Contract as Promise Thirty Years On

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At the time *Contract as Promise*\(^1\) was written, there were two views of the subject in the field: a traditional, doctrinal and not particularly theorized view that saw contract as the law’s way of allowing private parties to create and enforce the terms that would govern transactions and long-term undertakings,\(^2\) and a burgeoning literature that saw contract law as a tool of social control imposing obligations on parties growing in part, but only in part, from dealings into which they had voluntarily entered. This latter view saw contract law disappearing into tort law, which is quite frankly a means for adjusting—on grounds of perceived fairness, social utility or redistribution—relations between parties. The former was associated with an individualistic ethos friendly to capitalism and free markets, the latter with a more socializing, communitarian ethos. The signal works of this latter movement were Grant Gilmore’s *The Death of Contract*\(^3\) and Patrick Atiyah’s *The Rise and Fall of Freedom of Contract*.\(^4\) Atiyah nicely captured the time’s anti-individualist and anti-capitalist tone:

Promise-based liability rests upon a belief in the traditional liberal values of free choice. Many still admire these values but they bring with them, inescapably, many other consequences which are today less admired, especially in England. They bring, in particular, the recognition that some individuals are better equipped to exercise free choice than others, through natural aptitude, education, or the possession of wealth. And the greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities.\(^5\)

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2. The Restatement (Second) of Contracts, section 1 defines a contract as a “promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
4. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Atiyah did acknowledge the inevitability of using the expectation measure in contracts whose purpose was the allocation of risks between the parties, but failed to see that most, if not all, contracts have exactly that purpose.
5. *Id. at 6*. This was written before the Thatcher premiership.
Atiyah is particularly concerned to associate with these, he thinks, increasingly obsolete values of promise-based contractual liability, the enforcement of purely executory contracts and a damage regime measured by the expectation that such contracts generate. To this purely promissory and forward-looking ground for contractual obligation, he contrasts the more sympathetic, backward-looking grounds of liability based on the harm that a disappointed promisee suffered when he acted in reliance on the promise, or on the benefit that the disappointed promisee has conferred on the faithless promisor. These grounds of liability would cause contract law to disappear into the backward-looking grounds of tort and restitutionary liability, and that absorption of contract into tort was indeed the thesis of Gilmore’s book.

The socializing thrust of this critique of contract law was also associated with the legal realist movement, which had a long history in American law, and its post-1960s, often frankly Marxist-tinged avatar, the critical legal studies movement. The critical legal studies movement disputed, indeed mocked, the pretensions of standard contract doctrine to provide a neutral framework for discerning and implementing the terms of agreements freely arrived at. The analysis not only delighted in showing that these supposedly neutral doctrines were often contradictory and incoherent but also that the real energy behind contract adjudication—as elsewhere in the law—were social forces implementing social agendas. What those agendas were depended on the interests of those in power and those whom they represented or with whom they made common cause. The signal work in this genre was Duncan Kennedy’s *Form and Substance in Private Law Adjudication*.6

Against these intellectual and cultural themes, *Contract as Promise* sought to assert the coherence of standard contract doctrine as providing the structure by which actors could determine for themselves the terms of their interactions and cooperation—whether in commercial or in personal relations. The thesis was avowedly moralizing. It was based on a morality of autonomy, respect for persons and trust. Promise is a kind of moral invention: it allows persons to create obligation where there was none before and thus give free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons. That we must not harm another and that we must fulfill the terms of special relationships that may not have been of our choosing are moral obligations that are laid upon us. The obligation of a promise we lay upon ourselves. To be sure, this remarkable feature of promises can be trivialized by saying that the institution of promising and its obligations precedes any particular promissory obligation we may assume, but the fact remains that until we invoke the institution and do so with the very purpose of activating its

obligations, those distinct obligations do not exist. It is a remarkable feature of
the institution that what before was—or may have been)—morally indifferent
or optional becomes nonoptional, and becomes nonoptional because we want it
to be so as a way of achieving our purposes.

This is not to say that promissory obligation in general does not have its
roots in deeper, more general moral soil. The institution, as such, is not an
invention ex nihilo. It depends on the deeper morality of trust and respect for
persons. It is an institution, like language, that allows us to accomplish an
infinite variety of ends. But the efficacy of language depends in general on a
morality of truth-telling. If communications had no more than a random
relation to the truth, language would be useless to accomplish its (our) ends.
And truthfulness depends on trust, and trust on a morality of mutual respect.
Trust may be (mis)represented as merely providing a more or less secure
prediction of another’s future behavior. (“Trust him to lie, cheat and steal if he
thinks he can get away with it.”) But trust allows a particular kind of
prediction, coordination and collaboration. It allows coordination based on an
infinite and transparent mirroring of mutual recognition and respect. We start
with respect, which allows trust, which allows language, and finally comes to
the institution of promising. In each step along the way our moral powers are
amplified, as if each raised to a higher power the one before. And, as was said
in Contract as Promise, what starts as a means for enlarging human purposes
becomes—perhaps only adverbially—an end in itself: it is desirable to attain
our ends by the route of trust and promising, even if we could get there, and
quite innocently, just as well without them.8

Thirty years later, the intellectual fashion that provoked Contract as Promise
has faded from prominence. In its place has arisen a vibrant, voluminous and
often intricate literature offering alternative accounts and justifications for what
might be called the classical law of contract.9 Indeed, the economic analysis of

7. I qualify here because it is quite possible that a person may incur an obligation to another by acting in
such a way that that other has come to rely on him, though that was not the first person’s purpose, and the
disappointment of that reliance may be a harm that he is obliged to avoid. But that is not a promise. See
Fried, supra note 1, at 9-14. It is here, I think, that I disagree with Thomas Scanlon and his principle L. See
T.M. Scanlon, Promises and Contracts, in The Theory of Contract Law: New Essays 86, 92 (Peter

8. Fried, supra note 1, at 16-17; see Seana Valentine Shiffrin, Paternalism, Unconscionability Doctrine,

9. Those diverse approaches are reflected in the contributions to this symposium. Randy Barnett (whose
position I discuss later in more detail) and Barbara Fried, for example, do not so much disagree with the moral
underpinnings of contract as promise as they focus on the limits of that approach—that contract is more
importantly assessed as a matter of objective manifestation rather than the autonomy of the subjective moral
agent. See Randy Barnett, Contract Is Not Promise; Contract Is Consent, 45 Suffolk U. L. Rev. 735 (2012);
Braucher’s essay is a reflection of the dramatic growth of the Law and Society movement since the publication
of Contract as Promise. Her point is an interesting and subtle one: the marketplace has a somewhat different
morality, based less in the “stern morality of promise-keeping” as in a morality of adjustment, release and
law may today be the dominant intellectual approach to legal institutions generally and contract law in particular. The law and economics movement certainly shares nothing of the nihilistic and anti-free-market dispositions of the critical legal studies movement. Work in the economic analysis of contract law genre takes two closely related forms: one normative, one neutrally analytical. The analytic takes as its premise that rational actors seek to maximize their long-term advantage and will prefer legal arrangements that facilitate this choice. In respect to contract, legal institutions may be analyzed as either serving this disposition of the contracting parties, or if they do not, as serving the interests of some other class of actors, or as being irrational. The normative law and economics account starts with a premise quite similar to that embraced by *Contract as Promise*: the law should be designed to allow people in a voluntary relationship to structure that relationship in the way that they judge will serve their interests over the long run. Respect for the moral status of individuals requires that they be treated as the best judges of their own interests. This premise builds on several background premises that also accord with *Contract as Promise*: for instance, that the arrangement does not impose costs on third parties that those third parties have any right to complain about; that the individuals are at least ordinarily competent judges of their own welfare; that neither individual has been forced or deceived into entering the relationship. Most distinctive for both the law and economics analysis of contracts and the morality of promising that underlies *Contract as Promise* is the assumption that individuals (promising or contracting) have a certain persistence as entities over time, so that what an individual chooses for his forgiveness. Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 Suffolk U. L. Rev. 667 (2012). Lisa Bernstein’s empirical studies reveal a complex morality of promise-keeping and forgiveness. For a comprehensive survey, see Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law, in 1 HANDBOOK OF LAW AND ECONOMICS* 3 (A. Mitchell Polinsky & Steven Shavell eds., 2007).


12. For instance, if Dick and Jane agree to enter an intimate relationship, this may cause considerable pain to Dick’s disappointed rival, but it is not an effect the rival has any moral right to complain of. And more generally, disappointed rivals in a fair competition have no moral title to complain. There are exceptions to these generalities as well as disputes about what constitutes fair competition.
future, he is choosing for himself, not for another person who may happen to have the same name and DNA; and what he gets by that choice he may not complain of, as if it had been chosen for him by someone else.\footnote{13}

Given the similarity of the premises of the law and economics school and of \textit{Contract as Promise}, it is not surprising that the two should arrive at similar conclusions on many of the main points of contract doctrine.\footnote{14} The former is utilitarian and proceeds from a premise of consumer sovereignty or subjective measure of welfare;\footnote{15} the latter is avowedly Kantian and more or less takes its cue from Kant’s \textit{The Metaphysical Elements of Justice}.\footnote{16} In their deepest premises, the two analyses are quite dissimilar, differences that come to the fore when the issue is the effect of social arrangements on the overall welfare of groups,\footnote{17} as opposed to the joint welfare of two contracting parties. The convergence is particularly salient in the design of institutions that facilitate the coordination through agreements of the energies of two otherwise independent persons. Legal regimes by their nature are concerned with institutional design, and both the Kantian and utilitarian perspectives focus on maximizing the preferences of individuals \textit{ex ante}; that is, the two perspectives focus on the design of institutions, legal regimes and doctrines that those individuals would themselves see as furthering the purposes they hope to achieve in their free collaboration. There may be regret \textit{ex post}, but the Kantian perspective makes the individual responsible for his own regret; the premise of continuity and its entailment of self-respect requires an individual to be willing to make commitments into the future, and the corollary of respect for others requires him to abide by those commitments where made to others. The famous

\footnote{13}{This last premise has been a concern of mine since writing \textit{An Anatomy of Values}. \textit{Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice} ch. 10 (1970). It takes on an institutional character in \textit{Saying What the Law Is}. \textit{Charles Fried, Saying What the Law Is: The Constitution in the Supreme Court} 6-10 (2004). It is the subject of the profound work of Derek Parfit. The recent development of what has come to be known as behavioral law and economics may be understood as questioning these premises of rationality and continuity. One is left wondering what the normative—as opposed to the purely descriptive—entailments of this move might be. A kind of paternalism for sure, but measured by what metric? \textit{See, e.g.}, Richard Thaler & Cass Sunstein, \textit{Libertarian Paternalism}, 93 AM. ECON. REV. 175 (2003).}

\footnote{14}{The strongest and most comprehensive statement, from which I have drawn wisdom and encouragement, is Jody S. Kraus, \textit{The Correspondence of Contract and Promise}, 109 COLUM. L. REV. 1603 (2009). See also his \textit{Philosophy of Contract Law}, in \textit{The Oxford Handbook of Jurisprudence and Philosophy of Law} 687 (Jules Coleman & Scott Shapiro eds., 2002).}

\footnote{15}{Tort law is another matter. I had made a less comprehensive attempt at addressing the moral foundations of tort law in \textit{Right and Wrong} (1978) and \textit{An Anatomy of Values} (1970). In \textit{Making Tort Law: What Should Be Done and Who Should Do It} (2003) (with David Rosenberg), our analysis and conclusions over a large range of topics coincided with those of the economic analysis of the subject.}

\footnote{16}{\textit{Immanuel Kant, The Metaphysical Elements of Justice} (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797).}

\footnote{17}{\textit{See Rawls, supra note 8, §§ 5-6.}}
example is Kant’s discussion of lying, and especially the lying promise.\footnote{\textsc{Immanuel Kant}, \textsc{Groundwork of the Metaphysics of Morals} (H.J. Paton trans., Harper & Row 1964).} Kant’s test of universalization—would you be willing to propose the maxim of your action (i.e., the principle on which you act) as a universal law?—is quite congruent with the method of law and economics, which asks whether a rule of (contract) law is one that rational parties would accept \textit{ex ante} to govern the arrangements on which they plan to embark.

That both the Kantian ethics of respect and the economic analysis of law concern themselves with general rules and proceed \textit{ex ante} (i.e., before the parties know how a particular undertaking will work out) entails that the two methods arrive at similar, if not identical conclusions.\footnote{As John Rawls many times and in many places has acknowledged: the decision procedure by which individuals choose principles to govern their mutual interaction behind a veil of ignorance is very much like Kant’s formula: “Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.” \textit{Rawls, supra} note 8, § 40.} Utilitarianism and Kantian ethics diverge when they advise a particular person how she should behave \textit{ex post}; Kantian ethics and \textit{Contract as Promise} require that a promising (or contracting) party obey the rules she embraced \textit{ex ante}. But since the economic analysis of legal rules is an analysis of legal \textit{rules}, that point of divergence is rarely reached. The way in which a divergence may arise shows just how tight the convergence is. Imagine a dispute in which the issue is inequality of bargaining power—for instance, a consumer who knowingly signs a standard contract clause requiring that disputes be submitted to arbitration. There are those who hope the judge in a hard case will find some form of words to explain ruling for the more sympathetic party, even though no rule of law honestly applied would permit this.\footnote{See, e.g., Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013 (Ariz. 1992); Richards v. Richards, 513 N.W.2d 118 (Wis. 1997).} Perhaps a utilitarian might applaud such judicial (mis)conduct, but the economic analysis of law and \textit{Contract as Promise} would both insist that some rule reasonably applicable to all like cases be available to justify the ruling. They would both agree with Antonio in \textit{The Merchant of Venice}:

\begin{quote}
The duke cannot deny the course of law, 
For the commodity that strangers have 
With us in Venice, if it be denied, 
Will much impeach the justice of his state, 
Since that the trade and profit of the city 
Consisteth of all nations.\footnote{\textsc{William Shakespeare}, \textsc{The Merchant of Venice} act 3, sc. 3 (Jay L. Halio ed., Clarendon Press 1993) (1600).}
\end{quote}
Of particular interest, therefore, is the large body of literature that claims to find a divergence between standard contract doctrine and *Contract as Promise*, although *Contract as Promise* largely defends standard doctrine as comporting with, and indeed issuing from its Kantian moral premises. (The largest quarrel *Contract as Promise* has with standard doctrine is in the latter’s doctrine of consideration.) There have been two strands in these critiques. Both strands insist on the divergence, but take opposing tacks. Utilitarian-minded economic critics complain that *Contract as Promise* is unsuccessful in accounting, in its own moralizing terms, for a number of important and practically sound contract doctrines it embraces—particularly the expectation measure of damages and the related rule requiring the victim of a breach to make efforts to mitigate his own damages. If promise really were at the heart of contract, then a promisor would be held to perform his exact undertaking—perhaps by a decree of specific performance or by the imposition of punitive damages. But instead, contract doctrine and *Contract as Promise* allow the party in breach to “get away” with paying “only” the value of the expected performance. 22 Economists claim this shows that the law is more practical than moral and recognizes that a less rigid rule promotes social utility by encouraging a promisor to make the highest and best use of his resources, awarding the disappointed promisee a money equivalent no greater than the worth of the promised performance. This is the much mooted argument of the efficient breach. Related to efficient breach is the doctrine of mitigation. Economic critics of *Contract as Promise* have been known to argue that if the moral obligation of promise really were the basis of contract, then insult would not be added to injury—as it is in standard doctrine 23—by requiring that the victim of the breach extend himself to minimize the damage that the promisor has caused him.

These same instances are also deployed against *Contract as Promise* by those who criticize standard contract doctrine as insufficiently faithful to the morality of promise—as meretriciously swayed by (merely) economic arguments to loosen the rigors of promissory morality—and therefore they go on to fault *Contract as Promise* for being untrue to its own moral premises by apologizing for these departures from what promissory morality requires. The leading critic along these lines is Seana Shiffrin, who concludes her important article, *The Divergence of Contract and Promise*, 24 by suggesting that the prevalence of expectation damages and the doctrine of efficient breach “may play a role in creating a wider culture in which pressure develops not to comply

23. Id. § 350.
with the moral commitment, whether just because it is not legally required or
because the legal permission spawns cultural habits that render moral
compliance precious or alien.25 Thus, she calls to mind a theme sounded by
Atiyah, except that Atiyah celebrates what Shiffrin deplores.26

Both the moral criticism and the economic defense of expectation damages
persuade me that I had overstated the case for the connection between the
promise principle and expectation damages:

If I make a promise to you, I should do as I promise; and if I fail to keep
my promise, it is fair that I should be made to hand over the equivalent of the
promised performance. In contract doctrine this proposition appears as the
expectation measure of damages for breach. The expectation standard gives the
victim of a breach no more or less than he would have had had there been no
breach—in other words, he gets the benefit of his bargain.27

Here is the standard example used to illustrate the theory of efficient breach
and to justify the expectation measure of damages:

Seller contracts to manufacture and deliver 14 gross of custom widgets to
Buyer for $10 a gross for use as a necessary component in Buyer’s unique
gizmos. Just prior to the date of delivery Third Party offers Seller $25 a gross
for immediate delivery to him of the widgets. Buyer will have to pay $15 a
gross for the widgets from another manufacturer and will lose $5 in lost sales
for each gross as a result of the delay.

Economists reason that Seller should sell the widgets to Third Party and pay
Buyer the $5-per-gross difference in the price of the replacement widgets plus
the $5 per gross in lost gizmo sales. Buyer will be no worse off than if Seller
had faithfully performed, while Seller will be $5 per gross better off, which is
roughly equivalent to the additional value created by Third Party receiving the
early delivery of the widgets: Third Party valued the widgets more than Buyer.
Seller’s move is not only Kaldor-Hicks optimal, in that there is a greater sum
total of welfare, but also Pareto optimal, because none of the three is worse off
and Seller and Third Party are better off than if Seller had performed the
contract exactly as promised. The rule is socially optimal because resources
are directed without loss to their highest best use.

25. Shiffrin, supra note 24, at 740.
26. See supra note 4 and accompanying text.
27. Fried, supra note 1, at 17. The endnote quotes the Restatement (First) of Contracts § 329, cmt. a,
(1932): “In awarding compensatory damages, the effort is made to put the injured party in as good a position
as that in which he would have been put by full performance of the contract . . . .” The note also cites Charles
J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contracts, 89 Yale L.J. 1261
(1980).
Apart from Seana Shiffrin’s concern that the efficient breach/expectation measure fosters a culture of faithless opportunism, there is the objection raised by several contracts scholars \(^{28}\) that the advantage reaped by the defaulting promisor (the $5 per gross in my example) really belongs to the promisee-Buyer and not the faithless Seller. This objection may be restated in terms that call to mind Kant’s treatment of promises in *The Metaphysical Elements of Justice* \(^{29}\): By promising, I give a notional property interest in my promised performance to the promisee. And, of course, once viewed in property terms, any surplus would rightfully belong to the promisee. \(^{30}\) Indeed, that is the legal regime that obtains in respect to contracts for the sale of real property, the standard buyer’s remedy being specific performance. But this line of argument founders—or at least begs the question—if one considers that, after all, if the promisor is “master of the bargain” and the whole moral case is built on respect for the promisor’s autonomy, then the promisor should be able to specify not only the substantive terms but also what the bargain is worth in the event of default. Shiffrin’s objection that a promisor should (morally) not be free to specify the remedy for his default, that substance and remedy are different, that substance is for the parties to specify, and remedy for the state (and morality) to determine, can be gotten around by explicitly casting the promise in option terms. It would certainly be an odd kind of moral rigorism to allow freedom of contract to reign as to substance but to rule out option contracts. And several commentators have pointed out that as between sophisticated bargainers the full range of consequences of a breach—from relatively small stipulated damages \(^{31}\) to specific performance to perhaps even supercompensatory liquidated damages—will be reflected in the price that the promisee pays at the outset. \(^{32}\)

The law does, it must be said, take Shiffrin’s side to the extent that such remedial specification is subject to greater scrutiny and control than are substantive terms. Supercompensatory damage clauses may be struck down as penalties, \(^{33}\) and undercompensatory provisions struck down as

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29. KANT, supra note 17, at 20-21.

30. The analysis is more plausible as one considers that, after all, the promisee can always sell his right to performance and thus this issue boils down to who captures the surplus. This is illustrated by the leading case of *Groves v. John Wunder Co.* and its subsequent history. 286 N.W. 235 (Minn. 1939).

31. Such contracts are quite familiar: a contract for sale or for services that limits the remedy to a small sum—say the forfeiture of a deposit—but not so small that the law would treat the bargain as illusory.

32. See Craswell, supra note 28, at 632; Markovits & Schwartz, supra note 11, at 813.

33. See Craswell, supra note 28, at 637-38; U.C.C. § 2-718 cmt. 1 (1977) (“A term fixing unreasonably large liquidated damages is expressly made void as a penalty.”); see also RESTATEMENT (FIRST) OF CONTRACTS.
unconscionable. But it is hard to see how such limitations—at least as applied to sophisticated parties—accord with the general principle of freedom of contract and party autonomy. As Judge Richard Posner, citing Goetz & Scott, has said:

Deep as the hostility to penalty clauses runs in the common law, . . . we still might be inclined to question, if we thought ourselves free to do so, whether a modern court should refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments. Penalty clauses provide an earnest of performance. . . .

A better argument is that a penalty clause may discourage efficient as well as inefficient breaches of contract. . . .

On this view, since compensatory damages should be sufficient to deter inefficient breaches (that is, breaches that cost the victim more than the gain to the contract breaker), penal damages could have no effect other than to deter some efficient breaches. But this overlooks the earlier point that the willingness to agree to a penalty clause is a way of making the promisor and his promise credible and may therefore be essential to inducing some value-maximizing contracts to be made. It also overlooks the more important point that the parties (always assuming they are fully competent) will, in deciding whether to include a penalty clause in their contract, weigh the gains against the costs—costs that include the possibility of discouraging an efficient breach somewhere down the road—and will include the clause only if the benefits exceed those costs as well as all other costs.

On this view the refusal to enforce penalty clauses is (at best) paternalistic—and it seems odd that courts should display parental solicitude for large corporations.

What remains of Shiffrin’s point, I think, is that there is in this reasoning the danger of an infinite regress: if the remedy may be stipulated ad lib in the contract, what of the promisor’s failure to comply with that second-order obligation? At some point, the law must step in and enforce the contract and, in doing so, take account of the costs imposed by the faithless promisor not only on his counterparty but on the judicial system and the regime of confidence in contracts in general.

It is, of course, the case that many, perhaps most, contracts do not specify

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§ 356 (1932).

34. U.C.C. § 2-718 cmt. 1 (“An unreasonably small amount . . . might be stricken under the section on unconscionable contracts or clauses.”).


36. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1288-89 (7th Cir. 1985).
remedies in the event of breach. Indeed, all contracts fail to specify the parties’ intentions in respect to matters that ex ante seem quite remote and, at any rate, not worth spelling out. So courts are regularly called upon to fill in details that only ex post may loom large. This is a task that Contract as Promise discussed under the term “gaps”: “The gaps cannot be filled, the adjustments cannot be governed, by the promise principle.”37 This statement assumes that the parties to a promise understand each other perfectly about some things, and those things are governed by the promise principle, but are in doubt or lack any intention or have conflicting intentions as to others. But language and intentions are not like that. There are implications that come to awareness only when they arise, and the parties may recognize and acknowledge them or deny and disavow them—in good faith or bad. Contract as Promise, from its too rigid premise, drew the conclusion that since the promise principle did not apply outside this sharply drawn boundary, questions of interpretation, mistake and frustration can only be solved by recourse to other principles imposed on the parties but nevertheless gathered under the rubric of contract. The specification of a remedial regime is a particular case of a subject to which I will return when I consider matters of interpretation in general and the objective theory of contracts.

The most convincing contemporary literature (and it has grown very large) analyzes the specification of remedial regimes as a question of fashioning appropriate default rules; that is, rules that the courts will imply unless the parties specify something else. In this way, the voluntary nature of contractual obligation is preserved, in part, by the reality that the imposition of the default rules ab extra is not inexorable, and for the rest by the fiction that the default rule is a close approximation of what the parties expect and desire.38 The canonical expectancy rule is thus justified not in the way of Contract as Promise as a necessary implication of the promise principle, but as a default rule: either as the rule that most contracting parties would choose (a majoritarian default rule);39 or as the rule most likely to reach efficient results along the lines of the doctrine of efficient breach;40 or, most subtly, as whatever rule is most likely to force the parties to consider, reveal and jointly adopt the regime they actually prefer.41 (So if the default rule were that in the event of breach the party in breach must contribute his gains to the Red Cross, this would focus the minds of both promisor and promisee and cause them to negotiate to their mutually agreed optimum solution.)

37. Fried, supra note 1, at 69.
38. Richard Craswell, in his magisterial and corrosive essay, distinguishes between default rules, which may be altered by the parties, and background rules, which may not. Craswell, supra note 10.
Critics of *Contract as Promise* also point to the rule requiring the victim of a breach to make reasonable efforts—the expense of which is to be charged to the party in breach—to mitigate his damages. So if the victim is a seller, he must try to find an alternative buyer, charging the buyer the difference. Critics argue correctly that this rule cannot be deduced as a corollary of the promise principle. Some, who are hostile to the promise principle, argue that the mitigation rule shows that *Contract as Promise* is wrong to see the promise principle as underlying contract law. Others, who see contract law as insufficiently faithful to the promise principle, argue that the mitigation rule adds insult to injury by requiring the morally innocent injured party to take the initiative in salving his own wounds. The way *Contract as Promise* deals with the duty to mitigate is to treat it as another rule collected for convenience under the rubric of contract, although it is in fact imposed on the victim willy-nilly not to affect his preferences but to avoid a waste of resources (as with efficient breach) or to require a kind of altruism that is good for the soul. Recent scholarship quite reasonably identifies this as another default rule, which contracting parties can and regularly do reverse. Unlike expectancy as the default damage measure, it is not plausible to argue that contract law is simply choosing—for the convenience of the parties—the rule that they would have chosen had they thought about it. The moralists are more likely to be right in seeing as more natural a “you broke it, you fix it” default. The mitigation rule is quite well supported, however, on efficiency grounds: the disappointed promisee is more likely to know what will best remedy the difficulties into which the breach has plunged him, and requiring him to take the initiative—though not at his own expense—is the best way to avoid a dead-weight loss.

These defects and overstatements—and some others besides—in *Contract as Promise* point to a restatement that is suggested by pondering the arguments pressed by Randy Barnett in *Contract Is Not Promise; Contract Is Consent* and *A Consent Theory of Contract*. Noting the various departures by contract doctrine described above from what he believes the promissory principle requires, Barnett insists that the most salient departure is the contractual doctrine that binds a promisor to the *objective* meaning of his words even in the face of sincere and well supported claims by the promisor that he did not really mean what he appeared to say. If, as *Contract as Promise* insists, promise is morally binding because it is the willing invocation by a free moral

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45. See Hotchkiss v. Nat’l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911). Learned Hand wrote that the objective meaning binds the parties, even “were it proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them.” Id.
agent of a convention that allows him to bind his will,⁴⁷ and if promise were indeed the moral and political basis for contract law, as *Contract as Promise* also insists, then there would not be contractual liability in cases where the promisor had meant something quite other than his words ordinarily understood would be taken to mean. The prevailing objective doctrine shows, Barnett argues, that it is not promise but consent that is the underlying moral and political basis for contract law. It cannot be gainsaid that what has been called the will theory, to which *Contract as Promise* bears a close affinity, is incompatible with holding a promisor to the objective meaning of his words. The practical, economic and utilitarian grounds for holding him are obvious. And so is the moral argument that, as between the promisor who has said what he did not mean and the promisee who took him at his word, the former should—as in any accident—bear the cost of the harm he has caused. But these are not promissory, will-theory arguments.

Barnett first of all marks off contracts from promises by noting that there are many promises in which the promisor does not intend and cannot reasonably be understood as intending to be legally bound.⁴⁸ A moral rigorist might deny the requirement of this meta-intention, just as she might deny the validity of meta-intentions regarding remedies, reasoning thus: a promise creates a moral obligation, which is other-regarding; it creates a moral duty to another; and the promisor has no moral business denying the promisee the ability to enforce that obligation. This is indeed similar to the objections to contractual clauses limiting the remedy to the forfeiture of a small deposit or requiring arbitration before a religious panel. But just as I have argued that parties may, and by a morality of autonomy should, be able to agree not just as to the substantive terms of the promise but also as to its remedial implications, so that same morality requires, and the law (largely) agrees, that the parties may specify whether they want their promise to be legally cognizable at all. This is how Barnett puts it in the essay in this volume summarizing his thesis:

> [C]ourts should presumptively enforce private commitments when there exists a *manifested intention to create a legal relation*... [T]o determine the *prima facie* case of contract, we should determine whether there was a *manifested intention to be legally bound*. I refer to this criterion, in short, as *consent*.

I am not persuaded by Barnett’s argument. It does not solve but merely reproduces the puzzle posed by the objective theory of contract. Whether promise or consent is taken to be central to contract, contractual liability may

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⁴⁷. Fried, supra note 1, at 7-17.
⁴⁹. Barnett, supra note 9, at 655.
be imposed (or denied) in contradiction to the actual will of one of the parties.\footnote{Barnett, like the law, allows subjective intent to control if it can be shown that in spite of the objective meaning of their words, \textit{neither} party had a subjective intent to be bound, or that both parties understood a term of the contract to have a meaning other than the objective one. I will not go into the wonderful intricacies occasioned by cases in which both parties had a subjective intent—though not the same one—that differed from the objective meaning of their words.} Switching from promise to consent invokes a different set of concepts, perhaps less individualistic and more wholesale, as in the presumed \textit{consent} to be governed by the laws of a reasonably just polity in which we may all participate and whose benefits we take. And like the general duty to obey the laws of such a polity, so the objective theory is a practical necessity. What Barnett’s consent theory does—much in the same way as in the case of social contract theory—is to suggest the fairness of holding someone to legal obligations imposed by a regime with which, in one way or another, by his own actions he has become enmeshed.

The law of contract is, after all, a practical institution involving lawyers, judges, documents and third parties who make investments on the basis of what they read about contracts concluded or not concluded. Such a regime cannot correspond exactly to what the morality of promising requires and does not require. The objective theory emphasized by Barnett, like the regime of default rules, the requirement of mitigation and much else, are practical necessities if the government is to become involved in enforcing agreements at all. (Think of the many technical, unsentimental and unlovely but inevitable rules that come into being when the law becomes involved in the relations between lovers—whether as husbands and wives or otherwise.) Thus my claim in \textit{Contract as Promise} about the relation of the legal regime of contract to the moral institution of promising was not so much wrong as overstated.

As Barnett also notes, the great difference between the moral regime of promise and the legal regime of contract is that the law (the state) threatens, and in the end will use, force to compel compliance. The use of force by the state is morally regulated under the concept of justice. Though the laws of a just state will not violate morality—that is, will not violate their moral rights nor seek to compel citizens to violate their moral duties—neither can they protect all moral rights, nor enforce all moral duties. All this is well known and quite obvious, nor is this the place to enter into the difficulties, complexities and controversies this structure entails.\footnote{Kant’s \textit{The Metaphysical Elements of Justice} is the canonical text explaining the relation between moral obligation and obligation in law.} The economic analysis of law demonstrates how a well-functioning contractual regime increases the \textit{ex ante} well being of the contracting parties and social welfare generally. As I have argued, the moral regime of promising extends the moral autonomy of promisors—seemingly paradoxically—by giving them a means of putting themselves under moral obligations. To the extent that they are sufficiently
moved by the moral sense alone, the moral regime will accomplish practical goods similar to those identified by the economic analysis of contract law. And conversely, to the extent that contract law imposes legal obligations that are congruent with moral obligations, the use of force it threatens or employs is morally justified and comports with the general criteria by which we judge that a legal system is just. And so the relation between contract and promise is a good deal more complex than one of simple entailment.

A promisee who seeks to enlist the help of the law to enforce a promise moves far beyond an appeal to the promisor’s conscience into a forum where he must persuade strangers to use force against his moral adversary. These strangers (judges, jurors, bailiffs and so on) would themselves act unjustly and immorally if they descended upon the promisor just on the promisee’s say-so. In most instances this will be sufficient to explain the objective theory of contract interpretation. In this, contract law’s insistence on objective, not private, meaning is like the parol evidence rule, the statute of frauds and the statute of limitations. Each of these will often frustrate the true ex ante intent of the parties, but these doctrines express the law’s concern that in guessing wrong as to stale or unwritten agreements, it risks greater injustice than if it ignores them. Even as he insists on his subjective version of his promissory intention, the promisor must acknowledge that far worse has happened to the innocent caught in the toils of the law. Contract as Promise characterizes such promissory misfires as contractual accidents, where liability attaches or is denied on grounds analogous to the law of torts: the promisor has perhaps quite innocently created a situation in which his words or actions have caused harm or disappointment to another. And, as in tort, the law must respond somehow; even the decision to let the loss lie where it falls is a decision taken on some grounds of equity or efficiency.

Not only does mobilizing the ponderous and uncertain machinery of the law entail risks of error, but also it imposes significant costs on society—that is, on third parties not involved in the dispute. Even if all costs were assessed against the losing party (a regime that would have its own problems), the number of competent judges is limited: justice is a scarce societal resource. Arbitration is an interesting intermediate case. To the extent that arbitral awards are enforced by courts, an agreement to arbitrate is just a special kind of contract: a contract about a contract. If the parties stipulate against legal enforcement of the award, then this is another example of a promise that is not intended to create legal relations.
obligation may explain the energy behind the doctrine of consideration, on which Contract as Promise pours so much scorn. The “owners” of the machinery of justice in addition to wanting to avoid mistakes may reasonably choose to focus their attention on the more serious cases and cases in which a regime of reliable enforcement will redound to the benefit of society as a whole. The doctrine of consideration accomplishes this triage in notoriously over- and under-inclusive ways and therefore has spawned whole treatises of exceptions and supplements. And other legal systems have used other devices to answer the same difficulty. But grasping the nature of the problem should lead to greater indulgence of the law’s unavoidably imperfect solutions than Contract as Promise displayed.

This line of argument also helps explain the law of unconscionability. If contractual obligation is based in promise (contract as promise) and promise implements and extends the autonomy of the parties, it is hard to explain the law’s sometime refusal to enforce a promise not because it is too trivial, nor because it is not clear enough, nor because a competent, adult promisor may not have fully understood or was misled about what his promise committed him to, but just because it seems harsh or unfair. In such cases the doctrine seems paternalistic and, as such, inconsistent with the promise principle, which is expressive of and implements the right of adult individuals to set their own goals and make such arrangements as seem best to them. In her magisterial treatment of this problem, Paternalism, Unconscionability Doctrine, and Accommodation, Seana Shiffrin identifies some typical cases in which enforcement has been denied:

[C]ontracts that charge usurious loan rates, a contract paying a grossly inadequate sum for an annuity, a one-sided, mandatory employment arbitration agreement that heavily favored the employer, arbitration clauses that specify indeterminate or remote locations or that require high fees so as to discourage efforts at redress, contracts with people of modest means that feature aggressive repossession terms and very high interest rates, sales contracts that disclaim warranties and consequential damages, exclusive option contracts that permit a buyer both to refuse goods and to prevent the supplier from selling them elsewhere . . . .

Shiffrin acknowledges that in such cases the promisor understands just what he is getting into and that the denial of enforceability may in fact deprive that class of promisors of access to goods and services that they desire and may not get on better terms. She nonetheless concludes that the doctrine need not be paternalistic. It may override the promisor’s wishes not because of some

56. Shiffrin, supra note 8, at 205.
57. Id. at 205-06 (footnotes omitted).
possible harm to third parties and also not on the ground that the paternalistic court or state knows better what is in the promisor’s best interests.

Consider that in the case of gratuitous promises the law may simply wish to reserve its scarce resources for more serious matters, and what counts as more serious must inevitably be left to the law’s and its officers’ judgment. The law does not forcibly prevent the gratuitous promisor from doing as he said and usually would not lend its agency to recover his gift when he repents. Nor does the law prevent the promisee from respecting the subjective meaning of the promisor’s words. In much the same way, when the law for its own reasons imposes a statute of limitations on a promisee’s ability to complain of his disappointment or requires that certain promises be in writing, the law nonetheless will not prevent the promisor from paying a stale debt or honoring an unwritten obligation. And so it is with unconscionable bargains: the law will not prevent promisors from honoring them, but it will not lend its agency to what it believes is harsh, unfair or just plain ugly. It says: “This is an awful way to treat another human being. Go ahead and do it if you want, but don’t ask me to help.” Imagine an agreement between adult, competent persons to engage in some degrading sexual practice. Respect for their autonomy may mean that the law will not interfere with their arrangement, but surely it does not require that judges, jurors and bailiffs involve themselves in enforcing its implementation. We have just such an example in the case of racially restrictive covenants included in a deed of sale. Absent some antidiscrimination statute, voluntary compliance with such deeds is not unconstitutional, but in the leading case of Shelley v. Kraemer, the Supreme Court ruled that the government must not be complicit in their enforcement.58

So thirty years on, I cannot quite sing along with Edith Piaf, “Je ne regrette rien.” The scholars to whose work I refer explicitly represent only the leading edge of the vast amount of scholarship (some of which was already gathering when I wrote Contract as Promise)59 from which I have learned and of which Contract as Promise does not take account. As I said at the outset, the immediate spur of the book was a reaction to the theses that contract is not a distinct body of law, that it does not represent the working out of principles that allow free persons to make their own arrangements. If I overstated my case that contract law is founded in the morality of promising, it is only because I ignored the glaring truth that contract law, as any body of law whatever its moral and philosophical underpinnings, addresses not only the conscience of moral agents but must also adjudicate between persons who may not share the same moral commitments, who may indeed have no wish to act according to moral principles if they shared them, and who even if they did share them and wished to act according to them do not all see the facts in a particular dispute in

58. 334 U.S. 1 (1948).
the same way. And thus, like any body of law, contract law must set down rules for practical arrangements and for the practical resolution of disputes, rules and adjudications that will be enforced whether the parties agree to them or not.

I do not retreat from the assertion that promise is the human institution that expresses a morality of human freedom, of the expansion of the human will in relations of respect and trust, and that contract is the legal institution that is built on the moral institution of promising: hence contract as promise. But it is a legal institution and so must take account of the constraints, crudities and complexities of a legal institution seeking to embody (an aspect of) justice in an imperfect world. The intervening scholarship has brought me and generations of students and scholars to a better understanding and appreciation of these constraints and complexities. As I wrote only a year after Contract as Promise was published:

The picture I have, then, is of philosophy proposing an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground. It is the peculiar task of law to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict. That last twenty feet may not be the most glamorous part of the building—it is the part where the plumbing and utilities are housed. But it is an indispensable part. The lofty philosophical edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation—but no more. The law really is an independent, distinct part of the structure of value.60

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