

## The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action

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### ABSTRACT

This article begins to articulate a theory that a central moral concern in contract law in action is flexibility to recognize the need for adjustment, release, and forgiveness among good faith parties, most obviously in relational contexts. The article explores some telling examples, from the morality of the businessmen Stewart Macaulay wrote about in *Non-Contractual Relations in Business* to that of the characters in Harriet Beecher Stowe's satiric novel *The Minister's Wooing*, which puts the need for promissory forgiveness at the center of the dramatic action. Also examined in this article are the animating moral concerns of the law in action school of thought itself. The overall aim is to promote inquiry by contracts scholars into the moral concerns of contracting parties, particularly concerning the question whether a forgiveness principle may be as important as a principle of promise-keeping.

*When e're you make a promise  
Consider well its importance  
And when made  
Engrave it upon your heart<sup>1</sup>*

### I. INTRODUCTION

The central argument of this article is that the song sung by Brownies about the importance of keeping promises needs a second verse, one about forgiving others who have made promises to you. A forgiveness principle is conventional but under-articulated promissory morality, crucial to building sound relationships in business as well as other realms of social life. In his 1981 book *Contract as Promise: A Theory of Contractual Obligation*, Charles Fried

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1. Traditional song, sung by Brownies, young Girl Scouts, for several generations. See MELINDA CARROLL, *When E're You Make a Promise*, on GIRL SCOUTS GREATEST HITS, VOL. 3 (Legend Productions 2000), available at <http://itunes.apple.com/gb/album/girl-scouts-greatest-hits/id313529222>.

begins with a Kantian exposition of why keeping promises is a moral thing to do.<sup>2</sup> Promise-keeping, in this view, is moral behavior because it vindicates the autonomy of the promisor and also respects the promisee's trust and confidence.<sup>3</sup> Fried sees promissory morality not as communitarian but as based on respect for individuals' ability to plan and define the good for themselves.<sup>4</sup> Reacting to ideas at the time that contract was being absorbed into tort, with obligations imposed by law based on duty,<sup>5</sup> Fried pushed back. For example, he stressed that the expectation interest is ordinarily the appropriate remedy for contract breach because that is what was promised.<sup>6</sup> Contract, for Fried, is not about the wrong of inducing reliance, but about the liberty to engage in private ordering.<sup>7</sup>

My purpose is not to evaluate how successful Fried was in his attempt to explain contract doctrine as primarily based upon autonomy, trust, and respect for persons, vindicated by enforcing promises.<sup>8</sup> Rather, we should applaud his lack of embarrassment about talking about law and morals in the same breath and see where that might take us today in the study of contractual relationships.

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2. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14-19 (1981) (discussing the morality of keeping promises and, expressly invoking Kant, emphasizing the autonomy of the promisor and the inducement of trust and confidence in the promisee).

3. *Id.* at 16.

4. *Id.* at 2-3 (discussing idea that legal obligation enforced by the community must involve pursuing community goals and standards as "what I am reacting against"), 21 (addressing those "who have an interest in assimilating contract to the more communitarian standards of tort law"), and 20-21 (discussing importance of allowing persons to define the good for themselves and to have the freedom to bind themselves to contracts).

5. PATRICK ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); GRANT GILMORE, *THE DEATH OF CONTRACT* (1970). For discussion of how multiple bodies of law, not just contract law, deal with regretted decisions and mistakes, see two later books by E. Allan Farnsworth, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998) and *ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS* (2004).

6. FRIED, *supra* note 2, at 17, 21 (arguing it is fair for a breacher to be made to "hand over the equivalent of the promised performance" and describing the expectation interest as the "normal and natural measure for contract damages."); see also *Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. 103 (1926) (in which Samuel Williston, reporter for the first RESTATEMENT OF CONTRACTS (1932), took a similar position: "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made."). Although Williston had formalist impulses at times, he was a political progressive. Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 374 (1921) (arguing that freedom of contract "does not necessarily lead to public or individual welfare" and that experience justifies limiting it).

7. FRIED, *supra* note 2, at 20-21.

8. After setting forth his theory at the beginning, the rest of Fried's book analyzes the extent to which contract doctrine implements a morality of self-ordering through promise. He tries to reconcile autonomy with (1) the rules of consideration and offer and acceptance, *id.* at 28-39 (concluding that consideration is an incoherent doctrine, subject to many exceptions, and thus does not present a serious challenge to the idea of contract as promise), *id.* at 40-56; (2) the objective theory of formation and interpretation, *id.* at 61, 145 & n.14 (discussing "so-called objective theory of interpretation," including interpretation of offer and acceptance); (3) gap-filling including mistake, *id.* at 57-73; (4) good faith and refusal to enforce some harsh deals based on duress or unconscionability (which Fried considers appropriate when a party has exploited conditions of catastrophe but not, in his view, ordinary poverty), *id.* at 74-111 (generally) and 109 (distinguishing a retailer making hard bargains with poor customers from bargains made during catastrophe or a breakdown of social order); see also *infra* notes 54-58 and accompanying text.

In a forward-looking spirit, I want to suggest some projects to build on the legacy of Fried's focus on contractual morality. The first area of inquiry is whether there is any way to explain contract law in action—in its many varieties—in moral terms, Kantian or otherwise.<sup>9</sup> Fried is explicit that his concern is with common-law doctrine. He is a case-law man, not an empiricist, quantitative or qualitative, and he makes no pretense of examining the business of business. He does not delve into the mechanics of how businesses and individuals, sometimes aided by lawyers but often not, adjust their deals to preserve relationships and reputation to the greater glory of making money, keeping customers and suppliers happy, and spending as little as possible on law, which is not free.<sup>10</sup> Along the way, as will be discussed in Parts III and IV below, those doing deals are often guided by moral concerns, although not necessarily the same ones reflected in law on the books or Fried's theory. Contract law in action seems to involve recognition of a need for flexibility about adjustment, release, and forgiveness, operating in tension with promise-keeping, as an important part of promissory morality.

Fried lists Ian Macneil and Lawrence Friedman as among those who saw legal obligation enforced by the state as inevitably pursuing community concerns, thus presenting a challenge to his autonomy-based theory.<sup>11</sup> However, Fried does not engage with Macneil's ideas about relational rather than discrete contract being the paradigm in practice, largely regulated by nonlegal norms and sanctions.<sup>12</sup> Nor does Fried answer Friedman's criticism of a focus on common-law doctrine as opposed to the making and adjustment of deals in the context of the modern regulatory state.<sup>13</sup> Fried does not even cite Stewart Macaulay's *Non-Contractual Relations in Business*, published eighteen years before Fried's book.<sup>14</sup> Macaulay found that businesses often deliberately

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9. See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (discussing the difference between law on the books and law as it is administered and put into effect).

10. See generally Stewart Macaulay, *Non-Contractual Relations in Business—A Preliminary Study*, 28 AM. SOC. REV. 1 (1963) [hereinafter Macaulay, *Non-Contractual Relations*] (empirical study of business practices concerning deals and finding emphasis on adjustment and on building relationships in business dealings, often without reference to law and according to norms that differ from legal norms); Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What they Used to Be,"* 2005 WIS. L. REV. 365, 383 (2005) [hereinafter Macaulay, *The New Versus the Old Legal Realism*] (listing "Law is not free" as the first proposition of the law and society approach).

11. FRIED, *supra* note 2, at 2-3.

12. See generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

13. See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 25 (1965) ("[T]he common-law approach to law in the schools and in legal literature at its worst could be compared to a zoology course which confined its study to dodos and unicorns, to beasts rare or long dead and beasts that never lived.") Friedman also describes the rise of the regulatory state as displacing contract law, robbing it of its subject matter, and making it a minor, residual body of law, although structuring and adjustment of business relationships remains important, making it a better focus for teaching than appellate, common-law cases. See *id.* at 141-42.

14. Macaulay, *Non-Contractual Relations*, *supra* note 10.

fail to plan completely, mostly do not use legal sanctions to deal with disappointment, and have norms that are different from legal norms, such as regarding canceling the order as something different from breach of contract and seeing the reliance interest as the appropriate remedy for doing so.<sup>15</sup> Using a moral lens to examine actual business relationships and how they are adjusted could be a fertile line of inquiry. For legal education, there is a quite crucial point that young lawyers would be led seriously astray if sent forth in the world thinking that business people are necessarily interested in detailed, unambiguous planning or in holding each other to expectations as legally defined; law students should be exposed to business norms to prepare them to be effective as lawyers.<sup>16</sup>

Emile Durkheim's ideas of the sacred and the profane can help situate Fried's project as well as possible future projects that might make use of his legacy of moral inquiry in the contracts field.<sup>17</sup> Fried's focus on the world of appellate argument and appellate decisions has a sacred quality. Opposed though he is to seeing contract as communal,<sup>18</sup> Fried's imagined moral order based on law on the books nonetheless serves a symbolic, totemic function of advancing communal unity.<sup>19</sup> It is a sacred vision of the rule of law enabling personal autonomy. Meanwhile, the contracts machine of actual business affairs hums or grinds in another realm, a profane one in the sense of mundane and often self-interested. Neither realm is necessarily good or evil, but they are separate, meeting only occasionally and not necessarily with much influence on each other. The morality of contract doctrine, if one exists, cannot explain the profane machine, which might or might not be moral. Furthermore, what is missing in contract doctrine is often supplied in some other body of law that governs the same activity, such as bankruptcy law.<sup>20</sup> So the good news for the

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15. *Id.* at 56-60 (concerning the ways in which businesses do and do not plan, with frequent failure to plan completely); *id.* at 61-65 (concerning businesses' frequent lack of reference to law when adjusting their relationships and use of different norms, including the idea that canceling an order is not a breach of contract and is something that a buyer should be able to do if reliance loss is compensated).

16. STEWART MACAULAY ET AL., 1 CONTRACTS: LAW IN ACTION 1-2 (2010) (providing overview of law in action); *see also id.* at 25-29 (discussing the limits of law on the books and the often greater power of relational concerns).

17. EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (Karen E. Fields trans., Free Press 1995) (1912) (developing the concepts of the sacred and profane as not good-versus-evil, but rather as what promotes unity and the interests of the group (sacred realm) as opposed to ordinary, individual matters (profane realm)); *see also* Pound, *supra* note 9, at 24 ("To the ancient, law was sacred."), and 36 ("Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings.").

18. *See supra* note 4.

19. *See supra* note 17 and accompanying text; *see also* William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018 (discussing the symbolic nature of much consumer-protection law as part of a critique of its ineffectiveness). Fried is, of course, perfectly cast as a high priest, given his service as Solicitor General of the United States, arguing cases to the U.S. Supreme Court, and as a justice of the Massachusetts Supreme Judicial Court.

20. *See infra* notes 64-68 and accompanying text.

next generation of contracts- and business-law scholars is that much work remains to be done, and part of the job involves studying business deals in their full context of self-regulation and regulation by many bodies of law operating in concert. Can there be a moral theory or moral theories of all that?

Another important line of inquiry is to explore further the moral concerns animating the law in action school of thought and, in particular, its examination of contractual relationships as they in fact operate, rather than the image of them projected in decisional law.<sup>21</sup> This approach to law is, in part, about understanding social phenomena better by studying them systematically at the ground level, where legal doctrine is typically at most a faint shadow over a small corner of the stage. But there is more to the law in action perspective than neutral observation. This approach also raises critical and moral concerns, particularly about unintended consequences and even hypocrisy in the slip between law on the books and law as delivered (or not) by legal machinery as well as about how institutions other than law channel behavior. Exposure to these strands of thought should also be part of a legal education.<sup>22</sup> For contract scholars, two promising kinds of projects are examination both of the morality of the living law of contractual relations and of the values underlying the law in action school of thought itself, projects this article seeks to encourage.

## II. THE PROFANE CONTRACTS MACHINE

A significant contribution of *Contract as Promise* at the time of its publication was to introduce a note of balance to the embarrassment about morality exhibited by law and economics proponents, led by Richard Posner.<sup>23</sup> Squeamishness about morals in relation to law can be traced, unfairly, to Oliver Wendell Holmes Jr., whose thinking about law, morality, and contracts has been misunderstood.<sup>24</sup> There is no necessary inconsistency between Fried and Holmes as far as considering the morality behind legal rules,<sup>25</sup> and, indeed, Fried is decidedly Holmesian in his focus on law on the books, as will be discussed. Future scholars may enrich their perspective by considering the

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21. See *infra* Part IV.

22. MACAULAY ET AL., *supra* note 16, at 27 (discussing the idea that “good lawyers are skeptical idealists, aware of how the system works but unwilling to retreat into an easy cynicism.”).

23. Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 123 (1979) (noting that “conventional pieties,” including promise-keeping, reduce costs of policing markets).

24. Marco Jimenez, *Finding the Good in Holmes’s Bad Man*, 79 FORDHAM L. REV. 2069 (2011) (discussing influence of the “bad man” theory and misunderstandings of it as involving a permanent separation of law and morality).

25. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897) (recommending that lawyers should “Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte.”); see also Phillipa Strum, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 309-10 (1984) (recounting that Brandeis recalled urging Holmes “to get some sense of the world of fact” and to visit the mill communities of Lawrence and Lowell, but Holmes responded that although it “would be good for my immortal soul . . . I shrink from the bore”).

morality of law, but not just on the books. Fried went half way on this journey.

When we talk about promissory morality, we of course immediately think of Holmes's bad man.<sup>26</sup> Holmes advocated separating law and morality, but not for long. Rather, he urged temporary separation only for the purpose of learning and understanding the law and not for purposes of thinking about how to behave:

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.<sup>27</sup>

Holmes only wanted to put aside morality "for the moment" in order to understand law as prediction about what the courts will do. The reason for putting aside morality has to do with his views about what law is. The essence of Holmes's thinking about the bad man was very tightly entwined with his ideas about the nature of law. Of the bad man, he said:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.<sup>28</sup>

Of the law, he believed that it is a prediction about what courts will do: "When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court."<sup>29</sup> Applying this idea to contracts, he said: "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."<sup>30</sup>

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26. Holmes, *supra* note 25, at 459.

27. *Id.*

28. *Id.*

29. *Id.* at 457.

30. Holmes, *supra* note 25, at 462.

Despite his famous statement that the life of the law has not been logic but experience,<sup>31</sup> Holmes spoke of the law as decided by judges, who in his view decide cases based on experience. He was quite literal in saying that study of the law was the study of books: “The means of the study are a body of reports, of treatises, and of statutes . . . .”<sup>32</sup> Holmes was obviously not privy to later sociological ideas of law as how people behave toward each other in their various social relations and institutions, that is by an idea of “the living law,”<sup>33</sup> or by the concept of law as culture and plural culture at that.<sup>34</sup>

Holmes also pictured public enforcement as strong, fearsome even, and available to deal with the bad man.<sup>35</sup> An important question about contract law in action today is whether it deals adequately with the bad man and woman, for it surely does not typically force them to pay damages if they do not keep their contracts.<sup>36</sup>

If we consider the machinery of contract law in action, courts do not enforce promises very often, and both Holmes and Fried seriously underplay this point. *The Restatement (Second) of Contracts*, published in the same year as *Contract as Promise*, is a progressive expression of the art of the possible in the law of contracts and one that clearly has more in mind than party autonomy (for example, in its robust promotion of a variety of policing doctrines).<sup>37</sup> But for present purposes, it is interesting that the Restatement defines a contract as a promise or set of promises for the breach of which the law provides a remedy<sup>38</sup> and thus could be seen as supporting Fried’s focus on promise, although the Restatement adds the idea that only when the law provides a remedy for breach is a promise a contract. The Restatement is a statement of legal doctrine to be applied by courts and does not have law in action as a focus, but if one takes

31. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic; it has been experience.”).

32. Holmes, *supra* note 25, at 457. Holmes was, of course, steeped in the tradition of Christopher Columbus Langdell, the originator of the case method of legal education at Harvard, where Holmes was a law professor. The first casebook was Langdell’s *SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871).

33. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 493 (Walter L. Moll trans., Transaction Publishers 2001) (originally published in German in 1913).

34. LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 193-94 (1975).

35. Holmes, *supra* note 25, at 457 (“People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

36. See *infra* Part IV (discussing the morality of a contract law that is weak and leaves the parties mostly to their own devices).

37. See generally *RESTATEMENT (SECOND) OF CONTRACTS* (1981); see also Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 *COLUM. L. REV.* 1420, 1425-26 (2005) (discussing the progressive quality of the *Contracts* Restatement). The policing doctrines of the *Restatement (Second) of Contracts*, *supra*, include those dealing with (1) capacity, §§ 12-16; (2) misrepresentation, §§ 159-172; (3) duress and undue influence, §§ 174-177; (4) reasonable expectations in form contracts, § 211; (5) good faith and fair dealing, § 205; and (6) unconscionability, § 208.

38. *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1981).

the idea of providing a remedy at face value—in the law in action sense of actually rather than theoretically providing a remedy—there are very few contracts indeed. In many types of deals, contract law is not practically enforceable and fails to achieve its professed goals, and sometimes, as a result, it has been supplemented with statutes and administrative enforcement. Most consumer contracts, for example, drop out of the sphere of the practically enforceable, and as a result, legislatures have enacted elaborate state and federal consumer-protection statutes with enhanced remedies.<sup>39</sup> That you can find freak consumer-contract cases in the law reporters does not mean that consumers can frequently enforce contracts, and often businesses cannot afford to enforce contracts either.

Contract remedies are often too weak to be pursued at all, but even if they can be used, they will not give the aggrieved party the expectation interest in the sense of full compensation for not getting a promised performance. The propaganda of contract, in the form of appellate opinions, is that contract law will put an aggrieved party in as good a position as if the contract had been performed. As a practical matter, however, a party considering an attempt at enforcement faces the risk of losing the case even if in the right as legally defined because there can be a big difference between what happened and what a contract party can easily prove. This risk factor and the cost of putting on proof are part of the routine infeasibility of pursuing enforcement in the courts. Furthermore, contract doctrines about remedies fail many times over to give parties the benefit of the bargain. Attorneys' fees are not typically recoverable under the common-law American rule, absent contracting out of this background rule,<sup>40</sup> so that only contracts involving large sums of money are routinely enforceable, and the deduction of attorneys' fees from an expectation award means the expectation is not in fact fully protected. In addition, contract law denies damages for loss that is unforeseeable or not reasonably certain, and aggrieved parties are expected to take steps to avoid loss, doctrinal rules that reduce potential damage awards even in many big-dollar-volume contracts and

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39. See *infra* Part IV for discussion of this point. See generally Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contract Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575 (1989). Consumer law itself does not necessarily live up to its professed goals, either, although it is stronger than the common law of contracts in providing remedies such as statutory damages and attorneys' fees to a prevailing party. Furthermore, to the extent that consumer law's regulation of consumer contracts at the front end is ineffective, we end up with back end problems and the need for further remedies, such as bankruptcy, to provide forgiveness.

40. Theodore Eisenberg & Geoffrey P. Miller, *The English vs. The American Rule on Attorneys Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Companies' Contracts* (NYU Law & Econ. Research Paper Series, Paper No. 10-52, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1706054](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706054) (discussing fees in context of large companies contracting with each other, where opt-out by use of an attorney-fee clause is relatively easy). Eisenberg and Miller found that the American rule of no recovery of attorney fees is used about the same amount as the English or loser-pays rule. Additionally, use of the American rule is associated with a likely long-term relation between the parties and inversely associated with greater contract standardization, which suggests that sophisticated parties often find the American rule value-enhancing.

make pursuing legal remedies unlikely to be cost-effective; all these limitations have even been woven into a theory that contract doctrine reflects implicit understandings that good-faith parties should cooperate to minimize possible losses from breach and that the law should not serve a purpose of unilateral vindication of a claimant over a breacher.<sup>41</sup>

We have at this point not even begun to talk of disparities in sophistication, wealth, and other forms of power and how they play out in the realm of contract law in action. If we think of the old chestnuts of contract casebooks, they often involve individual-to-individual contracts—Uncle William Story Sr. and his nephew Willie and the uncle’s promise to pay \$5000 if Willie abstained from vice until age 21, the estranged Mr. and Mrs. Balfour and his promise to support her, and George Hawkins and Dr. McGee and the doctor’s promise to give George a good, rather than a hairy, hand.<sup>42</sup> Exposing law students to these sorts of cases without cautionary comment could give them a misimpression that such cases are typical, when instead they are highly unusual because individuals cannot usually bear costs of litigation.

Fried uses “I and Thou” language when describing contractual morality, which makes the idea of autonomy vivid.<sup>43</sup> One pictures two individuals making a deal. But consider, instead, disputes between Gateway, Inc., the computer company, and its individual customers,<sup>44</sup> or between Microsoft

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41. Concerning limitations on contract remedies, see RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 37, § 351 (unforeseeability as a limitation on damages), § 352 (reasonable certainty as a limitation on damages), § 350 (avoidability as a limitation on damages), and, for good measure, § 353 (damages for emotional disturbance not generally recoverable), and § 355 (no punitive damages absent tort for which they are recoverable); see also David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, in IMPLICIT DIMENSIONS OF CONTRACT 25, 42-46 (David Campbell et al. eds., 2003) (discussing the possibility of understanding the limitations on contract remedies as expressing implicit understandings that good-faith parties will cooperate to minimize losses, for example by mitigating after breach or having back-up ways of operating that will avoid losses); Stewart Macaulay, *Renegotiations and Settlements: Dr. Pangloss’s Notes on the Margins of David Campbell’s Papers*, 29 CARDOZO L. REV. 261, 279-80 (2007) (discussing the idea that there are opposing folk norms in contractual relation, one being “A deal is a deal,” and the other that a contract party should let the other party out of extremely burdensome promises, and also that renegotiation may sometimes be a win-win proposition that expands the pie); Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT’L L.J. 1319, 1366-67 (2001) (arguing that sophisticated parties can overcome reluctance to split losses by approaching a renegotiation as a chance to enhance value for both parties).

42. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891); *Balfour v. Balfour*, [1919] 2 K.B. 571; *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

43. When laying out his theory, Fried uses examples involving “I” making promises to “you.” FRIED, *supra* note 2, at 8-21. This stylistic choice brings with it an echo of Martin Buber’s *ICH UND DU* (1923), translated as *I AND THOU* (1937) (exploring I-Thou relationships, as opposed to I-It relationships, as central to the meaning of existence).

44. Most of the *Gateway* cases were brought as class actions seeking relief on statutory causes of action; they were only “contracts” cases because they sought to overcome standard-form arbitration clauses that eliminated class relief. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (1997) (in which Justice Easterbrook seeks rhetorically to underplay that the case is a class action, and indeed one for old fashioned intentional fraud, pursued using statutory theories); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998). These circumstances tell us nearly all we need to know about contract law in action in the

Corporation and its corporate customers, such as Prudential Financial, Inc. In the B2C context, the business—if well advised—will have carefully drafted a form that attempts to reduce the possibility of recovery to the vanishing point. If the consumer is to get any satisfaction, it probably will have no reference to the depressing form, the point of which is to depress a lawyer who might be considering representing the consumer.<sup>45</sup> The lawyer will quickly realize that there will have to be an expensive first round to fight the arbitration clause and that class relief to make litigation feasible may be precluded by arbitration rules unknown to consumers.<sup>46</sup>

In B2B transactions, there can also be issues of power and expense that make litigation impractical or impossible. Prudential must use Microsoft products and is as subject to take-it-or-leave-it terms from Microsoft as an individual consumer. Furthermore, the cost of suing Microsoft for breach of warranty or the like is a daunting prospect; there is no hope of obtaining the benefit of the bargain. Prudential is in a relationship with Microsoft, but not all relationships are happy or equal ones.

As an important aside, in an autonomy-based theory, it might be important to consider what “autonomy” of a business entity means. The only place I could find where Fried alludes to entities is when he discusses an example involving two companies and says having corporations on either side of the transaction “surely” makes no difference.<sup>47</sup> With closely held businesses, there may be no need to complicate theory; ideas about morality of keeping promises (and forgiving them) may work as well as they do for individuals. This is particularly true when there is no real separation between a business entity and a beneficial owner. But if we instead picture large corporations, “I and thou” does not capture the nature of the moral interaction. Entities might act “as if” they have morals, but they do not actually have them. There is also the complication that corporate managers have fiduciary obligations to shareholders. The managers are not supposed to be free to indulge their personal morals (an “agency cost”), with the effect of losing out in the marketplace to other entities with more ruthless managers who better serve their firm’s shareholders.<sup>48</sup> Contract law is weak in general, insufficient to

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consumer realm: it is weak in the extreme, and statutory causes of action are more promising, although still not necessarily practically usable. See *infra* Part IV.

45. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC’Y REV.* 115 (1979) (discussing how lawyers typically seek to avoid representing consumers, in part because it is not cost-effective to do so).

46. See *supra* note 44; see also David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1761675](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761675).

47. FRIED, *supra* note 2, at 80.

48. This is also an important point in B2C contracts, for example in consumer credit, where creditor ruthlessness has enabled profits in the subprime sector. See Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 *THEORETICAL INQUIRIES L.* 323, 334-36 (2006) (discussing hard-edged creditor culture that develops in deregulated competitive conditions).

make bad men (or women) be good, but it is probably even weaker to deal with “bad” corporations where control is exercised by managers who are fiduciaries for shareholders. When it comes to the law in action, individuals do have to sleep at night, and that may be a much stronger enforcer of their promises than contract law. Corporations do not need sleep or the moral tranquility that makes it possible. Furthermore, if we want individual fiduciaries to be able to sleep at night without prejudicing their firm’s shareholders, regulation is going to be needed, and regulation a lot stronger than that of the common law.<sup>49</sup> The morality of corporate promise-keeping and corporate adjustment-and-release behavior might be a fit topic suggested by Fried’s work.

In the B2B context, even if a lawsuit over a contract breach is feasible on the basis of probability of recovery of more than the cost of pursuing it, businesses will usually find it undesirable to pursue legal remedies for business reasons. Parties adjust because of the value of continuing relationships and good reputation; neither side gets its expectation in the sense of what was promised. Only when the relationship is over or no longer valuable is litigation likely to be considered, but settlement may occur before or just after a complaint is filed, for a combination of reasons already mentioned, including the cost of pursuing a lawsuit in terms of attorneys’ fees and costs of proof, risk of losing the suit, and reputational considerations. Expectations in the sense of benefit of the bargain are no more protected by settlement than they are by adjudication or informal adjustment. Furthermore, more and more contracts have binding arbitration clauses, and arbitral forums are known for splitting the difference or being biased in favor of repeat players.<sup>50</sup> And so on. The point is that the expectation interest is decidedly not protected by contract law or the shadow of contract law in any robust sort of way in most types of contracts, small or large.

Holmes viewed the lawyer’s role as centrally to predict what the courts will do for purposes of knowing what will be needed in court or to advise clients to avoid judicial attention,<sup>51</sup> but few of today’s lawyers would recognize that as an accurate job description. Appearing in court, particularly at the appellate level, is a rare activity. Nor is practicing law a simple matter of taking the holdings of reported decisions and turning them into legal advice. Lawyers help structure business relationships and adjust and readjust them primarily in light of business considerations. Prediction of what the courts will do matters much less, often not at all. Even mentioning legal rights can be to drop a bomb and destroy trust, a costly error when attempting to help contracting parties to go forward in peace.

To summarize, little legal enforcement of contractual promises is possible on a cost-effective basis, taking into account attorneys’ fees, doctrinal limitations

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49. *Id.*

50. Schwartz, *supra* note 46.

51. *Supra* note 29 and accompanying text.

on contract damages, costs of proof, risk of losing the case, and the value of relationships and reputation. When we talk about contracts in action, then, public enforcement is often no consideration at all or a very small one, not driving either planning or adjustment except far at the margin. Most of the time, the parties really are making their own law, untroubled but also unaided by a likelihood of public enforcement. Private ordering is for real. In this common context, morality or its absence may be quite important. It may be all we have got. Before exploring the morality of the profane world of contractual relations without realistic prospect of enlisting the help of the state, let us consider again what promissory morality entails and whether Fried's account of that morality is fully satisfying.

### III. WHAT THE GOOD DO ABOUT PROMISES

Fried believes promise-keeping is moral behavior because it respects the autonomy of the promisor and the promisee. But is that really why we keep promises, out of a reasoned commitment to our own and others' liberty? The song sung by Brownies stresses something more powerful: "When e're you make a promise . . . Engrave it upon your heart."<sup>52</sup> The good keep their promises if they can, but it may be more a matter of heart than head, of emotional ties to others and a commitment to building relationships.

The relational nature of promising brings us to a much less discussed aspect of promissory morality than promise-keeping, which is what the good do when those who have made promises to them experience regret. To his credit, Fried does discuss this side of the matter. He begins with a rigid, old-fashioned impulse: that holding others to their promises is to respect their autonomy and thus is moral behavior even though it seems harsh and ungenerous.<sup>53</sup> But then he concedes the legitimacy of several grounds for release. One is mistake, a category that he notes has the risk of becoming the thin end of the wedge,<sup>54</sup> and another is denial of enforcement to bad Samaritans who engage in predatory pricing during emergencies.<sup>55</sup> He draws a line, however, at the idea of denying enforcement on unconscionability grounds to those who take advantage of others' limited choices due to poverty or other everyday inequality, at least if there is some social minimum provided to all in a democratic society.<sup>56</sup> The reason for resisting use of a broad version of unconscionability is an idea that collective action should be the means of redistribution, if any, not ad hoc paternalism.<sup>57</sup> Here he is answering Duncan Kennedy.<sup>58</sup>

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52. CARROLL, *supra* note 1.

53. FRIED, *supra* note 2, at 19-21.

54. *Id.* at 58-67.

55. *Id.* at 109-11.

56. *Id.* at 103-09.

57. FRIED, *supra* note 2, at 106.

Most interesting of all, however, Fried talks about releasing others from promises they regret out of a spirit of compassion and generosity, although sternly warning that doing so risks not taking them seriously, infantilizing them, and not making them learn to be more prudent.<sup>59</sup> Later in the book, however, the sternness disappears in a discussion of the freedom to share voluntarily and to do so altruistically out of concern for one's fellow man.<sup>60</sup> Enforced sharing is what he finds unacceptable, a form of tyranny.<sup>61</sup> Bringing up enforcement at this point in the argument, however, is to retreat from morality to law. Promise-keeping is moral behavior, yet courts enforce it (at least to some limited extent). Acting altruistically is certainly to act out of respect for persons, just as keeping promises is, and is also moral activity—so why should it not be enforced as well? A moral, self-governing individual typically both keeps promises and acts altruistically every day in all the give-and-take of life. Furthermore, promissory morality as conventionally practiced involves holding ourselves to higher standards than we do others, perhaps in the hope of reciprocity when we fail to live up to our own standards. We engrave promises upon our hearts,<sup>62</sup> but we also release others because we know that we ourselves often disappoint and will need forgiveness.<sup>63</sup> The Brownie song needs a second verse about that. Fried's attempt to equate contractual morality with promissory morality does not account for the conventional morality of forgiveness.

Fried's argument that contract should not be redistributive among the parties also runs up against bankruptcy law, something he acknowledges and treats as a circumscribed exceptional case of enforced altruism.<sup>64</sup> With about 1.5 million bankruptcies a year on average in the last two years, most of them seeking discharge of multiple contractual obligations, it is a nontrivial exception.<sup>65</sup> An insight of the law in action approach is that when contract law fails to address a problem, often another body of law does so (in this case bankruptcy),<sup>66</sup> with the result that the subject matter of contracts flies away to

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58. *Id.* at 5, 136 & n.11 (referring to Duncan Kennedy's discussions of duress and unconscionability and citing Kennedy's *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)); *see also id.* at 76-77 (discussing Kennedy's article and rejecting the idea that altruism is part of contractual obligation, seeing it as an attack on contract as promise).

59. *Id.* at 19-21.

60. *Id.* at 90-91.

61. FRIED, *supra* note 2, at 90-91.

62. CARROLL, *supra* note 1.

63. This is the idea behind the biblical passage, "forgive us our debts, as we forgive our debtors." *Matthew* 6:12 (King James).

64. FRIED, *supra* note 2, at 108-09.

65. Press Release, Admin. Office of the U.S. Courts, Growth in Bankruptcy Filings Slows in Calendar Year 2010 (Feb. 15, 2011) (reporting 1,593,081 bankruptcy case filings in 2011, with 1,536,799 of them nonbusiness cases); Press Release, Admin. Office of the U.S. Courts, Bankruptcy Filings Slide in 2011 (Feb. 7, 2012) (reporting 1,410,652 filings in 2012, 1,362,847 nonbusiness cases).

66. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures* 67 AM. BANKR. L.J.

other fields.<sup>67</sup> Of course, creditors have noticed that bankruptcy law, unlike contract law or most consumer-protection statutes, provides usable remedies, and hence we have had a long campaign—only partially successful—to cut back on access to bankruptcy under the banner of “credit morality,” playing up the promise-keeping side of the story and de-emphasizing forgiveness.<sup>68</sup>

Rather than try to support my argument about adjustment, release, and forgiveness as part of promissory morality with Kant or any other moral philosopher, I will instead rely on a literary work as a form of experiential support.<sup>69</sup> Harriet Beecher Stowe’s *The Minister’s Wooing*<sup>70</sup> puts promises at the center of the dramatic action. The context is a Puritan community in late-eighteenth-century New England where everyone is impossibly good, with only a few exceptions. These good folk live in the thrall of a harsh doctrine that few among them will achieve eternal salvation and most will be damned to a horrible eternal fate. Stowe treats this as a situation ripe for comedy.

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501, 504-05 (1993) (discussing the lack of other usable legal remedies for consumers as one of the drivers of consumer bankruptcy filings). In the current mortgage crisis, there is a problem of lack of usable remedies for “honest but unfortunate” debtors, see *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), to give them ways to stay in their homes with some forgiveness of debt; meanwhile, there has been media fascination with a different and much smaller moral phenomenon, strategic default, meaning default by debtors who can afford the payments but who decide not to pay because the loan is underwater and the property appears unlikely to appreciate quickly. See Meredith R. Miller, *Strategic Default: The Popularization of a Debate among Contract Scholars*, 9 CORNELL REAL EST. REV. 32 (2011) (discussing media attention to strategic default and its morality).

67. FRIEDMAN, *supra* note 13, at 141-42; see also *supra* note 39 and accompanying text (discussing statutory consumer law as another example of how the law responds to the inadequacy of contract law).

68. Braucher, *supra* note 48, at 336-39 (discussing changes in consumer culture brought on by the huge growth in the supply of consumer credit and how creditors then used “credit morality” campaigns to try to cut back on bankruptcy access when the ranks of the over-indebted inevitably expanded with the increase in debt).

69. For the view of reading literature as experience from which we learn, see, e.g., *THE EXPERIENCE OF LITERATURE: A READER WITH COMMENTARIES* (Lionel Trilling ed., 1967).

70. HARRIET BEECHER STOWE, *THE MINISTER’S WOOING*, in *THREE NOVELS* 521 (Library of Am. 1982) (1859). *The Minister’s Wooing* was first published in book form in 1859, seven years after *Uncle Tom’s Cabin*. *Id.* at 1474 (in “Note on the Texts,” also stating that both first appeared in serial form). Stowe was the daughter of a minister, Lyman Beecher, who preached Calvinism, temperance, and resistance to free-thinking Unitarianism; he was also slow to condemn slavery. See generally JOAN D. HEDRICK, *HARRIET BEECHER STOWE: A LIFE* (1994). Stowe obviously has some personal business to take care of in *The Minister’s Wooing*. Of course, synopsis cannot provide the moral or artistic experience of reading the book, which I highly recommend to contracts scholars for insight and pleasure. It is interesting that *Uncle Tom’s Cabin*, despite its cringe-inducing stereotypes of its black characters, is a masterwork of advocacy, arguing that nearly all men and women are fundamentally good (the debased slave owner Simon Legree being the obvious exception, essentially the devil incarnate), and that the institution of slavery itself was evil and stood in the way of realizing human goodness in full. Stowe even explores, through conversations of her characters, the law in action with respect to slavery—noting that laws permitted extreme brutality, but that the interest in slaves as property protected them to some extent. Also, though an absolutist on abolition, Stowe observed that slaves were not usually oppressed to the full extent permitted by law for reasons other than self-interest, namely, that good people often balked at using immoral legal rights. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN*, in *THREE NOVELS*, *supra*, at 1, 258-62. On the other hand, this would not stop the bad man, represented by Legree, and thus Stowe also vividly shows us Holmes’s later point about the need for law to constrain outliers who do not care about morals.

In Stowe's novel, Mary, the beautiful, spiritual daughter of the Widow Scudder, loves a young man named James, her playmate since childhood and only lately the object of her womanly affections. James is interesting to her not only because he is free-spirited, adventurous, and has dark curls, but also because he is in spiritual peril. Mary fears for his immortal soul. He has gone to sea, traveled the world, and encountered temptation. About to set sail again for three years, James experiences a callow sort of love for Mary and goes to see her with the thought of extracting a promise of marriage by pretending that he believes only she can help him to save his soul. But in her presence, he finds that her shining goodness fills him with awe and a true appreciation for his risk of damnation. He confesses his original intention, vows to try to be good, and tells her he will not seek a promise of her hand because she should remain free for a better man. She promises to pray for his salvation. He promises to try to live up to her hopes for him.

James goes off to sea, and Mary returns to her dutiful outward life of helping her mother and others around her, but her inner life is all about James and her fervent wish that he will be able to see his way to goodness. Then word comes that James has been lost at sea in a storm and gone to his eternal reward or doom. Mary collapses. Her extreme grief is explained to the cerebral, theoretical, and middle-aged minister by a friend of them all, a busybody and dressmaker named Miss Prissy, who, "with womanly reserve," tells him, "It is same to her as if he'd been an own brother."<sup>71</sup> Thus the minister has no knowledge of prior claims on Mary's affections. Her long, slow recovery from grief begins. Mary has lost the capacity for joy, but she learns to think she may be contented and useful as the helpmate of the worthy minister, more than twice her age. She eventually accepts his proposal of marriage in a spirit of vocation. He is working on a stern new theology, one the ordinary mortals of his congregation cannot understand. The wedding date is set, the dress made, and a week before the ceremony, James returns. He lives! It turns out that the report of his death was in error; he was swept overboard on a rocky coast, but he made it to shore and, by a circuitous route, home.

Now we reach the central dilemma of the story. James did not extract a promise of her hand from Mary before he left, and since then she has given her solemn promise to the minister. It must be kept. Mary engages in a series of debates with those around her about her promissory obligation. She explains to James, "My word is pledged. I cannot retract it. I have suffered a good man to place his whole faith upon it,—a man who loves me with his whole soul."<sup>72</sup> She also points out that if James had come back a week later, she would already be the minister's wife, and it is all the same as if she already were. When James responds with a mistake argument, pointing out that she never would

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71. STOWE, *THE MINISTER'S WOOING*, *supra* note 70, at 718.

72. *Id.* at 833.

have given her word had she known he (James) was alive, she responds, “but I did give it. I have suffered him [the minister] to build all his hopes of life upon it.”<sup>73</sup> That she made a mistake, so her thinking goes, would not make it any easier on the minister for her to break her promise.

In an earnest conversation about her promise between Mary and her friend and confidant, an elegant Frenchwoman of questionable repute, the friend observes, “Any good priest could dispense you from that.”<sup>74</sup> Mary will have none of this old-world Popish laxity, declaring, “I do not believe . . . in any earthly power that can dispense us from solemn obligations which we have assumed before God, and on which we have suffered others to build the most precious hopes.” The Frenchwoman persists, arguing that even the minister himself would unbind her from “this dreadful promise.”<sup>75</sup> But Mary is resolute: “Perhaps he would . . . if I should ask him; but that would be equivalent to a breach of it. Of course, no man would marry a woman that asked to be dispensed.”<sup>76</sup> Mary thinks it would be wrong to even ask for release because that would be equivalent to a breach, holding as she does to a strict doctrine of morality that does not accept any excuses from her obligation to keep her promise.

The reader recoils at the thought that Mary will renounce James and marry the minister in the name of moral principle. The Frenchwoman sums up our feelings about this doctrinalism: “*Mais c’est absurde.*”<sup>77</sup> Every feeling rebels. The novelist’s solution is that the town busybody, Miss Prissy, must take it upon herself to go to the minister and tell him that Mary has always loved James and never would have agreed to marry anyone else if she had known he was alive. The minister has just one question: whether Mary, James, or anyone else asked Miss Prissy to seek Mary’s release. The answer is a truthful no, and this seems to please the minister. The minister spends a sleepless night but despite his harsh theology he knows he must give Mary up. In the morning, he does so with a good grace, rejecting her sobbing protestations that she must keep her promise. The minister presides at her wedding to James and becomes a dear friend for life of Mary and James. A promise is undone, and no one ever

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73. *Id.* at 834.

74. *Id.* at 845.

75. STOWE, THE MINISTER’S WOOING, *supra* note 70, at 845.

76. *Id.* This observation by Mary is an interesting point, raising the question: Why would no man hold a woman to a promise of marriage that she regretted? We might think it a matter of delicacy of feeling, but there is a more practical reason: A marriage in which one party enters it with regret is unlikely to realize a dreamed-of happy expectancy of cooperative harmony. This is a point with force in other relational realms; a reason to let any relational contract partner out of the relationship is that shirking and unpleasantness are the inevitable result of unwilling association. It is better to look for a willing partner. Indeed, the minister does better by releasing Mary; we learn at the end of the novel that he “did not want in time a hearthstone of his own, where a bright and loving face made him daily welcome; for we find that he married at last a woman of a fair countenance, and that sons and daughters grew up around him.” *Id.* at 871.

77. *Id.* at 845.

acts other than with perfect honor, except perhaps the busybody Miss Prissy, but Stowe makes her the heroine of this comedy, for daring to intervene to restore the right as we know it. The minister is portrayed as a rigid doctrinalist, working out a theological theory that is harsh and inflexible. Stowe mocks his theory both for its incomprehensibility to his flock and in the denouement in which he must rise above doctrinalism and do the simple good deed of letting Mary out of a promise she regrets.<sup>78</sup>

Lawyers might be tempted to raise protestations that the specialness of the marital relationship and the mistake of fact by Mary at the time of her promise (her belief that James was dead) give two grounds over for her release. But that would be to miss the point. This is a story about people who don't subscribe to those views; they know that the good keep their promises and consider it a breach even to ask for dispensation, and they also know to release others from promises they regret. But they need help to escape from theory and be guided by their hearts. Stowe explains why the help is needed:

Some will, perhaps, think it an unnatural thing that Mary should have regarded her pledge to the [minister] as of so absolute and binding force; but they must remember the rigidity of her education. Self-denial and self-sacrifice had been the daily bread of her life. Every prayer, hymn, and sermon, from her childhood, had warned her to distrust her inclinations, and regard her feelings as traitors. In particular had she been brought up to regard the sacredness of a promise with a superstitious tenacity; and in this case the promise involved so deeply the happiness of a friend whom she had loved and revered all her life, that she never thought of any way of escape from it. She had been taught that there was no feeling so strong but that it might be immediately repressed at the call of duty . . . .<sup>79</sup>

The butt of Stowe's wit is doctrinalism that teaches us to repress our feelings, which of course include important moral intuitions.

#### IV. MORALITY AND CONTRACT LAW IN ACTION

The two principles used by the characters in Stowe's novel are hard to reconcile. Promise-keeping is in tension with the need for release from commitments later regretted with good reason. The business world, however, understands this need for flexible relationships, at least in some contexts.

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78. Stowe also mocks his sermon against slavery, for use of rational argument and failure to move the congregation, whose members reassure themselves that he is a fanatic. *Id.* at 673-75. The upshot is that the slaveholders of the community join another congregation. Stowe, the "little woman"—in the phrase of Abraham Lincoln—who moved a nation to oppose slavery with her depictions of the human cost in *Uncle Tom's Cabin*, understood well the weakness of a dry appeal to reason in an effort to redress a moral outrage.

79. STOWE, *THE MINISTER'S WOOING*, *supra* note 70, at 835.

Macaulay refers to these as “non-contractual relations,” of which he found considerable evidence in his study of mostly manufacturing transactions. He learned that buyers felt they could cancel an order without committing a breach of contract, paying only for any wasted expenses of the seller, and sellers agreed, making these sorts of comments: “You can’t ask a man to eat paper [the seller’s product] when he has no use for it,” and, “One doesn’t run to lawyers if he wants to stay in business because one must behave *decently*.”<sup>80</sup> Furthermore, there was frustration with lawyers’ more rigid views, as with this comment by a businessman: “You can settle any dispute if you keep the lawyers and accountants out of it. They just do not understand the give-and-take needed in business.”<sup>81</sup> Quite apart from the specifics of their norms, these businesspeople clearly were thinking in moral terms, just in different ones from the realm of contract doctrine. Lawyers adhering to a doctrine that contract breach requires payment of expectation damages only impede businesspersons trying to work things out.

Lest anyone think that Macaulay’s findings reflect a bygone era, consider a recent exploration in an online magazine of what to do about promises in the business world today, written by a man who calls himself both a businessman and, jokingly, a “theologian.”<sup>82</sup> Philip Du Toit first discusses the popular business philosophy of “under promise and over deliver” and finds it problematic over time. He makes the sophisticated point that customers merely adjust their expectations to the pattern of performance and expect more than was initially promised. His observation supports the view that the real deal is how people in a relationship behave over time, not the paper deal made at the outset. He then considers whether it is better to promise “spot-on,” but explains that this ideal is both stressful for a business that tries to do it and unrealistic when it is necessary to rely on third parties. His solution is fascinating:

A much better strategy is to try *not to make promises at all*, or to make more “tentative” or “relative” promises.

E.g. “I will do my best to deliver on Monday” or “It normally takes two work days” or “If my supplier delivers on time it should be here by

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80. Macaulay, *Non-Contractual Relations*, *supra* note 10, at 61 (emphasis added); *see also* Jeffrey M. Lipshaw, *Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise*, 3 *LAW, CULTURE & HUMAN* 82 (2007) (developing the idea that the choice whether to seek to enforce a contractual promise is a moral one).

81. Macaulay, *Non-Contractual Relations*, *supra* note 10, at 61. Being open to renegotiation may sometimes be its own reward, in that there may be opportunities to enhance value for both parties, to expand the pie. *See* Salacuse, *supra* note 41, at 1366 (noting value created by renegotiation).

82. Philip Du Toit, *Under Promise Over Deliver?*, *EZINE ARTICLES* (May 17, 2009), <http://ezinearticles.com/?Under-Promise-Over-Deliver?&id=2357864> (describing himself as a “Businessman, piano teacher, web developer, theologian”).

tomorrow.”<sup>83</sup>

He then adds that not making hard promises works well when combined with three additional principles:

*Honesty.* Tell your client the truth in all circumstances. In this way you equalize expectancies and [it] takes off pressure from yourself. If something goes wrong, then your side is clean (and you can sleep at night).

*Transparency.* Give your customers enough details that they can understand how the process works or which procedures are followed in delivering the service. Clients want to know what they are paying for.

*Consistency.* Explain your company procedure to your clients. Try and keep with these procedures and try to treat all customers equally. Loyal customers may have a higher priority, but this principle may fit into a bigger picture of consistent procedure. Making too many exceptions may put more pressure on your business, or create uneven expectancies. This will also help you to know when to say “no” without being nasty or compromising on your level of service.<sup>84</sup>

Obviously, some customers in some sorts of deals will not accept having no promises or only tentative or relative promises. One can never stress enough the variety and plurality of business practices. The example is illuminating, however, about the difficulty of living with promises and why businesses try to avoid them in favor of more flexible dealings, in part motivated by promissory morality, and all in service of having good business relationships.

Lawyers and judges may err if they too readily impose “promise” as a description of what has been happening between businesspersons. Background rules of law may come as quite a surprise to those in business, given how little they are considered in many sorts of business relationships. Du Toit attempts to reconcile business norms with being a good person, and his effort suggests a type of worthy project for contracts scholars—qualitative study of

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83. *Id.* It is sometimes argued that legally enforcing cooperative norms may “crowd out” these norms. See generally Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009) (answering the “crowding out” argument by asserting that nonlegal incentives are much more important and that law is therefore unlikely to have much effect). In Du Toit’s piece, legal scholars might see a possibility that enforcing promises could crowd out making promises, but it is notable that there is no allusion at all in his article to legal enforcement. His focus is on having good relationships for business and moral reasons, and those are his reasons for not making promises, not the risk of legal enforcement of them. We probably do not need to worry much that legally enforced forgiveness crowds out informal forgiveness any more than enforcing promises crowds out making promises. To the extent that formal, sacred law is symbolic, and has little influence on behavior, perhaps we want that law to reflect our complex morality of promise-keeping balanced by forgiveness rather than a one-dimensional morality of promise-keeping. See *supra* note 17 and accompanying text.

84. Du Toit, *supra* note 82.

businesspersons' ways of operating in various transactional contexts to find out what practices let them sleep at night, or not. This would be work in the tradition of Eugen Ehrlich and his idea of living law; he wrote, "Business custom, business honor, and business decorum constitute elements of commercial legal life."<sup>85</sup> It is an interesting question how businesspersons set realistic yet high expectations for themselves and try to do the right thing at the same time. Having principles, such as honesty, transparency, and consistency, may be how they can pull this off. In the wake of some extreme risk-taking that combined with regulatory failure to cause a financial crisis with worldwide ripple effects known as the Great Recession,<sup>86</sup> we ought to be especially interested in breakdowns of business honor and decorum. Private ordering is capable of running amok. We might also be interested in ideas of custom, honor, and decorum among business lawyers, a kind of research project where the value added by law professors conducting interviews is greatest.<sup>87</sup>

While legal scholars with many perspectives emphasize that businesses and businesspersons behave in ways that build and preserve valuable relationships and reputations, it is plausible that these are the instrumental rewards for something experienced differently. For example, listening to and learning from customers, internalizing what they want and delivering it, avoiding making promises that might not be met, and dispensing forgiveness liberally may actually create relationships, not just their rewards. To act as if you care, it may be simplest to actually care. The subjectivity of relationships in business perhaps bears more examination.

If we turn to B2C deals, access to law for either side is even more unlikely than in the B2B context. Most individuals do not hire lawyers to represent them when they enter into even their most significant transactions. Furthermore, most never enter into a contract that they could afford to enforce in court. When something goes wrong in a transaction, most of the time consumers either get informal satisfaction or they lump it.<sup>88</sup> The real action in dispute resolution is in the informal realm, and what goes on there in the

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85. Ehrlich, *supra* note 33, at 58 (also saying that these add up to the concept of "fair dealing"). For discussion of the absorption of Ehrlich's idea of "living law" into the law in action approach, see *infra* notes 113-115 and accompanying text.

86. KATHLEEN C. ENGEL & PATRICIA A. MCCOY, *THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS* (2011).

87. Macaulay, *supra* note 45, at 119-20 (discussing the ready willingness of lawyers to discuss their practices with an inquiring law professor, with of course some risk that they also become willing to go along with a professor's definition of the situation). Law professors understand the professional roles of lawyers, and thus make excellent interviewers, probably better than social scientists, when subjects in a study are lawyers.

88. See Whitford, *supra* note 19 (generally discussing ineffectiveness of much of consumer law); Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1450-54 (concerning low rate of complaints by consumers to anyone after perceiving a problem with a product, with most complaints to the seller and rarely to a third party, such as a lawyer, and noting relatively good response if a complaint is made to the seller).

adjustment of many varieties of consumer transactions is a field of inquiry with endless possibilities.<sup>89</sup> Some consumers do get satisfaction after disappointment in their deals, but they have to seek it first. Complaining or entreaties by consumers, with a goal of getting discretionary benefits or forgiveness, is not necessarily behavior equally distributed across demographic groups; if the unsophisticated or disfavored who accept disappointment in transactions turn out to be relatively poor and more likely to be minorities, we might be concerned that they subsidize the more well-to-do and majority consumers who feel more entitled to demand adjustment.<sup>90</sup> A related problem is that by obscuring costly terms, and thus the true cost of a deal, businesses can lure in unsophisticated consumers unaware of these terms while the more sophisticated only enter deals if the costly terms will not affect them, raising a similar concern about socioeconomic discrimination and cross-subsidization.<sup>91</sup>

Another question is what sort of communication is most likely to be effective in informal adjustment in a B2C context. Debt collectors know to use guilt about promise-breaking to get people to pay. They use moral argument, presumably because it works, which means that debtors are motivated by morals to pay their debts and even those of dead relatives.<sup>92</sup> Along the same lines, consumers seeking release and forgiveness may be better off with appeals based on their changed circumstances than with more legalistic claims. A consumer buyer who is ill or unemployed may have a better chance of getting out of a deal than a person claiming breach of warranty.<sup>93</sup> Similarly, borrowers are probably more likely to get concessions based on having been out of work or having some other form of hardship than because they just overspent.<sup>94</sup>

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89. Braucher, *supra* note 88, at 1447-57 (collecting empirical studies about consumer-complaint behavior in the decade and a half after the advent of the consumer movement). It is time for more such work.

90. Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 900-03 (2008) (discussing possibility that a consumer-complaint policy of “the squeaky wheel gets the grease” by businesses in response to customer attempts to bargain around boilerplate could involve socioeconomic discrimination, and relating this point to the “shrouding” theory that the costs of obscured terms in boilerplate for consumer goods and services are disproportionately borne by the unsophisticated and involve cross-subsidization of those better off by those who are worse off).

91. Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505 (2006).

92. Chris Serres, *Death Won't Stop These Debt Collectors*, MINN. STAR TRIB., Sept. 19, 2010, at 1A (discussing use of guilt to get individuals who are not co-signers to pay debts of deceased relatives).

93. See *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393 (1972) (buyer of a boat sought return of his deposit because of illness; ultimately, the court held that the customer was liable for the seller's lost profit). This could be a good example of a freakish appellate case, in that the seller did not release the buyer when he tried to cancel because of illness. See MACAULAY ET AL., *supra* note 16, at 74 (concerning interviews with car dealers about their release policies; most of these dealers released customers and thought it ludicrous that the law might allow them to hold customers liable for lost profits, although some would only return deposits to customers with a legitimate reason for backing out).

94. Having a hardship of some kind is explicitly part of the Obama Administration's Home Affordable Modification Program for modification of the mortgages of borrowers at risk of foreclosure; the reason is to avoid “moral hazard.” Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 765

Contract may be a strict-liability legal theory, at least in the law on the books, but forgiveness may be much more likely in the informal sphere if one has a good reason. If so, the law in action effectively displaces the law on the books and makes informal remedies—often the only ones available—depend on the reasons for default or desired redress.

In the current mortgage crisis, mortgage servicers are the focus of popular outrage because of their unwillingness to modify mortgage loans for those who cannot afford them but who could pay more than would be realized in a foreclosure sale. Consumers in these relatively large transactions have bothered to ask for partial forgiveness, and conventional morality demands relief. The failure of servicers to respond sufficiently has brought down public disapproval on the mortgage-lending industry, leading to a search for legal rights (such as relief from fraud, deception, and unfairness<sup>95</sup>) to set up against an industry dug-in to the assertion of strict contract rights against distressed homeowners.

A final question about the morality of contract law in action concerns the school of thought itself. If one goes back to the beginning, law in action was borne of a frustration—expressed by Pound—with “an over-individualism in our doctrines and rules,”<sup>96</sup> based upon “the acceptance of Herbert Spencer’s Kantian formula of justice, the theory that government is to be held down to the inevitable minimum and the uncompromising insistence that men should be . . . made to stand or fall by the consequences of their choice.”<sup>97</sup> Pound traced this kind of thinking to Puritan theology (picture Stowe’s characters, discussed in Part III above), which he saw as the basis of the common law at the beginning of the twentieth century, carried down from earlier times<sup>98</sup>:

The fundamental proposition from which the Puritan proceeded was the doctrine that man was a free moral agent, with power to choose what he would do and a responsibility coincident with that power. He put individual conscience and individual judgment in the first place. No authority must be permitted to coerce them, but every one must assume and abide the consequences of the choice he was free to make.<sup>99</sup>

He said this Puritan intellectual history “has given us the conception of liberty of contract, which is the bane of all labor legislation.”<sup>100</sup> He observed that “a

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(2010) (discussing hardship requirement for a HAMP modification as reflecting stated government concern with moral hazard).

95. *Id.* at 776-77 (discussing the possible uses of these legal theories).

96. Pound, *supra* note 9, at 26.

97. *Id.* at 29.

98. *Id.* at 31.

99. *Id.* at 33.

100. Pound, *supra* note 9, at 33.

gulf has grown up between social justice, which is the end men are seeking today, and legal justice; the movement away from the Puritan standpoint in our social and economic and political thought has not been followed by legal thought.”<sup>101</sup>

As for the gap between the law in action and the law in books, he urged changing the books: “It is the work of lawyers to make the law in action conform to the law in the books . . . by making the law in the books such that the law in action can conform to it . . . .”<sup>102</sup> Writing in an era when “freedom of contract” was invoked to find labor laws unconstitutional, he deplored the unwillingness of courts to accept change through social legislation.<sup>103</sup> In our own time, gains made in labor contracts have led to arguments to put aside the morality of promise-keeping.<sup>104</sup> There is a common theme across a hundred years here, but it is not a story about consistency in promissory morality.

As in Part III above, Pound used a literary example, drawn from another great American novelist of the nineteenth century, to make his point about the trouble with the law in books: In Mark Twain’s *Adventures of Huckleberry Finn*, Tom Sawyer expounds to Huck a principle he learned from reading, that plots to free prisoners must involve digging with a small case-knife.<sup>105</sup> When that doesn’t work to rescue the run-away slave Jim, however, Tom demands again, “Gimme a *case-knife*,” accepts a pickaxe from Huck, and says not a word, leaving Huck to comment that Tom was always, “*Full of principle*.” Pound notes that Tom made an important discovery known in the law: “adhere to principle—but use the pickaxe.”

From reading Pound we learn that pursuit of social justice, meaning a communal rather than a libertarian morality, has been part of the law in action perspective since the beginning. Also, his idea was not to conform the law in action to the law in books but the other way around. Since then, what has the school of thought become? There was a time when a need was felt to justify the law in action approach to critics from the left. Conceding that all observation is value-laden, empiricism might be considered an arduous way to learn what can be gleaned without so much effort, by analysis of concepts and goals.<sup>106</sup> William Whitford responded, however, that we can learn from

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101. *Id.* at 30. He also urged, “[L]et us welcome new principles, introduced by legislation, which express the spirit of the time.” *Id.* at 35.

102. *Id.* at 36.

103. *Id.* at 15-16, 21.

104. Jeb Bush & Newt Gingrich, Op-Ed., *Better Off Bankrupt: States Should Have the Option of Bankruptcy Protection to Deal with Their Budget Crises*, L.A. TIMES (Jan. 27, 2011), <http://articles.latimes.com/2011/jan/27/opinion/la-oe-gingrich-bankruptcy-20110127> (arguing for state bankruptcy as a way to deal with unfunded pension obligations). *But see supra* note 68 and accompanying text (concerning creditor calls for “credit morality” in recent bankruptcy reform efforts).

105. Pound, *supra* note 9, at 12.

106. William C. Whitford, *Critical Empiricism*, 14 LAW & SOC. INQUIRY 61 (1989). Fried himself was, to a significant degree, responding to Critical Legal Studies, which was at its most robust stage when he wrote

observation things that we cannot from books, and we can advance law reform in the process.<sup>107</sup> In addition, modesty about claims of knowledge is perhaps the highest value in the law in action school of thought, one that should be shared regardless of political stance.<sup>108</sup>

Consideration of what law in action means today must take into account Macaulay's recent exploration of possibilities for a "New Legal Realism" based on examination of the legal order from the "bottom up."<sup>109</sup> Although Karl Llewellyn of course pursued some empirical projects,<sup>110</sup> he was more of a "top down" realist, who believed that unleashing candid, progressive appellate judges would bring about desired legal and social change.<sup>111</sup> The *Restatement (Second) of Contracts* was the ultimate doctrinal expression of that approach, for example, with its many references to "as justice requires" or "to avoid injustice."<sup>112</sup> Discussing bottom-up New Legal Realism, Macaulay argues for a broad definition of law in action, one that incorporates Ehrlich's ideas about "the living law," including studying all sorts of organizations and their norms as well as "life itself," as Ehrlich put it,<sup>113</sup> and not just Pound's idea of exposing gaps between law on the books and the law in action and conforming law to desired social action. In the Wisconsin tradition of law and society scholarship, Ehrlich was actually more explicitly considered than Pound; the phrase "law in action" came to incorporate the ideas of both Ehrlich and Pound as well as others who built on their legacy.<sup>114</sup> Macaulay argues that Ehrlich's

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*Contract as Promise.* See FRIED, *supra* note 2, preface (mentioning inter alia Morton Horwitz and "particularly" Roberto Unger and Duncan Kennedy as having "provoked me" with "their ingenious and relentless attack on premises I took for granted").

107. Whitford, *supra* note 106, at 65-66 (discussing how "critical empiricism" involves expressing and advancing the interests of underrepresented groups and has a role to play as part of the law in action school, but defending more politically mainstream projects that help to structure reform "to be modestly more effective").

108. *Id.* (discussing the need for empirical researchers to be self-conscious about their biases and to compensate for them); see also William C. Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 WIS. L. REV. 755 (1986).

109. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 390.

110. Most famously, Karl Llewellyn collaborated with E. Adamson Hoebel, an anthropologist, on *THE CHEYENNE WAY* (1941), although Hoebel did most of the field work. John M. Conley & William M. O'Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179 (2004); see also Karl Llewellyn, *Behind the Law of Divorce* (pts. I & II), 32 COLUM. L. REV. 1281 (1932), 33 COLUM. L. REV. 249 (1933).

111. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 370-71 (concerning Llewellyn's fascination with the process of appellate judging); see also KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

112. Braucher, *supra* note 37, at 1424-25 (discussing the Restatement's open-ended doctrines such as unconscionability and good faith and invocations of "as justice requires" and quoting Farnsworth's remark, "It is restatementese to use this phrase when we are saying honestly that this is an instance in which we feel the court must have some discretion.").

113. EHRLICH, *supra* note 33, at 493.

114. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 367-68, 387-88 (concerning awareness of and reliance on Ehrlich and expansion of the phrase "law in action" to include consideration of the norms of organizations and groups).

emphasis on norms and the impact of nonlegal institutions on society deserves even more attention today than in the past: “A New Legal Realism must go beyond mere gap research. Legal pluralism is an essential idea for one who would think about law seriously.”<sup>115</sup>

Gap research still has its place, of course, and like Pound, Macaulay does not advocate simply identifying and then filling gaps. He says, “Probably none of us would be willing to bear the costs of 100% enforcement of all the laws all the time.”<sup>116</sup> He notes broad skepticism across the many schools of thought today—law and society, law and economics, critical theories—about “making life better by creating legal rights.”<sup>117</sup> Rather, Macaulay has in mind that “[a] New Legal Realism looking at law bottom up could tell us more about the costs and benefits of attempts to bring about change through law.”<sup>118</sup> It seems to be true that not only are we all legal realists now, we are all also economists.<sup>119</sup>

Macaulay envisions a big tent for law in action, one that spans various political orientations and thus moral views. The Old Legal Realism was rooted in progressive politics,<sup>120</sup> but the New Legal Realism is destined to be more diverse. Looking at law from the bottom up can be a relatively neutral enterprise, in Macaulay’s view, giving us information about the functioning of legal systems and providing a better basis for legal education by increasing understanding of the roles lawyers actually play.<sup>121</sup> Investigation of facts at ground level also can serve at times a muckraking function, when observation reveals that things are not as we supposed and furthermore not as we think they should be.<sup>122</sup> Such work does not necessarily have any particular political orientation other than better aligning law with what a democratic process might produce. Perhaps the only sorts of empirical researchers whom Macaulay is not particularly interested in having join in a New Legal Realism are those who ignore important parts of what they are studying<sup>123</sup> or who go far beyond their data when discussing the implications of their research.<sup>124</sup>

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115. *Id.* at 388.

116. *Id.* at 390.

117. *Id.* at 391-92.

118. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 392.

119. Peer Zumbansen, *Law’s Knowledge and Law’s Effectiveness: Reflections from Legal Sociology and Legal Theory* (York Univ., Osgood Hall Law Sch., Research Paper No. 11, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415565).

120. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 374 & n.35 (quoting an observation that Llewellyn was part of the collectivist milieu of the 1930s, and an FDR supporter and folk dancer), and 392 (situating Old Legal Realism as part of progressive politics).

121. *Id.* at 392.

122. *Id.*

123. *Id.* at 394 (“Some approaches do put the rabbit into the magician’s hat by the way they frame questions and what they ignore.”).

124. Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 394.

The strong and broad appeal of law in action (aka New Legal Realism in its big-tent form) as Macaulay would have it is that it is not partisan or ideological. It is academic in the best sense of the term, clinging to the idea that we might learn something new by looking and listening and being open to finding something other than “what we want to believe.”<sup>125</sup> It is modest, acknowledging that we cannot find truth with a capital “T”<sup>126</sup> or answers with a capital “A.” Macaulay, like Whitford, thinks we need to recognize that we bring our biases to what we observe and try to compensate by self-consciously considering what those biases might be and by engaging with competing views.<sup>127</sup> Academics are unlikely to change the world very much. We can only try to explain what we see and make suggestions for change, most of which are likely to be rejected or ignored, as we freely admit perhaps they should be. We are not politicians, activists, or ideologues. We stand back, observe, learn, and teach. Those with power may believe that they are entitled to their own facts, but we can persevere in trying to play it straight. The pursuit of knowledge about, and understanding of, the law in action involves keeping critical distance, but it is not monkish engagement only with sacred texts; looking at the legal world from the bottom up gets down-and-dirty with messy, profane facts and asks whether we can live with things as they are rather than as we would like to imagine them.<sup>128</sup>

## V. CONCLUSION

This article seeks to extend Charles Fried’s legacy of moral inquiry in the contracts field by expanding the project to include the morality of contract law in action and not just law on the books, in the form of contract doctrine. The law in action perspective suggests the importance of adjustment, release, and forgiveness in contractual relations as an important principle, perhaps as much so as promise-keeping. We need to understand contract morality from the bottom up, where it is often beyond the reach of the legal system, and here empirical research is essential to learn the true character of private ordering. The many possible lines of inquiry include: To what extent do business people, consumers, business lawyers, and consumer advocates understand themselves as acting morally? Is their morality Kantian or communal or something else? What are the plural cultures of contractual morality in different commercial spheres? What does it mean for a large business entity, as opposed to a human

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125. *Id.* at 396.

126. *Id.*

127. *Id.* at 395-96.

128. See Macaulay, *The New Versus the Old Legal Realism*, *supra* note 10, at 402 (arguing that getting the bottom-up perspective of New Legal Realism more into the law schools is important because “law schools have influence not only on training students, but also on legal reform and public perceptions of our legal systems”).

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being, to act morally? Do businesses that act morally, by whatever definition, make more or less money? To what extent do contract parties perform for moral reasons? The good news for contracts scholars is that the possibilities for further research are endless.