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COULD BREACH OF CONTRACT BE IMMORAL?

*Seana Shiffrin**

Some scholars defend the contract law's ban on punitive damage awards on the grounds that breach of contract, in itself, is not morally wrong. In this Article, I offer two responses. First, I refute one prevalent argument of Steven Shavell's in support of this view. Shavell argues that contractual breach is not immoral in those cases in which the legal regime would offer expectation damages because the contracting parties would not have agreed to require performance had they explicitly deliberated about the circumstances occasioning the breach. I criticize his argument for failing to justify this hypothetical-contract approach and, in any case, for failing to apply the approach properly. Second, I provide some arguments for the general default interpretation that, unless explicitly delineated otherwise, a commitment to perform, morally, entails a commitment ***to perform*** *rather than a commitment to perform or pay.*

INTRODUCTION

In a recent article,[1] I argued that we should reconsider an oft-cited rationale for the contract law's strong traditional bar on punitive damages for intentional, gratuitous breach of contract. Further, this reconsideration should, perhaps, lead us to reevaluate the merits of maintaining the strong traditional bar. Morality, I claimed, correctly regards *some* breaches of promise as morally wrong and as warranting not only compensation but the administration of morality's punitive remedies, including blame, criticism, recrimination, and avoidance.[2] The contract law invokes promise as the fundamental component

* Professor of Law and Philosophy, UCLA. I am grateful for assistance and critical comments from Megan Brewer, Richard Craswell, Barbara Fried, Barbara Herman, Gillian Lester, Ariel Porat, Michael Pratt, Bill Rubenstein, Gabriel Shapiro, Eric Talley, faculty and students at the Universidad Torcuato DiTella, editors of the *Michigan Law Review*, participants in the Fault in Contract Law Symposium at the University of Chicago, and the members of the Contract Theory Workshop held at Georgetown University.

I am also grateful for Steven Shavell's reply. Shavell's reply was invited and produced after my Article was written and after the conference symposium took place. This Article, therefore, does not represent the product of a public exchange between us. Although I have read Shavell's reply, I have refrained from making responsive alterations to the main text in order to preserve the sense of Shavell's reactions to it; a few substantive responses to his reply appear in footnotes.

1. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

2. By morality, I mean those nonlegal, objectively grounded normative principles that regulate our motives, reasons, and conduct (and perhaps our attitudes). I am not using the term "morality" as a sociological term. That is, I do not use the term "morality" to refer to the set of principles that are socially understood or accepted as articulating what is morally acceptable or

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of a contract[3] but, puzzlingly, does not subject gratuitous breaches of contract (and hence breaches of promise) to the distinctive punitive measures endorsed and administered by law, save when those breaches are also torts.[4]

If the law's rationale for the bar on punitive damages is that the prospect of punitive damages might discourage efficient breach of contract—I label this *the efficient-breach rationale*—then the divergence between morality's response to breach and the law's response to breach is problematic in ways that morally decent citizens cannot accept. The efficient-breach rationale forwards a justification for a legal doctrine that consists in the claim that barring punitive damages would encourage and facilitate certain breaching behavior. But this behavior is condemned by morality. To the extent the law adopts and embodies this rationale, it thereby embraces and tries to encourage and facilitate immoral behavior. Although the law need not enforce morality as such, it is problematic when the law, either directly, or by way of the justifications underlying the law, embraces and encourages immoral action. Citizens, who in a democratic polity must be thought of as partial authors of the law, cannot, in all consistency, accept such laws and their justifications while simultaneously acting and reasoning as moral agents.[5] The law ought not to be structured or justified in ways that place citizens in such an untenable position: it must accommodate the needs of moral agency even if it need not or should not enforce morality directly.[6]

My argument against the efficient-breach rationale presupposes that there are occasions on which breach of contract is immoral because the contractual breach is a relevant instance of an immoral form of breach of promise. This presupposition has most recently been criticized, at least with respect to incomplete contracts, by Steven Shavell.[7] Shavell argues that breach of contract is not immoral under certain conditions. His strategy is to argue that when breach of contract occurs—at least with respect to an incomplete contract and in an appropriate legal context—the very occurrence of the contractual breach paradoxically demonstrates that there is no breach

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morally impermissible. Although (individual and) social understandings are, of course, relevant to what one should do and are often epistemically helpful in discerning what one should do, our beliefs may be incorrect about the correct content of these principles. My own approach to identifying their content is nonconsequentialist and deontological in character. This description is, of course, overly brief, but this is not the venue to describe or defend that general methodology more fully or to defend my assumption that there are such principles.

3. Shiffrin, *supra* note 1, at 721–22; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

4. Shiffrin, *supra* note 1, at 722–29; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 355.

5. Shiffrin, *supra* note 1, at 731–32, 740–49.

6. *Id.* at 710.

7. Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 439 (2006) [hereinafter Shavell, *Is Breach of Contract Immoral?*]. He has also articulated this position in Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 867 (2006) [hereinafter Shavell, *Specific Performance Versus Damages for Breach of Contract*], and Steven Shavell, *Contracts*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 436, 439 (Peter Newman ed., 1998).

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of promise—much less an *immoral* breach of promise.[8] The contracts that Shavell imagines are incomplete in the respect that they do not explicitly address the conduct at issue; there is a contractual breach not because explicit language has been defied but because the background, gap-filling law supplies a missing term that is not fulfilled. Because the promise contained in the contract did not explicitly address the conduct, to assess whether contractual breaches of this sort also represent promissory breaches, we must interpret the underlying promise.

Briefly put, Shavell's argument is that because the parties had not made specific, explicit promissory arrangements to address the contractual-breaching conduct (for the contract is incomplete in this respect), the appropriate way to interpret the underlying promise is to ask what the parties would have agreed to had they considered the matter.[9] In the relevant circumstances, he argues, the contractual breach itself reveals that the parties would have agreed to permit the breaching behavior had they considered the matter. Therefore, the underlying promise does not forbid the conduct in question and the contractual breach is not immoral, at least not because it is any sort of promissory breach.

Shavell's argument holds special interest in some part because it does not, at least on its surface, flow from a direct consequentialist analysis of the social welfare value of permitting or facilitating breach in relevant contexts. Rather, Shavell seems to be arguing that breach may be morally innocuous even if we assign moral pride of place to the significance of agreement as such.[10] In relevant legal contexts, Shavell concludes, the values associated with promissory fidelity are not impugned by contractual breach.

In this Article, I begin by answering Shavell. I then use the issues that arise from this dispute as a springboard to examine the significance of performance as such to the morality of promising more generally. In Part I, I describe Shavell's position, explore some questions of interpretation of his position, and then register some direct criticisms of the strongest

8. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 449–50.

9. In his reply, Shavell states that the parties' duties consist in what they would have agreed to "assuming that the parties know what this hypothetical contract would have stated." Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1570 (2009). It is unclear whether this knowledge is ex ante or ex post, but I think this matters substantially. It is one thing to say that, in light of implicit knowledge at the time of agreement of the other party's will, about an unspoken matter, that one is bound to respect the agreement that would have been made had implicit understandings between the parties been made explicit. It may be reasonable to expect the party who objects to what she knows (or what both know) is the implicit understanding of the other party to make that objection clear before the agreement is solidified; if she fails to voice her objection (or different understanding) at the time the agreement is made, but then later objects to the implicit term of which she was aware at the time of agreement, she would be attempting to take advantage of a misunderstanding, mistake, or known ambiguity. It is a different thing to say that parties are bound to what they would have agreed to when they in fact had no implicit understandings about the contingency at the time of contract; objecting to an agreement that one acknowledges, ex post, would have been made does not involve the same taking advantage as objecting to terms that one knew at the time of agreement were implicit. As I argue *infra*, the ex post principle is overbroad and fails to render agents responsible for securing (or for failing to secure) actual agreements. *See infra* Part I.

10. *See* Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 458.

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interpretation of his view. In Part II, I proceed to the larger underlying issue: what, if anything, is morally special about performance?

My conclusion is neither that all deliberate breaches of promise are immoral, nor that all immoral breaches of promise should be punished by contract law.[11] In this short Article, I mean only to defuse one source of resistance to the claim that *some* deliberate breaches of contract are immoral and to motivate one moral source of *some* promisees' claims to performance as such. A key theme in my argument is that it is a mistake to regard the available remedy for breach of contract as fully exhausting the content of the duty that one assumes when one promises (or when one contracts).

I. SHAVELL'S ARGUMENT THAT BREACH OF CONTRACT CANNOT BE IMMORAL

Shavell contends that where expectation damages are readily available,[12] breach of contract is not immoral. Instead, breach reflects the behavior that the parties would have agreed to had they directly faced the circumstances that gave rise to the breach.[13] It seems as though Shavell believes there is no *real* breach of promise in these circumstances. The promise and the contract it gave rise to were both silent about what to do in such cases, he supposes. And had the parties filled in the gap, the term they would have supplied would not require performance.

According to Shavell, a failure to perform is immoral only if it contravenes what the parties did agree to or would have agreed to had they explicitly contracted about the circumstances that gave rise to the breach.[14] At least with respect to cases involving the actions of rational agents, Shavell thinks, the circumstances that give rise to breach are ones that the parties would have agreed excused nonperformance had they explicitly faced the question.[15] Nonperformance in these situations, therefore, is not immoral.[16]

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11. Richard Posner's characterization of my position in this volume is thus much stronger than the position I actually take. *Compare* Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1363 (2009), *with* Shiffrin, *supra* note 1, at 733 (arguing that appeal to the economic values of breach cannot justify the rule against punitive damages, but that a distinctively legal reason for the rule may justify the bar). Nor do I intimate that all contract and tort liability should be fault-based.

12. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 451. Shavell is sensitive to the difficulties of collecting awards and to the lacunas in compensation for items such as attorneys' fees in the American method of calculating expectation damages. *See id.*; Shavell, *supra* note 9, at 1575 n.22. Having noted these difficulties, I will abstract from them as he does, and assume (as against reality) either that breaching promisors readily and voluntarily pay whatever damages would be legally awarded or that legal awards would include attorneys' fees and other transaction costs of collection.

13. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 449.

14. *Id.* at 443.

15. *Id.* at 449.

16. *Id.* at 449–50.

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If a contract explicitly provides for performance in the event of a particular contingency, then Shavell would allow that there is a moral duty to perform should that contingency occur.[17] If it explicitly excuses performance in that contingency, then Shavell would say there is no moral duty to perform.[18] If the contingency is not explicitly addressed, then in Shavell's view, "the moral duty of a party . . . is determined by what the contract would have said had it provided explicitly for the contingency."[19] In his illustrative example, *A* contracts to shovel *B*'s snow for a fee, say $150. If *A*'s snow-shovel is stolen but the contract did not address *A*'s duty in the case of theft, then A has a moral duty to locate a replacement and to shovel only if *A* and *B* would have explicitly specified that *A* must perform in cases of the theft of *A*'s standard equipment.[20]

Where the background law would award payment of expectation damages to *B* for *A*'s failure to perform in this contingency, Shavell argues that if *A* and *B* did not explicitly *require* performance and *A* breaches, then the parties would not have specified that *A* must perform.[21] For, according to Shavell, if *A* breaches, then *A*'s cost of performance must exceed the cost of expectation damages.[22] Suppose that the expected value to *B* was $200. If the cost of renting equipment in a snowstorm would be $500, then *A* may be expected to breach. Further, *A*, rationally, would not have agreed to perform in such a contingency, for it would be cheaper for *A* to pay expectation damages than to perform. Presumably, since the value to *B* is only $200, *B* would not have offered to pay more for *A*'s shoveling to cover the cost of the rental. Had they addressed the contingency, they would have agreed to excuse *A* from performance where *A*'s equipment fails. Therefore, *A*'s failure to perform is not immoral.[23]

Shavell's argument is unconvincing. It is unclear, for instance, why he assumes only certain aspects of the background law will infuse parties' hypothetical agreements and mutual understandings, but not others. A more consistent position on the background law might well yield a different result. Further, Shavell's hypothetical agreements fail to account for some of the probable effects of negotiating contingencies on the contract as a whole. I detail these and other problems with Shavell's position below.

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17. *Id.* at 443.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 444–46.

22. *Id.* at 449. Here, Shavell assumes *A*'s motives are not malicious, an assumption that might make a difference to whether one judged *A*'s breach to be immoral. *See infra* Part II; *see also infra* notes 33, 38.

23. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 450.

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A. *The Relationship Between Excuse and Expectation Damages*

It is mysterious how the background law providing for expectation damages plays the role it does in Shavell's argument. In championing the moral permissibility of nonperformance, Shavell presupposes that the promisor would pay expectation damages for his or her failure to perform.[24] But the support for Shavell's argument about the permissibility of nonperformance—the hypothetical agreement he imagines—is in tension with his presupposition about the availability of expectation damages. Under the hypothetical agreement Shavell postulates, the parties agree that performance should not occur in the relevant circumstances. At the same time, their deliberations are influenced by the background understanding that expectation damages will be legally available for nonperformance. Shavell gives no explanation why this background exists, what the justification is for this background norm, or how the parties would view it and its justification. This is puzzling because in *our* system, on which Shavell seems to rely, expectation damages are available only when there is an independently specified legal duty to perform.

In other words, Shavell's justification for the position that performance is not morally required is that the parties would have agreed to *excuse* the performance had they faced the contingency squarely and explicitly.[25] But if they would have agreed to *excuse* nonperformance, then why would there be a moral or legal duty to pay damages? If Shavell is right (a) that we should interpret the promise *and* the incomplete contract in light of what the parties would have agreed to, and (b) that the parties would have excused nonper-

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24. *Id.* at 441 ("In sum, we can deduce from the fact that the party in breach was willing to pay the expectation measure of damages that the breach was probably not immoral . . . ."). Shavell often appears merely to be arguing that specific performance is not morally required. *See* Shavell, *Specific Performance Versus Damages for Breach of Contract*, *supra* note 7, at 835. In his reply, Shavell clarifies that he meant only that if the hypothetical contract would not specify performance, then neither performance nor damages should be due to the promisee. *See* Shavell, *supra* note 9, at 1576. But this position raises further questions. First, why should we conclude from the mere fact that the promisor favored a payment of the amount of expectation damages over performance that the hypothetical contract would require neither performance nor payment from the promisor rather than its requiring some payment from the promisor? Second, this position now renders the moral status of the contract law that deems nonperformance as *breach* (as Shavell's title assumes) rather suspect. Either the contract law unjustifiably classifies nonperformance as breach in these situations in light of the fact that the parties would not have agreed to performance (or to payment in its absence), or it justifiably classifies nonperformance as breach in these circumstances. If the former, then the claim that *breach* as such is not immoral really stems from the implicit claim that some acts are treated as breach that really should not be. If it is the latter, then the argument for the morality of breach seems incomplete. If there are good normative reasons to hold promisors legally accountable for nonperformance in situations in which, had they considered the matter, the parties would not have required performance, then this casts some doubt on Shavell's suggestion that morality requires only what the parties would have agreed to. These good normative reasons (unspecified by Shavell) may be relevant to the moral valence of nonperformance, as may the fact that the law itself in some sense requires performance. They may also bear on the contents of the hypothetical agreement: the agents themselves may be responsive to these reasons and not merely to the financial costs associated with performance and nonperformance.

25. The specific language of "excuse" appears in Shavell, *Specific Performance Versus Damages for Breach of Contract*, *supra* note 7, at 866, and Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 445.

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formance, then it follows that there is no contravened duty giving rise to a claim to expectation damages. His remarks about excuse are difficult to reconcile with his emphasis on the background of expectation damages. That is, if the parties would indeed *excuse* nonperformance, then his own hypothetical-agreement method would yield the conclusion that there is no moral duty to pay expectation damages. Damages are a response to some failure to discharge a duty. But the duty to pay damages, and its execution, is in part what drives the conclusion that there is no moral duty to perform.

What might explain Shavell's puzzling position? There are three possible interpretations: First, that he thinks the legal duty to perform is more stringent than the moral duty; second, that the legal duty to perform and the expectation damages remedy just supply epistemic evidence for how the hypothetical, moral promissory agreement would turn out; or third, Shavell did not mean to adopt the standard legal meaning of "excuse" within the contract law. Rather, he meant that the parties in the hypothetical agreement would not insist on performance as such. Instead, they would agree that the promisor could either perform or pay expectation damages. I consider each of these possible interpretations below, but I focus on the third interpretation because I suspect it is what Shavell had in mind.[26]

First, perhaps Shavell believes that the contractual duty to perform—i.e., the duty that gives rise to the expectation damages remedy—is prior to the *moral* content of the promise and the *moral* duties it generates—these being supplied by his hypothetical agreement. The legal contractual duty gives rise to a legal duty to pay expectation damages, and this in turn sets the context for the hypothetical agreement between the parties. Assuming that expectation damages were forthcoming, the parties would agree that nothing further was expected of the promisor.

But this would be a strange position for Shavell to take given his methodology emphasizing the significance of agreement between the parties. For one thing, it would leave the legal duty unexplained. Why would the parties have a legal duty, *in Shavell's view*, to do something they had not agreed to do and *would* not have agreed to? Further, the implicit structure of this argument would render the relationship between moral and legal duties unexplained. *Ex hypothesi*, there would be a legal duty to perform; the failure to satisfy that duty is what would give rise to the claim for expectation damages; the availability of damages would help to explain why there was no moral duty to perform; and that conclusion, in turn, would support Shavell's view that there should be no further legal consequences for failure to perform, i.e., no punitive damages, at least not on moral grounds. With respect to the punitive damages argument, the legal duty follows the moral duty; but at the same time, the legal duty to perform is prior to the determination of the moral

26. Shavell's reply clarifies that the third interpretation is not, in fact, what he has in mind. I leave the main text unaltered, despite this clarification, to preserve the coherence of his reaction. In addition, I take the third interpretation to be the most plausible version of his view and I remain unconvinced that the difficulties associated with the other interpretations may be surmounted. Shavell, *supra* note 9, at 1576.

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duty. It is at best a complex, perplexing, and underexplained position. I therefore doubt this is what he has in mind.

Second, Shavell may regard the background of expectation damages as only epistemically relevant. Where the background of expectation damages is in place, a breach serves as evidence that the parties would not have explicitly contracted for performance because nonperformance proves to leave the promisor better off than performance would have, given the maximum price we assume the promisee would have been willing to pay.[27]

Perhaps this is Shavell's argument. But if so, it is puzzling why he focuses on what legal damages are actually available, rather than on the more general question of whether the cost to perform exceeds the value of performance to the promisee.[28] It is also puzzling why he argues that the background legal standard of expectation damages would lead parties to excuse performance under costly contingencies, when other background legal standards dictate the opposite result. For example, the doctrine of impossibility does not excuse nonperformance in the case of equipment failure or theft.[29] This background standard seems just as likely to infuse the understanding of the parties as the background standard of expectation damages, and it might influence them to require performance rather than to excuse it.[30]

Thus, Shavell's sense of how the background law implicitly infuses the parties' mutual understandings is selective, and he does not address the contents or motivation for his implicit principle of selection. This selectivity is all the more mysterious when one considers that the legal demand of payment of expectation damages, which Shavell relies on to show why breach is not immoral, is founded on the background legal requirement of performance in the case of equipment failure, which he omits from the parties' background understandings and commitments. Given that the background rule with respect to impracticability requires performance,[31] why shouldn't

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27. Note that one cannot make the more straightforward claim that the contract already intentionally incorporates a price break to the promisee for the promisor's possible failed performance, because it is presupposed by Shavell that the contingency in question has not been considered by the parties. So they cannot have negotiated or incorporated any precise price calibration ex ante. Might market pressures have already forced a price calibration whether or not the parties themselves intentionally sought to calibrate? In part, this depends on what their starting points are, whether any promisees have alternative contracts they could select, and if the transaction costs for negotiating for strict performance were low enough that they wouldn't preclude negotiations. The more salient point is that whether the ex ante price sufficiently compensates for the potential of deliberate breach depends in part on whether a mere implicit price break *could* morally compensate for a nonconsensual deliberate breach. That is, in part, what is at issue.

28. *See* Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 450.

29. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b, illus. 2–4 (1981).

30. Of course, Shavell might well respond that the meaning of this requirement is fully fleshed out by the available remedy, namely, expectation damages, for failure to fulfill it. But I take it that the larger issue here is whether all duties associated with a contract are fully discharged merely by voluntary compliance with the background remedies in place. If the remedy is a remedy for *breach*, then there is an independent duty. If remedies are to be interpreted as alternative responses to nonperformance, then the remedy may be "read into" the right. Because this is largely what is at issue, it is unsatisfying that Shavell implicitly presupposes that the right reduces to the remedy given that this is exactly what is at stake.

31. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b.

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we impute that content to the parties' moral agreement about what, morally, they would expect from one another?

Third, perhaps Shavell is not arguing that the parties would have *excused* nonperformance altogether, but that they would have provided the promisor with a disjunctive option either to perform or to pay expectation damages. I suspect that despite the language Shavell often uses, this is the correct interpretation of his position.[32] I will discuss this interpretation in two stages below: first, by investigating whether there is adequate support for Shavell's prediction, and second, by asking whether that prediction is morally significant in the way he assumes. These questions are interrelated, and the division between them is somewhat artificial; hence, discussion of the two questions will naturally overlap and cross-fertilize.

B. *What Would the Parties Have Agreed to?*

Whether the second or third interpretation is correct (whether the background of expectation damages serves as evidence of what the parties would have agreed to, or whether Shavell is asserting that the parties would have agreed to 'perform or pay'), Shavell's argument suffers from two other difficulties that cast doubt on his contention that the parties would clearly have agreed not to include a clause requiring performance as such.

First, Shavell fails to contemplate the entire contract and its contents. He focuses on how the contingency would have been settled in isolation. But it may well be that the promisee paid more for other aspects of the specified contract than she would have had the parties consciously considered the contingency and the possibility of nonperformance. If we consider the wider counterfactual, we might discover that the parties would have specified performance in the contingency but would have altered other contract terms; or, perhaps more likely, that they would not have specified performance but would have altered other contract terms. Does this mean that the contract terms they did agree to are invalid, or are not morally required? Is the content of the morally binding promise determined by the agreement the parties would have made if they had in fact thought of the contingency, excused performance *as such* should the contingency occur, and made other adjustments to the terms they did explicitly negotiate? Importantly, to the extent Shavell's argument is to remain attractive and distinctive because it appeals to the significance of agreement, we cannot idealize this agreement and substitute what we take rational agents motivated only by an interest in maximizing their economic position would agree to, as opposed to what the actual agents themselves would agree to.[33]

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32. *But see supra* note 26.

33. Actual agents with a variety of concerns—including concerns about the nature of their relations to one another—may negotiate differently than rational agents concerned only with maximizing wealth. That makes a difference, I submit, both to whether one concurs that, in all circumstances, agents will agree *only* to performances that cost the seller less than their value to the buyer, *and* to whether one concurs that this is "an objective claim that follows from straightforward logic." Shavell, *supra* note 9, at 1576. Because we are analyzing the question of whether breach can

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Second, even if we grant Shavell that the appropriate methodology is to ask what the parties would have agreed to if they had thought of the contingency, holding all else constant, it is unclear that he is correct about the result. Shavell argues that the promisee would not have been willing to pay for more than expectation damages, and that the promisor would not have been willing to perform, if it cost more than expectation damages. But this assumes part of what is at stake—namely, whether the value of performance to the promisee is captured by those measures of expectation damages that the legal system is well suited to implement. Further, many of the contingencies that Shavell has in mind are the byproducts of a risk. It is possible, as Shavell asserts, that the promisee would not have been willing to pay more than expectation damages to secure an explicit requirement that performance occur. However, it is also possible that the promisee may have been willing to pay some additional small price for an explicit promise of performance—a price calibrated to reflect the risk of equipment failure. Moreover, the price agreed on in the actual contract may have been substantially less than the full measure of expectation damages; that price, plus the calibrated price that the promisor would have charged to guarantee performance, may still be less than expectation damages. The possibility of this alternative contract (or alternative interpretation of the existing contract) weakens Shavell's assertion that the parties would have excused performance merely because the cost of performance exceeded the cost of expectation damages. On his own reckoning, the relevant question should be whether the actual price agreed to, plus the calibrated cost the promisor would have asked for to guarantee performance, exceeds expectation damages.

C. *Is the Moral Duty Determined or Revealed by the Content of the Hypothetical Agreement?*

So far, I have been exploring what Shavell meant and whether Shavell draws the appropriate conclusions about the contents of his hypothetical contract. There is, of course, the independent and more central question of whether his test makes moral sense. Is he right to assert that there is a moral duty to perform only if the parties would have explicitly agreed to perform had they squarely faced the contingency that is the occasion for the breach?

Hypothetical agreements are a famous matter of controversy.[34] Shavell's use of hypothetical agreements evokes at least one familiar sticking point with them. Specifically, one may be tempted by the thought that rather than implementing the agreement the parties would have made had they considered the contingency, one party should bear the burden for failing to raise the contingency in order to usher the parties to a concrete explicit bargain.

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ever be immoral, I also assume the motivations of actual agents with imperfect information are at least as relevant to the issue as those of hypothetical agents with narrow motivational sets and perfect information. *See id.* at 1577–78.

34. *See, e.g.*, RONALD DWORKIN, *Justice and Rights*, *in* TAKING RIGHTS SERIOUSLY 150, 177–83 (1978).

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In the case of the contract for snow removal, for example, the risks and costs of equipment failure are more salient to the promisor than to the promisee; after all, the maintenance of his equipment falls under the promisor's control and he would seem more aware of the likelihood of failure and the frailty of the equipment. One might presume for those reasons that he bears default responsibility for performance in this contingency, or at the very least, that he bears responsibility for drawing attention to the issue. It seems reasonable to expect the promisor to perform unless he raises the issue and makes special arrangements to counteract the promisee's reasonable expectation of performance. This seems more reasonable than the supposition that the promisor commits to perform using his equipment, supposing it to be functional. But this is what Shavell would seem to be advocating.

One of the gaps in Shavell's argument is the lack of an explanation as to why the existence of a moral duty to perform should hinge upon an explicit agreement to that effect, and why, absent such an explicit agreement, we should invoke the apparatus of hypothetical contractarianism. As the above discussion suggests, we might instead think that if the party most aware of the issue—or most capable of controlling the factors giving rise to the contingency—does not initiate a discussion of the matter, then she should bear the burden of the gap.

This is not to say that hypothetical inquiries are never relevant in helping us assess what, morally, we should expect from one another. They may be useful to help us ascertain what to do in situations that are out of the moral ordinary. Since neither party really should anticipate extraordinary situations, neither should be expected to take primary responsibility for arranging for them or bearing the burden if arrangements are not made. But in quotidian cases like the one that Shavell describes, why should we invent a hypothetical negotiation that serves the interests of a party who was well situated to negotiate on his own behalf but omitted to do so?[35]

I do not mean to suggest that agents may not permissibly make an explicit agreement that one party will either perform or pay. In many situations, they may. The issue is whether, granting such cases exist, the standard case should be understood in this way, or whether the moral default, at least in ordinary cases and ordinary sorts of contingency, should be understood to be performance.

This issue connects to a remaining unclarity about the sweep of Shavell's position. Although Shavell emphasizes the morality of nonperformance in incomplete contracts,[36] he does not explain what counts as a gap or what he presupposes is an implicit term. Shavell's apparent position on what constitutes a gap is overly capacious. He seems to intend his argument to justify morally the classic cases of efficient breach—at least insofar as

35. Notice also that the failure to raise the prospect of equipment failure and to negotiate an excuse in such situations may do some work to secure the deal. It may distract the promisee's attention from concerns she might otherwise have about the deal or the promisor's relative reliability—concerns that might affect the contents of her offer or her willingness to make it.

36. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 448–49.

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damages represent the true expectation value.[37] The appearance of a better offer seems to count as a contingency that renders the contract incomplete for his purposes. Take the classic case of efficient breach: *A* contracts to sell 50 cases to *B* for $100. *B* would receive $200 in expectation damages should *A* breach. Prior to delivery, *C* offers *A* $325 for the 50 cases. (Let us suppose *C*'s offer to *A* is exclusive, for personal reasons, so that *B*'s expectation damages do not alter in light of a potential resale of the cases to *C*.) Are we really to conclude from Shavell's argument that *A* has no moral duty to perform because the contract did not explicitly specify that performance should proceed *even were* A *to receive a significantly superior offer for* A*'s goods*? Should we conclude from *A*'s breach and the size of the expectation damages awarded to *B* that *A* would not have committed to performance given the size of the opportunity cost? Note too that the contract did not confront the case in which *A* just does not feel like performing on the day in question. So long as *A* would rather just pay expectation damages than perform, does that mean *A* does no moral wrong if she decides not to perform? In Shavell's view, is there any contract sufficiently detailed to render performance morally obligatory?

One might think that the contingency of feeling reluctant on the day of performance is sufficiently anticipatable that it would be morally and socially peculiar for either party to mention it. It would be strange to draft explicit language that assured the promisee that the promisor will perform even if he is in a bad mood on the day performance rolls around. And it would be awfully strange for the promisee to raise the issue in a negotiation. For either party to raise the issue and engage in direct contracting about it would signal something rather peculiar about the interlocutor—something that might raise eyebrows about that party's character and might provide cause to scuttle the potential agreement.[38]

But, as I argue above, one might have thought the same about equipment failure—Shavell's signal example. In many circumstances, it would be strange for a promisee to ask for an explicit provision clarifying what is a standard expectation—that the promisor will find a way to perform and is

37. *See id.* at 458–59.

38. This issue connects to another broader point of controversy. Shavell's approach reduces the moral permissibility of any breach to whether a breach in such circumstances would ever be morally permissible. That is, he asks whether the parties would agree to the omission of an act, but he does not discuss the motives under which they would act. *See supra* notes 22, 33. I, as promisee, may be sympathetic to the straits of the promisor with the faulty equipment. I might waive the promisor's obligation were the promisor to ask. I might even agree that it may be permissible morally for him to decline to perform, even absent my waiver, in cases where equipment failure was entirely unpredictable and the cost of rental is punishingly high. But it would be an entirely different moral matter if he declined to appear, in the same circumstances, not because he was unwilling or unable to pay the rental fee, but because he relished the safe harbor of such an excuse to inconvenience me for his personal pleasure. Failure to perform for bad motives even in circumstances that might warrant failure to perform for other reasons may be immoral. Shavell's approach is, on this score, objectionably indifferent morally to the performer's motive. He is, though, in some good company on this score. *See, e.g.*, DEREK PARFIT, ON WHAT MATTERS (forthcoming 2009); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 1–88 (2008); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990). *But see* Barbara Herman, *A Mismatch of Methods*, *commentary in* PARFIT, *supra*.

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responsible for maintaining the means requisite for performance. In fact, it could be somewhat insulting for a promisee to raise the matter and request an explicit provision addressing the contingency. Such a request might communicate that the promisee thought the promisor was unreliable or unprofessional.

I suspect that Shavell's position, as he sometimes hints,[39] is not that breach is permissible in a subset of cases, but that it is always permissible at least in those cases in which it is possible to provide the full measure of expectation damages to the promisee.[40] This is a more radical position than the one he seems to support by placing emphasis on the incompleteness of the contract.

II. The Significance of Performance

If my diagnosis of Shavell's implicit position is correct, this leads us to the question whether there is anything to be said for performance as such. Is it true that, except in cases in which performance really is entirely unique, whatever moral problem arises in cases of nonperformance emanates from the leaks and lapses in our remedial scheme—i.e., in our failure to ensure that expectation remedies are complete and readily provided? Is the real source of the *moral* resistance to breach of promise that legal compensation is usually incomplete because it fails to take into account the transaction costs of enforcement? If the promisee really were to receive the expectation value of performance, would there ever be a reason to insist that performance as such is *morally* required? One may be inclined to think that the fixation on performance is idiosyncratic where full compensation is available. Perhaps we might honor a specification of performance if it were explicitly made, but, given its idiosyncrasy, we have no reason to presume that preference or to criticize morally those who do not share or act on it.

Whether performance is special in some more principled way is, I take it, the principal point of contention.[41]

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39. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 458 ("[W]hen efficient breach does occur, it coincides with the terms of completely detailed contractual promises and thus should not be seen as immoral . . . .").

40. *Id.* at 452 ("If, though, expectation damages are near the value of performance, breach is quite likely to be moral, and the reason for breach does not need to be examined to infer that that is so.").

41. There are two ways to understand the issue here: on the one hand, as a question about the content of the *moral* default rule where there is a gap; in the alternative, as a question about whether moral considerations infuse the context under which interpretation is to take place in which case there may not be gaps where Shavell perceives them. That is, we might agree with Shavell that where the language of a promise is not explicit about a requirement of performance as such in specified circumstances, that the promise is therefore incomplete. But we may disagree about whether the moral default rule favors "perform or pay" or whether, for moral reasons, it disfavors *deliberate* nonperformance. Second, in the alternative, if there are moral reasons why deliberate nonperformance is morally disfavored unless the parties explicitly agree otherwise, one might take the view that all promises (themselves moral instruments) implicitly incorporate the significance of performance as such. On this view, the failure to articulate explicitly a requirement of performance as such in a range of circumstances does not necessarily signal a gap at all. I am not convinced it matters to the ethical analysis of the situation which of these ways of running the argument one selects, and the

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The idea that performance matters is a difficult point to support directly. It is the sort of position toward which one tends to be drawn by instinct rather than led by explicit direction. In what remains, I wish to try to articulate, if not to explain, the motivation for taking performance to be special. An example may be a useful starting point.

It is not uncommon, as many of us know, for plumbers or contractors to commit to appear to do a job but then fail to appear. You wait for hours, they don't call, and then you must reschedule and wait again, apprehensive that the scene will recur. Most people who are subject to this sort of treatment are enraged. I find those who are not enraged a little alien: they seem either sedated or to have made a heavy investment in honing their meditative techniques.[42] If the no-show plumber were to appear next time matter-of-factly presenting you with a check or a discount reflecting the value of your time that was wasted, I suspect that, after emerging from shock, the resentment would not fully dissipate.[43]

Why would resentment persist? I doubt it's merely emotional inertia. When the plumber opts not to show (without consulting with you to gain your permission or waiver) because another job is more urgent or unfinished or pays better, even if we indulge the fantasy that the plumber would compensate you for your time and irritation, she has still made a decision for you about how *your* time, attention, and labor must be devoted. One might exaggerate the point by saying she has made you an involuntary employee of hers. She has usurped your ability to make independent, voluntary decisions about the use and form of your time, attention, and labor. With

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argument that follows would serve either one. I suspect the correct analysis both resists that gaps in promises are as common as Shavell conceives of them (because of the implicit incorporation of the background moral context) and that what gaps do exist in promises may be filled in by a moral default rule that disfavors deliberate nonperformance unless the parties have otherwise agreed.

42. *See* Shiffrin, *supra* note 1, at 740–41, 749.

43. Shavell conducted a small survey of the moral reactions of respondents to breach in a case in which a contractor breaches on a kitchen renovation after discovering the prices for materials had risen substantially and the contractor would lose money. The average answer rated the breaching behavior as falling in between unethical and ethically neutral, but the respondents brightened if they were told that the contractor would pay compensatory damages. In the latter case, the respondents' average "score" for the breaching behavior rose to a point in between ethically neutral and somewhat ethical. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 453–55. On the one hand, it should strike Shavell as worrisome that the payment of the compensatory damages did not render the breaching behavior fully ethical in the respondents' estimation. On the other hand, I am not confident about the significance of what rehabilitation did seem to be accomplished through the payment. Two factors cloud Shavell's results. First, in his second hypothetical, parties are told that the contractor pays compensatory damages "as contract law says is required." *Id.* at 454. That the contractor is doing that which the law requires may influence the respondents' judgment about the ethical nature of the conduct. The respondents may think the law plays a role in establishing the parties' legitimate expectations and that the law has balanced the appropriate ethical concerns. Some of what may be going on in the respondents' reactions may be an implicit reliance on the imagined expertise and authority of the law's moral assessment of the conduct. Second, although Shavell's question does ask directly about the breach, I have some worry that the respondents are not focusing on the morality of breach per se but the overall moral assessment of the contractor's conduct. They may just be registering their greater moral comfort with a party who provides some remedy (damages) for his wrongdoing as opposed to a party who merely engages in wrongdoing. But although we do and should feel better morally about the character who attempts to provide a remedy, it does not show the initial action was not wrong in the first place.

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plumbing in particular, fairly important needs are often at stake, so the usurpation may evoke especially strong feelings of powerlessness and hence, strong resentment.

But one might object that the problem here is really with the nature of compensation. If the plumber gave you sufficient advance notice, all that would be required on your part is another phone call or two to different plumbers, calls for which you could be compensated. Indeed, sufficient advance notice would improve the situation. But even so, one must—on the decision of another—rally to find a replacement (that one may not wish to need or use) and to perform some activities at the convenience of another.

Whether in the more pronounced or more subtle form, the plumber's breach alters, involuntarily, the nature of the activities you must perform and the services you must accept. This is perverse because it inverts two aspects of the nature of the transaction that brought the two parties together in the first place.

In this example, as in Shavell's, the parties typically come together to contract for performance not as a sophisticated, disguised way to exchange currency or to perform a veiled arbitrage dance. They contract for performance because goods and services are themselves the ends at least one party seeks. Putting aside middlemen contracts (e.g., insurance contracts, futures contracts, hedge contracts, arbitrage contracts, and other contracts whose primary purpose is to allocate risk), the goods and services are not mere way stations for further economic exchanges. What one seeks is the specific good or service, not a voucher that will allow one to contract to obtain the good or service at a later date (even at a discount). Consider the absurd result in such cases if the payment of expectation damages were the universalized, reflexive response to agreements. No promisee would ever get what she sought. As a further consequence, if this were the universalized response, then agreements would never be made. The same is not true if performance were the universalized response to a promise to perform.[44]

Note that this difficulty attaches even if we relax or reject the assumption that contracts are legally enforceable promises or in some other way bear an

44. The number of promises might decline were performance the universalized response to a promise to perform, because in those cases in which conscientious agents had doubts, they would care to perform, and in those in which the potential promisee was unwilling to agree to an explicit "perform or pay" promise, conscientious agents would forbear from making the promise. This, however, is not any embarrassment. It is an embarrassment if a universalized practice, properly construed, would eliminate the practice, because this shows that the practice's flourishing depends on free riding off others behaving differently or depends on its salient features being obscured or disbelieved by the participants. If making the practice's features fully salient undermines the practice, this reveals a fundamental problem with its structure because it shows the motivations for the practice cannot be squared with its execution. By contrast, if making the practice's features salient merely reduces interest in the practice or encourages more cautious behavior, that does not show the practice itself is fundamentally misconceived. The argument I make in the text about universalization is not intended to be, contrary to Shavell's assumption, a welfarist argument of any kind. *See* Shavell, *supra* note 9, at 1580.

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essential derivative relationship to promises.[45] Even if contracts were a form of *sui generis* agreement, the practice of making these agreements could not flourish or perform its function if paying expectation damages became the default method of their satisfaction. But, the practice would flourish if performance were the default method of satisfaction. The payment of expectation damages necessarily works only as an *occasional* response to the occasion of a promise, suggesting that it isn't truly interchangeable for performance.

Note also that goods and services cannot be demanded as a matter of right[46] even if a would-be promisee proffers their economic value. Willingness to pay does not operate as a sufficient legal or moral justification for conversion; rather, a joint agreement is necessary. Performance is sought for reasons that do not reduce to the economic value of performance, and a contract to perform may be reasonably refused by the party in possession of the capacity to perform even if the relevant economic value is offered.[47]

Given the motivations of the parties that bring them together to make the promise that creates the contract, as well as the significance of the voluntary moment in its formation, it would be strange if a voluntary failure to perform did not have a moral valence. I generate a relationship with the plumber because I need my pipes fixed by him; his consent to the relationship is required even if I am willing to offer more than the value of his services. But, then, after the terms of the relationship are set, according to Shavell, he may morally violate them without my voluntary waiver, place me in a position where I need to perform a variety of acts I did not consent to, offer me money rather than services, and expect me to accept money instead of services. This should seem peculiar. The rules and structure of the relationship are being subverted *ex post*, but there is no clear reason why after the relationship is formed, this sort of nonconsensual behavior should be more morally anodyne than it would have been ex ante.

What I am suggesting is that breach of contract may be immoral, even when expectation damages are offered, because it disrespects two features

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45. Shavell does not contest this assumption but embraces it. Shavell, *Is Breach of Contract Immoral?*, *supra* note 7, at 444 ("[C]ontract is a species of a promise for which there are well-known grounds for finding moral obligations.").

46. Importantly, though, in public accommodations, *some* reasons to refuse to contract are both morally and legally impermissible. Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a (2006).

47. There are, of course, exceptions to this rule—but unsurprisingly, they involve exceptional circumstances. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 197, 263 (1965) (observing that trespass to land or on chattels is permissible in cases of private necessity to prevent serious harm, but compensatory damages will be payable). And, although one cannot force a contract with an unwilling party by offering that party the market (or greater) price of her performance, once a contract is formed, contract law adopts a more permissive standard for the delegation of duties and assignment of rights to third parties without an assignment clause and without the promisee's consent. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 317, 318 (1981) (permitting assignment and delegation except where it would substantially burden the other party). The ability to delegate without the other party's consent has been thought to be quite limited, however, in personal-service contracts and other contracts in which the identity of the specific obligee is thought to matter, categories some courts construe broadly. *See* Larry A. DiMatteo, *Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability*, 27 AKRON L. REV. 407, 413–29 (1994); *see also* E. ALLEN FARNSWORTH, 3 FARNSWORTH ON CONTRACTS § 11.10 (1990).

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of the moral significance of agreements. First, the motivations that lead parties to agreements may reasonably place a special premium on performance. Parties' commitments are responsive to these motivations. The breach, however, runs counter to the voluntary assumption of an obligation that purported to be responsive to this motivation. Second, the background structure that required agreement as a prerequisite to performance presupposed that performance could not be demanded upon the proffer of the performer's going rate. Whether or not she might agree to perform if money were offered, it matters whether or not she *in fact* agrees. The breaching party acts contrary to this presupposition, and, in the best case, uses the proffer of expectation damages to rearrange what the promisee must do, without the promisee's agreement.

Perhaps Shavell's thought is as follows: In the process of forming the contract, the promisee and promisor both find a way to place economic value on performance. Prior to formation, they may both abstain from the relationship and do not treat performance as fungible with compensation. But in making the contract, they signal a willingness to treat performance as exchangeable for economic value within this context. This voluntary treatment then explains and provides a full moral rationalization for the ex post rendering of expectation damages in exchange for performance. Entering this sort of relationship introduces a different set of norms internal to market interactions that would not be applicable outside the relationship.

But if this is Shavell's best response to the aforementioned problems surrounding the inadequacy of expectation damages, then his view threatens circularity. We are attempting to ascertain what the appropriate norms for market transactions ought to be and whether performance should be treated as unique or whether the rebuttable presumption is that it should be treated as fungible. That a party is willing to give money for performance does not mean that she is indifferent to whether performance occurs or that she regards both directions of exchange as on a par.

Conclusion

I have argued that performance, rather than "perform or pay," is the default content of the moral duty captured in an agreement to perform, and that it *may, in some circumstances,* be immoral to fail to perform even if one supplies the promisee with expectation damages. I am not arguing that breach of contract is always immoral, just that it may sometimes be. Nothing I have argued precludes the judgment that some forms of breach are morally permissible. There may, for instance, be cases in which performance would be unreasonably burdensome, e.g., significantly more expensive than the parties could have reasonably predicted; in such cases, nonperformance may become morally excusable (even where it would not be legally excused and would still result in a legal breach).[48] Further, many cases of inadvertent breach may not

48. *Stees v. Leonard*, 20 Minn. 494, 504 (1874), may be a good example of what I have in mind.

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be immoral, although they may still obligate the promisor to compensate the promisee. I merely mean to argue that it is not sufficient morally to excuse nonperformance on the grounds that a party might have made a better agreement excluding performance than she in fact did make and that she would prefer not to perform. Further, I am not suggesting that parties could never permissibly and explicitly make an agreement to "perform or pay."[49] Rather, there is reason to resist "perform or pay" as the default interpretation of all promises that do not explicitly rule it out.

Finally, although the moral status of breach may indirectly be relevant to legal practice by blocking arguments that appeal to the economic desirability to breach, it does not follow that the law should issue specific performance decrees or punitive damages for all or most failures to perform. There may be distinctively legal reasons to reject such remedies given the difficulties of judicial supervision, risks of arbitrary enforcement, and in some cases, the hazards of involuntary servitude.

Suppose we were to conclude that such remedies should never legally be available. It would not follow that there is no right to performance as such, or that the content of the moral right or the legal right mirrors exactly the remedies third parties may morally provide and enforce. There is a temptation to reduce the contents of rights to the contents of any and all available remedies. But it is a mistake, I submit, to yield to that temptation. Affording remedies logical priority over the rights and duties they enforce deprives us of the ability to explain and justify the normative grounding of the remedy. A remedy is provided because a duty has been transgressed—a duty for which there is an independent argument. Viewing the duty as a restatement of the remedy, or as deriving from the remedy, eliminates the rationale for the remedy's provision. It also neglects that the remedies we are willing or able to provide shift over time and as circumstances alter. It seems strange to think that the duty in question becomes stronger or weaker the more the court system is taxed or the greater the budget of the relevant enforcement agency.

Of course, it may be true that those actors who do not independently value the fact that something is a moral or legal duty may, from a practical decision-making perspective, look only to the available remedy to decide what to do. Some who contemplate criminal activity may engage in similar reasoning with respect to likely punishment. But the fact that deterrence theory correctly describes the reasoning process of some amoral actors should not lead us to endorse this line of thinking as morally insightful. For those actors and those affected by them, it is true that the cash value of a right to performance may reduce what remedies are available should performance not occur. As I have suggested, however, there are reasons to think that morality's substance may outstrip its market value.

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49. *See* Shiffrin, *supra* note 1, at 722. But see Barbara Fried's suspicion that I harbor or am otherwise committed to such a position. Barbara H. Fried, *What's Morality Got to Do With It?*, 120 HARV. L. REV. F. 53 (2007), http://www.harvardlawreview.org/forum/issues/120/jan07/bfried.pdf.

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