

Promise Etc.

Gregory Klass*

Charles Fried's *Contract as Promise* is the first post-realist will theory of contract. It is post-realist in two senses. First, Fried has learned the lessons of the realist critique of Langdellian formalism. He does not attempt to deduce the entire law of contract from a single promise principle. The theory is attuned to the multiple purposes and principles, as well as the practical exigencies, that figure into contract law. In his discussion of *Red Owl*, for example, Fried writes that "contract as promise has a distinct but neither exclusive nor necessarily dominant place among legal and moral principles."¹ While Fried minimizes the conflict between those different principles and purposes—imagining established boundaries and diplomatic relations rather than competing armies and territorial dispute—his approach is mildly pluralist. Second, the book is *post*-realist in its implicit rejection of Holmes's suggestion that scientific study of the law must "wash it with cynical acid."² Fried has also learned the lessons of Lon Fuller's critique of the realists. While Fried disagrees with much in *The Reliance Interest in Contract Damages*, I think he is sympathetic to its complaint that "at a time when men stand in dread of being labeled 'unrealistic' . . . we have almost ceased to talk about reasons altogether."³ *Contract as Promise* is an inquiry into the reasons for a law of contract—its justification. It attempts to provide a principled account of contract law.

The principle that Fried sees animating much of contract law is, of course, that a promise must be kept. More specifically, it is that a promise must be kept because it is freely chosen. The ability to make and keep a promise expands personal freedom by making possible projects that would otherwise be impossible for lack of trust. Fried is therefore correctly classified as an autonomy theorist. He advocates a "conception of contractual obligation as essentially self-imposed."⁴

* John Carroll Research Professor of Law, Georgetown University Law Center. I am grateful for the helpful comments I received on this work when I presented it at the *Contract as Promise at 30* conference at Suffolk University Law School and at the Law and Philosophy Workshop at Georgetown Law School, and from Jody Kraus, Daniel Markovits, Tom Pink, Michael Pratt, and Seana Shiffrin.

1. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 25 (1981).
2. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).
3. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 57 (1936).
4. FRIED, *supra* note 1, at 2.

There is, however, an important difference between Fried's theory in *Contract as Promise* and other autonomy theories. I have argued elsewhere that contract theorists typically employ one of two pictures of contract law.⁵ For some, contract law functions first and foremost to impose duties on persons who have entered into agreements for consideration, whether or not they intended to be legally bound. P.S. Atiyah's theory is an example. Atiyah maintains that the point of contract law is not to give potential promisors the power to purposively undertake new legal obligations, but to prevent or redress reliance-based harms or unjust enrichment.⁶ For these theorists, contract law is a duty-imposing rule.

For other theorists, the primary function of contract law is to confer a form of legislative power on private individuals, enabling them to undertake new legal obligations when they choose. Randy Barnett, for example, has argued that a just contract law imposes a legal duty to perform only on promisors who objectively intended to undertake such a legal obligation.⁷ For Barnett, contractual obligations are self-imposed because the parties have chosen to be legally obligated. Contract law is a power-conferring rule.

Both Fried and Barnett are autonomy theorists. "The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be."⁸ But contract law under Fried's theory is a duty-imposing rule, not a power-conferring one.⁹ Contracts are enforced not because the parties have chosen the legal obligation, but because they have a moral obligation to perform.¹⁰ What makes Fried nonetheless an autonomy theorist is that he views that moral obligation as a chosen one. It is a promise. Whereas for Barnett, contractual obligations are chosen obligations because the parties have chosen to be *legally* obligated, for Fried, they are chosen obligations because the parties have chosen to be *morally* obligated.

5. See Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727 (2008).

6. See P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW Q. REV. 193 (1978).

7. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291-94 (1986).

8. FRIED, *supra* note 1, at 57.

9. At least Fried in *Contract as Promise*. In his comments at the *Contract as Promise at 30* conference, Fried suggested that he is more sympathetic, today, with something like Barnett's consent theory. But adding an intent-to-contract requirement to his theory would demand changes to Fried's arguments in later chapters of his book. Fried can no longer simply argue that "[t]he law of contracts . . . is a ramifying system of moral judgments working out the entailments of a few primitive principles." FRIED, *supra* note 1, at 132. Parties who intend to be legally bound, for example, might prefer more formalist interpretive rules that ignore "the background of normal practices and understandings" that figure into promises and which Fried would integrate into the law. See *id.* at 86; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549 (2003).

10. The only discussion in *Contract as Promise* of the parties' intent to contract occurs in a footnote in the chapter on consideration. There, Fried suggests that "some additional intention to create legal relations" is not a requirement for contractual liability, though "the parties should in principle be free to *exclude* legal enforcement." FRIED, *supra* note 1, at 38 n.*.

Contractual obligations are self-imposed because contracts are promises, and promises are self-imposed obligations. “Freedom of contract *is* freedom of promise.”¹¹ While the difference might appear small, the extra step puts Fried squarely on the duty-imposing side of the divide. Contract law, according to the theory in *Contract as Promise*, imposes duties on persons because of their extra-legal, moral obligations—moral obligations that happen to be chosen ones. On the power-or-duty question, Fried is closer to Atiyah than to Barnett.

My own view, which I call the “compound theory,” is that contract law functions both to impose duties and to confer powers. Thus while contract law takes account of the fact that many parties intend to be legally bound, such intent is not the *sine qua non* of contractual liability. Contract law functions both to enable persons to purposively adopt new legal obligations and to impose such obligations on those who enter into agreements for consideration.

Here I want to think further about one side of the compound theory: contract law’s duty-imposing function, which is conveniently also the object of Fried’s analysis in *Contract as Promise*. More specifically, I want to examine the idea, also central to Fried’s theory, that the reasons for imposing the legal duty lie in the parties’ moral obligations to one another.¹² A theory of contract law that maintains that it functions to impose legal duties on contracting parties because of their moral obligations to one another should be able to say what those obligations are. For Fried, they are freely chosen promissory obligations. But this is hardly the only possible answer. Part I argues that Fried’s autonomy-based account of promising is not the whole story about the moral obligations of contracting parties. A complete theory of contract law’s duty-imposing function must take account not only of the moral power of promising, but also of the other moral reasons why a party to an exchange agreement has an obligation to perform. Part II then applies that observation to critically assess three recent interventions in contract scholarship: Michael Pratt’s argument that contracts need not be promises, Jody Kraus’s thesis that correspondence theories entail party choice over legal remedies, and Seana Shiffrin’s claim that contract and promise diverge in problematic ways.

Before beginning, a note on terminology. I use “duty” here as a generic term to refer to any moral or legal responsibility. I use “obligation” as a narrower term to refer only to those duties owed to specific persons, which philosophers sometimes call “special obligations.” The moral and legal

11. FRIED, *supra* note 1, at 35.

12. A duty-imposing theory of contract law need not maintain that the reason for imposing the duty lies in the moral obligations of those subject to it. Many economic theories of tort, for example, maintain that the reason for imposing tort duties of care or compensation is to maximize welfare. That the efficient legal duties track morality is a happy coincidence. One can imagine a similar theory of contractual duties. Most economists, however, adopt a power-conferring theory of contract law. The reason lies in their methodological premise that the law creates incentives that legal subjects respond to. Apply that premise to the rules governing contract formation, and you get the assumption that parties normally intend legal liability.

prohibitions on murder, for example, define duties that are not obligations: the duty is owed to everyone. Filial duties, on the contrary, are obligations: the duty is owed to specific persons, namely one's parents. This use of "obligation" should be distinguished from the use of the term to refer only to moral duties that are voluntarily acquired or undertaken.¹³ Whereas that use focuses on the reason for the duty, mine turns on to whom the duty is owed.

I. REASONS FOR A MORAL OBLIGATION TO PERFORM

Many canonical sources for the law of contract in the United States use the terminology of promise to describe the act of entering into a contract.¹⁴ The first section of the *Second Restatement of Contracts* defines "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."¹⁵ That definition tracks Williston's: "A contract is a promise, or set of promises, to which the law attaches legal obligations."¹⁶ Other authorities avoid the language of promising. The Uniform Commercial Code, for example, generally speaks of agreement rather than promise. "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."¹⁷ Ian Macneil attempts an even more minimalist definition: A contract is "the relations among parties to the process of projecting exchange into the future."¹⁸

Definitions aside, there are good reasons to use the language of promises when doing or talking about contract law. Talk of promises provides both a quick entry into the basic ideas of contract and a useful set of organizing concepts. Promises are a familiar, salient form of voluntary obligations. Entering into a contract, whether it involves promises proper or not, is at least *like* promising to perform, and breaching a contract is at least *like* breaking a promise. And the promissory idiom allows for precision in describing contractual relationships. We can say that the difference between a bilateral and a unilateral contract, for example, is that one is an exchange of promises while the other an exchange of a promise for a performance. And the terms "promisor" and "promisee" provide a simple way to refer to each party's normative standing relative to a contractual obligation. One can try to teach contract law without the language of promises, but at a cost.

13. See Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1614 (2009).

14. The first edition of Corbin's treatise has a nice discussion of the definitional approaches at mid-century. See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION 4-6 (1952).

15. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

16. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS 1 (1931).

17. U.C.C. § 2-204(1) (2004).

18. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 4 (1980).

Neither definitional fiat nor heuristic value, however, establishes that to contract *is* to promise. The interesting question concerns not how we define “contract” or what words we use to describe contractual relationships, but what the act of contracting is and what the moral obligations of contracting parties are. This is an empirical question, one that concerns the moral qualities of contractual transactions. Its answer requires inquiries into both positive law and moral theory.

First, a bit of moral theory. Moral philosophers disagree not only as to the grounds and scope of promissory duties, but also as to just what a promise is. Some employ a narrow concept of promising, according to which to promise is to incur an obligation through the expression of the intent to do so.¹⁹ Others use the term more broadly to refer to all the obligations one knowingly incurs when undertaking joint projects with other people, such as obligations based on expectations, on reliance, or on trust.²⁰ To promise in the narrow sense, it is necessary and sufficient to communicate an intention to incur an obligation by that very communication. Promises in the broader sense include duties that also come from other sorts of facts, such as the relationship between the parties, reliance on the promise, or an expectation of performance.

This divergence is not merely definitional. Those who use the word more broadly commonly doubt the frequency, importance, or even bindingness of promises in the narrow sense.²¹ That said, the issue is at least, in part, about how to use the word “promise.” Here I will use the word in the narrow sense and distinguish promises from other voluntary obligations. A promise in this narrow sense is the expression of an intent to undertake a moral obligation by the very communication of that intent. By uttering the words “I promise to *X*,” the speaker both communicates her purpose to undertake an obligation to *X* and, if her promise succeeds, thereby acquires that obligation. This definition does not require that a person use conventional words, such as “I promise,”

19. See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1442-46 (2004); David Owens, *A Simple Theory of Promising*, 115 PHIL. REV. 51, 54 (2006); Michael Pratt, *Promises, Contracts and Voluntary Obligations*, 26 LAW & PHIL. 531, 531-32 (2007); Joseph Raz, *Promises and Obligations*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 210, 210 (P.M.S. Hacker & J. Raz eds., 1977)[hereinafter Raz, *Promises and Obligations*]; Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 927-33 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981))[hereinafter Raz, *Promises in Morality and Law*]; Gary Watson, *Promises, Reasons, and Normative Powers*, in REASONS FOR ACTION 155, 155 (D. Sobel & Steven Wall eds., 2009). In addition to the above, Michael Pratt lists the following individuals as accepting this definition: David Hume, John Finnis, John Rawls, John Searle, H.L.A. Hart, Charles Fried, Elizabeth Anscombe, Richard Brunaugh and Tony Honoré.

20. See, e.g., P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 184-99 (1981); Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. 1), 46 PROC. ARISTOTELIAN SOC'Y 59 (Supp. 1972); Thomas Pink, *Promising and Obligation*, 23 PHIL. PERSP. 389 (2009); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 208-10 (1990).

21. See Pink, *supra* note 20, at 391. Pink argues that the source of promissory duty “does not lie in any . . . acknowledgement of an obligation, still less in the expression of an actual intention or purpose that the obligation arise.” *Id.*

to communicate her intent. If she communicates the intent indirectly or nonliterally, her promise is implied. She promises, however, only if she expresses such intent. While a promise might be implied, it cannot be implicit. The promisor must say that she promises.²²

It is this narrow sense of “promise” that makes promising the paradigm of a normative power, and which makes promises so important for autonomy theories. Pure promises are a form of moral legislation. By performing a speech act of the right sort, the promisor changes her moral situation. As Fried puts it, “By promising we transform a choice that was morally neutral into one that is morally compelled.”²³ The power to promise gives persons a new form of control over their moral lives by giving them the power to undertake new moral obligations when they wish. And the moral force of promises lends support to a conception of the moral individual as a free sovereign. It would seem that if a pure promise is binding, it is only as a consequence of the will of the promisor. The promisor’s intention to be morally bound is, as Jody Kraus puts it, “the sole source of purely self-originating moral responsibility.”²⁴

Not all agreements involve promises in this narrow sense. Nor are all agreement-based obligations promissory ones.²⁵ An agreement is a joint decision as to what one or more participants in that decision shall do. If Bonnie says to Clyde, “Shall we rake the leaves tomorrow?” and Clyde responds, “Sounds good,” they have agreed to rake the leaves.²⁶ Neither, however, has expressed an intent to undertake an obligation to rake. More to the point, their

22. A formal contract—a contract under seal—is structurally similar to a promise in the narrow sense of the term. By complying with a legal formality, a party can express her intention to undertake a new legal obligation, and by that very expression succeed in doing so. A formal contract results from the exercise of a legal power, a promissory obligation from the exercise of a moral one. Of course, there are also differences. Formal contracts require that the expression of intent be in a conventional form, whereas a promisor need not employ the words “I promise” or other conventional expressions of her intent to undertake the obligation. But the logic of formal contracting is quite similar to that of promising. Both are exercises of a normative power—the one legal, the other moral—to undertake an obligation.

23. FRIED, *supra* note 1, at 8. Niko Kolodny and R. Jay Wallace make a similar point: “the distinctive utility of promising is not simply that it allows A to assure B that A will do X when A has a prior or [nonmoral practice-based] reasons to do X . . . but also that it allows A to assure B when A does not have *any* prior or [nonmoral practice-based] reasons to do X at all.” Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 30 PHIL. & PUB. AFF. 119, 143 (2003).

24. See Kraus, *supra* note 13, at 1615.

25. Compare, here, Barbara Fried’s observation that “the lay person, I think, is much more likely to view promises as continuous with other forms of conduct (conscious coordination, representations about one’s own expectations, and likely future events) that have the effect of leading others to expect you will do X even if you never explicitly promised you would.” Barbara Fried, *Is as Ought: The Case of Contracts*, 92 VA. L. REV. 1375, 1381-82 (2006).

26. One might object to the focus on agreement between natural persons, on the grounds that contracts between firms are at least as common and arguably more important to contract law. But recall my broader thesis that contract law serves both to confer powers and to impose duties. My subject here is only contract law’s duty-imposing function, the explanation of which is more likely to be found in morally thicker contracts between natural persons. In the case of contracts between large firms, contract law functions more to confer powers than impose duties. Thanks to Alan Schwartz for suggesting the need for this clarification.

agreement is not based on the expression of such an intent. Clyde's, "Sounds good," cannot be replaced with, "I promise to rake with you tomorrow," without changing the meaning of what he says. By the same token, in response to, "Sounds good," Bonnie might ask, "Do you promise?" This would not be a request for clarification, but for a speech act of a different type—namely, the express undertaking of an obligation to rake. As Margaret Gilbert observes, in order to agree to *A*, two people "must simply *be* jointly committed [to *A*]; and the available mechanisms for this allow that they need not, in fact, mutually express willingness to be jointly committed to intend to do *A* as a body in order to be so committed."²⁷ Or David Hume, more succinctly: "Two men, who pull the oars of a boat, do it by agreement or convention, tho' they have never given promises to each other."²⁸

Nonpromissory agreements of this sort often generate moral obligations. If Bonnie defects from the plan to rake the leaves, she might wrong Clyde. Bonnie therefore has an obligation to rake the leaves. Because their agreement did not include a promise, the reason that Bonnie has an obligation cannot be her expressed intent to undertake it. The reason must lie elsewhere. One possibility is Clyde's reliance. Clyde's predictable reliance on Bonnie's agreement to rake the leaves might create for Bonnie a duty to perform that agreement, or at least a duty to prevent or make good Clyde's losses in reliance on it.²⁹ But familiar as reliance-based duties are in contract theory, they are hardly the only reason that Bonnie's agreement might generate an obligation. By agreeing to rake the leaves, Bonnie not only announces an intention upon which Clyde might rely, but also invites Clyde to trust her. To invite trust is to suggest that one will take the invitee's interests into account in one's practical deliberations.³⁰ Such an invitation obligates Bonnie for reasons independent of Clyde's reliance. As Thomas Pink observes, "deliberately to invite trust, and then to betray that trust for no good reason, and to do so in circumstances where one's trustworthiness clearly matters to the person betrayed, is to show

27. MARGARET GILBERT, *What Is It for Us to Intend?*, in *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 14, 24, (2000).

28. DAVID HUME, *Of Morals*, in *A TREATISE ON HUMAN NATURE* 291, 315 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739-1740).

29. See ATIYAH, *supra* note 20, at 184-99; MacCormick & Raz, *supra* note 20, at 68. Facundo Alonso has recently argued that most shared intentions involve some minimal form of reliance-based moral obligations. Facundo M. Alonso, *Shared Intention, Reliance, and Interpersonal Obligations*, 119 *ETHICS* 444, 446 (2009). Seana Shiffrin suggests, "The reliance principle seems to be a variation of the promising principle, invoking similar generative powers." Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *PHIL. REV.* 481, 513 (2008). I think this is incorrect, at least if we are talking about promises narrowly conceived, which by hypothesis generate an obligation independently of any reliance on them.

30. For an account of the difference between reliance and trust, see Annette C. Baier, *Trust and Antitrust*, 96 *ETHICS* 231, 234-35 (1986), *reprinted in* ANNETTE C. BAIER, *MORAL PREJUDICES: ESSAYS ON ETHICS* 95, 98-99 (1994).

them contempt.”³¹ But this is not all. If the agreement to rake takes the form of a quid pro quo, it might also be subject to general principles of reciprocity. Nonsimultaneous exchange agreements commonly generate an obligation to make a return.³² If Bonnie, in exchange for her agreement to rake the leaves, received Clyde’s help washing her car, she has an obligation to give something back to him. More generally, if one party establishes the conditions on which her performance shall be granted, acceptance of that performance can give rise to an obligation to reciprocate—whether or not one has expressed an intention to undertake such an obligation.³³ Finally, many agreements take place within, or help generate, relationships that are in themselves valuable. If Bonnie and Clyde are lovers, a defection from the agreement to rake the leaves, trite though the subject matter is, can do harm to the relationship between them. The same is true of more quotidian relationships, such as those between employers and employees, a homeowner and a builder, or a supplier and a long-term customer.³⁴ Samuel Sheffler has described such obligations in some detail: “We human beings are social creatures, and creatures with values. Among the things we value are our relations with each other. But to value with one’s relationship with another person is . . . to see oneself as having special responsibilities to the person with whom one has the relationship.”³⁵ Relationships give rise to a general responsibility to take account of the other person’s needs, interests, or wishes when deciding how to act. The fact of an agreement can transform those general responsibilities into more specific obligations.

The above list of reasons for nonpromissory agreement-based obligations—reliance, trust, exchange, and relationships—is not meant to be exhaustive.³⁶

31. Pink, *supra* note 20, at 412. Seana Shiffrin makes a similar point: “other things being equal, it is wrong to *solicit* another’s trust and then to act in a way that is inconsistent with that invitation.” Shiffrin, *supra* note 29, at 518. This is one place where the morality of agreement-keeping strongly parallels the morality of truth-telling. See Edward S. Hinchman, *Telling as Inviting to Trust*, 70 PHIL. & PHENOMENOLOGICAL RES. 562 (2005); David Simpson, *Lying, Liars and Language*, 52 PHIL. & PHENOMENOLOGICAL RES. 623 (1992).

32. Pink, *supra* note 20, at 401.

33. Principles of reciprocity can support an obligation even absent any antecedent agreement. A familiar example is the unattended roadside fruit stand with marked prices and a box for depositing a cash payment. See Richard H. Thaler & Robyn M. Dawes, *Cooperation*, in THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 6, 19-20 (1992).

34. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 782-83 (1974).

35. Samuel Sheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 200 (1997); see also Monika Berlitzer, *Valuing Interpersonal Relationships and Acting Together*, in CONCEPTS OF SHAREDNESS: ESSAYS ON COLLECTIVE INTENTIONALITY 253, 266 (H.B. Schmid et al. eds., 2008); Samuel Sheffler, *Projects, Relationships, and Reasons*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 247 (R. Jay Wallace et al. eds., 2004).

36. An agreement might also specify exactly what is required by a role-based obligation, such as that of an employer or a business partner. See Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 354-62 (1994). For a somewhat different argument that a promise is not the only reason to perform, see Neal A. Tognazzini, *The Hybrid Nature of Promissory Obligation*, 35 PHIL. & PUB. AFF. 203, 225-32 (2007).

Nor does every agreement generate every type of reason on the list. The point is simply that agreements produce obligations, even absent a promise to perform.

While such agreement-based obligations do not require promises, they are often voluntary obligations, in a strong sense of the term.³⁷ First, they attach to a person as a consequence of her voluntary acts—entering into an agreement. Second, and crucially, a person’s knowledge that she will incur the obligation counts as an additional reason for imposing it. The latter fact does not make them *promissory* obligations. The reason for imposing the obligation need not include an expressed intent to undertake it. This difference is crucial. Pure promises are important to autonomy theories because the reason for the obligation resides, first and foremost, in the promisor’s choice—in her interest in exercising control over her moral situation. Other reasons for voluntary, agreement-based obligations do not involve choice or control in the same way. It may be important to our moral reasoning that the action in question was voluntary and that the actor understood its moral consequences. But the actor’s choice is not the reason we impose the obligation. We impose the obligation based on principles of harm-prevention, respect for the interests of others, reciprocity, or the value of a relationship. The point here is similar to one that Hart makes about the criminal excuses of mistake, accident, provocation, duress, and insanity. These doctrines “maximiz[e] within the framework of coercive criminal law the efficacy of the individual’s informed and considered choice in determining the future and also his power to predict that future.”³⁸ Maximizing choice within a regime that imposes duties for other reasons is not the same as imposing obligations because they are chosen. Because the nonpromissory reasons for agreement-based obligations do not involve an act of pure choice—or the exercise of a normative power—the obligations they generate are not chosen in the sense that matters for autonomy theories.

I suggest that when describing the moral situation between Bonnie and Clyde, we say that Bonnie’s agreement to rake the leaves gives rise to a single obligation to rake, which might be supported by any number of moral reasons.³⁹ If Bonnie merely announced to the world her intention to rake the

37. Raz, *Promises in Morality and Law*, *supra* note 19, at 928-31. I discuss Raz’s idea of voluntary obligations, and the difference between voluntary obligations in general and obligations that come from the exercise of normative powers, in Klass, *supra* note 5, at 1774-75; see also J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325, 327-30 (1996) (identifying nonpromissory types of voluntary obligations). The point is important because it helps explain how these nonpromissory moral reasons can provide what Raz calls “protected reasons”—reasons to act that also exclude some potential countervailing reasons. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 35-48 (1990).

38. H.L.A. HART, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGES OF MODERN SCIENCE 81 (S. Hook ed., 1958), reprinted in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 46 (2008).

39. This is not the only agreement-based obligation Bonnie might have. She might also have an obligation, for instance, to tell Clyde if she changes her mind about raking the leaves, or to somehow make it

leaves, perhaps the only reason she would have an obligation to do so would be Clyde's potential reliance on that announcement. In another case, her obligation to rake might be supported by more than one reason. Bonnie might have the obligation because Clyde has relied on her agreement, because Bonnie's agreement invited Clyde's trust, and because they are lovers. In such a situation, we can say that Bonnie has a single obligation supported by several reasons, instead of saying that she has three separate obligations—a reliance-based one, a trust-based one, and a relationship-based one.⁴⁰

So far I have been focusing on agreements without promises. What if Bonnie also promises to rake the leaves? My suggestion is that such a promise does not supersede or otherwise extinguish the nonpromissory reasons for the obligation. The promise, to the extent that it makes a difference, is an *additional* reason for her obligation to perform.

We can now turn to the moral obligations of contracting parties, contracts being a type of legally binding agreement. There are two questions here. First: Do contracts typically involve promises? Second: If they do, is a party's promise to perform the best reason for imposing on her a legal obligation to do so? I believe there are good reasons to think, despite the law's "explicit self-representation of its relationship to promising,"⁴¹ the answer to the first question is "No": contracts need not, and many contracts do not, involve promises in the narrow sense. But even if I am wrong and contracting parties typically do promise performance, that fact would not answer the second question. Perhaps even where parties promise performance, that promise is not the best reason to impose on them a legal obligation to perform.

Contracts are promises if the conditions of contractual validity entail that parties acquire a legal duty to perform only if they promise performance—only if they express an intent to undertake a moral obligation to perform by the very expression of that intent. The conditions of contractual validity do not require that the parties make a promise in this sense. To take an extreme case, consider a *Second Restatement of Contracts* illustration of an implied-in-fact contract:

up to Clyde if she fails to rake the leaves. Those other obligations might be supported by all or only some of the reasons for her obligation to rake the leaves.

40. The advantage of this way of speaking, which I will not exploit here, is that it allows one to then employ John Gardner's Razian account of corrective justice in thinking about the possible functions of contract law vis-à-vis the moral obligation to perform. John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 38 (2011); Joseph Raz, *Personal Practical Conflicts*, in *PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS* 172 (Peter Baumann & Monika Betzler eds., 2004). Gardner argues, "When we have a primary obligation to ϕ at $t1$, but do not ϕ at $t1$, we acquire, all else being equal, a secondary obligation to come as close as we now can to ϕ ing at $t1$, where closeness is determined by the reasons for the original obligation." Gardner, *supra*, at 38. Or a bit more poetically: "the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due." *Id.* at 33.

41. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 721 (2007). Contrary to my approach, Shiffrin recommends that the reader "start by taking the law's self-description seriously and conceive of contracts as resting upon promises per se." *Id.* at 722.

“A telephones to his grocer, ‘Send me a ten-pound bag of flour.’ The grocer sends it. A has thereby promised to pay the grocer’s current price therefor.”⁴² There is a good argument that a request for goods from a merchant typically implies an *agreement* to pay. This is especially so if the parties have a history of such transactions (“A telephones to *his* grocer. . .”). A should reasonably expect to be bound by an obligation—both legal and moral—to pay for the flour. And that fact might figure into the decision to hold A responsible for paying. A’s legal and moral obligations are voluntary ones. But where here is A’s expression of an intent to undertake an obligation to pay through the expression of that intent? A acquires the obligation because he has implicitly agreed to pay for the flour. He acquires it because he does, or should, understand that his grocer is not in the business of giving flour away for free. As a competent moral agent, A should understand that principles of reliance, trust, reciprocity, and relationships together impose on him a duty to pay for the flour. These principles do all the work necessary to establish A’s moral obligation to pay. We do not need to posit an implied expression of intent to undertake the obligation by the very expression of that intent. More to the point, such an interpretation would not be true to the phenomena. It would misunderstand the meaning of the transaction.

Of course, implied-in-fact contracts are extreme cases. But how a rule operates at its outer borders can illuminate its operation at the center.⁴³ In practice, the conditions of contractual validity require only an agreement to perform; they do not require a promise to do so.

The above argument does not rule out the possibility that contracts are systematically related to promises. Even if the conditions of contractual validity do not require a promise as such, they might work to limit legal enforcement to cases in which the parties have implicitly promised. It might be, for example, that exchange agreements are normally understood to involve implicit promises to perform.⁴⁴ Consider another *Second Restatement* example of an implied-in-fact contract:

42. RESTATEMENT (SECOND) OF CONTRACTS § 4 illus. 1 (1981). Barbara Fried makes a similar point about implied-in-fact promises. See Fried, *supra* note 25, at 1379.

43. Other examples near the outer border include the Uniform Commercial Code’s rules for warranties and for modifications. Under the U.C.C., “[a]ny description of the goods” or “[a]ny sample or model” that “becomes part of the basis of the bargain creates an express warranty.” U.C.C. § 2-313(1)(b)-(c) (2009). A warranty does not require a promise that the description or sample is accurate. Thus “[i]t is not necessary to the creation of an express warranty that [the seller] use formal words such as ‘warrant’ or ‘guarantee’ or that the seller have a specific intention to make a warranty.” *Id.* § 2-313(3). The provisions governing modification by conduct are even more striking. The U.C.C. provides that “course of performance shall be relevant to show a waiver or modification of any term inconsistent with such performance.” *Id.* § 2-208(3). Courts and commentators have read this provision to authorize modifications of even integrated agreements. See 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES §§ 2-202:3, 2-208:3. Such modifications do not require express agreement, much less promise.

44. I am grateful to Shawn Kaplan, who suggested this argument to me in conversation.

A, on passing a market, where he has an account, sees a box of apples marked “25 cts. each.” A picks up an apple, holds it up so that a clerk of the establishment sees the act. The clerk nods, and A passes on. A has promised to pay twenty-five cents for the apple.⁴⁵

Why would *A* hold the apple up for the clerk to see except, one might argue, to acknowledge—and by signaling, undertake—an obligation to pay for it? If this is correct, the consideration requirement could serve not, as Lon Fuller maintained,⁴⁶ to put the parties on notice that they are undertaking a *legal* obligation, but to ensure that they are purposively undertaking a *moral* one. This suggests a positive role for the consideration requirement within promissory theories of contract.

I am not entirely convinced. But I do not want to argue this point here.⁴⁷ Even if we grant that contracting parties commonly do promise to perform, in most cases, that fact will not be the only reason for their moral obligation to do so. If the promise was given for consideration, the promisor’s obligation to perform might also be supported by norms of reciprocity. Depending on the facts of the case, a contractual promise can also generate an obligation because the promisor knowingly caused the other side to expect and to rely on her performance, because she invited the other side to trust that she will perform, or because her nonperformance would harm an intrinsically valuable relationship between them. Even if one or both parties have promised performance, the transaction between them is also likely to include these morally salient facts. Assuming that the duty-imposing function of contract law rests on the moral obligation to perform, we still need an argument that the reason for imposing the legal duty to perform is the promise, and not reliance, trust, exchange, relationship, or some other morally salient fact.

II. SOME IMPLICATIONS FOR CONTRACT THEORY

A complete theory of the moral basis of contract law’s duty-imposing function would next ask whether any of these reasons for the moral obligation

45. RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a, ill. 2.

46. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-05 (1941).

47. P.S. Atiyah makes a beginning of the argument in his review of *Contract as Promise*, where he writes, “The promises of the parties are legal constructs that cannot be identified until we have decided what the parties ought to do. Obligation comes first, Promise afterwards.” P.S. Atiyah, Book Review, 95 HARV. L. REV. 509, 519 (1981) (reviewing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981)) [hereinafter Atiyah, *Review*]; see also P.S. ATIYAH, *CONSIDERATION IN CONTRACT* 24-27 (1971). Ann DeMoor too has argued for a distinction between contract and promise, though she employs a broader conception of promise than the one I am using here. Anne De Moor, *Are Contracts Promises?*, in *OXFORD ESSAYS IN JURISPRUDENCE* 103 (John Eekelaar & John Bell eds., 3d ser. 1987); see also Penner, *supra* note 37, at 340-43 (arguing that contracts should be understood as enforcing agreements, not promises).

to perform an agreement are also a reason to impose legal liability for its breach. In *Contract as Promise*, Fried argues that the reason for imposing the legal duty is the existence of a promise, and that the legal obligation tracks the moral one.⁴⁸ I take this to explain why a central passage of the book does not distinguish between the moral and legal reasons for requiring that a promise be performed:

[W]e feel that holding people to their obligations is a way of taking them seriously and thus of giving the concept of sincerity itself serious content. Taking this intuition to a more abstract level, I would say that respect for others as free and rational requires taking seriously their capacity to determine their own values. . . . Others must respect our capacity as free and rational persons to choose our own good, and that respect means allowing persons to take responsibility for the good they choose.⁴⁹

From this argument, Fried concludes that because contracts are promises, “it is not surprising that the law came to impose on the promises it recognized the same incidents as morality demands.”⁵⁰

Thirty years later, the question looks more complicated. This is not only because we know that agreements are more than mere promises. Fried knew this, and he grants that contract law might also sometimes respond to both reliance-based and restitution-based obligations.⁵¹ The question appears more complicated today because the intervening years have produced a more detailed understanding of the many different functions that a duty-imposing law can have in relation to the moral order.

Most obviously, a duty-imposing law can be designed to enforce first-order moral duties. The crime of murder, for example, arguably enforces the moral duty not to kill. Fried assigns this sort of function to contract law: it enforces the moral obligation to keep one’s promises. First-order enforcement might serve deterrence, retribution, public condemnation, or some other end. Alternatively, or in addition, a duty-imposing law might be designed with a view to second-order duties—duties that arise as a result of first-order moral wrongs. If the crime of murder enforces the first-order moral duty not to kill, the tort of wrongful death appears to address the murderer’s second-order moral obligation to compensate surviving family members for their loss. Similarly, contract law might aim to enforce not the moral obligation to

48. See FRIED, *supra* note 1, at 17 (noting reasons for imposing legal duty).

49. See *id.* at 20. Earlier in the same chapter, Fried suggests a somewhat different argument for the moral obligation to perform a promise: the fact that a promisor “intentionally invokes a convention whose function is to give . . . moral grounds . . . for another to expect performance” and thereby extends an “invitation to the other to trust, to make himself vulnerable.” *Id.* at 17.

50. *Id.* at 20-21.

51. *Id.* at 21-27.

perform, but second-order obligations of corrective justice.⁵² I take this to be Atiyah's point in his review of *Contract as Promise*: "the law does not really enforce the promise at all, but instead gives a remedy in damages for its nonperformance."⁵³ The first two sorts of functions both concern the moral duties of individual agents. A law might also impose legal duties, not out of concern with the moral duties of individuals, but as a way of supporting moral culture or practice more generally. By punishing or otherwise responding to moral wrongs, the law can publically recognize and affirm the moral rule. When society punishes murder, it also condemns it, marking it as a wrong. Thus Raz suggests that contract law is designed primarily to support the practice of entering into and keeping agreements.⁵⁴ Alternatively, or in addition, a law might be designed to give greater determinacy to moral rules or principles. Traffic laws, for example, make more determinate the general moral duty not to drive a car dangerously—generating the more specific duty to stop at a red light.⁵⁵ Jules Coleman suggests that contract law serves this function insofar as it provides "as exogenous resources upon which agents can draw to reduce uncertainty and aid cooperation among them."⁵⁶

Cutting across these four possible functions is Raz's distinction between "derivative" and "original recognition."⁵⁷ The law sometimes gives legal effect to nonlegal norms, such as the rules governing agreement-based moral obligations, because of the value we attach to those norms themselves. This is derivative recognition.⁵⁸ In other instances, the law gives legal effect to nonlegal norms for other reasons, such as social welfare, which might not correspond to the underlying logic of the extralegal norm. This is original recognition.⁵⁹ The legal reasons for recognizing the agreement-based moral obligations might derive from the value of those moral norms, or might stem from other social purposes original to the law. The difference is important. Whereas derivative recognition typically provides a reason for the law to

52. See Kraus, *supra* note 13, at 1628 (discussing first-order moral responsibilities). Kraus maintains that "[a] strong correspondence account of contract cannot justify a remedial legal duty on the ground that it corresponds to the first-order moral obligation to keep a promise unless that obligation entails a second-order (remedial) moral duty for its breach." *Id.* If this is what Kraus means by "strong correspondence," I have no complaint. But Kraus seems to assume that the law should enforce only second-order moral obligations. *Id.* at 1628-30. It would not be nonsensical for a law to enforce a first-order moral obligation in ways that do not "correspond" to the obligor's second-order obligations.

53. See Atiyah, *Review*, *supra* note 47, at 517.

54. See Raz, *Promises in Morality and Law*, *supra* note 19, at 934.

55. See Gardner, *supra* note 40, at 19 (citing moral obligations expressed in laws).

56. JULES L. COLEMAN, *RISKS AND WRONGS* 141 (1992). Coleman thinks of this role only in relation to contract law's power-conferring function. *Id.* at 133. I am suggesting that it also applies to contract law's duty-imposing one.

57. Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. 2), 46 *PROC. ARISTOTELIAN SOC'Y* 79, 86-87 (Supp. 1972).

58. See *id.* at 86 (explaining derivative recognition).

59. See *id.* at 86-87 (explaining original recognition).

remain true to the extralegal-normative structure, original recognition allows more space for normative innovation.

The different functions the law can play in relation to the moral order move us far beyond the simple dichotomy between reliance and will theories that defined the debate when *Contract as Promise* appeared. A complete theory of the moral basis for contract law's duty-imposing function must explain not only which moral facts of agreements for consideration are legally salient, but also the law's function or functions in relation to those facts.

I will not attempt such a theory here. Instead, I want to apply the results of Part I to critically examine three recent claims about the moral basis of contract law: Michael Pratt's argument that there is an important difference between contracting and promising,⁶⁰ Jody Kraus's correspondence theory of contract and promise,⁶¹ and Seana Shiffrin's thesis that contract law diverges from the morality of promising in problematic ways.⁶² I hope to show that each relies on oversimplified accounts of the moral landscape of contract.

Both Pratt and Kraus deploy their arguments to criticize Shiffrin's divergence thesis, which maintains that contract law differs in problematic ways from the morality of promising.⁶³ I therefore begin with a brief summary of Shiffrin's argument. Shiffrin does not assume that contract law aims to enforce moral obligations or is otherwise justified by any of the reasons described above. Instead she makes the more modest claim that no matter what the reasons for assigning legal liability for breach, we should want a party's contractual obligations to harmonize with her moral ones.⁶⁴ Liberal theory requires that the law be "compatible with the conditions necessary for moral agency to flourish."⁶⁵ Consequently, "even if enforcing interpersonal morality is not the proper direct aim of law, the requirements of interpersonal morality may appropriately influence legal content and legal justification to make adequate room for the development and expression of moral agency."⁶⁶ The existing law of contract, Shiffrin argues, does not satisfy this requirement because "the contents of the legal obligations and the legal significance of their breach do not correspond to the moral obligations and the moral significance of their breach."⁶⁷ Examples of problematic divergences include the

60. Pratt, *supra* note 19.

61. Kraus, *supra* note 13.

62. Shiffrin, *supra* note 41.

63. See Kraus, *supra* note 13, at 1648-49 (concluding promissory morality reconciles contract and promise); Pratt, *supra* note 19, at 531 (arguing contract and promise as logically independent).

64. See Shiffrin, *supra* note 41, at 712-15.

65. *Id.* at 709.

66. *Id.* at 715. Shiffrin also argues that "[t]he legal system's rules and justifications should be acceptable to moral agents without disrupting their moral agency," and that "[t]he law and its rationale should be transparent and accessible to the moral agent. . . . [U]nderstanding the law's rationale should not present a conflict for the interested citizen qua moral agent." *Id.* at 717-18.

67. *Id.* at 709.

unavailability of punitive damages, which would “express the judgment that the behavior represents a wrong”;⁶⁸ courts’ refusal to grant specific performance in cases of anticipatory repudiation, even though “moral observers would direct that the performance should occur as promised”;⁶⁹ the failure to award damages for unforeseeable-consequential harms (the *Hadley* rule), which is “quite strange” from a moral perspective;⁷⁰ and the mitigation rule, which is contrary to the breaching promisor’s burden to locate and provide an adequate substitute for performance.⁷¹

Michael Pratt has argued against Shiffrin that contracts need not involve promises and that “the law of contract is not concerned with promises as such.”⁷² Pratt observes that we can imagine a person exercising the power to undertake a legal obligation to perform while at the same time communicating that she intends not to undertake a corresponding moral obligation. Parties might sign a document providing that “the commitments expressed herein are exclusively contractual” and “are . . . not promises.”⁷³ One can therefore contract without promising, for “[w]hatever may be involved in its performance, the garden-variety speech act known as ‘promising’ is not performed by a speaker who manifestly denies promising and who disclaims any moral obligation to perform his undertaking.”⁷⁴ It follows that “not all contractual undertakings are promises and contracts are not properly defined as promises that the law will enforce.”⁷⁵ Any divergence between contract and promise is not problematic, because contract as such has nothing to do with promise. “It is not in virtue of the morally significant feature of an undertaking that the law regards that undertaking as contractual.”⁷⁶

Pratt’s analysis, even on its own terms, does not answer all of Shiffrin’s moral critiques. Even if there is no *a priori* relationship between contract and promise, there might be empirical overlap. If most contracts involve promises, or if the practices are similar enough that persons are likely to confuse them, then differences between contract and promise might still work to degrade the moral culture of promising. But Pratt’s argument is incomplete in another way as well.

While it is true that one cannot undertake to promise and at the same time expressly deny that one is promising, other voluntary, agreement-based obligations are not so easily avoided. One cannot invite a friendship and at the

68. Shiffrin, *supra* note 41, at 723.

69. *Id.*

70. *Id.* at 724.

71. *Id.* at 725.

72. Michael Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801, 802 (2008).

73. *Id.* at 808.

74. *Id.*

75. *Id.*

76. Pratt, *supra* note 72, at 816.

same time effectively disclaim all the obligations that attach to the relationship. If one gains a trusting friend despite the disclaimer, one remains under the obligations that result from having invited her friendship. A contract is not typically an invitation to be friends. But it is commonly an invitation to rely in the context of an exchange. In many cases entering into a contract involves an invitation to trust. And many contractual agreements figure into the creation or continuation of valuable relationships. An obligation to perform, generated by reliance, exchange, trust, or relationship, cannot be avoided by a simple disclaimer. Yet these obligations are, in an important sense, voluntary obligations. Pratt suggests that “a voluntary obligation is one that would not obtain but for the intention of the obligor to acquire it.”⁷⁷ But this is too narrow a definition. The world of voluntary obligations is comprised of more than promises. When a person acts in a way that she knows will put her under an obligation to another, she voluntarily undertakes that obligation—though that undertaking might not be accompanied by an expressed intent to acquire the obligation.

This is enough to get Shiffrin’s divergence thesis off the ground. Shiffrin’s argument starts from the broader principle that the state has a legitimate, and even liberal, interest in ensuring that legal rules “make adequate room for the development and expression of moral agency.”⁷⁸ Because the concern is moral agency writ large, Shiffrin does not and should not limit her inquiry to promises in the narrow sense. In her theoretical work on promising, Shiffrin seems to use “promise” to refer to agreement-based obligations more generally.⁷⁹ And nothing in her work on contract law suggests that the divergence thesis is limited to promises narrowly conceived. The requirements of contract law might diverge from the voluntary obligations of contracting parties even if some, many, or all contracts do not involve promises per se.

Jody Kraus has a different answer to Shiffrin: her arguments for the divergence thesis fail to differentiate between a promisor’s first- and second-order obligations.⁸⁰ Kraus is interested in “correspondence theories” of contract—theories that maintain that contractual duties correspond to the moral obligation to perform. While this might seem to be thoroughly trodden ground, Kraus adds something new. He argues that a correspondence theory must attend not only to the first-order moral obligations a promise creates, but also to

77. *Id.* at 811.

78. Shiffrin, *supra* note 29, at 502-03.

79. Shiffrin maintains, for example, that the logic of promise both allows persons to “bind themselves through the communication of their intention to do so,” and explains why the statement “I intend to ϕ ” gives rise to an obligation to ϕ . *Id.* Similarly, she distinguishes among “promises” of varying degrees of strength, formality, and expressness. *Id.* at 514-17. And, as noted above, she suggests that reliance-based obligations are variations on promises. *Id.* at 513.

80. See Kraus, *supra* note 13.

the second-order obligations of a breaching promisor.⁸¹ And, he argues, because promissory obligations are grounded on the autonomous choice of the promisor, the promisor's choice should also govern her remedial moral obligations in the case of nonperformance:

If personal sovereignty explains and justifies promissory obligations on the ground that they vindicate the will of the individuals who incur them, then the remedial moral duties, if any, that attach to the violation of those obligations should also be subject to the will of the individuals who create the obligations. If autonomy underwrites the moral liability, so to speak, then it should also underwrite the moral remedy.⁸²

The right moral remedy for an unfulfilled promise depends, according to this theory, on the second-order obligation the promisor intended to undertake, which is an empirical-interpretive question. Kraus then applies his correspondence thesis—that contractual obligations should track promissory ones—to argue that the right legal remedy depends on the answer to the same empirical-interpretive question. “Contract law certainly enforces promissory morality to the extent that it enforces the promisor's explicit intention to assume a remedial obligation.”⁸³ Where the promisor does not express her intent, the law should look to her probable, unexpressed intent. It is but a short step, via familiar economic arguments about how remedies affect the joint surplus of trade, to the conclusion that the majoritarian default interpretation of the parties' remedial intent is expectation damages.⁸⁴ Where Shiffrin sees in contract law's remedial doctrines a divergence from the requirements of morality, Kraus sees an attempt to “ensure contract law's respect for a promissory morality based on personal sovereignty.”⁸⁵

Kraus's argument is ambitious and original. It also makes several, questionable analytic leaps. While my primary concern is his equation of contract with promise, several other aspects bear quick mention. To begin with, it is not obvious that moral duties generally come with well-defined second-order duties attached to them.⁸⁶ The point can be made by extending

81. *Id.* at 1628-29.

82. *Id.* at 1629-30 (footnote omitted).

83. *Id.* at 1635; *see also id.* at 1630 (“[T]o justify the legal enforcement of the moral obligation to keep a promise, correspondence accounts must look to the voluntary choice of promisors not only to identify their promissory obligations but to determine their remedial moral duties as well.”).

84. *See* Kraus, *supra* note 13, at 1632-34.

85. *Id.* at 1640; *see also id.* at 1640-47.

86. David Owens makes this point with respect to the morality of promising:

Often the wronged party does indeed have the right to receive compensation for the injury they have suffered (whether or not they have the further right to use force to extract it) and it is a good thing that this is so. But, just as frequently, talk of compensation seems out of place though there is no

Kraus's premise: If first-order duties come with second-order ones, then second-order duties presumably come with third-order duties triggered by their violation, which, in turn, suggest the existence of fourth-order duties, and so on. The fact that our moral intuitions quickly run out as we ascend the ladder shows that the idea of a moral duty need not have attached to it a higher-order duty triggered by its breach. There may well be second-order moral duties, but it is not obvious that every first-order duty comes with one. And even if we grant that promises come with second-order obligations that attach to their breach, it is not obvious that the autonomy interest in promising requires granting promisors a choice of remedial obligations. Ian Macneil has argued that the legal reasons for giving persons the autonomy to undertake contractual obligations do not support giving them the power to decide the legal remedy for their violation.⁸⁷ By the same token, the moral reasons giving persons the power to undertake moral obligations might not support giving them the ability to set the terms of a moral violation. We need a thicker account of the autonomy basis of promising to be sure that it also underwrites a choice in remedial obligations.⁸⁸ Finally, even if we were to allow that the morality of promising imposes clear second-order obligations, it still would not follow that the legal remedy for breach should correspond to them. Kraus thinks the question is clear because, for him, "correspondence" refers not only to correspondence of rules (such as the obligation to perform), but also to correspondence of rationales (autonomy).⁸⁹ If the moral reason is autonomy, then so too must be the legal reason; and if autonomy supports remedial choice in the morality of promising, then it must also in the law of contracts. But recall Raz's argument that the law sometimes recognizes and gives legal effect

doubt that the injured party has been wronged. If I fail to show up to your wedding as promised, you might well expect me to do something to make it up to you, but that something is not valued as *compensation* for the wasted place at the wedding breakfast, not even for your sense of disappointment.

DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* (forthcoming Sept. 2012) (manuscript § 9, at 96) ("Wrongs and Wrongs").

87. Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 *CORNELL L.Q.* 495, 498 (1962).

88. Thus Raz, who identifies the moral basis of promising in autonomy, argues:

We must . . . clearly distinguish between two questions. First, is the formation of promises entirely within the control of the promisor? Second, is the content of the promissory obligation entirely within the control of the promisor? I have suggested that an affirmative answer to the first does not entail an affirmative answer to the second.

Raz, *Promises in Morality and Law*, *supra* note 19, at 932. David Owens has similarly argued that while the parties have control over the solemnity of the promise—the first-order reasons for performing and the scope of the exclusionary reasons it creates—they do not have control over its stringency. OWENS, *supra* note 86, § 44 ("The Solemnity of a Promise").

89. See Kraus, *supra* note 13, at 1607-08.

to nonlegal norms for its own reasons.⁹⁰ Kraus needs an argument for his premise that correspondence theories are perforce also autonomy theories.

Even if we grant Kraus all these points, however, there remains his assumption that all contracts involve promises. Kraus's emphasis on moral autonomy corresponds to his use of "promise" in the narrow sense of the term. Like Pratt, Kraus maintains, "The responsibility described by [the] moral obligation . . . requires that those actions be taken with the additional and distinct intention to incur a moral responsibility that individuals are otherwise free to avoid."⁹¹ Kraus does not attempt to answer Pratt's argument that a contract need not involve a promise in this narrow sense. His argument simply assumes that contracts involve promises. Nor, and this is the crucial point, does Kraus take into account the fact that even where one or both parties have promised performance, the parties can be obligated to perform for nonpromissory reasons as well. Because nonpromissory obligations are not simply willed into existence, Kraus's argument about remedial choice does not apply to them. So even if we allow that the legal remedies for breach should correspond to the parties' second-order moral obligations, we need not accept that all of those second-order obligations are subject to party choice. We might grant Kraus that "a moral theory that mandates the content of the remedial duties created by breach of *promissory obligations* would be inconsistent with the personal sovereignty conception of autonomy from which those obligations derive,"⁹² yet maintain that moral theory does mandate the content of remedial duties created by breach of *other voluntary obligations* that attach to contractual agreements. If it does, remedial correspondence requires something other than a majoritarian default. It requires correspondence with remedial obligations that are not a matter of party choice. This is all that Shiffrin's divergence thesis needs.

If neither Pratt's nor Kraus's critique hits the mark, that does not mean that Shiffrin is right, that contract law does diverge from the moral obligations that attach to contractual agreements in problematic ways. Shiffrin's argument for the divergence thesis has three layers. First, Shiffrin argues that individual rules of contract law, especially the remedies for breach, do not correspond to the requirements of morality. As a result, contract law sends the wrong message about the parties' moral obligations to one another.⁹³ Second, Shiffrin argues that the best explanation of the law's remedial rules, the theory of efficient breach, is inconsistent with the requirements of morality, because the theory recommends that promisors breach whenever performance becomes too

90. See Raz, *Promises in Morality and Law*, *supra* note 19.

91. See Kraus, *supra* note 13, at 1629.

92. *Id.* (emphasis added).

93. See Shiffrin, *supra* note 41, at 719-29.

expensive or a better opportunity comes along.⁹⁴ Finally, Shiffrin argues that following the rules of contract law can inculcate habits of practical reasoning that are incompatible with the development or maintenance of moral character.⁹⁵ Even if contract law did not express the wrong message about morality or rest on an immoral theory, “the rule and its justification may play a role in creating a wider culture in which pressure develops not to comply with the moral commitment, whether just because it is not legally required or because the legal permission spawns cultural habits that render moral compliance precious or alien.”⁹⁶

A complete evaluation of Shiffrin’s argument would therefore need to consider three separate questions: one interpretive, one theoretical, and one empirical. The interpretive question is whether contract law, in fact, sends the message Shiffrin reads in it. Shiffrin argues, for example, that by prohibiting punitive damages for breach, the law “fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price.”⁹⁷ But perhaps we should instead interpret the law’s preference for compensatory damages as reserving stronger expressions of censure for yet more-serious moral wrongs, such as lying promises or bad faith breach.⁹⁸ Nor should we forget the law’s purported preference for the expectation measure over the reliance measure. By calculating damages in terms of the value of performance to the promisee, the law might be said to express, without specifically enforcing, the promisee’s entitlement to performance. The theoretical question is whether the theory of efficient breach is, in fact, the best explanation of contract law’s remedial rules. There is an extensive economic literature casting doubt on that theory and its simplifying assumptions.⁹⁹ Lastly, the empirical question is whether contract

94. See *id.* at 729-33.

95. See *id.* at 740-41, 747-49.

96. See *id.* at 740.

97. Shiffrin, *supra* note 41, at 724.

98. The idea here is that there is something like a principle marginal disapprobation. Just as economic theories of criminal law require that sanctions satisfy the principle of marginal deterrence (greater sanctions should be reserved to deter more significant harms), expressive theories entail that more censorious remedies should be reserved for more serious wrongs, so as to avoid a message of moral equivalence.

99. See Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 584 (2006); Kenneth W. Clarkson et al., *Liquidated Damages v. Penalties: Sense or Nonsense*, 1978 WIS. L. REV. 351, 352-57; Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1460 (1985); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 668-70 (1988); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 491 (1996); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 653 (1999); Aaron S. Edlin & Alan Schwartz, *Optimal Penalties in Contracts*, 78 CHI.-KENT L. REV. 33, 40 (2003); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 562 (1977); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 369-76 (1978); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 936-39 (1998); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 285 (1979); Eric L. Talley, Note, *Contract*

law, in fact, engenders habits of practical reasoning that are at odds with moral character. Relevant here is Lisa Bernstein's observation, which extends the empirical work of Stewart Macaulay and others, that merchants commonly treat the law as providing "end-game norms,"—rules that come into play only if the relationship should break down, and that during the life of most contract disputes are resolved on the basis of more flexible and cooperative extralegal, "relationship-preserving norms."¹⁰⁰

Interesting as these discussions are, I want to address a narrower point suggested by the above analysis. I have argued that in defending her divergence thesis, Shiffrin uses "promise" in a broader sense than do Pratt and Kraus. But many of Shiffrin's arguments about the law's divergence from moral requirements are true only of promises in the narrower sense. Nonpromissory agreements—agreements that are not accompanied by the expression of an intent to undertake an obligation by that very expression—are often less stringent than promissory ones and, at the same time, entail a greater degree of cooperation and joint responsibility.¹⁰¹ We commonly speak of the sanctity of promises, but not of agreements. "But you promised" is a more significant reproach than "But you agreed." The reason is that nonpromissory, agreement-based obligations can be relatively weak, their breach the occasion for disapprobation, but not punishment or compelled performance. At the same time, nonpromissory agreements often involve a degree of cooperation and shared responsibility that is absent in unilateral, or even reciprocal, promises. The party to a nonpromissory agreement might reasonably expect her partner to inform her of any unusual losses defection is likely to cause her. Nor need one side's defection end the relationship, in which case the defecting party might reasonable expect that the other will take steps to minimize her losses.

Renegotiation, Mechanism Design, and the Liquidated Damages Rule, 46 STAN. L. REV. 1195, 1229 (1994).

100. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796-1802 (1996); see also Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 760-76 (1999). The *locus classicus* of this literature is Stewart Macaulay's *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). A recent important intervention in it is Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 COLUM. L. REV. 1377 (2010) (discussing inter alia how "low power" remedies, such as reliance damages, function to protect and promote development of trust between parties).

101. Shiffrin makes a similar point in her theoretical work on promising. She states:

Intermediary relations of created commitment often transpire implicitly, doing some of the work I ascribed to firm commitment as such but in a myriad of subtle, flexible ways, employing moral gradations based on the knowledge and comfort level of intimates. Variations may occur, not only with respect to what language is used, if any, but also in the moral consequences of failure to keep the commitment, what conditions should excuse the commitment, and under what conditions the promisee should release the promisor.

Shiffrin, *supra* note 29, at 514. The problem, as I see it, is that Shiffrin does not take these observations into account in her description of the minimal content of contracting parties' moral obligations.

Agreement-based obligations come in a variety of forms. If we replace “promise” with “agreement,” the rules governing punitive damages, specific performance, unforeseeable damages, and mitigation do not seem nearly so odd.

If many of the divergences Shiffrin observes do not apply to nonpromissory, agreement-based obligations, that fact provides a rather different argument for Pratt’s thesis that “the law of contract is not concerned with promises as such.”¹⁰² Pratt’s argument for this claim is that the conditions of contractual validity do not include a promise to perform, from which he draws the conclusion that “[i]t is not in virtue of the morally significant feature of an undertaking that the law regards that undertaking as contractual.”¹⁰³ Once we recognize that many contractual agreements involve nonpromissory moral obligations, the divergence of contract from promises in the narrow sense is unproblematic for a different reason. Reliance, trust, reciprocity, and relationship are all morally significant features of undertakings, each of which can figure into a party’s moral obligations. If the moral reasons they generate better harmonize with the law of contract than does the logic of promising, this is evidence that the moral basis of contract law’s duty-imposing function lies not in the parties’ promises to perform, but in their agreement more broadly conceived. The divergence Shiffrin observes suggests that the law of contract is not concerned with promises as such, but with other aspects of the parties’ moral obligation to perform.

CONCLUSION

The above re-reading of Shiffrin’s argument is not a complete theory of the moral basis of contract law’s duty-imposing function. That would require a more detailed assessment of the possible functions of contract law in relation to the various morally salient features of agreements for consideration. With respect to reliance and reciprocity, for example, contract law might serve to enforce second-order obligations or repair or return. Alternatively, with respect to the relationship-based reasons, the best the law might be able to do is support the moral practice by condemning its violation. But if the theory remains incomplete, I hope the above analysis has at least mapped the space it might occupy.

102. Pratt, *supra* note 72, at 802.

103. *Id.* at 816.