

## Promise and Private Law

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### ABSTRACT

This essay was part of a symposium on the thirtieth anniversary of the publication of Charles Fried's *Contract as Promise* and revisits Fried's theory in light of two developments in the private-law scholarship: the rise of corrective justice and civil-recourse theories. The structural features that motivate these theories—the bilateralism of damages and the private standing of plaintiffs—are both elements of the law of contracts that *Contract as Promise* sets out to explain. I begin with the issue of bilateralism. Remedies—in particular the defense of expectation damages—occupy much of Fried's attention in *Contract as Promise*, and he insists that this particular remedial response flows from a commitment to promissory morality. I am skeptical of this claim and seek to show the implausibility of grounding compensatory damages in a duty to keep a promise. Rather, to explain this feature of contract law, the duty to keep a promise must be joined with principles of corrective justice. I next turn to the issue of private standing. First, I seek to demonstrate that our plaintiff-centered system of contract law is a genuine puzzle. We cannot dismiss the issue of private standing as a pragmatic and ad hoc response to problems of enforcement. Rather, I argue that a better candidate can be found in the work of civil-recourse theorists who seek to elucidate the value of victims in a liberal society by holding wrongdoers accountable for their wrongs. Finally, I address some of the problems associated with the arguments presented in this essay. How exactly do promissory morality, corrective justice, and civil recourse relate to one another? My conclusion is that, at best, there is an uneasy and ill-defined relationship between these different goals. On the other hand, I hope to show that promissory theories of contract nevertheless must take the issue of private law seriously. The bilateral structure of liability and the system of private standing are major institutional features whose existence must be acknowledged and accounted for in future efforts to defend a promissory vision of contract.

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## I. INTRODUCTION

Charles Fried's *Contract as Promise*<sup>1</sup> is a justly celebrated work. Published in 1981, it arrived at a moment when contract scholarship, particularly in its most theoretical inflections, was turning against the idea that contract law could be presented as a coherent normative practice. Grant Gilmore had announced the death of contract a few years before, insisting that contract as a form of self-imposed liability had reached a point of intellectual and practical exhaustion.<sup>2</sup> The less idiosyncratic Patrick Atiyah had just finished his magnum opus, *The Rise and Fall of Freedom of Contract*, which put forward a far more rigorous version of the same historical argument.<sup>3</sup> The Critical Legal Studies movement was in its rambunctious childhood, and Duncan Kennedy was likewise taking aim at the coherence of contract law.<sup>4</sup> In this environment, Fried's claim that "contract[] can be traced to and is determined by a small number of basic moral principles"<sup>5</sup> with promissory morality at their center was an iconoclastic defense of classical liberal principles and the basic coherence of contract law.<sup>6</sup>

Fried's theory has attracted more than its share of critics, including from among those who share his basic liberal orientation.<sup>7</sup> Far from dying, however,

1. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

2. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

3. See generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

4. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Kennedy's argument in this piece, with its faith in a deep, if contradictory, struggle between formalism and altruism, seems to have been largely inspired by French structuralism. During this period, however, other critical scholars were pushing the claim that law in general—and contract law in particular—should be understood as simply mirroring political power within society. See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 33-65 (1992) (discussing the development of American contract law during the nineteenth century).

5. FRIED, *supra* note 1, preface.

6. As discussed below, Fried did not believe that contract law was perfectly coherent. Most famously, he found the doctrine of consideration to be perverse and contradictory.

7. See generally Randy Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992).

promissory approaches to contract law have become a prominent feature of the philosophy of contract.<sup>8</sup> Nevertheless, a great deal has happened in private-law theory since Fried published his book thirty years ago. The most dramatic development has been the spectacular rise of the law-and-economics movement.<sup>9</sup> Unlike, perhaps, when Fried published his book, no serious work on contract theory can afford to ignore economic arguments in the way that *Contract as Promise* does.<sup>10</sup> To his credit, Fried has announced his interest in updating his argument in light of the profusion of economic work on contract law.<sup>11</sup>

This essay revisits Fried's *Contract as Promise* in light of further developments in the private-law scholarship: the rise of corrective-justice and civil-recourse theories. Corrective-justice theory and civil-recourse theory have arisen primarily in debates over the law of torts,<sup>12</sup> although efforts have

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8. See generally DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003); Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 687-51 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Kraus, *Philosophy of Contract Law*]; STEPHEN A. SMITH, CONTRACT THEORY (2004); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009) [hereinafter Kraus, *The Correspondence*]; Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

9. See generally THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999) (collecting papers discussing the renaissance of economic justifications for contract); F.H. BUCKLEY, JUST EXCHANGE: A THEORY OF CONTRACTS (2005) (offering economic theory of contract doctrine).

10. See generally Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005) [hereinafter Oman, *Unity and Pluralism*] (discussing place of economics in contemporary contract-law theory); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829 (2007) [hereinafter Oman, *Failure of Economic Interpretations*] (discussing place of economics in contemporary contract-law theory).

11. See Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 5 (2007) ("In the end it is not the divergence between contract and promise that is striking but their convergence, and the convergence of both with the economic/efficiency explanation for legal institutions.")

12. See generally JULES COLEMAN, RISKS AND WRONGS (2002) [hereinafter COLEMAN, RISKS AND WRONGS]; JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001) [hereinafter COLEMAN, PRACTICE OF PRINCIPLE]; ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter WEINRIB, PRIVATE LAW]; Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) [hereinafter Coleman, *Mixed Conception*]; Jules Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) [hereinafter Coleman, *Structure*]; Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) [hereinafter Coleman, *Tort Law*]; John C.P. Goldberg & Benjamin Zipursky, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524-627 (2005) [hereinafter Goldberg, *Due Process*]; John C.P. Goldberg, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) [hereinafter Goldberg, *Tort Law*]; Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403-21 (1992) [hereinafter Weinrib, *Corrective Justice*]; Ernest Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002) [hereinafter Weinrib, *Nutshell*]; Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695-757 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter Zipursky, *Rights, Wrongs and Recourse*]; Benjamin Zipursky, *The Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623-55 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Zipursky, *Philosophy of Private Law*]. For an overview of the debates in tort-law theory giving rise to corrective-justice and civil-recourse theories, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) [hereinafter Goldberg, *Tort Theory*]; John C.P.

been made to apply both approaches to contract law.<sup>13</sup> Corrective-justice theory began as a critique of economic theories of tort law.<sup>14</sup> Those theories conceptualize tort as a mechanism for creating optimal incentives for agents to invest in precautions against harming others, primarily by forcing tortfeasors to internalize costs through money damages.<sup>15</sup> As Jules Coleman and other corrective-justice theorists point out, this theory cannot account for the bilateralism of damages. Damages in private litigation are always paid by defendants to plaintiffs, yet if damages are merely fines that internalize externalities, the payment to the plaintiff makes no sense, and in some circumstances is economically perverse. In contrast, corrective-justice theorists, harking back to Aristotle, have argued that wrongdoers have a duty to compensate their victims and that it is this duty that accounts for the bilateral structure of private-law remedies.<sup>16</sup>

Civil-recourse theory is a response to corrective justice. Recourse theorists share with corrective-justice theorists a skepticism about economic theories of private law, but they believe that the duty to compensate provides an equally incomplete account.<sup>17</sup> Strictly speaking, the private law does not enforce any particular set of duties.<sup>18</sup> If someone commits a tort or breaches a contract, no state prosecutor will step in to enforce the norms of tort or contract law. Rather, nothing will happen unless a plaintiff chooses to exercise her right to bring suit against the wrongdoer. This plaintiff-empowering aspect of private law demands an explanation, according to recourse theorists, and neither economics nor corrective justice provides an adequate justification.<sup>19</sup> At best, those approaches see plaintiff empowerment as a system of disaggregated enforcement, much like *qui tam* actions.<sup>20</sup> The problem, however, is that

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Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501-19 (2002) [hereinafter Goldberg, *Unloved*].

13. See generally Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 (2007); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) [hereinafter Oman, *Civil Recourse*]; Oman, *Failure of Economic Interpretations*, *supra* note 10; Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 37 FLA. ST. U. L. REV. (forthcoming 2012) [hereinafter Oman, *No Duty*], available at <http://ssrn.com/abstract=1906753>; Zipursky, *Civil Recourse*, *supra* note 12.

14. See generally Coleman, *Structure*, *supra* note 12.

15. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 30-49 (7th ed. 2003) (discussing economic theories of tort law).

16. See ARISTOTLE, *NICOMACHEAN ETHICS* (F.H. Peters trans., Barnes & Nobel Library ed. 2005); Coleman, *Mixed Conception*, *supra* note 12; WEINRIB, *PRIVATE LAW*, *supra* note 12.

17. See Zipursky, *Civil Recourse*, *supra* note 12, at 709-32 (critiquing corrective-justice theory).

18. See generally Oman, *No Duty*, *supra* note 13.

19. See generally Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009). See also Zipursky, *Civil Recourse*, *supra* note 12, at 710 (“[I] argue that tort law frequently imposes remedies that, in the circumstances, are not aimed at having the defendant make the plaintiff whole, so the recognition of a right of action in tort cannot be isomorphic with the recognition of a duty of repair.”).

20. See Oman, *Civil Recourse*, *supra* note 13, at 562 (discussing disaggregated enforcement and *qui tam* actions); Oman, *Failure of Economic Interpretations*, *supra* note 10, at 848-49 (same).

doctrines such as the privity requirement in contract mean that only victims have the ability to bring an action, whereas systems of disaggregated enforcement—like whistleblower statutes—allow anyone with information about wrongdoing to sue.<sup>21</sup>

The structural features that motivate these theories—the bilateralism of damages and the private standing of plaintiffs—are both elements of the law of contracts that *Contract as Promise* sets out to explain. This essay does not ultimately provide final answers to how a promissory theory of contract should deal with these issues.<sup>22</sup> Rather, my hope is to frame the problem, suggest possible avenues that promissory theories might take, and discuss some of the problems that those approaches face. I begin with the issue of bilateralism. Remedies—in particular the defense of expectation damages—occupy much of Fried's attention in *Contract as Promise*, and he insists that this particular remedial response flows from a commitment to promissory morality. I am skeptical of this claim and seek to show the implausibility of grounding compensatory damages in a duty to keep a promise. Rather, I argue it is more natural to see such damages as vindicating a corrective-justice duty to make promisees whole in the face of promisors' misbehavior. Such a move requires a commitment to Fried's promissory principle, as the harm suffered consists of the deprivation of the promisee's entitlement to the promisor's performance, but the duty to compensate is not ultimately a promissory duty.

I next turn to the issue of private standing. First, I seek to demonstrate that our plaintiff-centered system of contract law is a genuine puzzle. We cannot dismiss the issue of private standing as a pragmatic and ad hoc response to problems of enforcement. As a decentralized system of enforcement, our current law is a poorly designed institution at best. Given the way in which recourse through the courts is limited to the victims of promise breakers, it seems more plausible to suppose that there is something peculiar about being a victim that entitles one to bring suit and that empowering victims to act against wrongdoers serves some distinctive normative goal. This goal, however, is not ultimately promissory. Rather, I argue that a better candidate can be found in the work of civil-recourse theorists who seek to elucidate the value of victims in a liberal society holding wrongdoers accountable for their wrongs.

Finally, I address some of the problems associated with the arguments

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21. See Oman, *Civil Recourse*, *supra* note 13, at 562 (discussing disaggregated enforcement and *qui tam* actions); Oman, *Failure of Economic Interpretations*, *supra* note 10, at 848-49 (same).

22. Indeed, in the interest of full disclosure, I am happy to state that I increasingly find myself skeptical of promissory theories of contract in general. See generally Oman, *Civil Recourse*, *supra* note 13 (arguing that contractual liability consists of consent to retaliation in the event of breach rather than the enforcement of promissory obligations). My own suspicion is that contract is best understood in terms of maintaining markets rather than reflecting moral obligations per se. See Nathan B. Oman, *Contracts and Markets: A Very Short Essay Without Footnotes* (William & Mary Law Sch. Research Paper No. 09-100, 2011), available at <http://ssrn.com/abstract=1859471>.

presented in this essay. How exactly do promissory morality, corrective justice, and civil recourse relate to one another? Are they theories of different things that can be neatly sealed off from one another, or rather must we find some way of ranking and reconciling them? My conclusion is that, at best, there is an uneasy and ill-defined relationship between these different goals. It is by no means clear that they ultimately belong together in the same theory. On the other hand, I hope to show that promissory theories of contract nevertheless must take the issues of private law raised by these theories seriously. The bilateral structure of liability and the system of private standing are major institutional features whose existence must be acknowledged and accounted for in future efforts to defend a promissory vision of contract.

The remainder of this essay proceeds as follows. Part II discusses the issue of bilateralism. Part III turns to the system of private standing. Part IV looks at the issue of pluralism in contract theory, raising the question of how the various approaches taken in this essay related to one another. Part V concludes.

## II. THE BILATERALISM OF CONTRACTUAL DAMAGES

Picking a date for the birth of the contemporary philosophy of contract law is an arbitrary exercise,<sup>23</sup> but Lon Fuller and William Perdue's article *The Reliance Interest in Contract Damages*<sup>24</sup> is surely a good candidate. In that article, Fuller and Purdue pose the question of why the default remedy in contract law is to put the promisee in the place she would have been in had the promise been performed, as opposed to, for example, the position that she would have been in had the contract never been made.<sup>25</sup> Not surprisingly, Fried provides an extensive discussion in which he lays out his answer to this question.<sup>26</sup> His discussion of this problem provides a starting place for a discussion of the bilateralism of contract damages and how this feature of contractual liability might figure in a promissory theory of contract.

### A. From Promise to Expectation Damages

Fried clearly links promissory morality and the expectation measure of damages. He writes:

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23. See, e.g., Oman, *No Duty*, *supra* note 13 (claiming that modern private-law theory began in 1961 with the publication of R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

24. L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52 (1936).

25. *Id.* at 54 (defining so-called reliance interest); see also RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (adopting Fuller and Perdue's expectation, reliance, and restitution interests as purpose of contract remedies).

26. Indeed, it is worth noting that Fried acknowledges his debts to "the late Lon Fuller, who was my friend and teacher when I was a junior faculty member." FRIED, *supra* note 1, preface.

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.<sup>27</sup>

Stated in these terms, Fried's claim is deceptively weak looking. He seems to be claiming only that it is fair to award expectation damages. Given that he is explicitly responding to reliance theorists such as Grant Gilmore and Patrick Atiyah, who are critical of expectation damages, such a limited and defensive reading of his claim might seem plausible.<sup>28</sup> Read in these terms, Fried's argument seems to be speaking to a criterion similar to that put forward recently by Seanna Shiffrin, namely that legal rules should not be inconsistent with or undermine moral practices, even if the law does not directly enforce the obligations created by those moral practices.<sup>29</sup> If Fried is making such a claim, then there is no necessary connection between the promise principle that he defends and expectation damages. Rather, we could read his argument as defending the claim that awarding expectation damages on the basis of whatever promissory or nonpromissory principle might justify them involves no unfairness.

We have good reason for believing, however, that Fried is making a stronger claim regarding the link between promissory morality and expectation damages. If we fail to hold a promisor to his commitment, argues Fried, "[w]e infantilize him."<sup>30</sup> Respect for the autonomous choice of others, of course, is at the heart of Fried's account of contract.<sup>31</sup> He thus claims that the legal obligation to pay expectation damages in the event of breach simply mirrors a pre-legal, moral obligation to do the same thing. "Since contracts invoke and are invoked by promises," he writes, "it is not surprising that the law came to impose on the promises it recognized the same incidents as morality demands."<sup>32</sup> Indeed, he invokes the strong correspondence between morality and contract law on this point to express skepticism about the historical claim put forward by Horwitz, Atiyah, and others about the recent vintage of expectation damages. "The connection between contract and the expectation principle is so palpable that there is reason to doubt that its legal recognition is a relatively recent invention."<sup>33</sup> What, however, is the palpable connection

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27. *Id.* at 17.

28. *See id.* at 4-5 (noting targets of arguments include Gilmore and Atiyah).

29. *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 741-43 (2007).

30. FRIED, *supra* note 1, at 21.

31. *See id.* at 14-17 (arguing promissory morality arises from liberal value of respect for personal autonomy).

32. *Id.* at 21.

33. *Id.*

between Fried's "promise principle" and the "expectation principle"?

Fried never explains precisely why the moral obligation to keep a promise implies a moral obligation to pay a sum of money sufficient to put the promisee in the position that she would have been in had the promise been performed. Contrary to the claims made by Fried, it is by no means obvious that this is true. Suppose I promise my wife that I will pick her up from the airport. I fail to do so, and as a result, she must hire a cab to drive her home. In this situation, what is my moral obligation to my wife? I have clearly made a promise, and I have clearly breached the promise. It is very easy to determine my wife's expectation damages: the cab fare. Does my duty to keep my promise obviously imply a duty on my part to give my wife a sum of money equal to the cab fare? It would certainly be strange were I to do so. A much more natural response would be for me to apologize to my wife for my carelessness or to acknowledge the legitimacy of her feelings of resentment towards me.<sup>34</sup> Of course, this example does not prove that Fried's expectation principle cannot be extracted from his promise principle. It does, however, suggest that appeals to the self-evidence of the connection will not get the job done. It seems to me that there are at least four ways in which the expectation principle might be extracted from the promise principle. In the end, however, I don't believe any of these approaches are truly successful.

First, there are cases where the payment of expectation damages is tantamount to performance. The most obvious example is a promise to pay a liquidated debt. If I promise to give you \$500 next week, your expectation damages if I fail to tender the promised sum will be exactly \$500.<sup>35</sup> Forcing me to pay \$500 in expectation damages simply forces me to perform my obligation. Indeed, this is precisely how the common-law writ of debt was understood. It did not award damages for breach of an obligation, but simply forced the obligor to perform. Liquidated debts, however, are not the only situations in which expectation damages will amount to performance. Another example is the situation where a seller breaches and a buyer covers in the market and then sues for the difference between the cover price and the contract price.<sup>36</sup> Indeed, any time that an alternative to performance is readily

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34. Cf. Peter F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962) (arguing breach of moral obligations can give rise to morally justified feelings of resentment).

35. I am assuming, of course, that there are no consequential damages or issues with the time value of money.

36. See U.C.C. §§ 2-711 to -712 (2011) (stating when and how buyer may cover).

(1) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) A buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages under Section 2-715, but

available in the market, giving a disappointed promisee expectation damages will allow her to purchase the equivalent of performance without any loss. Expanding on this basic idea, Melvin Eisenberg, for example, has argued that expectation damages function as a de facto form of specific performance.<sup>37</sup> Despite its appeal, however, this argument ultimately cannot explain the connection between expectation damages and the promise principle in a large class of contract cases. Most obviously, contracts involving even moderately unique services cannot be analogized to contracts for the sale of a commodity where money forms an almost perfect substitute for performance. Likewise, contracts for unique items such as land, certain kinds of goods, or the like, cannot be specifically performed by simply having the defendant write a check.

The second possibility is that promissory obligations continue to exist in some sense even after the initial promise has been broken, and it is this residual-promissory obligation that creates the duty to pay expectation damages. Consider again my promise to pick up my wife from the airport. Suppose I promise that I will meet her in front of the airport at 5:00 PM. Through my own negligence, however, I am not at the airport at 5:00 PM. At this point, I have clearly broken my initial promise to her. What obligations do I now have toward my wife with regard to my promise?<sup>38</sup> One possibility would be that my obligations are at an end. I am clearly in the wrong because I broke my original promise without good cause. At this point—5:30 PM—however, there is no way that I can perform my initial obligation. Accordingly, while I am now guilty of a moral wrong, I have no further moral obligations associated with my promise. It is finished. While this account of my promissory obligations is logically possible, it doesn't seem to track our ordinary understanding of what we undertake when we make a promise. Rather, it seems to me that at 5:30 PM I have an obligation *based on my promise* to get to the airport to pick up my wife. Abstracting from this example, we could say that when we break a promise we continue to have a promissory obligation to provide some sort of reasonable substitute performance.

On this view, expectation damages are simply the continuation of the initial promissory obligation. If I promise to deliver goods to you at a specified time

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less expenses saved in consequence of the seller's breach.

U.C.C. § 2-712.

37. See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 977 (2005).

38. Clearly, I would have all sorts of moral obligations to my wife in this situation that have nothing to do with my promise to pick her up. For purpose of this argument, I am simply setting these obligations aside and focusing purely on my promise. As my wife would be quick to point out, however, even if the account of residual-promissory obligation that I lay out in the text is mistaken, I still have an obligation to get my wife from the airport simply because of our relationship. Hence, I have an obligation not because I promised her, but because I am her friend and husband.

and fail to perform, my promissory obligation has not come to an end. Rather, I remain obligated to do the next best thing or something of the like. Accordingly, when I pay you expectation damages, I am performing my obligations under the promise, albeit only those residual obligations remaining after I have broken my original promise. This view is very close to the virtual specific performance view sketched above. Like that view, it sees the payment of expectation damages as enforcing in some way the underlying promissory obligation. Put another way, both views purport to ground the expectation principle solely on the moral obligations created by the promise without relying on some independent, nonpromissory fount of moral duties. There are, however, some interpretive advantages to viewing expectation damages as enforcing residual-promissory obligations rather than specifically performing the primary obligation itself. As noted above, it simply is not possible to see all awards of expectation damages as a clean substitute performance. This fact, however, is not an embarrassment to the view that expectation damages enforce residual-promissory obligations. If I pick up my wife at 6:00 PM rather than 5:00 PM as promised, I am still acting on the basis of my promissory obligations even though a 6:00 PM pickup is clearly different from a 5:00 PM pickup.

The residual-promissory-obligations theory of expectation damages, however, has its own embarrassments. It is by no means clear that in most cases the residual-promissory obligation left in the wake of a broken promise consists of a duty to pay money. Imagine that I am on the way to the airport to pick up my wife at 5:00 PM, but through my own negligence I left late. At 5:15 PM I pull into the arrivals lane at the airport, and when I see my wife waiting at the curb, rather than stopping to pick her up, I roll down the window and toss out a wad of money as I speed by the sidewalk. The gaucheness of my behavior in this case, I take it, arises from a basic misunderstanding of the obligations that I undertook when I promised to pick up my wife from the airport, including my residual obligations when I broke the initial promise to arrive at 5:00 PM.

Of course, one might respond that while the payment of expectation damages in cases such as intimate promises between spouses is out of place, in the run of the mill commercial contracts, such payments are an unobjectionable discharge of one's remedial obligations. Fair enough. Two other problems, however, remain. First, as a doctrinal matter, contract law is not limited to commercial transactions. There is no reason that the intimate promise between my wife and me cannot also be a legally enforceable contract provided that the traditional requirements of offer, acceptance, and consideration are met. Second, the law does not seem to recognize a legal obligation to perform one's

residual-promissory duties.<sup>39</sup> Suppose that I am a general contractor who promises to have a building completed by a specified date. If I fail to finish the building when promised, making my very best effort to have the building completed as soon as possible after the contract date is no defense to liability. Yet making such efforts seems a completely reasonable account of my residual-promissory obligations in this situation, and it is precisely those obligations that the payment of damages is supposed to discharge on Fried's theory. One might point out that the completion of the building would serve to reduce the ultimate damage award, so perhaps one's residual obligation consists of a duty to make best efforts to complete the building plus the payment of damages. This argument, however, feels like a makeweight, in effect always tacking money damages on to any residual obligations that remain after a promise is broken. The fact that as a matter of law such damages are always, at least in theory, available regardless of what one does in an effort to meet one's residual obligations after breaking a promise, however, suggests that they are not grounded in those residual obligations.

The third possibility is that expectation damages simply punish promisors for breach. On this theory, expectation damages are a fine and serve the same purpose as criminal fines. On one hand they deter future breaches of contract by threatening promisors with costs in the event of breach. Alternatively, they serve some retributive function, punishing the promisor for his wrongdoing as a way of showing proper respect for his autonomous choice. Admittedly, such an account strays somewhat farther from the promise principle than the two proposed above, but it would still rest itself firmly within the effort to get promises performed or at least respected.

This account, however, faces at least two problems. First, it doesn't seem to explain expectation damages. If damages merely act as a punishment for breach, then why should the amount of the punishment exactly match the value of the promisee's expectation? A pure retributive version of the damages-as-punishment theory might justify expectation damages on some talionic principle. The idea would be that the punishment should be proportionate to the crime—an eye for an eye, a tooth for a tooth, an expectation for a promise. On the other hand, if the punishment is simply about deterring breaches, then there is no *a priori* reason to suppose that expectation damages provide some optimal level of deterrence.

The damages-as-punishment theory, however, faces a second and even deeper problem. It cannot explain why damages should be paid to the promisee. The purpose of the fine is to sanction a wrongdoer. Once the wrongdoer has been sanctioned, however, the idea of sanctioning provides us with no further reason that the money paid as a sanction should go to the

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39. See generally Oman, *No Duty*, *supra* note 13.

victim. Indeed, in the case of most criminal fines, the money goes to the state rather than to victims. One might try to justify the payment to promisees as a pragmatic way of creating decentralized performance, but as I have explained at length elsewhere, such an argument fails to explain doctrines such as privity that make it impossible for anyone other than the promisee (or a third-party beneficiary) to obtain damages.<sup>40</sup>

Fourth, one might argue that when promisors make a contract, they are making a promise to pay damages in the event of breach. On this view, the obligation to pay damages is part of the contingent content of what was promised and the award of damages is thus in effect a form of specific performance. Expectation damages are not an implication of the promise principle itself. Rather, expectation damages are justified because it just so happens that when people make the promises that become contracts, they promise to pay expectation damages in the event that they fail to perform their obligations. In his oral remarks at the conclusion of the Suffolk University Law School symposium marking the thirtieth anniversary of *Contract as Promise*, Fried endorsed a version of this argument. In support of this claim, he pointed out that expectation damages are provided as a default remedy.<sup>41</sup> The parties are free to contract to an alternative remedy if they wish.<sup>42</sup> The expectation remedy is offered as a majoritarian default rule, one that Fried admitted might not be justified in all contractual situations.<sup>43</sup>

There are two objections to this argument. The first is that it is simply mistaken to suppose that most contracting parties do in fact intend to pay damages in the event of breach. The argument advanced by Fried in his symposium remarks is a descendant of the option theory of contract put forward by Holmes, which has garnered the attention of some legal empiricists.<sup>44</sup> While contracting is too ubiquitous an activity for a

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40. See Oman, *Civil Recourse*, *supra* note 13, at 560-63 (explaining why expectation damages not understood as decentralized enforcement on model of *qui tam* actions); Oman, *Failure of Economic Interpretations*, *supra* note 10, at 851-54 (same).

41. See Charles Fried, Closing Remarks at the Suffolk University Law School *Contract as Promise* at 30 Symposium (May 20, 2011) (available on iTunesU).

42. See *id.*

43. See *id.* In his remarks, Fried seemed to endorse the arguments made at the symposium by George Triantis. See George Triantis, *Promissory Autonomy, Imperfect Courts, and the Immorality of the Expectation Damages Default*, 45 SUFFOLK U. L. REV. 827 (2012).

44. Holmes articulated the theory this way in *The Common Law*:

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 236 (Mark DeWolfe Howe ed., 1963) (1881). Holmes, of course, did not ground contractual liability in promissory morality, and in his voluminous correspondence with the English jurist Frederick Pollock, he insisted that while he saw contractual obligations as disjunctive, he did

comprehensive sociological study, we do have reason to suppose that businesspeople do not regard contractual obligations as disjunctive.<sup>45</sup> One might respond to this argument by claiming that what is promised when it comes to expectation damages is not an alternative mode of performance, but rather one's remedial-moral obligations in the event of the moral failure of breach. This theory of expectation damages has been advanced by Jody Kraus.<sup>46</sup> A detailed discussion of Kraus's argument is beyond the scope of this essay, but, at the very least, it commits one to a controversial view regarding promising and the extent that an agent may control the nature of their moral obligations. Even Kraus's argument, however, is open to the second objection.

The second objection is that, as a matter of law, contract law does not allow the parties to fully control the content of their remedial obligations. While it is true that expectation damages are a default remedy only, it does not follow from this that parties are free to specify any remedy that they wish. Furthermore, the constraint on party control over remedial obligations extends much further than prohibitions on unconscionable remedies such as Shylock's pound of flesh in *The Merchant of Venice*.<sup>47</sup> Strikingly, parties cannot contract into the remedy of specific performance.<sup>48</sup> The penalty doctrine places constraints on the content of explicit liquidated damages, limiting them to those

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not believe this resulted from a disjunctive promise. See 2 HOLMES-POLLOCK LETTERS 233-35 (Mark DeWolfe Howe ed., 1941) ("I don't think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable *simpliciter*.").

45. Lisa Bernstein, for example, found in her study of contracting practices within the cotton industry that merchants did not regard payment of damages as a form of performance:

"As one transactor explained, '[y]ou want performance, not payment for nonperformance. [Payment] is not fulfilling your deal.' And, as another transactor put it, 'you do not just breach and pay. This is not done.'"

Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1755 (2001) (footnote omitted).

46. See Jody S. Kraus, *Personal Sovereignty and Normative Power Skepticism*, 109 COLUM. L. REV. SIDEBAR 126 (2009) (defending idea that one has power to specify one's moral obligations in event of breach); Kraus, *The Correspondence*, *supra* note 8, at 1627-34 (arguing promisors have normative control of their remedial moral obligations).

47. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3 ("an equal pound / Of your fair flesh, to be cut off and taken / In what part of your body pleaseth me"). But see Nathan B. Oman, *Shylock and Article Nine of the U.C.C.*, in PERSPECTIVES ON THE UNIFORM COMMERCIAL CODE 106 (Douglas E. Litowitz ed., 2d ed. 2007) (offering tongue-in-cheek defense of Shylock's contract under Uniform Commercial Code Revised Article 9).

48. See RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1981) ("Because the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages, although a court may take appropriate notice of facts recited in their contract."). For a detailed discussion of the rule, see EDWARD YORIO, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* 439-52 (1989). Likewise, courts can order specific performance, even if the parties explicitly agree that the remedy will not be available. See RESTATEMENT (SECOND) OF CONTRACTS § 364(2) ("Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.").

that are a reasonable forecast of actual damages.<sup>49</sup>

Finally, and most controversially, I would argue that the law of contracts does not acknowledge a duty to pay damages in the event of breach.<sup>50</sup> Writing in response to Holmes's option theory, Frederick Pollock pointed out nearly a century ago, that the pleading requirements of the common law distinguish sharply between the duty to keep a contract and the remedy available for breach. "[H]ow [do] you escape censuring the common form of declaration in assumpsit," he challenged Holmes. "Don't you want an averment of *neither* performance *nor* tender of damages?"<sup>51</sup> In other words, in order to make out a case for breach of contract on the writ of assumpsit, one must demonstrate breach of the obligation to perform, but there was no necessity to prove the failure to tender damages.<sup>52</sup> The same is true of 12(b)(6) motions under the relaxed pleading requirements of the federal rules.<sup>53</sup> In order to make out a case for breach of contract, one need not allege a failure to tender damages.<sup>54</sup> Yet if the duty to tender such damages were a way of performing one's contractual obligation, it would seem that one would have to allege the failure to comply with that duty to survive a demurrer.<sup>55</sup>

### B. Reconstructing Promise and Expectation Damages

The arguments in the previous section suggest that contrary to the claim made by Fried, the connection between the promise principle and expectation damages is not palpable.<sup>56</sup> Indeed, while proving a negative is always difficult, there does not seem to be an argument that both grounds the duty to pay expectation damages in promissory morality and also tracks current contract doctrine. One response to my claim might be critical. Perhaps contract doctrine simply needs to shift to more closely mirror the promise principle. While Fried's argument is essentially an exercise in normative reconstruction, the possibility of such a critical response certainly isn't ruled out by his basic methodological stance.<sup>57</sup> He argues strenuously, for example, against the doctrine of consideration, which he accuses of both internal incoherence and inconsistency with the promise principle.<sup>58</sup> Perhaps by altering the mix

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49. See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

50. See Oman, *No Duty*, *supra* note 13.

51. 2 HOLMES-POLLOCK LETTERS, *supra* note 44, at 233.

52. See Oman, *No Duty*, *supra* note 13.

53. See *id.*

54. See *id.*

55. See *id.*

56. See FRIED, *supra* note 1, at 17-21 (drawing link between expectation damages and the promise principle).

57. See *id.* at 21 ("Since contracts invoke and are invoked by promises, it is not surprising that the law came to impose on the promises it recognized the same incidents as morality demands.").

58. See *id.* at 28-39 (offering critique of doctrine of consideration).

between expectation damages and specific performance, contractual remedies can be made to more closely mirror the structure of promissory morality.<sup>59</sup>

Another possibility, however, is that Fried is simply mistaken. Perhaps expectation damages are not justified directly by the promise principle, but rest instead on some nonpromissory foundation. Such an approach would suggest that contrary to his stated ambition, Fried's contract-as-promise theory cannot provide the unitary account of contract that he promised at the outset of his book.<sup>60</sup> Upon closer examination, however, Fried's theory of contract is considerably less unitary than it at first appears. He explicitly acknowledges that doctrines surrounding restitution,<sup>61</sup> pre-contractual reliance,<sup>62</sup> and, most dramatically, promissory estoppel<sup>63</sup> cannot be justified by the promise principle. Perhaps there is some nonpromissory theory that can account for expectation damages. The jurisprudence of William Blackstone and John Austin suggests the beginning of such a theory.

Blackstone was a much-abused figure by nineteenth-century utilitarian thinkers. Bentham wrote of "the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole [of the work]."<sup>64</sup> The influence of Blackstone's remedial thought on Bentham's main jurisprudential heir, John Austin, is thus ironic. For Blackstone, the private law was organized around a four-part structure of a right, wrong, action, and remedy.<sup>65</sup> At each stage in the process, the law defined the scope of the concepts. Hence, one had a legal right to quiet enjoyment of property.<sup>66</sup> A trespasser committed a wrong when he entered property without the owner's consent.<sup>67</sup> This gave rise to an action for trespass.<sup>68</sup> If successful, the action then provided the property owner with a remedy such as money damages. Austin adopted Blackstone's basic

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59. See Shiffrin, *supra* note 8, at 722-23 (arguing remedy of specific performance should be more widely available in order to make contract law more consistent with promissory morality).

60. See FRIED, *supra* note 1, at 1 ("The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.").

61. See *id.* at 26 ("Promise and restitution are distinct principles. Neither derives from the other, and so the attempt to dig beneath promise in order to ground contract in restitution (or reliance, for that matter) is misconceived.").

62. See *id.*

63. See *id.* at 25 (discussing promissory estoppel and promise principle).

64. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (Francis Charles Montague ed., Clarendon Press 1891) (1776).

65. See Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 4-5, 10 (2000) (discussing Blackstone's typology and its relationship to Austin's thought).

66. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 ("[T]hat sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

67. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*209 ("[I]t signifies no more than an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.").

68. See *id.* ("Every unwarrantable entry on another's soil the law entitles a trespass.").

approach, but simplified it.<sup>69</sup>

According to Austin, the law recognizes what he calls primary rights and duties and secondary rights and duties.<sup>70</sup> Primary rights and duties specify the conduct that the law requires of citizens. For example, one has a duty not to trespass on another's land, and the owner of the land has a corresponding right to be free of such trespasses. "If the obedience to the law were absolutely perfect," Austin writes, "primary rights and duties are the only ones which would exist; or, at least are the only ones which would ever be exercised, or which could ever assume a practical form."<sup>71</sup> Such, however, is not the case. Agents often defy the law and fail to live up to the primary duties that it imposes on them. When this happens, the violation of primary rights and duties gives rise to secondary rights and duties.<sup>72</sup>

Austin's formulation suggests a possible relationship between the obligation to keep a promise and the obligation to pay expectation damages. The obligation to perform one's contract arises naturally from promissory morality and would constitute a primary obligation in Austinian terms. The duty to pay expectation damages, however, is a secondary obligation that comes into existence only in the event of breach. On this view, there is not a necessary connection between the normative basis for primary obligations and the normative basis for ordinary obligations.<sup>73</sup> The duty to pay expectation damages is thus wholly independent of the duty to keep a promise. It is not a penumbra or shadow of promissory obligation. It rests on its own independent, normative foundation. Of course, this logical point begs the question of what the identity of that normative foundation in fact is.

Curtis Bridgeman has suggested that corrective justice could provide such a foundation.<sup>74</sup> This is the idea that there is a free-standing moral principle that creates a duty of repair for harms that one wrongfully causes.<sup>75</sup> Corrective

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69. See Birks, *supra* note 65, at 4-5 (discussing Austin's simpler version of Blackstone's typology).

70. See 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 788-800 (Thoemmes Continuum 2002) (1861) (discussing the distinction between primary and secondary rights and duties).

71. *Id.* at 763.

72. According to Austin:

All the rights and duties which I style sanctioning or secondary, are undoubtedly means or instruments for making the primary available. They arise out of violations of primary rights, and are mainly intended to prevent such violations: though in the case of the rights and duties which arise out of civil injuries, the secondary rights and duties also answer the subordinate purpose of giving redress to the injured parties.

*Id.* at 789.

73. Cf. Peter Birks, *The Concept of a Civil Wrong*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 31, 36 (David G. Owen ed., 1995) ("It is essential to the understanding of the nature of civil wrongs to dispel the illusion that compensation and such wrongs are intrinsically connected.")

74. See generally Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 (2007).

75. See ARISTOTLE, *supra* note 16 (setting forth the concept of corrective justice).

justice has been an important concept in contemporary debates on tort theory, where it has been offered as an alternative to economic theories that—as in contract—flounder on the bilateralism of private law.<sup>76</sup> There are two objections to Bridgeman's approach, one of which he deals with and one of which he does not.<sup>77</sup> The first objection is that contractual liability is strict; there is no requirement that a breach be wrongful.<sup>78</sup> Breach simpliciter alone is enough to trigger liability.<sup>79</sup> Bridgeman responds by invoking a particular conception of corrective justice put forward by Jules Coleman, one that argues that the duty to repair is triggered by the violation of a right independent of the wrongfulness of that violation.<sup>80</sup> Provided that Coleman's account of corrective justice is valid, the strict liability of contract is not a problem.<sup>81</sup> The second objection to Bridgeman's account, however, is that corrective justice provides us with no traction as to the content of the underlying rights that the law protects.<sup>82</sup> A person has a duty to repair one whom he has harmed, but that duty tells us nothing about what constitutes a harm.<sup>83</sup> Hence, corrective justice suggests that contract has a necessarily pluralistic structure. In order for corrective justice to get off the ground, one must have an account of why breach of contract is a harm that is repaired by expectation damages, but corrective justice itself cannot provide an answer to that question; a fact that Bridgeman forthrightly acknowledges.<sup>84</sup>

Fried's promissory theory, however, can step in to fill this gap. Accepting the cogency of his central argument for the obligation to keep a promise and the place of the moral practice of promising in a liberal society, his theory can provide an account of the primary obligations to which Bridgeman's corrective-justice account of secondary obligations can be applied. As Fried is at pains to point out in his discussion of offer and acceptance, promissory obligations are not free-standing moral duties.<sup>85</sup> Rather, they are necessarily relational. A promisor is not merely obligated to keep a promise, but he is obligated *to the promisee*. If Fried is correct about the relationality of promissory duties, then they are not owed to the world in general but rather create a right in the

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76. See generally Coleman, *Structure*, *supra* note 12 (discussing WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)).

77. See Bridgeman, *supra* note 74, at 3014.

78. See *id.* (describing contractual breaching as "indifferent" to wrongfulness).

79. See *id.*

80. See *id.*; see also COLEMAN, *PRACTICE OF PRINCIPLE*, *supra* note 12, at 1-54 (discussing corrective justice); COLEMAN, *RISKS AND WRONGS*, *supra* note 12, at 361-89; Coleman, *Mixed Conception*, *supra* note 12 (opining on meaning of corrective justice).

81. See Bridgeman, *supra* note 74, at 3014.

82. See *id.*

83. See *id.* at 3021.

84. See *id.* at 3015.

85. See FRIED, *supra* note 1, at 40-45 (discussing law of offer and acceptance).

promisee to the promised enforcement. Breach is thus not simply the abstract failure to perform a moral duty. It is an act that deprives someone else of a right. The law provides expectation damages as a way of doing corrective justice, forcing the promisor to compensate the promisee for her loss.

This account of expectation damages has important advantages over Fried's assertion that promissory morality itself creates a duty to pay such damages. First, it is unembarrassed by the implausibility of believing that the duty to keep a promise always carries with it a corresponding duty to compensate the promisee in the event of breach. As the example of my breached promise to my wife and her cab ride home above illustrates, there are times when it seems quite odd to believe that breaking one's promise creates a promissory duty to compensate.

Corrective justice is likewise unembarrassed by the problems of conceptualizing expectation damages as a kind of virtual specific performance. Virtual specific performance, as a theory of expectation damages, fails to account for their persistence in situations where the payment of money can provide a perfect substitute for performance, as it can, for example, in cover cases involving commodity contracts.

Corrective justice also avoids the problems of expectation-damages-as-residual-promissory obligation sketched above. In at least some situations, the natural-residual obligation in the face of breach would be some lesser performance. As Justice Cardozo famously noted, however, "The courts never say that one who makes a contract fills the measure of his duty by less than full performance."<sup>86</sup> Finally, expectation damages seem a better fit with corrective justice than with retributive justice, particularly when one considers that one's liability for breach of contract is not calibrated to one's fault in breaching a contract. Yet a retributive theory of contract damages would seem to require some sensitivity to such issues.

### III. PROMISE AND PRIVATE STANDING

Even if the marriage between corrective justice and the promise principle offered above is accepted, the question posed by civil-recourse theory remains. Why does the law of contracts—like tort and other forms of private law—empower plaintiffs to act against defendants rather than committing the enforcement of primary and secondary obligations to the state or some other party? In this section, I hope to first dispose of one possible answer. One might argue that private standing is simply a disaggregated system of enforcement. For the reasons offered below, I believe that this view is mistaken. Next, I turn to the accounts of private standing that have been given by civil-recourse theorists and show how those answers both mesh with and

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86. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

problematize Fried's promise principle.

*A. Private Standing as Disaggregated Enforcement*

One might justify private standing on practical grounds. In a complex and decentralized economy there will be many breaches of contract.<sup>87</sup> Acquiring information about when breaches occur would place unacceptable strains on government prosecutors already burdened with other concerns. It therefore makes sense for plaintiffs to act as private attorneys general who enforce public norms on behalf of the community.<sup>88</sup> Accordingly, we should see the promisee in a contract case as analogous to the whistleblower in a *qui tam* action. Under these statutes, ordinary citizens have power to bring actions against wrongdoers as a way of vindicating some social policy and are paid a bounty in return.<sup>89</sup> In the case of *qui tam* actions, the social policy is defending the public fisc by reducing private fraud against the government.<sup>90</sup> In the case of contract cases, it is whatever policy motivates the underlying concern for "enforcing" contracts.

Notice that this second best explanation of private standing works equally well across economic-, promissory-, and corrective-justice theories. It bears no unique relationship to the promise principle. For example, efficiency theorists might posit that plaintiffs are paid to incentivize optimal performance. In the case of promissory theories, in contrast, plaintiffs enforce the obligation to perform one's promises. In the case of corrective-justice theories, plaintiffs substitute for prosecutors, punishing promisors who fail to carry out their duties of repair, and so on. The pragmatic argument for private standing is ultimately agnostic about the source and shape of the underlying social policies that it vindicates.

This pragmatic argument has an initial plausibility, but it cannot explain the odd fact that it is only the promisee (or a third-party beneficiary) that is able to bring an action for breach of contract.<sup>91</sup> On the other hand, if private standing were simply a diffuse method of enforcement, then there is no reason not to allow anyone who happens to have information regarding breach to bring an action. Indeed, in *qui tam* actions this is precisely the approach that the law

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87. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.S-11 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S11Sep08.pdf> (reporting over 1000 actions pending regarding contract disputes in only federal courts).

88. See Oman, *Failure of Economic Interpretations*, *supra* note 10, at 848-49.

89. See 31 U.S.C. § 3730(d) (2006) (providing procedure by which *qui tam* recoveries are divided between government and *qui tam* plaintiff).

90. See Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998) ("The Civil War revived interest in the *qui tam* action due to the inability of the federal government to effectively police defense contractor fraud.").

91. See *Mahalsky v. Salem Tool Co.*, 461 F.2d 581, 584 (6th Cir. 1972) ("[There is] no remedy for . . . an action in contract absent privity.").

takes. Whistleblowers, by definition, are people with information about wrongdoing. Possession of this information is all that the law requires. There is no further requirement that the whistleblower be a victim of wrongdoing or have some other connection with the defendant. Knowledge is the only thing that connects the plaintiff and defendant.<sup>92</sup> There is no requirement, for example, that the plaintiff be in privity with the defendant.<sup>93</sup> Not so in contract actions.

### B. Civil Recourse and Contract as Promise

It is important to realize that for Fried's theory, the privity doctrine is a key aspect of contract law. Unlike the doctrine of consideration, for example, he does not view it as an unfortunate holdover from more woolly headed times. Rather, for Fried, promises create relational-moral duties, and, accordingly, contracts consist of relational-legal obligations. He writes, "Promises—and therefore contracts—are fundamentally relational; one person must make the promise to another, and the second person must accept it."<sup>94</sup> Admittedly, Fried makes this comment in the context of his discussion of formation rather than the privity doctrine, which he does not discuss, but it does not seem unreasonable to suppose that his notion of relational obligation could support such a doctrine.<sup>95</sup>

It does not follow from this, however, that Fried has an account of the relationship between his promise principle and private standing. Indeed, in the one place in *Contract as Promise* where he seems to explicitly touch on the issue of private enforcement and moral obligation, his comments seem at least potentially hostile to private standing. Again, in the context of discussing contract formation, he writes:

[D]on't say that I can always refuse to enforce the promise, or refuse to scold the promisors for breaking it, or even refuse to feel resentment at the breach. The moral force of a promise cannot depend on whether the promisee chooses to "enforce" the promise. After all, what does it mean to enforce a promise in the moral sphere? I suppose one can demand its performance, but if there is a morally binding obligation under a promise, the existence of the obligation does not depend on a demand by the promisee—nor on his scolding the

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92. See 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.")

93. See *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998) (concluding a *qui tam* plaintiff only has standing as a representative of the government, and only "the government has a dog in the fight").

94. FRIED, *supra* note 1, at 45.

95. It is interesting to note at this point that Fried does not discuss the major exception to the privity rule, namely the third-party-beneficiary doctrine.

promisor, nor on his feeling resentment.<sup>96</sup>

This passage suggests that the moral obligation to keep a promise is not contingent on action by the promisee to “enforce” it. Yet the law is indifferent to the breach of contract unless the wronged promisee takes some action. Furthermore, as noted above, this cannot be chalked up to pragmatic, enforcement concerns. At this point, Fried’s theory must be reconstructed if it is to be made congruent with the core remedial structure of contract law. Civil-recourse theory suggests a variety of ways in which this might be accomplished.

John Goldberg and Benjamin Zipursky have justified private standing based on an ingenious reading of John Locke’s social-contract theory.<sup>97</sup> According to Locke, when a person is harmed by another in the state of nature, natural law gives “beside the right of punishment common to him with other men, a particular right to seek reparation from him that has done it.”<sup>98</sup> When the social contract forming the state is made, we give to the state our natural right to enforce natural law, and in return the state provides us with a system of private law by which we can exercise our natural right to “seek reparation from him that has done” us wrong.<sup>99</sup> Of course, this argument is prone to all of the objections that can be made against Lockean and other social-contract stories. The narrative of a state of nature and an original contract must be treated as shorthand for a set of claims about the sorts of moral obligations that a person would reasonably accept.<sup>100</sup> Provided that the social-contract story can be made to yield an argument in place of its offered metaphor, the Lockean account can be meshed with Fried’s promise principle. On this view, breaking a promise is a wrong. This wrong then gives rise to a natural right on the part of the promisee to seek recompense against the wrongdoer. The law of contract then vindicates this right.

Jason Solomon has sought to fill in some of the lacunae in Zipursky and Goldberg’s normative argument by employing Stephen Darwell’s recent work

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96. FRIED, *supra* note 1, at 41.

97. See ZIPURSKY, PHILOSOPHY OF PRIVATE LAW, *supra* note 12, at 637-40; Goldberg, *Due Process*, *supra* note 12, at 541-44 (setting forth a Lockean defense of civil recourse).

98. See ZIPURSKY, PHILOSOPHY OF PRIVATE LAW, *supra* note 12, at 637 (quoting Locke’s Second Treatise on Government).

99. See *id.* at 637-40.

100. Zipursky has put the point thus:

The Lockian social contract metaphor cannot take much pressure, as sympathetic critics from Hume to Rawls have pointed out. The metaphor is often taken as a place holder for a broader argument based on the existence of reasons for members of a group of persons within a state to regard a state bounded by certain norms as legitimate and authoritative and to act as members of it, reasons conditioned on the like-minded acceptance of other persons in the state.

*Id.* at 642.

in moral philosophy on the so called “second person standpoint.”<sup>101</sup> According to Darwell, moral philosophy has been primarily concerned with either first-person moral deliberation—“What should I do?”—and third-person moral deliberation—“What should a person do?” It has not sufficiently focused on the second-person standpoint—“You should do this”—in which one moral agent has practical authority over another moral agent by virtue of some relationship between them.<sup>102</sup> Darwell gives the example of someone who steps on my foot.<sup>103</sup> Rather than asking, “Should I step on a person’s foot?” or, “Is it right for a person to step on the foot of another?” I say to the person stepping on my foot, “Hey buddy, get off my foot.”<sup>104</sup> In making this demand, I am claiming practical authority over the person standing on my foot and holding them accountable for their actions.

Following Peter Strawson, Solomon believes that the victims of wrongdoing are entitled to feel resentment toward those that have wronged them.<sup>105</sup> By acting against wrongdoers on the basis of this resentment, victims exercise second-personal authority over their wrongdoers.<sup>106</sup> In so doing, they demand their entitlement to be treated with respect, a demand that is rooted in liberal ideals of the equal accountability and moral status of persons.<sup>107</sup> This, according to Solomon, is what a private lawsuit does. It allows victims to address their wrongdoers in a way that demands their respect and thereby sustains liberal practices of equal accountability.<sup>108</sup>

This more elaborate civil-recourse framework might be applied to Fried’s promissory conception of contract. Fried begins his argument with a restatement of the liberal principles that Solomon sees as underwriting civil recourse. “[M]orality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal.”<sup>109</sup> As Fried states the liberal ideal, it is—to use Darwell’s vocabulary—third personal. It is addressed to what people in general are supposed to do. Contract law, being a species of private law, however, is not third personal in this sense. It does not issue a general demand that all actors comply with the obligations that it imposes upon them. Rather, contract law exists for the purpose of empowering wronged promisees to hold breaching promisors accountable. On this view, the liberal ideal that contract instantiates

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101. See Solomon, *supra* note 19, at 1792 n.147. See generally STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

102. See DARWALL, *supra* note 101, at 39-65.

103. See *id.* at 5-11.

104. See *id.* at 7-8.

105. See Solomon, *supra* note 19, at 1785-90.

106. See *id.* at 1791-94 (discussing second-person standpoint).

107. See *id.* at 1794 (“By acting against one who has wronged us, we are essentially saying: ‘You can’t do that to me.’ In doing so, we affirm our moral worth, self-respect, and dignity.”).

108. See *id.* at 1798-1811.

109. FRIED, *supra* note 1, at 7.

is thus second personal. Fried's statement above might be reformulated, "I demand that you respect my person and property and leave me free to make my life as I leave you free to make your life. This is the liberal ideal." Provided that Fried's account of promissory morality follows from this second-personal version of the liberal ideal, then the promisee as wrongdoer may legitimately act against the breaching promisor as a way of holding him accountable for the disrespect he has shown by breaking his promise.

#### IV. PLURALISM, PROMISE, AND PRIVATE LAW

At this point we may ask whether the dual reconstruction of contract as promise sketched above works. Does it hold together and make sense? At the outset, I observe that the reconstructed version of Fried's account is a compromised version of the promissory theory of contract. Fried's goal, in part, was to reveal contract as "determined by a small number of basic moral principles."<sup>110</sup> In essence, his view of contract was unitary and reflective. It was unitary in the sense that he saw contract as instantiating a single moral principle—fidelity to promising—and believed that a large swath of doctrinal detail could be derived from this principle. It was reflective in the sense that he saw the legal obligations of contract as essentially mirroring promissory-moral obligations.<sup>111</sup> The account sketched above compromises on both of these principles. First, it is more complex in that it invokes nonpromissory moral concerns such as corrective justice and civil recourse to justify key features of contract law. It is also no longer purely reflective because the law is no longer seen as simply enforcing promissory obligations. Rather, promise recedes into the background as a baseline that defines obligations of repair rooted in corrective justice and a basis for justified resentment and recourse. Contract law manages these secondary concerns rather than simply enforcing moral obligations as legal duties.

Of course, Fried's theory was never entirely unitary. *Contract as Promise* does not insist that all of the matters that are normally grouped together as "contract law" can be grounded in promissory morality. In particular, he argued that reliance-based liability was not, properly speaking, promissory, but rested on a tort-like principle of avoiding harm to others.<sup>112</sup> Likewise, he saw restitutionary remedies as resting on nonpromissory principles rooted in the obligations created by the conferral of a benefit.<sup>113</sup> Of course, breaking a

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110. *Id.* preface.

111. See generally Kraus, *The Correspondence*, *supra* note 8 (discussing reflective-promissory theories of contract law).

112. See FRIED, *supra* note 1, at 4 ("The latter basis of liability, the compensation of injury suffered through reliance, is a special case of tort liability."). *But see id.* at 25 n.\* (arguing promissory estoppel cases do not represent reliance-based liability but a belated attempt to compensate for problems created by the doctrine of consideration).

113. See *id.* at 25.

promise also harms the promisee by depriving her of her entitlement to performance. Promises confer benefits on promisees, but for Fried, the harm involved in reliance cases, and the benefits restored in quasi-contract cases do not require a morally binding promise to get off the ground. Is the pluralism introduced into the promise theory by corrective justice and civil recourse so easily accommodated to Fried's promise principle?

The answer, alas, is no. Jody Kraus has usefully distinguished two kinds of pluralism in contract theories.<sup>114</sup> One is what he calls the horizontal strategy. In this view, apparently incompatible theoretical approaches—specifically, Kraus mentions autonomy and efficiency theories—can be reconciled by noting that they are actually theories of different things.<sup>115</sup> Fried's approach to reliance and restitution adopts a horizontal strategy, in effect carving these areas off from contract law and assigning them to some other legal realm.<sup>116</sup> Such an approach, however, will not work with the corrective-justice and civil-recourse argument sketched above. Bilateralism and private standing are implicated in all of the Fried's "core" promissory cases of contract. These features cannot be dismissed as part of some noncontractual body of law.<sup>117</sup>

The second approach to theoretical pluralism identified by Kraus is what he calls the vertical-integration strategy.<sup>118</sup> Rather than assigning different legal practices to different normative theories, this approach seeks to create a consistent hierarchy of normative values. Hence, for example, one might believe that one should pursue economic efficiency unless it conflicts with values of personal autonomy, in which case autonomy should act as a trump.<sup>119</sup>

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Since restitution, like reliance, is a principle of fairness that operates independently of the will of the parties, the attempt to refer promissory obligation to this principle is another attempt to explain away the self-imposed character of promissory obligation. . . . The reduction of promise to restitution (or to restitution plus reliance) must fail.

*Id.*

114. See generally Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, in 1 SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 385 (Enrique Villanueva ed., 2002); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, in SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 420 (Ernest Sosa & Enrique Villanueva eds., 2001).

115. See generally Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VA. L. REV. 157 (2008); Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773 (2007); Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007).

116. See FRIED, *supra* note 1, at 54-74.

117. This does not mean, of course, that a theorist might not adopt this strategy. Indeed Stephen Smith has argued, for example, that the law of contract remedies is not really part of contract and therefore need not be accounted for by his promissory approach to the subject. See SMITH, *supra* note 8, at 426 (discussing promissory explanations of the doctrine in *Hadley v. Baxendale*). I do not find this approach persuasive. See Oman, *Unity and Pluralism*, *supra* note 10, at 1493-99 (criticizing Smith's argument).

118. See Kraus, *Philosophy of Contract Law*, *supra* note 8, at 689 n.6.

119. I have argued for this approach in the past. See Oman, *Unity and Pluralism*, *supra* note 10, at 1499-

Alternatively, one might see one normative value as, in effect, authorizing a sphere in which another value operates.<sup>120</sup> Hence, one could see promissory obligations as nested within a broader framework of corrective justice, where corrective justice authorizes the forcible transfer of wealth from promisors to promisees in the case of breach as a way of correcting wrongdoing rather than “enforcing” a promise.<sup>121</sup>

Ultimately, however, it seems unlikely that such a strategy will work. The problem lies in the relationship between civil recourse and corrective justice. For recourse theory, the purpose of damages in a contract case is to hold the breaching promisor responsible for the affront to the respect and dignity of the promisee. What is necessary is a confrontation between the two parties in which the promisor is forced to acknowledge the promisee’s entitlement to equal respect, an entitlement that is violated, presumably, by the gratuitous breaching of a promise. Accordingly, a civil-recourse theory is consistent with both sub- and supra-compensatory damages. The corrective-justice theory, in contrast, is concerned with compensation for the lost value of the promisor’s expectation. It is not concerned with the value of the plaintiff’s agency in acting against the defendant and is hostile to any remedy that is noncompensatory. Nothing that I have said thus far in this essay explains how these two conceptions of the proper legal response to a broken promise relate to one another.

One approach is to simply abandon the idea of compensatory damages for breach of contract, in effect denying that contract law does or should provide disappointed promisees with the value of their expectation.<sup>122</sup> This, however, is a radical move, one that seems inconsistent with Fried’s insistence that promisees are entitled to the value of the promised performance. Alternatively, one could simply embrace a corrective-justice account of contractual liability. The problem with such an approach is that our system of plaintiff-empowerment becomes difficult to account for. Why doesn’t the state simply punish contract breachers for failing to pay compensatory damages, say, with a prison sentence or a punitive fine? Does the empowering of plaintiffs serve any normative purpose other than convenient enforcement? Given the way that the privity doctrine limits who may enforce a contract, it seems rather implausible to suppose that private standing is nothing more than a pragmatic

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120. T.M. Scanlon, for example, seems to take this approach with personal autonomy and contract law. See generally T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86 (Peter Benson ed., 2001). Arguably, Seana Shiffrin’s view of promissory morality as a constraint on the morally permissible structure of contract as opposed to moral model reflected in legal obligations is another example. See generally Shiffrin, *supra* note 8.

121. I have also argued for something like this approach in the past. See generally Oman, *Failure of Economic Interpretations*, *supra* note 10.

122. See generally Oman, *Civil Recourse*, *supra* note 13 (arguing that contractual liability consists of consent to retaliation rather than compensation in the event of breach).

method of enforcement.

#### V. CONCLUSION

*Contract as Promise* is a justly celebrated book. Thirty years after its publication, it continues to be cited and discussed by contract theorists. It is, however, very much a book of its times, and one of the most interesting questions that it raises is how its argument fits into the debates that have raged in private-law theory in the generation since it was published. This essay has explored its relationship to one of these latter-day debates, the rise of corrective-justice theory and civil-recourse theory. Both approaches purport to tell us something important about private law, and it is not surprising that they raise questions for Fried's theory of contract.

While a promissory theory of contracts can be accommodated to the issues raised by both approaches, such accommodations raise questions that promissory theorists need to grapple with. Should expectation damages be thought of as an extension of promissory morality or do they rest on some other normative basis, such as a duty in corrective justice to compensate the victims of wrongdoing? Why does contract law empower plaintiffs to act against contract breachers rather than punishing promise breakers or coercing performance? Why may only victims of breach bring suit, and why is there no requirement that they do so? If we seek answers to these questions in corrective-justice and civil-recourse theory, how are we to understand their relationship to one another? This essay does not ultimately answer these questions, but hopefully, by elucidating the issues involved and sketching out some possible answers, it advances the rich discussion that Fried helped launch thirty years ago.