality or promises as such, there is no special worry associated with contract law's divergence from promise. Participants in contract, as in other legal domains, may have to constrain their pursuit of its goals to accommodate other personal and social values, but that represents a flaw neither in the separatist conception of contract nor in its divergence from promise.

Both approaches harbor some elements of truth and so neither seems correct. I subscribe to an intermediate position that advocates accommodating moral agency but not enforcing morality as such. I agree with separatists that there is no direct and reliable route from the content of interpersonal morality to the appropriate content of the

corresponding area of law. Legal domains may pursue normative purposes and principles of their own that are not straightforwardly derived from interpersonal morality. Furthermore, the standard liberal concerns about direct enforcement of morality have some traction.

It does not follow, however, that legal principles in these domains should be entirely insensitive to or divorced from the demands of interpersonal morality. Such insensitivity is not dictated by a commitment to liberal principles. Liberalism does not require that the theory of justice and the law must be predicated on a model that works equally well for amoral and moral agents. Quite the contrary. John Rawls's theory, for example, explicitly and plausibly presupposes that agents have developed moral capacities that underlie their capacity for a sense of justice.[6] These moral capacities are not so fine-tuned that they consist of only those abilities necessary to understand and comply with the terms of justice narrowly understood. Rather, they depend on a broader, fuller moral personality.

Indeed, mastery and appreciation of promissory norms must figure among these requisite moral capacities, however broadly or narrowly construed.[7] Absent a culture of general mastery and appreciation of promissory norms and the moral habits and sensitivities that accompany them, I doubt that a large-scale, just social system could thrive and that its legal system could elicit general patterns of voluntary obedience. Further, I doubt that, absent a strong promissory culture, the individual relationships that give rise to and sustain moral agency and relationships of equality could flourish. Whether or not all norms and virtues of moral agency must be accommodated by the legal system, those associated with promissory norms seem quite central to the possibility of a flourishing system of justice.[8]

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[6] *See* JOHN RAWLS, A THEORY OF JUSTICE 395–587 (1971).

[7] *See* Seana Valentine Shiffrin, Promising, Intimate Relationships, and Conventionalism 42–52 (Dec. 1, 2006) (unpublished manuscript, on file with the Harvard Law School Library) (arguing that promisors must have the ability to bind themselves with a promise "if they are to have the ability to conduct relationships of adequate moral character"); *see also* H.L.A. HART, THE CONCEPT OF LAW 197 (2d ed. 1994) (recognizing the social necessity of rules respecting promises); RAWLS, *supra* note 6, at 346–48 (noting the obligation, derived from the "principle of fairness," to comply with promises). This is not to endorse the view that the duty to obey rests on a promise or a contract.

[8] Some reports about Tongan and Iranian culture may complicate claims about the universality of promising, but it is difficult to determine exactly what they show. *See* Fred Korn & Shulamit R. Decktor Korn, *Where People Don't Promise*, 93 ETHICS 445 (1983) (discussing the absence of promising in Tonga island culture); Michael Slackman, *The Fine Art of Hiding What You Mean To Say*, N.Y. TIMES, Aug. 6, 2006, § 4 (Week in Review), at 5 (discussing the prevalence of what appear to be insincere promises in Iranian culture). Some of this evidence could be interpreted to show that in some cultures, it is hard to tell when sincere commitments are expressed, but not that promises as such have little or no significance. Further, the purported departures from the culture of promising take place in contexts of hierarchical, unequal structures; thus, they may not serve as counterevidence of the importance of promising in maintaining social relations

When the directives of law and morality regulate the same phenomena, moral agents have to negotiate two distinct sets of norms. The rules of contract and promise present a salient instance of this navigation problem. Especially because there are moral duties to obey the law, legal rules should be sensitive to the demands placed on moral agents so that law-abiding moral agents do not, as a regular matter, face substantial burdens on the development and expression of moral agency.[9] Respecting this constraint yields an intermediate stance between the position that law should promote moral behavior for its own sake and the position that interpersonal morality should be irrelevant to the form and justification of law. To wit, even if enforcing interpersonal morality is not the proper direct aim of law, the requirements of interpersonal morality may appropriately influence legal content and legal justifications to make adequate room for the development and expression of moral agency. The influence that is exerted, however, need not result in efforts to mirror interpersonal morality closely.

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of equality amid local conditions of vulnerability. Tongan society is so pervasively hierarchical that much of its social interaction and dialogue is colored by status differences. *See, e.g.*, Kerry E. James, *Tonga's Pro-Democracy Movement*, 67 PAC. AFF. 242, 243 (1994) (noting the Tongan "traditions of rank and hierarchy"); Adrienne L. Kaeppler, *Poetics and Politics of Tongan Laments and Eulogies*, 20 AM. ETHNOLOGIST 474, 476 (1993) (drawing on Tongan rituals and pronouncements to show that "hierarchical principles of status and rank pervade life and death"); Adrienne L. Kaeppler, *Rank in Tonga*, 10 ETHNOLOGY 174, 174, 177, 188, 191 (1971) (arguing that the inequality inherent in Tongan society remains in force and has withstood the small movement for democratic reform); Kerry E. James, *Pacific Islands Stakeholder Participation in Development: Tonga* 17 (World Bank, Pac. Islands Discussion Paper Series No. 4, 1998) (describing Tongan society as traditional and hierarchical).

Similarly, Slackman describes the Iranian practice of *ta'arof*, a form of polite communication generally regarded as insincere, as developing from the need for subterfuge, against occupiers for example. *See* Slackman, *supra*. While perhaps not as all-encompassingly hierarchical as Tongan society, the context in which *ta'arof* occurs reflects unequal status relationships. *See, e.g.*, WILLIAM O. BEEMAN, THE "GREAT SATAN" VS. THE "MAD MULLAHS": HOW THE UNITED STATES AND IRAN DEMONIZE EACH OTHER 43 (2005) (tracing U.S. misunderstanding of Iran to Americans' failure to appreciate, among other things, that Iranian communication "tends toward hierarchical skewing"); Anne H. Betteridge, *Gift Exchange in Iran: The Locus of Self-Identity in Social Interaction*, 58 ANTHROPOLOGICAL Q. 190, 191 (1985) (arguing that *ta'arof* reflects strategic rules for interaction among people of differing status, as contrasted with "intimates"); Zohreh R. Eslami, *Invitations in Persian and English: Ostensible or Genuine?*, 2 INTERCULTURAL PRAGMATICS 453, 456 (2005) (finding that communication involving *ta'arof* reflects the communicators' consciousness of their status differences); Laurence D. Loeb, *Prestige and Piety in the Iranian Synagogue*, 51 ANTHROPOLOGICAL Q. 155, 156 (1978) (pointing out that *ta'arof* was used "by the [Persian] elite to reinforce rank differentiation"). Professor Loeb shows that a similar consciousness of rank guides the practice of *ta'arof* in a contemporary Iranian synagogue. Loeb, *supra*, at 157.

[9] I assume that the rules of morality have much substantive content independent of and prior to the law. That is, their content is not fully determined by law's contents and those moral principles requiring obedience to law.

A. *Liberalism and the Accommodation of Moral Agents*

These reasons to reject separatist views do not commit us either to a version of reflectivism or to some other illiberal approach. We can be sensitive to the conditions for supporting moral agency and, for that reason, fashion law to be responsive to the content of interpersonal morality without running afoul of liberal strictures that counsel against enforcement of morality or that declare the priority of the right over the good.[10] Two main commitments underlie these strictures. First, the theory of justice must be articulated and defended without relying on any particular comprehensive theory of the good. Its contours are not subject to objection on the mere grounds that they fail to promote or reflect the commitments of any such theory. Second, agents have a primary commitment to abide by the requirements of justice, a commitment that overrides conflicts presented by agents' specific conceptions of the good.

These commitments do not preclude efforts to ensure law's compatibility with the conditions for moral agency. The idea that the right is prior to the good does not entail that the law's content should never be sensitive to the norms of interpersonal morality. The requirements of justice do not fully determine all aspects of law. Contract provides a salient example. The principles of right may require a system of distributive justice, which may in turn require a system of contract. Any adequate contract law may need to have certain features, but all of its particulars may not be fully determined by the principles of justice narrowly construed. For example, considerations of justice may not decisively settle whether to adopt the mailbox rule. Settling the specifics of contract law may depend, in part, on other features of the culture and the society, including components of interpersonal morality. For instance, *if* contract law's aim were to protect against harm suffered from breach of promise, measured in terms of reasonable reliance, what counts as a reasonable form of reliance might depend on the cultural context and the degree to which easy trust is encouraged; the degree to which trust is encouraged might, in turn, be a matter settled partly by the norms of morality and not merely by cultural customs.

To be sure, in many circumstances, liberal principles of justice may preclude the direct implementation of moral commitments for their own sake or direct appeal to them as a rationale for legal decisions. Such principles prohibit both direct and indirect state pressure to engage in activities whose value depends on authentic and voluntary

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[10] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 173–211 (1993); JOHN RAWLS, *The Priority of the Right and Ideas of the Good*, *in* COLLECTED PAPERS 449 (Samuel Freeman ed., 1999).

participation, such as which private relationships to pursue or which ideas to express. Think of the speech and religion protections. Further, to invoke a familiar Rawlsian theme, liberal principles prohibit state endorsement of positions or values, social disagreement about which creates the very need for a theory and system of justice, but reliance on which is not necessary for the system to fulfill its purposes.

Not all components of moral agency or principles of morality fall into these special categories. In particular, the rules of promissory commitment generally do not demand authentic endorsement or performance for their value, nor are they controversial in the ways that create the very need for a system of justice.[11]

I advocate an intermediate position — that law's contents must be structured to make room for moral agents. It calls for the accommodation of moral agents, although the envisioned accommodation differs from some other common forms and connotations of accommodation.[12] Often, "accommodation" refers to adjustments or exceptions to otherwise valid laws that are made for unusual agents or outliers. The sort of accommodation defended here, by contrast, is more foundational. It would inform the guidelines for the shape of the general law and would extend to all moral agents. It would not merely and weakly exempt some agents from legal requirements to permit them to engage in certain behaviors or ways of life. This version of accommodation contains the stronger, positive requirement that the legal system's rules and justifications should be acceptable to moral agents without disrupting their moral agency.

B. What Accommodating Moral Agency Requires

I have been arguing that the legal system should be fashioned, justified, and interpreted to accommodate the opportunity for the governed to lead a full and coherently structured moral life. What does this commitment entail in the case of contract? I start from the following premise: when a legal practice is pervasive and involves simultaneous participation in a moral relationship or practice, the content and normative justification for the legal practice must be acceptable to a reasonable moral agent with a coherent, stable, and unified personality. Law's justification should not depend upon its being opaque or

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[11] Performance of some intrafamilial promises may be an exception, and this may in part (though only in part) explain the resistance to enforcing intrafamilial promises. *See, e.g.*, KIMEL, *supra* note 2, at 72–87 (discussing the inadequacy of the contract framework for pursuing the value of personal relationships); *see also infra* section II.A.2, pp. 724–26 (discussing mitigation); *infra* section III.B.2, pp. 736–37 (discussing gift promises).

[12] I discuss some more familiar forms of accommodation and their role within liberalism in Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270 (R. Jay Wallace et al. eds., 2004), and Shiffrin, *supra* note 5.

obscure or upon the ignorance, amorality, or split personality of the citizens it governs.[13] From this basic premise follow three more specific principles that regulate the interrelation between moral norms and legal norms, at least in those pervasive, regular contexts that involve the simultaneous participation of moral agents in parallel legal and moral relationships or practices.

First, what legal rules directly require agents to do or to refrain from doing should not, as a general matter, be inconsistent with leading a life of at least minimal moral virtue. "Minimal moral virtue" should be understood in a way that does not presuppose any particular comprehensive conception of the good or ideal of virtue.

Second, the law and its rationale should be transparent and accessible to the moral agent. Moreover, their acceptance by the agent should be compatible with her developing and maintaining moral virtue. Although knowledge of the justifications of law is not required or expected of every citizen, understanding the law's rationale should not present a conflict for the interested citizen qua moral agent. This is not merely because the agent is subject to the law and that to which she is subject should be justifiable to her. Within a democratic society, the law should be understood as ours — as authored by us and as the expression of our joint social voice.

This second principle governs both the reasons that actually motivate government agents to impose and enforce divergent rules, as well as the strongest available justifications for the divergence. Examination of the latter reveals whether the divergence is intrinsically problematic. This task is the focus of this Article. Nonetheless, it is possible for there to be an adequate theoretical justification for a divergent rule that is not actually the basis of a court's or a legislature's adoption of that rule. A court or legislature might be guided by poor reasons even when better reasons could be provided for the position. In such a case, we might say that the particular instance of imposition was impermissible because its rationale was not acceptable to a moral agent, even if the rule itself is not intrinsically problematic.[14] In addition, adoption of an intrinsically permissible rule for an impermissible reason may be problematic because even the implicit endorsement of unacceptable reasons[15] may have a corrosive effect on the moral culture and thereby implicate the next principle.

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[13] I use "citizens" as a shorthand for those regularly subject to a legal regime's requirements.

[14] I note, but do not address here, the further question of whether a regime that showed *convergence* between legal and moral rules, but whose legal justifications were unacceptable to moral agents, would also be suspect. I believe it would be, but that position requires greater argument than there is room for in this Article.

[15] As is well known, there are concerns about how we can coherently refer to the reasons that motivated a legislature, given that it may pass legislation without discussion of, much less consen-

Third, the culture and practices facilitated by law should be compatible with a culture that supports morally virtuous character. Even supposing that law is not responsible for and should not aim to enforce virtuous character and interpersonal moral norms, the legal system should not be incompatible with or present serious obstacles to leading a decent moral life. A principled requirement that the law facilitate a culture that is compatible with moral virtue need not go so far as to enforce moral virtue. In some circumstances, this goal may better be realized by doing quite the opposite. One may facilitate moral virtue by affording opportunities to be virtuous and by refraining from offering strong incentives or encouragements to misbehave; direct enforcement of virtue for its own sake, in some contexts, can be counterproductive — particularly when it is a necessary aspect of the virtuous conduct that it be voluntary and that it be evident to others that it is voluntarily performed.[16]

The remainder of my discussion investigates whether the divergence of contract from promise can satisfy these principles. The next two Parts argue that although contract law does not violate the first principle by issuing directives that contradict moral requirements, it may violate the second and third principles. Defenses of the rules of contract law often invoke rationales the acceptance of which is incompatible with maintaining one's moral convictions. Further, the rules themselves may contribute to a culture that challenges moral agency.

II. THE DIVERGENCE OF PROMISE AND CONTRACT

I now turn to the particulars of the divergence between contract and promise. I focus specifically on the ways in which contract law expects less of the promisor and more of the promisee than morality does.[17] Chiefly, I examine the treatment of remedies in contract and promise, although I occasionally draw on other helpful examples.

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sus on, reasons for that legislation. I put these issues aside here, although a fuller account of legislative rationale must face them, as some have attempted to do. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520–27 (2000) (asserting that the expressive meaning of collective action is not only a matter of legislative intent, but also a function of public understanding); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 438–42 (1996) (arguing that governmental motive could be determined by looking at the legislation produced).

16 For a discussion of the claim that factors of this sort support the consideration rule, see *infra* section III.B.2, pp. 736–37.

17 In some contexts, however, contract may be more demanding of the promisor than morality. This is certainly the popular notion of contract among laypeople. In close interpersonal relationships, there may be more room for interpretative flexibility than in contract. The law must come to a definitive conclusion about what a clause means; sometimes this serves the promisee's interests, as when the promisor is deemed to bear the risk of ambiguity — perhaps because he is the drafter or because he knows more about the industry. *See* RESTATEMENT (SECOND) OF CON-

In this Part and the two Parts following, the argument proceeds in three steps that correspond to the three principles for accommodating moral agency just articulated. First, contract and promise diverge in some significant ways, although not by directly generating inconsistent directives. Second, some of the standard arguments for the doctrines' divergence are exactly the sort of justifications that a virtuous agent could not accept. Third, even though some reasons for the divergence may be acceptable to a virtuous agent, the divergence itself may risk another difficulty by contributing to a culture that may be in tension with the conditions for the maintenance of moral character.

Before launching this argument, a few further assumptions about contract and promise should be made explicit. With respect to promising, I will assume, but not defend, that there are definite norms of promising that all moral agents are required to respect.[18] Generally, however, all that is required to raise the sorts of questions contemplated in this Article is the weaker assumption that there are *some* definite promissory norms — whether or not they are exactly as I describe — that bind moral agents within an aspirationally democratic, large-scale society such as ours.[19]

Of course, the moral contours of the promissory terrain are not always evident on the ground. In addition, there is a range of commit-

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TRACTS § 201(2) (1979). By contrast, moral partners may be obliged to acknowledge directly the ambiguity of the meaning of a promise and strike a compromise given two competing reasonable understandings. Further, as Professor Bernard Williams notes, in many informal contexts promissory parties should adjust their understandings of one another when compliance becomes more difficult than anticipated, especially when unforeseen circumstances arise. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 112 (2002). By contrast, contract law adopts stricter rules, placing the burden on the party who reasonably bears the risk of unforeseen circumstances. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 154. Sometimes this will place a higher burden on the promisor than morality might.

I put these examples of divergence aside. The divergence they exhibit is less stark than the examples I consider in the body of this Article. Contracting promisors often bear the burden of interpretative ambiguity, but not always. The promisee bears the burden when there is mutual misunderstanding, causing the contract to be dissolved. *See id.* § 152. Moreover, promisors will be bailed out in those cases of impracticability that threaten the survival of their operations. *See id.* § 261. These forms of divergence, unlike the ones on which I focus in the body of the Article, seem to be the product of the distinctive function of a large legal system to provide clear, predictable rules for conflict resolution and definitive adjudication when informal, more contextual mechanisms fail. Their content is explained by the effort to place the burdens of such stark rules, when necessary, on the parties who are more able to protect themselves ex ante against those burdens. The divergences I discuss in the body of the Article do not share these features.

[18] I discuss the central significance of promising to the moral agent in Shiffrin, *supra* note 7. My own approach does not take promises and their main moral force as resting on or deriving from a social convention, though many aspects of how we signal, understand, and fill in promissory gaps are, of course, based on local conventions. Most of this Article's points, however, do not depend on the rejection of conventionalism but only on the moral rules of promising being understood in the broad terms I describe.

[19] *See also supra* notes 7–9 and accompanying text.

ments that agents may form — some of which are promises, some of which are not, some of which have many but not all of the features of promises, and some whose nature is unclear. There are live philosophical and linguistic puzzles about promising, as well as gray areas and cases along a spectrum, just as with many other moral activities. Often, subtle, contextual distinctions must be deployed within the practice and along its boundaries — to do such things as differentiate promises from mere declarations of intention in context given that we do not always require invocation of the phrase "I promise" to make a promise. This Article works with clear cases of promises and puts aside these genuine unclarities, however, because they do not bear on the issues with which the Article is concerned. For the same reason, this Article also brackets much of the complexity, nuance, and qualification within contract law in favor of a simpler, perhaps overly blunt, treatment of its central doctrines.

Finally, the main argument does not presuppose a particular theory about the purposes of contract law. Hence, it begins without a detailed account of contract law's purposes. Rather, it starts from contract law's explicit self-representation of its relationship to promising to explore how well this self-representation sits alongside the moral agent's commitments.

U.S. contract law represents that a contract is an enforceable promise. Contracts do not merely resemble promises in that both involve voluntary agreements, usually concerning future activity, and often use identical language. (Later, I return to the significance of the close resemblance itself.) In U.S. law, promises are embedded within contracts and form their basis. The *Restatement of Contracts* defines a contract as "a *promise* . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[20] The *Restatement*'s definition of a promise is not technical. It invokes the familiar notion of the communication of an intention, the content and context of which justify the recipient in believing that a commitment has been made through its communication.[21] The language of promises, promisees, and promisors saturates contract law — in decisions, statutes, and the *Restatement*. It also permeates the academic literature through its common characterization of contracts as the law of enforceable promises and by its formulation of the foundational questions of contract as which promises to enforce, why, and how.[22] Notably, in U.S. law, promises of the right sort may form the

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[20] RESTATEMENT (SECOND) OF CONTRACTS § 1 (emphasis added).

[21] *See id.*

[22] *See, e.g.*, P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981); FRIED, *supra* note 2, at 7–14; ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133–68 (rev. ed. 1954); W. DAVID SLAWSON, BINDING PROMISES 173 (1996); Morris R. Cohen, *The Basis of*

basis for a contract without an additional intention to enter into a legally binding arrangement.[23] Suppose we start by taking the law's self-description seriously and conceive of contracts as resting upon promises per se. As I argue below, a virtuous agent could not accept this self-description as accurate while also accepting the justification and structure of some of the divergence of contract from morality.

A. The Divergence Between Promise and Contract

As I have already observed, U.S. contract law diverges from the morality of promises. Contract law would run parallel to morality if contract law rendered the same assessments of permissibility and impermissibility as the moral perspective, except that it would replace moral permissibility with legal permissibility[24] and it would use its distinctive tools and techniques to express and reflect those judgments. For example, typically, a promisor is morally expected to keep her promise through performance.[25] Absent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised. Financial substitutes might be appropriate if, for good reason, what was promised became impossible, or very difficult, to perform. Otherwise, intentional, and often even negligent, failure to perform appropriately elicits moral disapprobation. If contract law ran parallel to morality, then contract law would — as the norms of promises do — require that promisors keep their promises as opposed merely to paying off their promisees. The only difference is that it would require this as a legal, and not merely a moral, matter.

1. Specific Performance and Damages. — Contract law, however, diverges from morality in this respect. Contract law's dominant rem-

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Contract, 46 HARV. L. REV. 553, 571–92 (1933); Craswell, *Two Economic Theories*, *supra* note 3, at 19–44; Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1 (1979); Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW, *supra* note 3, at 206, 240–64; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); James Gordley, *Contract Law in the Aristotelian Tradition*, *in* THE THEORY OF CONTRACT LAW, *supra* note 3, at 265, 268–97.

[23] *See* RESTATEMENT (SECOND) OF CONTRACTS § 21 ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."). In other countries, the presumption sometimes runs the other way. For instance, in British law, the intention to enter into legal relations is presumed for promises between commercial entities but must be positively proved for social and familial promises to become contracts. *See* THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW 113 (James Gordley ed., 2001). American law also evinces reluctance to enforce certain sorts of familial promises, though this resistance is not articulated through a doctrine that there must be additional intent to enter into legal relations.

[24] Legal impermissibility would substitute for moral impermissibility, legal requirement for moral requirement, and so on.

[25] *See* FRIED, *supra* note 2, at 17.

edy is not specific performance but expectation damages. Usually, the financial value of the performance is demanded from the promisor, but actual performance is not required (even when it is possible), except in special circumstances.[26] Further, intentional promissory breach is not subject to punitive damages,[27] that is, to those legal damages that express the judgment that the behavior represents a wrong.[28] Notably, U.S. law typically makes damages for emotional distress and attorney's fees unavailable upon breach.[29]

There are two further examples of the divergence over the significance of performance. First, one cannot obtain an order of specific performance even when one successfully alleges anticipatory repudiation. Even prior to the directed time of performance, a court is unlikely to direct specifically that the promised performance should occur. On the contrary, moral observers would direct that the performance should occur as promised, unless the promisee waives. The difference between the moral and legal reaction to breach does not appear only after the specified time for performance elapses.

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[26] *See, e.g.*, U.C.C. § 2-716 (2005) (explaining that specific performance may be available when goods are unique, the buyer cannot find cover, and under other "proper circumstances"); RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (explaining that specific performance is not available when damages adequately protect the expectation interest); 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1139 (1964) (discussing specific performance as only a supplemental remedy).

[27] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 355. Punitive damages are available in cases of fraud or other violations of contract law that are also torts. For a brief period, California awarded punitive damages for "bad faith" contractual breach. But this doctrine covered only the very narrow class of cases in which the breaching party not only breached, but also contested liability without a good faith belief in the defense. Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158, 1167 (Cal. 1984); *see also* Nicholson v. United Pac. Ins. Co., 710 P.2d 1342, 1348 (Mont. 1985). *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995), sharply limited the doctrine to the insurance context a decade later. Even under *Seaman's*, intentional breach with a ready payment of compensatory damages would still have been perfectly acceptable. Nonetheless, the quite modest application of punitive damages in *Seaman's* was still met with consternation. It was severely constricted after three of its authors, Rose Bird, Joseph Grodin, and Cruz Reynoso, were all unseated from the California Supreme Court in the 1986 election. Although the retention election focused on their positions on the death penalty, Professor David Slawson obliquely suggests some connection between the election and those who blamed the court's decision for higher liability insurance costs. *See* SLAWSON, *supra* note 22, at 110–11. Some states still recognize some form of bad faith breach and subject it to punitive damages. *See id.* at 112–32.

[28] *See, e.g.*, Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73, 73–74 (1997) (stating that punitive damages represent legal recognition of a serious wrong).

[29] *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 (allowing damages for emotional distress only when breach causes bodily harm or when serious emotional distress is "a particularly likely result" of breach); 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 66:67 (4th ed. 2002) (reporting that attorney's fees are generally not recoverable in contracts cases because they are viewed as penal, that the Uniform Commercial Code does not provide for punitive damages, and that the common law rule regarding attorney's fees was not purposefully abrogated by the Uniform Commercial Code provision for consequential damages).

Second, under the *Hadley*[30] rule, promisors are liable only for those consequential damages that could reasonably have been foreseen at the time of the contract's formation.[31] From a moral perspective, this is quite strange. If one is bound to perform but without excuse voluntarily elects to breach one's duty, a case could be made that the promisor should be liable for all consequential damages. If foreseeability should limit this liability at all, what would matter morally is what was foreseeable at the time of breach rather than at the time of formation. Whereas the former reflects the idea that breach is a wrong for which the promisor must take responsibility, the latter fits better with the idea that the contract merely sets a price for potential promissory breach.

The law thereby fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price. For this reason, I find unpersuasive the possible rejoinder that contract and promise deliver the same primary judgments — namely, that breach of promise is wrong — but that they diverge only with respect to legal and moral remedies. There are standard legal remedies (as well as legal terms) that signify that a wrong has been done. In other areas of private law, remedies such as punitive damages and specific performance are more commonly invoked.[32] Contract has a distinctive remedial regime that not only diverges from its moral counterpart, but also reflects an underlying view that promissory breach is not a wrong, or at least not a serious one.

2. Mitigation. — The mitigation doctrine provides another example of divergence. Contract law requires the promisee to mitigate her damages. It fails to supply relief for those damages she could have avoided through self-help, including seeking another buyer or seller, advertising for a substitute, or finding a replacement. As a general rule, morality does not impose such requirements on disappointed promisees. True, morality does not look sympathetically upon promisees who stay idle while easily avoidable damages accumulate. But this is a far cry from what contract expects of the promisee and what it fails to demand of the breaching promisor. Following the norms of promising, promisors would not readily expect the promisee to accept

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30 Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854).

31 *See id.*; RESTATEMENT (SECOND) OF CONTRACTS § 351(1).

32 Despite the official distaste for punitive damages in contract, Professor Marc Galanter reports a greater rate of punitive damage awards for successful plaintiffs in contracts cases than in torts cases. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want To Know About Contract Litigation*, 2001 WIS. L. REV. 577, 604–06. It is difficult to know what to make of his data without further details of the cases and the nature of the successful claims. As his data show, most of the punitive damage awards are provided in employment cases or in cases in which the behavior at issue was also tortious, though it was classified as a contracts cause of action. *Id.* at 605 tbl.7.

a substitute for the promised performance, at least not without a strong excuse or justification for nonperformance. Were a substitute unavoidable or justified, promissory norms would ordinarily place the burden on the promisor, rather than the promisee, to locate and provide it. It may sometimes be permissible for the promisor to *ask* the promisee to shoulder this burden when the substitute is *much* easier for the promisee to obtain or when the promisor is ill-suited to select a replacement (as when the promisee's judgment is necessary for the replacement to serve the promisee adequately). Still, even in such cases, it would usually be unacceptable for the promisor to insist were the promisee to refuse.

The difficulties in measuring and fully compensating for the costs incurred in mitigation provide another rationale for the moral stance and trouble some scholars have with respect to the current legal rule.[33] But concerns about whether compensation can be full and adequate do not exhaust the moral reasons for declining to impose a strong responsibility to mitigate on the promisee. It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing. That expectation is especially distasteful when its rationale is that it makes the promisor's wrongdoing easier, simpler, more convenient, or less costly.

Might it be objected that the promisee, while within her rights to refuse, should not, morally, refuse a promisor's request that she mitigate? It might be thought to be stingy and overly punitive to refuse such a request.[34] If so, it might be maintained that the mitigation doctrine does in fact run parallel to morality.

Sometimes it can be morally wrong for the promisee to refuse to mitigate, especially when the costs of refusal are very steep and disproportionate to the seriousness of what is promised. But whether it is morally wrong for the promisee to refuse may depend on a number of factors to which the law is insensitive, including the closeness of the relationship, the history of the relationship, the reason for breach, the reason the promisor wants to shift the burden, and how cumbersome mitigation activities would be.

It might be suggested that the law's insensitivity to these factors is the byproduct of the need to formulate a clear rule. This is not an entirely satisfying diagnosis. The law is capable of fashioning clear, but more sensitive, rules in other equally complex contexts. Furthermore, it is unclear why, if a blunt rule is necessary, it should be fashioned to

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[33] *See* Richard Craswell & Alan Schwartz, *Notes on Mitigation and Reliance by the Promisee*, *in* FOUNDATIONS OF CONTRACT LAW 64, 64–67 (Richard Craswell & Alan Schwartz eds., 1994).

[34] *See* FRIED, *supra* note 2, at 131; Melvin A. Eisenberg, *The Duty To Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 654–55 (2002).

favor systematically the breaching promisor and not the promisee. Not only is the promisor the party responsible for the breach, but the wrong committed by the unreasonably reluctant mitigator-promisee is not the sort that is typically the appropriate object of legal enforcement. This wrong may fall within the category of wrongs the law should allow because interference in this particular domain might preclude recognizable realization of the virtuous thing to do — namely, to be gracious and forgiving in the face of another's wrong.[35]

3. Punitive and Liquidated Damages. — Not only are punitive damages unavailable as a response to garden-variety, intentional breach, but willing parties are not permitted to elect them in advance through legally enforceable agreements.[36] It is a delicate question whether this bar exhibits true divergence. On the one hand, agents typically cannot specify the moral seriousness of their conduct and, in particular, their misconduct: the moral status of conduct that is truly misconduct is usually independent of agents' attitudes or will. This feature of morality might lend support to the view that the rule in contracts runs parallel to morality.

On the other hand, promises occupy an interesting part of moral territory because, through them, agents themselves can alter the moral valence of some future conduct. A promise may render an action mandatory and important, when it otherwise would have been optional and, perhaps, unimportant. This created status can then be undone yet again through the consent and waiver of the promisee. Further, although I have been speaking of promises in a rather univocal way, a number of different sorts of commitments are available to agents. Parties can have tacit understandings that have many of the features of formal, strict promises. Certain sorts of affirmations or agreements constitute commitments that can be promise-like without using the most formal terms of promising. Within our moral practices of promising, agents can signify an understanding that there is a commitment but that it is fairly loose and flexible; it is not illusory, but it is subject to change for lesser reasons than would normally be acceptable for standard promises. Consider the following commitment: "I promise to be there if I can, but life is complicated right now and I can't commit for sure." The issuer is surely bound to appear if her schedule is free and her car and legs function; she is bound to turn down new, unanticipated, and conflicting requests for commitment or attendance; but she is not duty-bound to attend if it turns out that working late is necessary to meet a preexisting deadline. We are also able to signal

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[35] Interestingly, French law does not impose a similar duty of mitigation on the promisee, and some acts of mitigation in the United States would be seen as breach by the promisee in France. *See* de Moor, *supra* note 3, at 106–07.

[36] *See* U.C.C. § 2-718(1) (2005); RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

when such looseness and flexibility is out of order, such as when one makes a solemn commitment to be there *no matter what*. One might regard the ability to specify punitive damages as a very rough legal counterpart to the poorly defined mechanisms through which parties mark a particular promissory relation as especially serious or not. If so, then the law does show divergence by disallowing enforceable specifications of liquidated damages that exceed rough approximations of market value.[37] As I say, though, this would be a rather rough method of capturing this aspect of promising — both because it might better be captured through more clearly specified content within the contract, for example through conditions of performance, and because it marks a departure from the more general inability of moral agents to specify for themselves the significance of their own moral failures and the appropriate remedies.

B. An Objection to the Claim of Divergence

Given the plasticity of our promising practices, might the claims about divergence be challenged by arguing that contract law does not treat promises differently than does the moral system, but rather that it produces different promises with particular contents? One might attempt to recharacterize the divergent contract rules that I identify instead as rules that inform the content of what is promised between contractors. Justice Holmes famously declared that a contract to perform should be understood not as a promise to perform full stop, but as a promise either to perform or to pay damages: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else."[38] Moreover, we might generally regard the promises that contractors enter into as implicitly incorporating the background contract law and, in turn, producing complementary terms. On this rendering, contract does not diverge from the rules of promising, but rather provides a complex background structure for certain promises, a structure that then infuses their content.[39]

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[37] *See* U.C.C. § 2-718(1); RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

[38] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 235–36 (Transaction Publishers 2005) (1881) (discussing the exceptionality of specific performance and noting that "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass").

[39] *See, e.g.*, KAPLOW & SHAVELL, *supra* note 2, at 191–92. Richard Craswell may also be read as taking this position. *See* Craswell, *Contract Law*, *supra* note 3, at 490 ("[T]he fidelity principle is consistent with any set of background rules because those rules merely fill out the details of what it is a person has to remain faithful to, or what a person's prior commitment is deemed to be.").

This rejoinder is unpersuasive for several reasons. The first, which I mention only to put aside, is that it does not pertain to the claim that the doctrine of consideration diverges from morality. This strategy can only work, if it does at all, to recharacterize gap-filling, the specific conceptions of the duties in a promise, and the responses to breaches of binding promises as specifications of the particular content of a binding promise. But it cannot address the divergence between the different *sorts* of promises that contracts and morality treat as binding, for instance their divergence over whether unilateral promises bind.

Even when the reconceptualization strategy is pertinent, it seems unpersuasive. If the promise to perform were plausibly interpreted as really a promise either to perform or to pay compensatory damages, it still would not eliminate the divergence over punitive damages. If the breaching party fails to perform *and* fails to pay damages voluntarily, there is a breach *even on the reinterpretation* of the meaning of the relevant promise. The law will respond only by providing expectation damages. It will not respond to this recharacterized promise and its breach with measures reflecting disapprobation.[40]

Should we go further and reinterpret the content of the promise as a promise only to perform *or* to pay compensatory damages, whether voluntarily or through compulsion upon legal complaint? This further recharacterization provokes another worry, namely about the assumption that the contents of promises are indefinitely plastic and utterly up to their makers. I have my doubts about this assumption. It is out of bounds to say: "I solemnly promise to do X, but I may fail to do so if something better comes along; moreover, if it does, you can only expect X's market value from me, although you may need to enlist the help of others to pry it out of my clenched fist. Further, let us now declare that should I fail, it will not be the sort of thing deserving of moral reprobation so long as eventually you are made whole monetarily. Moreover, it is not the sort of thing you may be upset with me over or view as showing my bad character." This is not a full-fledged promise. Its elaboratory remarks defy the language of its opening gambit. They clarify that it is not a promise at all, while attempting to elicit the interlocutor's acknowledgment of that fact. Rather, it seems to be the statement of an intention to act, along with an acknowledgment that the statement will, in this context, render the utterer susceptible to one sort of liability at the hands of another. But there is no commitment by the utterer to *do* anything at all. Although one can declare within a promise some of the conditions under which the promised performance may not occur, those conditions cannot coher-

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[40] *But cf. supra* note 27 (discussing a limited exception to the general lack of disapprobation).

ently extend so far as to include any situation in which the promisor has a change of heart or entertains a better offer.

Further, I doubt that one may alter by declaration or by agreement the moral significance of a broken promise (even within its terms and even if the promise itself already has a weight of its own that is partly settled by the parties). A promise may make a nonobligatory action obligatory, but only because the object of the obligation is within the promisor's power in the first place (at least for standard sorts of promises). By contrast, the power to alter the significance and appropriateness of *others'* reactions to a broken obligation is not within the power of the promisor. It does not seem to be the sort of thing that could be altered by consent or made *part* of the content of the promise. In response to another's wrong, we have the elective power to forgive, but forgiveness involves, among other things, recognition of a past wrong, not a power to make it the case that the wrong was never a wrong. Because contract's divergences involve features that are not in the power of moral agents to elect, these divergences should not be understood as components of a framework that infuses the content of certain promises.

III. IS THE DIVERGENCE PROBLEMATIC?

Although many aspects of the promissory and contractual regimes diverge from one another, the two are not flatly inconsistent. Contract law does not require promisors to breach or to respond inappropriately to breach.[41] It will not place pressure on the promisor to behave mor-

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[41] Does corporate law require those with a fiduciary duty of care or of loyalty to shareholders to pursue an efficient breach if it would clearly enhance share value? The question is probably academic. The dutyholder who wishes to comply in the face of an opportunity for efficient breach could probably successfully invoke the business judgment rule by claiming that breach was not clearly in the company's or the shareholders' long-term interest, whether because of standard uncertainties in markets or reputational costs associated with intentional breach and the consequent financial repercussions, or because intentional breach conflicts with the company's mission statement. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 414 (2002). But suppose the dutyholder forswore these defenses or they were overcome. Could a dutyholder defend against a charge of breach of fiduciary duty for failure to pursue an efficient breach of contract on the ground that intentional breach of promise is immoral? It might depend on the jurisdiction. The general rule is that corporate directors are to maximize shareholder wealth. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 683–84 (Mich. 1919). Many, but not all, states allow or require those with fiduciary duties to take into account third-party interests, including the interests of contracting parties and the community. *See* BAINBRIDGE, *supra*, at 414; *see also* 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2) (1992) (recommending that governance statutes permit corporations to take into account appropriate ethical considerations). The issue also arises in other contexts in which there are fiduciary duties, such as those of an executor. Professor Liam Murphy brought my attention to *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies (1927), Ltd.*, [1938] A.C. 624 (P.C.) (appeal taken from Sing.), which held that an execu-

ally, but neither will it directly proscribe moral behavior by promisors. Nonetheless, despite their prescriptive consistency, the justifications for the divergence may violate the tenet that the virtuous agent should be able to accept the justification for the divergence.

A. Efficient Breach

A common justification for the remedies scheme in contract is that of the so-called "efficient breach." The justification may be stated in two ways. The stronger version contends that, morally, we should facilitate efficient breach because it promotes overall economic welfare and therefore overall social welfare. Take, for example, Professor David Slawson's claim: "People ought not to be liable for punitive damages merely for breaching a contract. They have done nothing wrong if they pay full compensation. Indeed, society loses if people do not breach contracts that would cost them more to perform than to pay compensation for breaching."[42] The weaker version concedes that breach of promise may indeed be morally wrong but maintains that it also can promote greater net economic gain, at least between the parties; that is to say, the economic gains to the promisor from breach may exceed the economic losses to the promisee.[43] Because facilitating efficient economic transactions is the main point of contract law and because orders of specific performance and punitive damages would deter efficient breach, contract law disallows them.[44] On this charac-

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tor never has a duty to break an enforceable contract because breach is an unlawful act. *Id.* at 635.

[42] SLAWSON, *supra* note 22, at 122 (emphasis omitted); *see also* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284–85 (1969) (arguing that it would be socially desirable to encourage "[r]epudiation of obligations . . . where the promisor is able to profit from his default" after paying expectation damages); Linzer, *supra* note 2, at 115–16, 138–39 (criticizing efficient breach generally but defending, in the limited commercial domain in which people enter contracts for economic reasons, the argument that "law, economics, and arguably common sense all condone the deliberate and willful breach"); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 939 (1998) (noting that punitive damage awards for breach of contract often result in "excessive and expensive performance . . . , thereby lowering the welfare of the contracting parties").

[43] I aim merely to describe the argument, not to endorse its notion of efficiency, which is yet another aspect of the justification that may be challenged.

[44] Some discussions frame efficiency arguments in contract in these weaker terms, although not always explicitly so. *See, e.g.*, Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636–38 (1988) (discussing efficient breach in light of the goal of contract damages — to give compensation); Craswell, *Two Economic Theories*, *supra* note 3, at 27 (arguing that efficiency-based liability may not be compatible with promises, strictly construed, but that we should recognize another intermediate form of commitment that is compatible with efficiency-based liability); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1216 (1970) (describing the system of contractual remedies as "heavily influenced by the economic philosophy of free enterprise" and showing "a marked solicitude for men who do not keep their promises"); Lewis A. Kornhauser, *An Introduction to the*

terization, contract law is thought to have distinctive purposes that punitive damages would obstruct. Although breach may be immoral, that fact falls outside the domain of concern of contracts per se.[45]

Although it is disputed whether orders of specific performance and punitive damages are in fact economically inefficient in the specified respect,[46] for the purposes of this Article I will assume that the premise of efficient breach theory is correct. That is, I will assume that punitive damages and specific performance orders would deter some efficient breaches or would increase transaction costs in such a way that a contract law with punitive damages and more permissive specific performance rules would be less economically efficient in the specified sense than one without them.

Could the virtuous agent accept some version of efficient breach theory as a justification for these remedial rules? The stronger version of the theory would seem to be precluded by her moral commitments. A virtuous agent cannot believe both that a promise can be binding even if a better opportunity comes along that competes with fulfilling the promise *and* that breach of contract, involving breach of promise, is, all things considered, morally justified merely because it leads to (even only marginally) greater economic welfare.

Economic Analysis of Contract Remedies, 57 U. COLO. L. REV. 683, 686, 692 (1986) (stating that economic analyses view the purpose of contract law as the promotion of efficiency and that "the purpose of contract remedies is to induce the parties to act efficiently").

Neither characterization fits the defense of efficient breach that holds that it does not involve a breach of promise at all because breach in such circumstances is what the parties would have wanted if they had formed a complete contract. *See, e.g.*, Steven Shavell, *Contracts*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 436, 439 (Peter Newman ed., 1998). I put this third characterization aside because it deserves a longer treatment than there is room for in this Article. In brief, the argument assumes that people would always have made the best bargain for themselves from an economic point of view had they made a complete contract and that what they did promise is determined by what rational economic actors would have promised had they focused on the relevant contingency. Both of these premises, among others, seem contestable.

[45] This description of the doctrine of efficient breach does not depend upon a comprehensive consequentialist view. For instance, an adherent might reject consequentialism as a moral position for individuals or even as the general foundation for legal doctrines, but merely posit that the purpose of the domain of contract law in particular is to create an economically efficient system for transfers and exchanges. Thus, its doctrines should be fashioned to pursue that aim, and in this limited domain consequentialist reasoning is appropriate. This more moderate description of the doctrine of efficient breach and its underlying justification thereby differs from that offered and criticized by Frank Menetrez, *supra* note 2. For a more comprehensive consequentialist view, see Craswell, *Two Economic Theories*, *supra* note 3, at 19–20, 26–34. Professor Craswell argues that economic analysis of contract has a broad scope and evaluates the effects of legal rules on a variety of parties' incentives and behaviors beyond performance, including incentives to rely, to insure, and to prepare to perform. *See id.*

[46] *See, e.g.*, Craswell, *supra* note 44, at 635; Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1145 & nn.10–11 (2003); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 6–7 (1989); Linzer, *supra* note 2, at 131; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 951–53 (1982).

The weaker version of the efficient breach theory does not, by contrast with the stronger version, hold that a party's breach of promise is morally justified, but rather that contract is indifferent to the moral status of the actions it recommends, promotes, or allows; it has distinct purposes that, on occasion, are furthered by breach of contract and so should be facilitated in those circumstances. Perhaps a moral agent should not breach promises, but this is not the concern of contract law.

Could the virtuous agent accept this argument as a justification for contract law's divergence from promise? She might have difficulty. This line of argument does not merely reject moral norms as a source of guidance for law, but harbors a strong conception of the independence of the domains — namely that a legal domain may pursue purposes that are not constrained by moral norms. It is not clear that a moral agent can accept a rule the justification of which is based on the rule's promoting the full-blown pursuit of a putatively valuable end when this full-blown pursuit would conflict with the moral agent's fundamental moral commitments.

That is, under efficient breach theory, what propels the lack of punitive damages is an affirmative normative position: agents *should* breach when it would yield net economic gain. So punitive damages must be foregone in order to make breach, and thereby a more efficient system of exchange, more likely. A virtuous agent can surely accept that there may be good aspects to wrongful breach on certain occasions. Yet, if such breach is indeed, all things considered, wrong, a virtuous agent cannot accept the economic benefits of breach as constituting a sufficient, or even a partial, contributory justification for the law's content. The challenge would be all the greater if the primary, positive justification for the law's content were the desirability of *encouraging* (and not merely making more likely) the wrongful conduct per se. In that case, the law (or its justification) would be suggesting a prescriptive recommendation to act wrongfully. It is hard to see how a virtuous agent could embrace that recommendation, whether explicit or implicit.

To be clear, the argument currently on the surgical table is not that it is none of contract law's business whether breach is immoral, so that we must therefore reject punitive damages because the only possible argument for them would be breach's immorality. That sort of argument (to which I will return) does not contain any implicit recommendation to breach. It does not, on its face, suffer the difficulty of asking a moral agent to accept the idea that it would be a good thing if people broke their promises and that we should create incentives for them to do so. How could a moral agent think both that breach of promise is, all things considered, wrong and also that it makes sense for us, as a

community of moral agents, to create a system in which we attempt to encourage, however mildly, breach of promise (all the while holding out the possibility of deploying our moral condemnation of breach)?[47]

B. Distinctively Legal Normative Arguments

The root of the problem is that the efficient breach theory is driven by an underlying general *normative* position that directly conflicts with promissory norms, and not by a distinctively *legal* normative argument, by which I mean a moral argument whose range is specifically tailored to the special, normatively salient properties of law and its appropriate content and shape. An example of distinctively legal grounds of justification will illuminate the contrast between legal grounds and more general moral grounds. The reluctance to order specific performance could be justified on familiar, distinctively law-regarding grounds, such as the difficulty and expense of ordering and supervising performance by a reluctant party and, in some cases, the unseemly and disproportionately domineering nature of such state-enforced orders on individuals.[48] These are often persuasive grounds, though less so when performance merely involves the transfer or receipt of nonunique manufactured goods or the provision of services by representatives of a firm rather than by any particular individuals or employees. Whether or not these grounds are persuasive, they are distinctively legal. They do not question the general proposition that specific performance is the appropriate moral response to breach or anticipatory repudiation; rather, they resist the idea that specific performance should be implemented through legal means because of distinctive features associated with law and legal mechanisms.

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[47] Why not condemn the efficient breach recommendation simply on the grounds that it is morally wrong? Why make the more complicated appeal to what justification the moral agent could accept? First, appeal to the moral agent involves a narrower and differently contoured sensitivity to the role of moral judgments in legal justification. Direct appeals to moral judgments might authorize eliminating certain options merely on the grounds that such options were morally bad ones. An accommodationist perspective need not accept that argument. A moral agent could not accept a rule that generated such morally bad options by direct appeal to their moral qualities but *could* accept as a reason that autonomous agents should have the opportunity to decide for themselves what to do. Second, the appeal to the moral agent reflects the correct order of explanation. The efficient breach justification is not rejected because it is morally wrong but because it cannot be endorsed by a moral agent and is therefore inconsistent with the imperative to accommodate. Arguments for accommodation do not appeal directly to the correctness of the position of moral agents but rather to the essential importance of morality to moral agents and the significance of their character traits for the flourishing of just institutions and cultures. As with religious accommodation, these grounds are compatible with greater neutrality toward the correctness of substantive moral views than is an approach that engages in more direct moral evaluation.

[48] *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY 400–01 (2004) (discussing the liberty objection to specific performance).

Are there further distinctively legal grounds that would justify the divergences I identified earlier?

1. *Liquidated Damages and Punitive Damage Agreements.* — One might support the rule against punitive damage agreements on the distinctively legal grounds that they circumvent the state's monopoly on punishment. The law asserts a monopoly on punishment to prevent vigilantism and to ensure that punishment is meted out fairly and manifests horizontal equity. Legally administered punishment is also supposed to express the voice of the community. Punitive damage agreements allow parties privately to determine appropriate levels of punishment and then to commandeer the legal system to administer the punishment; this may threaten the interest in horizontal equity and in the community's authority to determine appropriate, proportionate responses to wrongs. Perhaps, then, the ban on punitive damage agreements might be justified on the grounds that contract law should not provide the means for private parties to circumvent the limits on private self-help established by tort and criminal law.

By relying on distinctively legal reasons, this theory avoids being in direct tension with commitments presupposed by promissory norms. It may not be entirely successful, however, in providing a complete explanation for the ban on punitive damage agreements. Whether this argument succeeds depends on an issue I will identify here but not attempt to resolve; namely, whether the social interest is in a monopoly on punishment, narrowly understood, or in exclusively determining the wider range of all remedial reactions to legal wrongs and breaches. If the social interest is in preventing the circumvention of the monopoly on punishment, a more limited means than a complete ban on contractual punitive damages would suffice. For instance, one could forbid those agreements that specify alternative damages, whether stronger or weaker than what the law otherwise provides, for independently tortious or criminal activity, but still allow other sorts of punitive damage agreements concerning mere intentional breach. If the social interest is in exercising authoritative and exclusive judgment over the significance of and reactions to breaches of law, however, then the wider ban on all punitive damages agreements makes more sense.[49]

As for the argument about horizontal equity, it would seem strange sometimes to require punitive damages to be administered in horizontally equitable ways[50] but then to permit great variation by the election of the parties. This argument faces obstacles, however. First, concerns about horizontal equity may have less traction when the par-

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[49] *See supra* pp. 728–29 for a discussion of the parallel moral phenomenon that agents cannot alter by declaration the moral significance or seriousness of immoral behavior.

[50] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003).

ties agree specifically to the penalty. Second, variable punitive damages may make more sense in contract because the seriousness of the promise can vary between parties; variable punitive damages may represent a rough means by which to mark this difference, although in ways that blur the line between the substance of the promise and the remedy for breach.[51] By contrast, one might think that the significance of torts and crimes are less subject to manipulation or alteration by the parties involved. This is not a straightforward matter by any means. Consent may transform some actions that would be torts or crimes into legal activities. Still, if nonconsensual activity that comprises a tort or crime occurs, the parties cannot transform the moral seriousness of such nonconsensual, wrongful activity by agreement (whether ex post or ex ante). Agreement can play some role in establishing how serious a promise is, but it cannot, as I argued earlier, alter whether breach is a wrong.

Finally, to succeed, this defense of the ban on punitive damage agreements would have to distinguish between liquidated damages and consideration. The ban on punitive damages, put roughly, disallows liquidated damages that exceed approximated expectation damages; the doctrines of adequacy of consideration and unconscionability are far more permissive about inequitable exchanges, however, and allow consideration that may patently exceed the value of what is received in return. This creates a difficulty for any defense of the ban on punitive damage agreements, because many punitive damage agreements can be recast as forms of consideration. Graduated payment schedules that appear in the body of a contract may present alternative courses of performance and thereby appear to be complex articulations of enforceable contractual duties, even though they achieve the same result as liquidated damage clauses that overreach and are invalidated as penalties.[52] Some theory of what makes a voluntarily elected penalty a penalty would have to be provided to vindicate a defense of the ban. Perhaps that can be done.[53] If these challenges could indeed be met, the defense would be permissible from an accommodationist perspective because its appeal to distinctively legal normative considerations

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51 *See supra* section II.A.3, 726–27.

52 *See* FARNSWORTH, *supra* note 1, at 817–18.

53 I sketch some criteria in Seana Valentine Shiffrin, *Are Credit Card Late Fees Unconstitutional?*, 15 WM. & MARY BILL RTS. J. (forthcoming Dec. 2006), and suggest that determining whether a term is a penalty requires analysis of the form of the contract, its wording, and its primary function. For example, late charges should be understood as penalties if these charges do not represent the point of the exchange and are framed as responses to a failure to perform another duty that is the point of the contractual relationship.

makes it perfectly compatible with acceptance by a morally virtuous agent.[54]

2. Gift Promises and Consideration. — A different sort of distinctively legal argument appeals to the special hazards associated with legal rules. Professor Melvin Eisenberg and others make arguments of this sort about gift promises. Professor Eisenberg argues that legal enforceability of unilateral promises would cast doubt upon whether their performance was motivated by altruism and care, or by concern about legal liability.[55] This argument has the right structure because it specifically concerns the *legal* status of gift promises. Nonetheless, it seems only partly to justify the consideration rule.

First, many unilateral promises are not tendered as gifts, at least not in the sense presupposed by the argument. They are not always proferred as purely altruistic measures, designed in part to begin, reinforce, or symbolize a particular sort of intimate or special relationship. Second, the argument assumes that *performance* of the promise must be motivated by altruism and care in order for the value of the gift to be realized. Why doesn't the voluntary nature of the offer or promise of the gift sufficiently realize the purely voluntary component of gift promises? Why must its delivery also remain voluntary to achieve the values associated with gifts?

Professor Eisenberg's argument seems motivated, in part, by an effort to preserve the meaning of the gift for the recipient. But it is unclear that the existence of a legal enforcement mechanism would undo or cast significant doubt upon the motivations for compliance with gift promises between intimates. Often, in these circumstances, the motivations for compliance are fairly transparent, especially between parties who already share a special relationship. Further, the existence of legal remedies is unlikely to introduce muddiness. Typical transaction costs and risks make it rather unlikely that promisees will sue for breach for most sorts of gift promises. This is known to both parties, rendering it implausible that the promisor's motivation for fulfilling the promise is fear of legal enforcement activities and implausible for the promisee to worry that this is the promisor's motivation. Even putting aside standard transaction costs, legal enforcement is still unlikely because its initiation by the promisee would often do further damage to the underlying relationship — damage that may be disproportionate to the contemplated breach. These hazards are also likely to be known by both parties, again often affecting what motivations

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[54] This defense would extend only to the ban on punitive damage agreements; it would not explain the general ban on punitive damages as a remedy in contract.

[55] *See* Eisenberg, *The Theory of Contracts*, *supra* note 22, at 230; Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 846–52 (1997); *see also* KIMEL, *supra* note 2, at 46–49, 72–74; Gordley, *supra* note 22, at 330.

are in play and what motivations are surmised.[56] Although Professor Eisenberg's defense provides another good example of a distinctively legal argument, I remain unconvinced of its details and application.

C. *Is the Divergence Objectionable?*

The presupposition that divergent contract rules are suspect and in need of distinctively legal justification might be challenged in two ways. First, one might claim that the line between moral reaction and legal reaction captures exactly the appropriate level of concern about breach of promise.[57] Promissory breach merits personal disapprobation but not necessarily the community's concern. Second, one might press the view that law and morality occupy separate spheres. Perhaps there is a presumption against the law issuing prescriptives that directly contradict moral requirements, but there is no further presumption that the law should exhibit parallelism with moral norms.

A direct, comprehensive answer to these objections might take another article. But a taste of that answer might be gleaned by asking a more internal question about the relationship between different doctrinal areas — namely, what explains why tort and criminal law levy penalties but contract law does not? It cannot be sufficient to argue that tort and criminal law offer penalties in response to legal wrongs, not moral wrongs or at least not moral wrongs as such. This just raises the question why breach is not a legal wrong. That question is essentially a variation on the initial question and does not move us further along.

One might claim that tort and criminal law concentrate on a special set of cases involving especially bad behavior, often involving the infliction of physical harm. Tort and criminal law address a distinct range of moral wrongs, deserving of greater punishment than the decentralized, unofficial moral system can safely deliver. It might further be argued that the prevention and condemnation of physical harms serve special moral ends: they are ends that form some of the impetus for a legal system and that must be served for the system to function; further, they are relatively uncontroversial ends endorsed by a wide range of moral views.

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[56] *Cf.* Anthony J. Bellia, Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25, 34 (2002) (arguing that legal enforcement is not a perfect substitute for voluntary performance). Professor Bellia also observes that legally enforceable promises may help to form the basis for a relationship that then becomes dependent on other sources of trust. Further, even in solid interpersonal relationships, an offer to make a legally binding promise may help to reinforce the relationship of trust. *Id.* at 36.

[57] *See* SMITH, *supra* note 48, at 419–20 (endorsing in part and criticizing in part this suggestion).

Let me take these points in turn. Tort and criminal law do not specialize in physical harms only — think of white collar crimes, fraud, and defamation. Why are these wrongs palpably worse, necessarily, than intentional breach of trust? The answer is not obvious. Nor can it be plausibly maintained that physical security uniquely serves what is needed for social or legal functioning. Confidence that one can, by and large, trust others' word and their professed commitments is also essential to harmonized and civilized systems of social functioning. On the direct question of whether the mainstay of tort and criminal law — physical security — is more important morally than breach of trust, I do not know how to begin to evaluate the claim. Lapses in physical security can certainly cause more dramatic, immediate trauma; lapses in fidelity and confidence in others may cause more subtle forms of social and psychological corrosion.[58]

Maybe different legal reasons explain the distinctions. Perhaps threats to physical security are more tempting and so require greater deterrence, or perhaps self-enforcement is both more tempting and more dangerous if people orient themselves toward in-kind responses. Then the prospect of strong and decisive enforcement that includes state-administered punishment could be necessary to deter destructive retaliation for physical harms but not for promissory breach. With respect to the latter, unorganized social responses backstopped by a legal compensatory regime might be both safe and optimally deterrent.

This explanation differs from those just discussed because it does not point to a moral distinction between the wrongs but to a distinction between the habits and tendencies associated with responses to those wrongs, habits, and tendencies that themselves call for different sorts of legal responses. It therefore has a distinctively legal structure, but I doubt it will succeed on the merits. It depends not only on questionable empirical claims about moral practice, but also on how we conceive the point of contracts. On the empirical front, I worry that the culture of trust and promising is fragile in subtle ways that are difficult to track; it may require greater and more explicit forms of sup-

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[58] One might suggest that although there is a moral consensus that promises matter and that remedial reactions to breach are appropriate, the moral remedial rules are opaque. Reasonable people may differ about the seriousness of breach or how stringent the appropriate moral remedies should be. Further, the moral significance of any promise varies substantially according to context, the situation of the parties, and their mutual understandings. Given the controverted and highly contextual nature of the moral specifics, there is reason for the legal system to adopt a conservative posture within its rules of contractual enforcement. In response: It is unclear that the moral status of many torts and their appropriate remedies is clearer and less controverted than that of breach. In any case, even if a blunt, conservative rule is called for, it is not clear why these epistemic worries support our current promisor-favoring approach rather than a promisee-favoring approach. At least in cases of intentional breach, the latter seems the more conservative approach since the promisor can avoid being subject to the burdens associated with the rule by fulfilling the promise.

port, such as legal recognition, because threats to it are less salient than the threats to social order posed by acts of violence.[59] But I put this aside to pursue a different point about the significance of such empirical claims.

If the purpose of contract were purely to facilitate economic exchange, say by analogy to electronic banking, or to serve that and other goals such as deterring dangerous private vigilantism, the argument just rehearsed would have some force if empirically true. But if contract has a more robust normative function, the issue is harder. That is, if contract serves a positive normative purpose and not merely an instrumental and deterrent backstopping role, then empirical facts about the minimal remedies necessary to achieve instrumental and deterrent purposes would not be sufficient to establish that minimal remedies are appropriate. The moral purposes served by contract might require remedies that reflect the wrong of breach, independent of whether such remedies serve deterrent purposes or do so in a maximally efficient way.[60]

I will return to the sort of moral conception I have in mind in Part V. Before doing so, I want to address a final concern about the divergence between promise and contract to which I have adverted but have not explained. It provides an independent reason to investigate the justifications and effects of divergence.

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[59] To be sure, it is not a simple matter whether fragile cultures gain strength from the blunt and sometimes intrusive methods of the law. Concerns that legal recognition and involvement may harm organized religion more than they help make up one of the traditional strands of argument behind the Establishment Clause. *See, e.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1181–82 (1988); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 42–47 (2004); William W. Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 914 (1987).

[60] Some moral conceptions recognize moral ends other than economic efficiency in contract. *See, e.g.*, ATIYAH, *supra* note 22, at 68–69, 138–46; FRIED, *supra* note 2; KIMEL, *supra* note 2, at 22–27, 100–07; Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296–305 (1986); Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 314–19 (1995); Curtis Bridgeman, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 260–68 (2003); Gordley, *supra* note 22, at 307–08, 327–30; Jody Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001) (critiquing economic efficiency as a normative grounding for contract while arguing for an autonomy-based theory whose implementation is sensitive to efficiency considerations); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–21 (2004); T.M. Scanlon, *Promises and Contracts*, *in* THE THEORY OF CONTRACT LAW 86, 86–93 (Peter Benson ed., 2001); Liam Murphy, Theories of Contract (Sept. 2004) (unpublished manuscript, on file with the Harvard Law School Library); Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, 1 ISSUES IN LEGAL SCHOLARSHIP, June 2001, art. 5, at 26–31, http://www.bepress.com/cgi/viewcontent.cgi?article=1004&context=ils. Some of these conceptions advance distinctively legal and normative arguments about contract. Others do not.

IV. CULTURE AND THE MAINTENANCE OF MORAL CHARACTER

Thus far, I have claimed that there may be problems for a system of contract that invokes and is activated by promises as such, but whose rules diverge significantly from those of promise for reasons that are not distinctively legal. I have been focusing on how moral agents should regard a justification for a legal rule that celebrates the breach of a moral commitment, even though the rule merely permits it. I stand by the idea that the justification for a legal rule should be acceptable to the moral agent without compromising her virtue, but it may seem strange to place so much weight upon the content of a justification that may in fact be known to few.

Putting aside the merits of a transparency requirement, the rule and its justification may play a role in creating a wider culture in which pressure develops not to comply with the moral commitment, whether just because it is not legally required or because the legal permission spawns cultural habits that render moral compliance precious or alien. This possibility raises a further worry about a legal regime that introduces divergent norms that apply to agents simultaneously alongside moral norms — namely, whether moral individuals can participate in both cultures without running the risk that their participation will corrode the habits and expectations associated with moral practice.[61]

I will begin with an example to help elucidate what I have in mind, although I do not think it is wise to hang too much on any particular case. I do not know whether disapproval often follows a corporate officer's conscientious objection to taking advantage of an efficient breach. But I have witnessed several conversations in which one party regarded another with incredulity for thinking that she was morally bound not to break her lease against her landlord's will for convenience, suggesting that it made her a "chump," a moral fetishist for feeling bound given that the landlord could readily (though unwillingly) find a substitute renter.[62] Related exchanges occur with respect to contractors. A promisee fumes that the contractor did not come on time or, more realistically, did not come at all, despite repeated, firm promises. Her interlocutor regards her outrage as strange, observing that no more should have been expected; contractors regularly fail to

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[61] Professors Kaplow and Shavell also briefly raise this possibility, but they do not pursue it because they regard it as a factor only relevant within a welfare economics analysis, one they believe would not entail a significant change in contract rules. *See* KAPLOW & SHAVELL, *supra* note 2, at 211–13.

[62] The ethical context in this situation may be complex, I grant, especially when month-to-month leases are unavailable and parties must make year-long commitments to gain access to a requisite good, thereby depriving them of needed flexibility.

show up on time when something better comes along, so it isn't a big deal — "it's business."

To be clear, I am not advancing the empirical assertion that a weakening of promissory honor is or will be the effect of the divergence of contract and promise, if only because of the almost comic difficulties in adducing persuasive evidence and examples. You may respond to my case by saying: "What do you mean? Breaking the lease is perfectly reasonable. In fact, it's what the landlord should expect." I respond: "Aha! That only shows how deep the corrosion goes. You've been infected too!" You demur and so on.[63]

To avoid such exchanges, it may be more fruitful to retreat to a more abstract level, to ponder how human moral agents nurture and maintain their habits and dispositions of moral agency. The basic concern begins with a background supposition about good behavior and forms of habituation in thought, emotion, and behavior. Namely, a great deal of morally virtuous behavior depends upon cultivating sound instincts and habits and allowing these to guide one's behavior. Morally good agents do not and cannot consciously redeliberate about all the relevant considerations bearing on a decision on every occasion. For everyday matters, agents must often depend on past deliberations that have become encoded into their general cognitive, emotional, and behavioral reactions to moral choices. Much of this deliberation and encoding is supported directly by social institutions and influenced more indirectly by the behaviors they encourage and render salient or standard.[64] This may be especially true when the law plays (or is meant to play) a leadership role in shaping social practice. If this abbreviated account is plausible, then we should be concerned about law's assigning significantly different normative valences and expectations to practices that bear strong similarity to moral practices, especially if we expect both practices to occur frequently and often alongside each other. That is, we should be concerned that the one will influence the other, making it more difficult to maintain those habits and reactions that are essential to the moral behavior. To expect otherwise, one would need to rely heavily on a clear delineation of the different behaviors and their proper contexts, as well as on our abilities to compartmentalize tightly.[65]

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[63] I am not alone in worrying, however, about the decline of the culture of promising and its interrelation to legal norms and the expectations a legally shaped culture will induce. Roscoe Pound voiced similar anxieties. *See* POUND, *supra* note 22, at 159–68.

[64] *See* THOMAS NAGEL, EQUALITY AND PARTIALITY 169–79 (1991); SAMUEL SCHEFFLER, HUMAN MORALITY 133–45 (1992); Barbara Herman, *Morality and Everyday Life*, 74 PROC. & ADDRESSES OF THE AM. PHIL. ASS'N 29, 34, 36 (2000).

[65] This argument is developed and applied to the cases of compelled speech and compelled association in Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 839–55 (2005), and in Vincent Blasi & Seana V. Shiffrin, *The Story of* West

Suppose the law of legally binding agreements, through its structure or justifications, encouraged individuals to associate the conditions of binding agreements with quid pro quo exchange or to engage freely in promissory breach when breach yields only marginal economic net gains. The worry would be that these associations and behaviors would influence how the moral agent approached promises — that the divergent treatment of agreements in contract would exert a subtle influence over time on how seriously the moral agent regarded unilateral promises and how casually she regarded promissory breach. This problem may be particularly acute for those who regard the moral practice of promising as resting on a social convention, since the boundaries of that convention are not sharply defined and could well be influenced or partly constituted by the social conventions within law.[66]

Contract and promise have features that strongly trigger this general concern. Contractual agreements are entered into frequently and are a part of daily life. They bear a strong resemblance (if, *ex hypothesi*, not identity) to promises. Even if contracts are not defined in terms of promises, both contracts and promises involve voluntary agreements, can be written or oral, and may range over the same subject matter. Further, their boundaries are not especially clear, rendering it tempting to move back and forth from one set of norms to the other.

Of course, we could identify the onset of contractual relations in a clearer way to put parties on greater notice that these agreements are subject to special rules and may be treated differently than promises. Suppose that could be done and it would be worth the associated education and transaction costs to make people aware of the distinction and special rules associated with contracts. Even so, I am not sure such clarity would eliminate the difficulty, in part because, even if the distinction is underlined, the same agreement may be both promise and contract. Defining a contract as distinct from a promise does not make the contract cease to be a promise as well. Further, once the distinction is transparent, parties may explicitly ask each other for both contractual and promissory assurances. If the very same agreement is subject to both contractual and promissory norms and these norms diverge, then the difficulties reemerge. Additionally, the norms themselves, or their justifications, may point in different directions. This

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Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433, 454–75 (Michael C. Dorf ed., 2004).

66 *See* KAPLOW & SHAVELL, *supra* note 2, at 163 (arguing that conventionalists have failed to specify the full content of the social convention and that "legal rules themselves are part of the social institution of promising"). I will not lean on this point both because I am not a conventionalist and because the problem holds for nonconventionalists as well.

may either place the agent directly in a state of conflict, or more weakly, in a position in which it is tempting to treat and regard the two as alike. If contract is more forgiving of transgressions, as I have suggested, this may exert a subtle influence to treat promises less seriously.

These factors give us some reason to be cautious about endorsing the suggestion that the problems discussed in the prior Part could be avoided merely by explicitly construing contract and promise as separate domains and by recasting contracts as entities distinct from promises. They may also give us reason to be cautious about even those divergences that can be grounded in distinctive legal normative justifications.

A. Poker and Corporate Etiquette

Of course, there are many occasions on which it is permissible to act in ways that in other contexts would be wrong. In a poker game, for instance, it is permissible to try to mislead the other players about the content of one's cards for personal gain. Not only is misleading behavior in this context permissible and consistent with the general prohibition on deception, but we do not much worry that our behavior in poker games will corrode the relevant aspects of our moral character — our resolve not to lie and to take truth-telling and candor seriously. Games provide many examples in which sharp dealing and an effort to obstruct others or to cause them to suffer loss is encouraged, whereas such conduct would be morally disallowed in other contexts. Or, to consider another context to which Professor Meir Dan-Cohen has called our attention, we do not expect sincerity from the clerk of a large corporation who thanks us for our business.[67] Why, then, shouldn't we regard the norms of contract as analogous to the norms of games or the norms in business contexts similar to Dan-Cohen's example? In these contexts, different norms of conduct govern and are not perceived to constitute a threat to our moral agency.

Games like poker and the special behaviors permitted and encouraged within them are relatively unusual activities that are fairly rigidly defined and separated from the normal course of events in life and in relationships. One may mislead only about a narrow range of topics. Within poker, these topics are limited to what cards one has and one's confidence in one's hand. Available moves in the game are not defined in terms of moral activities outside of the game. The boundaries are rigid enough that it would be inappropriate, to say the least, to ask one's fellow player, "Yes, but what cards do you really have?" Further, the game of poker and other game-like activities often require particu-

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67 MEIR DAN-COHEN, HARMFUL THOUGHTS 247–49 (2002).

lar behaviors to achieve their aims. Trying to cause another to lose (by winning) is necessary for the aims of competition to be realized. This also explains, in part, why different standards of candor are applied to lawyers and those giving testimony in adversarial settings.[68]

By contrast, contracts pervade our lives. We cannot easily opt out of them or treat them as merely an occasional leisure activity. No clear boundaries delineate the realm of activities in which contracts and contractual norms may be encountered from the realm of activities in which promises and compliance with promissory norms is expected. The lack of clarity would persist even if promise and contract were explicitly declared to be separate domains. Unlike in poker and in Professor Dan-Cohen's case of the clerk, it is not inappropriate or a clunky category mistake in the case of a contractual commitment to ask for further reassurance — to ask "Do you really mean it? . . . You're really *promising*?" Contract is not taken to be a category of behavior incompatible with promising. It is hard to see how it could be, given the prevalence of and pervasive need for contractual and promissory commitments. Finally, it is not clear, especially in light of contract law's explicit invocation of the language of promising, that the aims of contract do intrinsically rely on relaxing or abandoning moral behavior. Indeed, that is partly what is at stake in this Article.[69]

The contrast between poker and contractual promises is not stark, but rather falls on a continuum. For instance, we may have reason to be wary of the professional poker player, for whom the game is not occasional but a way of life, unless she is awfully attentive to her character and to maintaining the boundaries between the game and her other relationships. Many lawyers lose their moral bearings. But professionals are not the only ones at risk. Professor Tom Grey reported to me that a group of couples he knew used to get together in the 1970s for evenings of Diplomacy, an especially long and intense war game. By contrast with poker, it involves the forging of alliances followed by their ultimate rupture. "[C]alculated lying and backstabbing" are "crucial parts of the game play."[70] After a period of time, the group

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[68] Witnesses and lawyers need not volunteer some facts that they would otherwise be required to volunteer by conventions of cooperative conversation; lawyers may withhold elements of their strategies and advocate positions they do not personally hold. The moral permissibility of these behaviors depends in part on the well-defined boundaries of the practice as well as the underlying justifications for the practice.

[69] The majority of the aims of contract law are surely compatible with moral constraints. In Part V, I sketch one more positive and unified account of the aim of contract law that dovetails with the moral norms of promising.

[70] Wikipedia, Diplomacy, http://en.wikipedia.org/wiki/Diplomacy_(board_game) (last visited Dec. 10, 2006). "A stab can be crucial to victory, but may have negative repercussions in interpersonal relations. . . . In some circles cheating is not only allowed, but also actively encouraged. Players are allowed and expected to move pieces between turns, add extra armies . . . , listen in to private conversations, change other players' written move orders and just about anything else

had to stop meeting because the breaches of trust involved in the game were threatening their interpersonal relationships of trust outside the game.

Nor it is clear that we should be altogether casual or sanguine about the situation of Professor Dan-Cohen's clerk. It helps tremendously when the clerk truthfully represents the position or sentiments of management or the company as a whole, the represented party is sincere, and it is understood that the clerk represents another party.[71] This already distinguishes the case from the divergence between contract and promise. In the latter, the typically disallowed behavior is not directly in the service of representing someone who is acting in a standardly moral way.

It is more disturbing if the clerk lies on behalf of management. Professor Dan-Cohen objects that someone in the corporate office may have decided that thanking customers was politic but that no person at the corporation may have any real feelings of gratitude, so that the clerk is not representing anyone's gratitude at all.[72] However, although the corporation itself may not have a mental state of gratitude or any individual employee who cares, corporations do have practices, commitments, principles, and cultures. There is a difference between a corporation that behaves in an appreciative, respectful manner toward its customers and one that treats them purely as means. Representing the former as grateful can be appropriate, even if the particular agents who design and recite the script are not themselves grateful, whereas representing the latter as grateful is deceptive. In the latter case, the fact that the clerk plays a defined role does not exempt him from fault, though the clerk may bear less fault than the script's authors higher up in management.

In both cases, it helps that the clerk's role has defined boundaries — that the clerk says these sorts of things only while at work, while being paid to represent another. The clerk's personal insincerity may be partly distinguished from the case of contract and promise. But, given the dominance of work in our lives and its spillover effects on other facets of our lives and personalities, it may be regrettable that we ask workers to display personal insincerity routinely and that we have come to expect to treat and to be treated by others with personal insin-

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they can get away with. In tournament play, however, these forms of cheating are generally prohibited, leaving only the lying and backstabbing which is prevalent wherever *Diplomacy* is played." *Id.*

[71] In such cases, it may even be questioned whether this is a real case of insincerity. His "Thanks for shopping here!" may be an abbreviated form of "The company thanks you for shopping here!" *See* DAN-COHEN, *supra* note 67, at 247–48.

[72] *See id.* at 248–49.

cerity. These expectations are exactly the sort of phenomena that may provoke concern about moral drift in the culture.[73]

B. Individual Versus Corporate Agents

It may be objected that I am writing as though contracting usually takes place between individual persons — especially individuals who have preexisting bonds or who are even emotionally vulnerable to one another. But many contracts are formed between businesses or other sorts of organizations. Do I really mean to suggest that the failures of businesses to adhere to promissory norms when transacting with each other have special moral significance per se and further, that these failures may inflict damage on the external promissory culture?

My answer is, yes — at least sometimes. To some extent, I share the intuition that promissory breach between businesses is of significantly less moment, although I worry that in part my intuition is the product of an overly blunt anticorporatism. It may represent a general stance that sweeps too broadly to include small businesses as well as megacorporations and uses an indiscriminate brush not well tailored to the underlying concerns about inequality and homogeneity. There may, however, be something worthy at its root, namely a reaction to the fact that a person intrinsically matters in a way that an economic construct, even one affecting and composed of people, does not. The insult of promissory breach against a business may not sting as harshly as when it is suffered by a person. Some of my reaction also reflects attention to a different frame of reference than the one I have been discussing. That is, the more permissive intuition with respect to breach between organizations may not be a response to the general rule or practice but rather may encapsulate more particularized ethical assessments of singular cases of business-to-business breach within closely competitive contexts. It may be understandable for a party to breach when its competitors have no compunctions against doing so when it is to their advantage, when refraining from doing so would place it at a severe competitive disadvantage, and when it would be very difficult to alter the terms of interaction on a reciprocal basis through unilateral action. Even if these intuitions are appropriate to singular instances given the rules that govern the context, the overall structure of these contexts themselves may be challenged as I have been suggesting.

Further useful distinctions can be drawn between individual and organizational promisors and promisees, and in particular between

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[73] *Cf.* Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 469 (arguing that contract law should "make room" for the predispositions of managers, employees, and judges for fairness and cooperative behavior).

contracts involving individuals and those involving only experienced organizational actors.[74] It may also matter whether the contractors have repeated interactions, whether they are members of the same linguistic or geographical community, and whether the contractual formation involves communication between people or merely filling out forms on the Internet. The distinctions between different types of contractual agents and different types of contractual content may bear mightily on the relevant analysis and the overall conclusions we reach. We should therefore be wary of overly general diagnoses and conclusions.

Nonetheless, contract norms that authorize or encourage intentional breach of promise for gain among organizational actors should still give us some pause. True, an organizational actor as such cannot have disappointed feelings or expectations, at least if expectations are taken to be mental states. But for reasons I explore elsewhere,[75] I am disinclined to think that the presence of such mental states is at all essential to the binding nature of a promise (although the consequences, including the parties' potential disappointment, may sometimes bear on a promise's strength and seriousness). Furthermore, although the organizations that make commitments are not persons, persons compose them. Within business transactions, individuals often make and receive promises. An individual representing the seller company may aver to another individual representing the buyer: "Bob, I promise you, a thousand cases will be delivered tomorrow." Individuals make decisions whether to honor or breach these promises. The promises are not thereby made personal, but the involvement of individuals in the acts of commitment, receipt, and intentional breach matters. Individuals solicit one another's trust in the process of forging promissory relations between their organizations.[76] Even if these promises are not

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[74] *See, e.g.*, David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 457–60 (1990); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–46, 550, 618 (2003) (distinguishing between intercorporate transactions and transactions involving individuals and less sophisticated organizations); *see also* Kreitner, *supra* note 73, at 466–74 (agreeing that efficiency concerns should be more dominant in interbusiness transactions but questioning whether those concerns should be exclusive).

[75] *See generally* Shiffrin, *supra* note 7 (discussing the solicitation of trust as a critical component of forging promises).

[76] *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 150 (2000) (observing that "what appears to be an arm's-length contract between two anonymous firms is often the result of negotiations between two friends who belong to the same social club or sit on the board of the same charitable organization"); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 119–25 (1992) (describing the relationship between trading clubs and transactions in the diamond industry) [hereinafter Bernstein, *Opting Out of the Legal System*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–54 (2001) (stressing the importance of personal relations and one-on-one encounters in commercial cotton agreements).

addressed to individuals as such and the individuals delivering them are not the formal promisors,[77] there is something troubling about a legal system that encourages persons, whether representing themselves or others, to fail to take these solicitations seriously and to take different attitudes depending upon whether they represent themselves, others, or other entities.

Consider assertion, by analogy. Although promising differs from assertion in some respects,[78] they bear a close relationship to one another.[79] At least with respect to moderately serious matters,[80] one's moral obligations not to lie or mislead do not change when one represents or addresses a business or another sort of enterprise. (Perhaps the duty of forthcomingness and the degree of wrongfulness vary, but the fact that one is speaking to the representative of an organization in itself does not alter in fundamental ways the obligation to speak truthfully.) Why should the moral norms of promising be different? Both involve the solicitation of trust. True, in a large organizational structure, the party that initiates or authorizes the breach may be a different person from the one who makes the promise, whereas the liar is often the same person who makes the representation that attempts to draw upon another's trust. But this may not matter since the party who breaches is bound, via the relation of representation, by the invitation made by the promise-giver.

Of course, one can respond that the offeror should not regard her solicitation on behalf of an organization as her own, and that the recipient of this promise should not invest her trust in the offeror as she might were the promise offered to her qua individual, in a more personal context. Perhaps. However, I do not fully grasp what motivates the "should" other than perhaps a counsel of prudence. If this prescription would not be justified as an organizing principle with respect to the sincerity of assertions, even if a more relaxed attitude toward assertion would lead to financial gain, why would it be justified with respect to promising? In any case, it is unclear whether this should be a telling point for those of us who do not believe that the moral force of a promise (or the duties following assertion) depends on whether the promisee relies or expects performance to occur.[81]

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[77] Daniel Markovits suggests, by contrast, that these considerations may be dispositive. *See* Markovits, *supra* note 60, at 1465–68.

[78] *See* Gary Watson, *Asserting and Promising*, 117 PHIL. STUD. 57 (2004) (discussing some of the differences between promises and assertions).

[79] *See* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 294–321 (1990).

[80] Here I mean only to bracket games, jokes, and cases such as Professor Dan-Cohen's, which regard the sincerity of pleasantries by representatives. *See supra* pp. 743–44.

[81] I reject the view that the promisee must rely on, or develop an expectation of, performance for a promise to be binding. *See* Shiffrin, *supra* note 7.

More troubling is the implicit suggestion that legal norms should encourage and expect recipients to respond this charily to one another's entreaties. This, of course, returns us to territory we have already visited, involving the degree of alienation the legal system should expect and encourage from its citizens in their everyday activities, including those involving work and economic exchange. A system that leans heavily on such alienation and compartmentalization is dispiriting to defend, to put it mildly.

V. TOWARD AN ALTERNATIVE CONCEPTION

My primary aim has been to develop and advance an accommodationist approach that renders the norms of interpersonal morality relevant to the shape of law, but in a distinctive way that draws on the perspective of moral agents as subjects of law. My secondary aim has been to deploy this approach to sound some alarms about the divergence of promise and contract, particularly with respect to contract's remedial doctrines. What I have argued so far may be summarized as follows: Moral agency must be accommodated either out of respect for agents' basic, reasonable interests in leading moral lives, or because a robust culture of promissory commitment is necessary for a flourishing political society. In either case, we have a political interest in ensuring that we, as a community, do not invoke and recognize promises within our political institutions while treating them in ways inconsistent with their value, through the stance we take toward them in our rationales for various rules. To be sure, our purpose in invoking promises may not be directly to support or encourage the culture of promising as such. Indeed, we may invoke promises, in part, because such invocation is convenient. The concept of a promise operates as shorthand that is readily accessible and familiar to most citizens, even those who are not legal initiates. The use of a moral concept as shorthand is one way to make legal outcomes more accessible and to facilitate transparency. Still, if we invoke promises, directly or indirectly, we have a duty, taking something of the form of a side constraint, not to act or reason in ways that are in tension with the maintenance of a moral culture of promising.

Along the way, I have also made gestures in the direction of a more positive theory of contract that would treat the conditions of moral agency and the culture of promising in a more complementary way — a conception of contract that would incorporate sensitivity to the moral culture of promising, rather than merely regarding these concerns as a constraint on the pursuit of our other purposes, such as collective wealth enhancement. I will end with tentative remarks about a distinctively legal normative conception of contract that would sit more comfortably with our moral agency.

Promises and fidelity to them do not, of course, require law in the way systems of real property require law, or at least socially recognized boundaries.[82] So what is the purpose of a legal regime dedicated to the enforcement of some subset of promises? Suppose one did not start from a purely instrumental point of view. Would generally morally compliant and highly proficient agents who are not shy about making and keeping promises have reasons to establish a system of contract?

I believe they would. In related work, I have defended the claim that in addition to the work they may do in facilitating cooperation or the pursuit of parties' ends or projects, promises play a significant moral function in interpersonal relationships.[83] Promises and their availability provide a concrete (and I believe indispensable) way for parties to reaffirm their equal moral status and respect for each other under conditions in which possibly divergent present or future interests create vulnerability. The promissory commitment represents an effort to disable and manage some of the hazardous mechanisms and effects of power, hierarchy, and vulnerability. These reasons may be extended to illuminate the function of promises between nonintimates as well. For the purposes of this Article, I assume these claims are true.[84]

One might then understand contract as the public complement to the private promissory relationship. In creating a contract, the parties render public their efforts to manage morally their disparate interests, as well as the associated latent or emergent vulnerabilities this disparity may create or feed. Creation of a contract invites this relationship to be witnessed, recognized, and scrutinized by the public.[85] The purpose of rendering the relationship public might vary according to cir-

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[82] The counterclaim, insofar as it encompasses the claim that socially recognized boundaries are essential to promising, engages the debate about conventionalism and promising. *See, e.g.*, Shiffrin, *supra* note 7 (defending a nonconventionalist view of promising). *But see supra* note 66.

[83] Shiffrin, *supra* note 7.

[84] For a more complete treatment of this issue, see *id.*

[85] Why would the interest in rendering the relationship public require law? Could other forms of social disclosure perform this function? I will only gloss these important questions. In brief, some alternative forms can work, albeit in discrete, insular, and small-scale contexts. *See, e.g.*, Bernstein, *Opting Out of the Legal System*, *supra* note 76, at 115, 119–30, 132–35; *see also* Charny, *supra* note 74, at 392–97, 412, 417–19 (discussing nonlegal sanctions for breach and the limited contexts of their effectiveness). Our culture, interestingly, lacks a clear public forum other than law in which the socially cooperative community has an official voice. The need for law to serve as our collective voice may not be an essential feature of all cooperative life, although it may be an essential feature of large-scale democratic societies. In more homogeneous cultures, religious bodies may serve as an authoritative social voice, the pronouncements of which nonetheless do not have the status of (civil) law. Given our religious and other sorts of heterogeneity (as well as the economic and civil liberty structure that nurtures such heterogeneity), it may be no accident that we lack a unifying intermediate and independent institution other than law that serves as an official public forum and voice.

cumstance and content. In some cases, contracts provide assurance — going public is meant to assuage concerns that one or more parties have about the security of the arrangement. Motivations like these are familiar in both business contexts and familial contexts, including the public promises involved in marriage. But the emphasis on contract as primarily a mode of assurance, a response to the worry that things may go wrong, is exaggerated.[86] Contract law may play an important function even outside nonideal moral circumstances. Parties may well seek to create contracts for reasons that are not predominantly grounded in fear, lingering distrust of their promissory partners, or even more innocuous concerns about inadvertent breach.

For other parties, by contrast, going public may be a demonstration of feelings of strong security in the relationship and in the reliability of the commitment; one or both parties may be so confident of the commitment that they are happy to render it public and regard their willingness to do so as a symbol of their good intentions. Again, motivations like these are familiar in both business contexts and familial contexts, including the public promises involved in marriage. In other cases, contract serves a positive gap-filling function; parties may come to the essence of an agreement but rely on public rules designed to provide reasonable accommodations of the parties' interests and any relevant public interest to resolve open questions.[87] In still other cases, given what is at issue in the agreement — for example, the use of important resources — going public may be mandatory because public oversight of such resources is necessary to protect broader interests.[88]

Except in cases of the latter type, why should the public attend to these commitments and expend effort to enforce them, as well as establish norms that fill in the gaps that promissory parties fail to anticipate or resolve? A partial answer refers to reasons quite familiar from our discourse about contract. First, although promises solve and manage certain dynamics of vulnerability, they also generate new vulnerabilities. The public has an interest in protecting parties from the consequences and harm caused by breaches that result from these vulnerabilities. Second, and more broadly, the reinforcement of equal status facilitated by promises takes on a political value when made public. In addition to the political interest in a culture of taking commitment seriously, there are reasons to affirm and support such public declarations of equal status and such good faith efforts to manage di-

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86 For instance, Professor Scanlon's claim that the institution of contracts is "centrally concerned with what is to be done when contracts have not been fulfilled" and his stress on contracts as furthering the "value of assurance" reflect an overly narrow conception of the function of contract. Scanlon, *supra* note 60, at 93, 99.

87 *See, e.g.*, Craswell, *Contract Law*, *supra* note 3.

88 *See* Gordley, *supra* note 22, at 280.

versity and vulnerability morally. That such a system also tends to create efficient systems of economic exchange is an important side benefit that may affect many of our decisions about how to structure the institution, but only in ways complementary to our other moral purposes.

This quick articulation is admittedly vague, but it provides a flavor of a set of rationales that could supply normative, moral reasons for an institution of contract without relying upon any direct aim to enforce interpersonal morality or to encourage virtuous behavior. Contract, on this view, is not an effort to get people to act virtuously, to prompt people to keep their promises for the right reasons, to ensure that private relationships go as well as possible, or to get people to make promises when morally appropriate to do so. It is not an effort to legalize as much as possible the interpersonal moral regime of promising, but rather to provide support for the political and public values associated with promising.

Understood in this way, a variety of the divergent aspects of contract law make sense, especially those associated with evidentiary concerns. Requirements of writing — for example, the parol evidence rule or the statute of frauds — may be understood more generally in terms of the conditions of making something verifiable to outside assessors and the public. The unconscionability and public policy doctrines manifest the limits on what commitments the public can support, given the underlying purpose of supporting equality as well as our other social aims.[89] The doctrines of mistake and impracticability presuppose notions of reasonable risk that represent our sense of which endeavors and which assumptions of risk are worth our affirmation and efforts. These characterizations refer back to public, legally normative values, but they are not in implicit or explicit tension with the view that the underlying moral promises are binding.

Although this normative conception of the purposes of contract law can readily support some divergences between promise and contract, it *may* be inconsistent with some others discussed in the body of this Article,[90] such as the general unavailability of punitive damages in contract. At the least, some standard arguments for these doctrines are in tension with the maintenance of the conditions of moral agency. Given the overriding nature of our moral commitments, as well as the de-

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[89] *See* Shiffrin, *supra* note 5.

[90] Of course, some legal-normative grounds may be given for the doctrine of consideration. Exchange or its promise signals to the parties (or may serve as evidence to third parties) that a promise is legally relevant. These are permissible sorts of reasons, but they do not provide convincing support for the proposition that consideration is a necessary condition of achieving such ends, especially given the risks of creating cultural confusion about the moral significance of quid pro quo requirements. *See supra* 736–37; *see also* Scanlon, *supra* note 60, at 306–07.

pendence of a well-functioning democracy on a flourishing moral culture, there may be reason to reexamine these doctrines and their justifications, and to strive for greater convergence between promise and contract.

Many legal theorists have been particularly troubled by the idea of separating criminal law, tort, or constitutional law from moral concerns. Some have been more sanguine about conceiving of contract law as an amoral domain driven by aims entirely insensitive or indifferent to the concerns of interpersonal morality.[91] I suspect that quite the opposite is true. Contract law cannot properly be regarded as an amoral domain in the least. From an accommodationist perspective, the nesting of promise into the self-conception of contract, the ubiquity of promises and contracts, and the elemental role of commitment in social life require a legal approach to contract that is deliberately sensitive to the demands of interpersonal morality.

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[91] *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 73–74, 192–93, 197 (1992). *See generally* Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54, 66–69, 79–80 (Jody S. Kraus & Steven D. Walt eds., 2000) (discussing the intellectual history of law and economics).

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