

Correspondence and Divergence in Contract and Promise

by

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A popular and initially plausible account of the relationship between contract and promise holds that legal liability in contract enforces a corresponding moral responsibility for a promise. Recent scholarship uses this “correspondence” account to identify the divergence between contract and promise and raise moral objections to it.¹ The correspondence account is not new. Charles Fried’s classic contract as promise thesis, for example, literally defines contract as the body of law devoted to enforcing promissory obligations, thereby deporting a number of mainstream doctrines from contract law because of their alleged divergence from promise.² More recently, the correspondence account has motivated a moral objection to a number of traditional contract doctrines, chief among them contract law’s standard remedy for breach. The objection holds that when A promises B to do X, contract law should enforce A’s obligation by making him do X because that is precisely the moral obligation A undertook by promising to do X.³ The default remedy for breach of contract, however, is expectation damages, not specific performance. Indeed, the expectation damages default rule led Oliver Wendell Holmes, Jr. famously to claim that the legal duty to keep a contract is “a prediction

¹See e.g., Seanna Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708 (2007); Dori Kimel, *From Promise to Contract: Toward a Liberal Theory of Contract* (2003), Ch. 4 (Kimel, however, uses the correspondence account to raise a moral objection to an alleged divergence, but then offers a response to defeat the objection).

²For example, Fried jettisons the doctrine of consideration entirely and reclassifies as part of tort law any contractual liability predicated on either objective intention or reliance. Charles Fried, *Contract as Promise* (1981). See also, Jody S. Kraus, *Philosophy of Contract Law*, in Jules L. Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 703-732.

³Notably, Fried himself does not take exception to the expectation damage default remedy, instead maintaining that “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.” Charles Fried, *Contract as Promise* (1981), p. 17. Other scholars disagree, arguing that Fried should endorse expectancy only if specific performance is not possible. See e.g., Dori Kimel, *supra* n. ? at 95-96; Thomas M. Scanlon, *Promises and Contracts*, in xxx, Peter Benson, Ed., at ?; Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 *Osgoode Hall L.J.* 273 (1995).

that you must pay damages if you do not keep it, – and nothing else.”⁴ If Holmes is right, then contract law converts the promissory obligation to do X into the contractual duty to do X or pay damages. The moral objection thus faults contract law for imposing a remedy for breach that fails to hold promisors legally accountable for their promissory obligations. To make matters worse, economic analysts have taken Holmes’s view one step further by defending the efficient breach hypothesis,⁵ which justifies expectation damages on the ground that it not only permits but approves and encourages breach when paying damages instead will make promisors better-off. The interpretive gloss on the expectation damages default remedy that treats it as commending the moral wrong of breach, combined with a perceived divergence between the requirements of morality and the requirements of numerous other contract doctrines,⁶ has led some philosophers not merely to decry contract law’s failure to hold moral agents legally accountable for their promissory obligations, but for eroding the very social foundations of moral agency itself.⁷

These moral objections, however, misunderstand the relationships between promissory obligation and legal liability, moral obligation and deontic autonomy-based moral theories, and promissory obligation and the remedial moral duties that attach to them. A careful analysis of the logical structure of correspondence accounts of contract reveals relatively few genuine sources of divergence between contract and promise.

⁴Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897). Holmes also famously claimed that “[t]he 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.” Oliver Wendell Holmes, Jr., *The Common Law* p. 236 (Little Brown 1963) (1881).

⁵See e.g., Daniel Friedmann, *The Performance Interest in Contract Damages*, 11 Law Quarterly Review 628 (1995); Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 Yale L.J. 568 (2006). For my response to Brooks, see Jody S. Kraus, *A Critique of the Efficient Performance Hypothesis*, 116 Yale L. J. Pocket Part TK (2007).

⁶These include the liquidated damages doctrine, the bar on punitive damages, the mitigation doctrine, the foreseeability doctrine governing consequential damages, the consideration doctrine, and promissory estoppel. I discuss each of these in the last section of the essay.

⁷See e.g., Shiffrin, *supra* n. ?.

1. The Logical Structure of Correspondence Accounts of Legal Enforcement

It is natural to think that tort and criminal law can be explained and justified on the ground that they legally enforce the moral responsibilities of individuals not to harm others negligently or intentionally. On this view, morality generates moral duties that the law then enforces by creating legal duties that correspond to them.⁸ These correspondence accounts of tort and criminal law require some normative political principle that licenses the exercise of political coercion to enforce a particular class of moral duties. The most obvious candidate would be a crude legal moralism that claims the state is justified in enforcing morality generally. Tort and criminal law would be justified because they enforce a particular sub-class of moral duties. But there are other, more appealing, candidates, such as corrective justice theories and standard rule utilitarian accounts of morality and political coercion, that might justify tort and criminal law on the ground that they enforce a certain class of moral duties. Fried's contract as promise view holds that contract law can be explained and justified on the ground that it too legally enforces individual moral responsibilities. In particular, his view holds that contract law enforces the moral obligation to keep a promise, which itself is grounded on respect for individual autonomy.

Correspondence accounts of tort and criminal law appear to have the same logical structure as correspondence theories of contract law. Both justify legal liability on the ground that it enforces a corresponding moral responsibility. It is therefore tempting to conclude that

⁸So conceived, such a view presupposes that the existence and content of the moral duties enforced by tort and criminal law necessarily are determined, as a conceptual matter, prior to the legal liability that attached to them. In this respect, these "correspondence" views seem to have an explanatory structure that resembles the well-known correspondence theories of truth. See e.g., G.E. Moore, 1910-11, *Some Main Problems of Philosophy*, London: George Allen & Unwin 1953, Chapter 15, and Bertrand Russell, 1912, *Problems of Philosophy*; reprinted at Oxford: Oxford University Press 1971, 129. For a general discussion of correspondence theories of truth, see The Stanford Encyclopedia of Philosophy (*on-line*), <http://plato.stanford.edu/entries/truth-correspondence/#1>. However, some philosophers explicitly deny that any theory justifying legal enforcement on the ground that it enforces moral duties must treat those moral duties as determined conceptually prior to their legal enforcement. Although Jules Coleman's corrective justice account of tort law claims that tort law can be explained and justified on the ground that it enforces a certain class of moral duties, he denies that the full content of those duties is determined, as a conceptual matter, before legal liability attaches to them. Instead, he argues that tort law itself necessarily assigns additional content to the moral duties it enforces in the course of their adjudication. For Coleman's view and my argument against it, see Jody S. Kraus, Transparency and Determinacy in Common Law Adjudication, 93 Va. L. Rev. 287 (2007), at 313-320.

these correspondence accounts should stand or fall together: If tort and criminal law are justified on the ground that they enforce moral responsibilities, then contract law could also be justified on the same ground. But tort and criminal law enforce moral *duties*, while contract law enforces moral *obligations*. Moral duties designate those responsibilities to which morality subjects individuals solely by virtue of their status as moral agents alone, while moral obligations designate those responsibilities to which morality subjects moral agents only if they have voluntarily chosen to undertake them.⁹ Unlike moral duties, moral obligations are self-imposed. The justification for legal enforcement that correspondence accounts offer is necessarily sensitive to this difference in kind between moral responsibilities. The reasons that explain the moral significance of this difference can affect the justification for legal enforcement that correspondence accounts offer.

By claiming that a legal duty is justified on the ground that it enforces a particular moral duty, correspondence accounts necessarily endorse whatever moral-theoretic commitments are necessary to explain the normative significance of the category of moral duty itself. In other words, such a correspondence account necessarily acknowledges the existence of a class of mandatory, or non-voluntary moral responsibilities. Thus, it would have to reject moral theories that reject the normative significance of the category of moral duties, and it would be committed to taking seriously competing accounts of the normative significance of the category of moral duties. Unless the correspondence account rejected the enterprise of moral theory altogether (perhaps by embracing a primitive moral intuitionism), it would presumably be committed to the view that some moral theory explains the normative significance of the category of moral duties. And in any event, it would have to acknowledge that competing views of the normative significance of the category of moral duties might affect its justification for legally enforcing moral duties. If, for example, a theory held that moral duties, by virtue of their logical structure as duties, can exist only in the state of nature and cannot exist for individuals governed by a political state, then the correspondence account could not coherently both accept that theory of the structure of moral duties and claim that

⁹See H.L.A. Hart; Simmons, etc. Cf. Richard Brandt, *The Concepts of Obligation and Duty*, *Mind* (1965).

some legal duties are justified on the ground that they enforce a corresponding moral duty.

Similarly, by claiming that a legal duty is justified on the ground that it enforces a particular moral obligation, a correspondence account necessarily makes whatever moral-theoretic commitments are necessary to explain the normative significance of the category of moral obligation itself.¹⁰ Such a correspondence account affirms the normative significance of the distinction between moral duty and obligation. Since that distinction turns entirely on whether a moral responsibility is mandatory or self-imposed, the correspondence account would be committed to treating the voluntariness of a moral responsibility as normatively significant. And again, unless the correspondence account rejected the enterprise of moral theory altogether, it would presumably be committed to the view that some moral theory explains the normative significance of the voluntariness of a moral responsibility. Finally, it would also have to acknowledge that competing views of the normative significance of the category of moral obligation— that is, the category of self-imposed moral responsibility— might affect its justification for legally enforcing moral obligations. Indeed, I will argue that individual will theories of the normative significance of moral obligation are inconsistent with the justification for legal enforcement of moral obligations offered by a correspondence account of contract. Correspondence accounts of tort and criminal law, therefore, do not stand or fall with correspondence accounts of contract. As I explain below, the objection I raise against correspondence accounts of contract rests on a particular account of the normative significance of moral obligation, and therefore has no necessary bearing on the viability of correspondence accounts of tort and criminal law, which claim to justify legal enforcement of moral duties, not obligations.

Deontic moral theories often account for the normative significance of the distinction

¹⁰It might be useful to redefine legal duties that enforce moral obligations as “legal obligations.” But the law uses the term “legal obligation” infrequently and with complete indifference to its correspondence to moral duties and obligation. Therefore, in order to maintain the linguistic convention of the legal doctrine and to avoid the impression that the language of the law tracks this moral distinction, I will use the term “legal duty” throughout to refer to legal responsibilities that correspond to either moral duties or obligation. I will, of course, take care to clarify the kind of moral responsibility to which the legal duty refers in every context.

between duties and obligations by explaining the role each plays in vindicating individual autonomy. However, although moral duties and obligations may each be grounded on respect for individual autonomy, each accords individual volition a different role in explaining the origins of the kind of moral responsibility they describe. The responsibility described by moral duty is limited in application to the intentional actions of moral agents. In the domain of moral duty, then, intention serves to limit the range of actions over which individuals can be held morally accountable. Importantly, although individuals are not morally responsible for unintentional conduct, intention plays no (direct) role in explaining the origin of moral duties themselves. The responsibility described by moral obligation is also limited to intentional actions, but it further requires that those actions be taken with the additional and distinct intention to incur a moral responsibility that individuals are otherwise free to avoid. In the domain of moral obligation, intention thus serves not only to limit the range of actions over which individuals can be held morally accountable, but also as the sole source of purely self-originating moral responsibility. For deontic theories with a foundational commitment to individual autonomy, moral obligation constitutes the quintessential moral responsibility.

The special role played by intention in accounting for the normative significance of the category of moral obligation raises an objection to correspondence accounts of contract. Such accounts claim that the legal enforcement of promises is justified on the ground that it holds individuals to the moral obligations they create by promising. But what if an individual wants to make a promise without incurring legal liability for the resulting promissory obligation? A correspondence account of contract law must insist that legal enforcement is morally justified even for promissory obligations created by promisors who intend not to incur legal liability when they make a promise. On this view, individuals are free to undertake moral obligations as they see fit, but they are not similarly free to decide whether to subject themselves to legal liability for those moral obligations. This result would be unremarkable if correspondence accounts of contract had the same justificatory logic as correspondence accounts of tort and criminal law. After all, the latter are hardly embarrassed by the fact that individuals cannot avoid tort or criminal liability by the simple expedient of committing otherwise tortious or criminal acts with the intent not to incur legal liability for them. But as we have seen, the

moral responsibilities enforced by tort and criminal law are moral duties, whose morally binding force therefore does not derive from an intention to be bound by them. Moral duties apply to an individual by virtue of his status as a moral agent, not by virtue of his intention to subject himself to them. It is unsurprising, then, that an individual's intention not to be subject to a moral duty has no effect on whether the duty applies to him. Moral duties are not self-imposed. Thus, no puzzle arises for a correspondence account that justifies a legal duty on the ground that it enforces a moral duty, even when the individual subjected to that duty intends not to be held legally accountable for violating it. Just as his intent plays no role in explaining why he is morally subject to that duty, it plays no role in explaining why he is legally liable for violating it. Correspondence accounts of tort and criminal law, then, can simply rely on the same reasons that explain why moral duties apply to individuals, even if they intend not to be bound by them, to explain why the corresponding legal duties likewise apply even to individuals who intend not to be bound by them. The whole point of correspondence accounts is to ground legal liability, at least in part, on the reasons that explain the underlying moral responsibilities they enforce.

However, as we have also seen, moral obligations are self-imposed. They do not apply to an individual whether or not he has an intention to incur them. Indeed, moral obligations can be incurred only by individuals who have precisely such an intention. The category of moral obligation exists for the sole purpose of enabling individuals voluntarily to subject themselves to moral responsibilities they otherwise are free to avoid. So when a correspondence account of contract insists on imposing legal liability for a promissory obligation to which the promisor intends not to be legally bound, it conflicts with the moral theory that explains the source of the moral responsibility that the correspondence account would legally enforce. That theory grounds the moral responsibility in the individual will of the promisor. Promisors are held morally accountable for their promises out of a deep respect for their individual autonomy— their individual right to choose to undertake moral commitments as they see fit. When a correspondence account insists on enforcing a promise made by a promisor who intended it not to be legally binding, it paradoxically purports to justify a legal obligation on the ground that it enforces a moral responsibility derived entirely

from the individual's free will, even though by legally enforcing that obligation it thereby violates the will of the very same individual whose autonomy the moral obligation is supposed to vindicate. Correspondence accounts of contract commit no logical error by legally enforcing promises that were made with the intent that they not be given legal effect. But they are deeply inconsistent with the fundamental moral value that both underwrites the moral responsibilities they enforce and provides the ultimate moral justification for the legal liability they impose.

Correspondence accounts of contract, in fact, also face a logical barrier that prevents them from justifying the legal enforcement of all promissory obligations. Individuals who do not wish to incur legal liability for their promises can make their promises conditional on their promisees not seeking to legally enforce them. Any attempt to legally enforce such a conditional promise would have the effect of extinguishing the moral obligation.¹¹ Contract law could refuse to respect this condition by insisting on legally enforcing the promissory obligation as if it were not subject to the condition. But the resulting legal liability could not be grounded on the claim that it enforces a corresponding promissory moral obligation. By its own lights, a correspondence account of contract could not justify the legal enforcement of a promise that is made conditional on its not being legally enforced.¹²

¹¹Translated into the terms of the law of conditions in the (First) Restatement of Contracts, § 250, the promise would be subject to a condition subsequent that the promisee seek legal enforcement of the promise. The promisee's seeking to enforce the promise would constitute a fact that extinguishes the promissory duty (i.e., obligation). Under the Restatement (Second) of Contracts, §230, the promisee's seeking to enforce the promise would constitute the occurrence of an event that terminates the promisor's duty (i.e., obligation).

¹²Note that individuals could also avoid legal liability for promissory moral obligations by conditioning them on the non-existence of a law making them legally enforceable. However, this condition would disable individuals from subjecting themselves to a promissory moral obligation that persists irrespective of the state of the law. If a law making all promissory obligations enforceable is in effect at the time they make such a conditional promise, the law will constitute an event the occurrence of which prevents the promissory obligation from taking moral effect. The promisor will not be bound by a promissory obligation until the law ceases to exist. If the promise is made before a law making all promissory obligations enforceable is in effect, then the promisor will be bound by the promissory obligation unless and until such a law is in effect, at which time the promissory obligation will no longer be binding on the promisor. While such a conditional promise indeed does protect the promisor from the risk of being held legally liable for the promise, it does so only by preventing him from subjecting himself to a promissory obligation that necessarily binds him from the moment he makes the promise until the moment he performs the promise. Thus, the possibility that individuals can condition their promises on the non-existence of laws making them legally enforceable does not explain how correspondence accounts of

In sum, promissory obligations, like all moral obligations, are self-imposed. Moral obligations are distinguished from moral duties in order to call attention to their distinctive source. Unlike moral duties, moral obligations are created only by virtue of the exercise of the individual will to create them— individuals become subject to moral obligations only by intending incur them. As a result, correspondence accounts of contract cannot justify the legal enforcement of all promissory obligations. The same commitment to respecting individual autonomy that explains and justifies the existence of the category of moral obligation itself, also explains why legal liability for promissory obligations cannot be imposed on individuals who intend not to incur legal liability for their promises. In addition, although correspondence accounts of contract can claim to justify the imposition of legal liability for some promises on the ground that it enforces a corresponding promissory obligation, they cannot claim that the imposition of legal liability for every promise can be similarly justified: It is logically impossible to legally enforce promissory obligations created by promises conditioned on the non-occurrence of legal enforcement.

2. Self-Imposed Responsibility: Subjective versus Objective Intention

Correspondence accounts cannot justify the imposition of legal liability for all promissory obligations and also maintain fidelity to the deontic moral theories that derive those obligations from a foundational commitment to autonomy. A legal regime that refused to honor the intent of individuals who wish to subject themselves to legally unenforceable promissory obligations would be inconsistent with that commitment. Whether or not a promissory obligation can be justifiably enforced, then, requires (suitably modified) correspondence accounts to determine whether the promisor intended his promise not to be given legal effect. But the intention necessary to create promissory obligations, and to determine their content and legal enforceability, can be understood objectively or subjectively.

contract can be reconciled with the autonomy foundation on which their justification ultimately must rely. If the only way to avoid legal responsibility for one's promises is to make them conditional on their not being legally enforceable, then the freedom of individuals to bind themselves as they see fit would be held hostage to the contingency of whether laws legally enforcing those promises are in effect. Indeed, even the risk that such laws might come into effect would contradict the autonomy foundation of correspondence accounts of contract by impermissibly constricting the range of promissory moral obligations individuals can incur.

Contract law predicates contractual liability on a finding of objective intent. The Restatement (Second) of Contracts defines a promise as “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”¹³ Contract law therefore can be viewed as enforcing the moral obligation to keep a promise only if morality also holds that objective intention is sufficient to create promissory obligation.

Some deontologists, such as Fried, insist that a promissory obligation can arise only from the subjective intention of an individual to make a promise. Fried’s claim is certainly grounded on a natural interpretation of the classic deontological moral theories, such as Kant’s and Hegel’s.¹⁴ In what sense is an obligation self-imposed if the self never exercises its will to incur it? Of course, no deontologist would deny that individuals sometimes can be held morally responsible for the unintentional but voluntary conduct. But deontological theories assign less moral responsibility for unintentional wrongs than for intentional wrongs because unintentional wrongdoers do not choose to engage in immoral conduct with the knowledge that it is immoral.¹⁵ Unintentional wrongs are, in this sense, not an authentic expression of free will. Such conduct gives rise to moral responsibility because it is nonetheless voluntary—the actions of unintentional wrongdoers are still *their* actions.¹⁶ The natural home for the legal enforcement of unintentional moral wrongs is tort law, to which Fried happily assigns it. For Fried, the objective intention to make a promise gives rise to liability in tort because the individual who unintentionally leads another reasonably to believe that he has made a promise, and then disappoints the promissory expectation he created, violates his moral duty to use reasonable care in avoiding injury to others. Objective intent therefore cannot create a

¹³Restatement (Second) of Contracts, §2.

¹⁴There are, however, credible interpretations of classical deontological moral theory, as well as contemporary deontological accounts of contract, that deny that contractual liability must be traced to subjective intent. *See e.g.*, Peter Benson, *Absolute Right . . .* and Thomas Scanlon, *Promises and . . .*, *supra* n. ?.

¹⁵Or as philosophers of mind would put the point, moral agents who unintentionally violate moral duties believe *de re*, but not *de dicto*, that they are committing an immoral act.

¹⁶*See* Stephen Perry and Jules Coleman on outcome responsibility.

promissory obligation, but by creating the reasonable appearance of one, it can nonetheless transform the failure to perform the apparent promise into a violation of a moral duty.

The problem with Fried's analysis is that it subjects promisees to the ineliminable risk that their promisor only appears to have undertaken a promissory obligation but in fact has not. A promisee can never be sure that she has the moral right to hold her promisor morally accountable for his failure to discharge his promissory obligation. Instead, if the promisor in fact did not subjectively intend to incur a promissory obligation, then, by definition, the promisor did not create, and is not morally bound by, a promissory obligation. Indeed, the reasonableness of the promisee's belief— the weight of the objective evidence establishing the subjective promise— is entirely irrelevant to determining whether a promissory right and duty exist. The presence or absence of subjective intent is dispositive. Evidence of the appearance of a promise is relevant only to establishing the reasonableness of the apparent promisee's belief that a promise was made and the apparent promisor's failure to use due care. As I argue below, such evidence establishes the breach of moral duty, rather than obligation, which therefore generates a mandatory remedial moral duty to compensate for detrimental reliance. The remedial moral duty triggered would not be derived from the promisor's choice and would likely entitle the apparent promisee to a remedial moral right that differed from the remedial moral right she would have received had the promisor's conduct created a genuine promissory obligation.

In short, on Fried's analysis, promisors lack the power to create a verifiable, and thus credible, promissory undertaking. But such a power lies at the heart of the autonomy foundation from which the power to create promissory obligations derives. A moral theory that expresses an individual's power to create self-imposed moral responsibilities by conferring only the power to create a non-verifiable moral obligation pays only lip service to a foundational commitment to individual autonomy. The value of the power to create promissory obligations derives from the role they play in the practical reasoning of not only the individuals that assume them but the individuals who receive them. The point of recognizing the category of promissory obligations is to enable individuals to change the

practical reasoning not only of promisors, who will always know whether they have made a subjective promise, but of promisees, who can never know whether they have received a subjective promise. Fried's view would reduce the role of promissory obligation in moral life to the role of a silent vow, which makes a difference in the practical reasoning of those who make it, but because it is neither made to nor received by anyone, has no role to play in changing the practical reasoning of others.¹⁷ Thus, if moral obligations were purely a private matter, as Fried would have it, they would lose their relational character, which is essential to the role they play in vindicating individual autonomy.

Still, the autonomy analysis of objective and subjective intent requires a comparison of two different risks: Although the objective view necessarily subjects promisors to the risk that they will sometimes be bound when they do not subjectively intend to be bound, the subjective view of intent subjects promisees to the risk that they will rely on a mere appearance of a promise which has no morally binding effect on the apparent promisor. The objective view of promissory obligation is justified if it is the best means, all risks considered, of empowering individuals to undertake promissory obligations that align with their subjective intent. In either regime, both parties could take precautions to reduce the risk of error. But in the subjective regime, only the (alleged) promisor can know with certainty whether he has created a moral obligation. In the objective regime, the ability to determine the presence of a promissory obligation is symmetrical: it will turn on a reasonableness inquiry governed by facts and norms equally available to both promisors and promisees. It therefore assigns an equal weight to the autonomy interests of promisors and promisees alike. For this reason, a moral theory grounded in individual autonomy is likely to favor an objective view of intent.

3. From Legal Enforcement to Legal Remedy

The moral objection to expectation damages summarized at the outset holds, in the first instance, that in order to justify the legal enforcement of A's promise to B to do X on the

¹⁷If pledges and vows are analyzed as promises between an individual and God, then perhaps they also could be understood in relational terms.

ground that it enforces the promissory obligation A's promise creates, the law must require A to do X if doing X remains possible after breach. In doctrinal terms, the legal remedy for A's breach must be specific performance. As we've seen, this objection presupposes a correspondence account of contract law. Otherwise, the alleged failure of contract law to enforce A's promissory obligation would not count as an objection to using expectation damages as the default remedy in contract.

The initial problem facing a correspondence account of legal remedies is to identify a remedial moral duty that corresponds to and thereby justifies the legal remedy. But moral theories specifying first-order responsibilities often do not specify the remedial, or second-order, moral responsibilities, if any, that individuals incur when they violate first-order moral responsibilities. In the case of promising, the deontic moral theories that explain promissory obligation typically lack an account of the nature or content of the remedial moral duty, if any, to which breach gives rise. Correspondence accounts 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. The moral objection simply refers to the first-order promissory obligation to do X as grounds for concluding that violations of that obligation give rise to a second-order moral duty to do X if doing X remains possible after breach. This conclusion, however, does not follow as matter of logic— it requires substantive argument. The only self-evident conclusion that can safely be drawn from breach is that the breacher violated his moral obligation and therefore committed a moral wrong.¹⁸ Correspondence accounts of contract therefore require an account of the remedial moral duties that arise from violations of promissory obligations.

Accounts of the remedial moral duties for violations of promissory obligations, however, are subject to different substantive constraints than accounts of the remedial moral duties for violations of moral duties. Just as the autonomy foundation for moral obligations

¹⁸On some views of the nature of moral discourse, it might also follow (from the fact that the promisor committed a moral wrong) that it is morally appropriate for the promisee to express condemnation and resentment toward the breacher and for the breacher to express regret and to apologize to the promisee.

inherently limits the kinds of promissory obligations that can justify the creation of legal duties under a correspondence account, it also limits the remedial moral duties that can attach to the violation of promissory obligations. Because promissory obligations are imposed on individuals only by virtue of their willingness to undertake them, 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. The foundational commitment to respect for individual autonomy, which explains and justifies the category of moral obligation itself, would require any moral theory that imposed mandatory remedial moral duties for the violation of moral obligations to justify the resulting limitation on the nature and extent of the moral responsibility it permits individuals voluntarily to incur. If, for example, an individual wished to make a promise whose breach triggered only a moral duty to apologize, a moral theory foundationally committed to respect for individual autonomy would be hard-pressed to explain why this individual should not have this option. The remedial moral duties that attach to violations of promissory obligations, like the legal duties that correspondence accounts attach to promissory obligations, must themselves be consistent with the moral foundation from which those obligations derive.

To justify an area of law, then, a correspondence account must be able to identify not only the first-order moral responsibilities that correspond to the substantive legal duties it claims to justify, but also the second-order remedial moral duties that correspond to the remedial legal duties it claims to justify. A correspondence account of contract law, thus, must identify the remedial moral duties that correspond to the remedial legal duties recognized in contract law. The moral objection to contract law's remedial legal duty to pay expectation damages, then, is that it fails to correspond to the remedial moral duty that attaches to violations of the first-order moral obligation to keep a promise. In particular, the objection holds that violation of the first-order moral obligation to keep a promise gives rise to a remedial moral duty to perform the promise if it is possible to do so. But what is the basis for this claim? It seems to treat the inference from a promissory obligation to a remedial performance duty as analytic— an inference that follows from the concept of promissory

obligation itself.¹⁹ But while it is certainly true that a promise to do X entails the promissory obligation to do X, the violation of that obligation does not conceptually imply or logically entail a remedial duty to do X.²⁰ The content of remedial moral duties does not necessarily correspond to the content of the first-order moral responsibilities whose breach they remedy.²¹ Only a substantive, rather than conceptual, argument can bridge the gap between the violation of a first-order moral duty and the content of the remedial moral duty to which its gives rise. And that argument at least must be consistent with, and likely will be grounded in, the same moral theory that provides the normative source of the first-order moral responsibility in question.

Moreover, I have argued that the deontic foundation for promissory obligations is incompatible with a theory that mandates the content of the remedial moral duties arising out of the violation of promissory obligations. A moral theory that mandated the content of the remedial moral duties arising out of violations of first-order moral duties would not necessarily be inconsistent with the moral theory from which those first-order moral duties are derived. But a moral theory that mandates the content of the remedial duties created by breach of a

¹⁹Consider Dori Kimel's puzzlement over Fried's argument for expectation damages: When [Fried] writes that "[i]f 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," his narrative only begs the question why not drop the "equivalent of" bit; and when he commends expectation damages for giving the victim of a breach . . . "the benefit of his bargain," specific performance springs to mind as something which, when application could surely achieve this very aim more simply, more directly, and more accurately. After all, specific performance is the remedy that aims at granting the innocent party precisely what she bargained for, whereas expectation damages merely aim at compensating her, albeit fully, for not receiving what she bargained for. At best, . . . it is a second best. Kimel at 95.

²⁰In addition, once a promise has been breached, it is conceptually impossible to perform the promised act. If the time for performance has expired, specific performance cannot be understood as an equivalent to performance of the promise, but rather at most constitutes performance of the act promised. If breach is by way of anticipatory repudiation, then the repudiation breaches an implied duty not to state an unequivocal intention not to perform. Subsequent performance of the act promised still cannot qualify as performance of the promise, since its performance required non-repudiation. Thus, specific performance does not make the promisor perform the promise, but at best makes him perform the promised act. It therefore does not correspond to the moral duty the promisor violated, which required the promisor to perform the promised act by a certain time and without repudiating before that time expired.

²¹By that logic, the eye-for-an-eye theory of punishment would be a conceptual implication or logical entailment of the primary conduct criminalized.

promise would be inconsistent with the autonomy foundation from which promissory obligations are derived. Whether or not breach of promise triggers a remedial moral duty to perform the promised act is contingent on the remedial moral duties the promisor voluntarily incurred when he chose to incur the promissory obligation. To be sure, a moral theory could make the content of the remedial moral duties for promissory obligations mandatory without undermining the voluntary character of the moral responsibility promisors assume. In such a moral regime, promisors still freely choose to subject themselves to the remedial moral duties with mandatory content when they freely choose to incur the promissory obligations to which those remedial moral duties attach. However, although such a theory does respect promisors' right to choose their promissory obligations, and in that sense makes the assumption of the remedial moral duties attached to them voluntary as well, it nonetheless unjustifiably deprives them of the right to choose the content of the remedial moral duties that will attach to the promissory obligations they choose to undertake. That deprivation is substantively inconsistent with the principle of autonomy that both underwrites promissory obligations and ultimately grounds the remedial moral duties to which their violation gives rise. Thus, to 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.²²

²²Seanna Shiffrin appears to reject this claim:

One might attempt to recharacterize the contract rules that I have represented as divergences as instead rules that inform the content of what is promised between contractors. . . . I doubt that one may alter by declaration or by agreement the moral significance of a broken promise. . . . I doubt that an effort to do that can be thought to be a part of a promise. Although a promise may make a non-obligatory action obligatory, the object of the obligation was within the promisor's power in the first place. By contrast, the power to alter the significance of and appropriateness of others' reactions to a broken obligation is, by contrast, not within the power of the promisor. So, it does not seem to be the sort of thing that could be altered by consent. Nor could it be made part of the content of the promise. In response to another's wrong, we have the elective power to forgive, but forgiveness involves, *inter alia*, recognition of a past wrong.

Shiffrin, 17-18.

Shiffrin's argument conflates two kinds of "moral significance" of broken promises. The first is the appropriateness of the promisee's reaction and the promisee's right to withhold or grant forgiveness. The second is the remedial moral duty that attaches to a promissory obligation. Perhaps it is a conceptual or conventional truth that the concept of breach *entails* the moral right to grant or withhold forgiveness and to feel and express condemnation and contempt for the promisor. In so, then aggrieved promisors cannot alter the moral legitimacy of an aggrieved promisee's reactions to suffering the moral wrong of breach. That promisees lack that power,

I have argued that objective intention gives rise to promissory obligation. Thus, the content of the remedial moral duties attaching to promissory obligations should also turn on the objective intention of the promisor. When a promisor expressly manifests his intention to attach a particular remedial moral duty to his promissory obligation, morality must ratify his choice by giving moral effect to that remedial duty and no other. Similarly, for a correspondence account of contract, the remedial legal duty must correspond to the remedial moral duty that the promisor expressly undertook. A correspondence account cannot impose a legal remedy that fails to correspond to the moral remedy, and the promisor's intent is the sole source of the content of the moral remedy for breaking a promise. But what remedy should a correspondence account adopt for cases in which the promisor failed, either expressly or implicitly, to indicate the content of the remedial moral duty to be attached to his promissory obligation? Here, the moral theory of promising faces the same challenge that preoccupies the theory of contract: What default rules should morality (contract) use to prevent gaps in promissory obligations arising out of the promisor's failure to indicate his intention? Gaps in manifested intention arise because the promisor either failed to form the relevant intention or failed to manifest the intention he formed. By hypothesis, the idiosyncratic evidence in any case will not resolve this ambiguity.

Contract law solves this problem by adopting default rules that provide a set of terms, or mechanisms for generating them, that will be imputed into all contracts unless the parties indicate otherwise. With some notable exceptions,²³ most contract default rules are best

however, has no bearing on my argument that the promisor necessarily has the power to completely determine the content of the remedial moral duty that binds him upon breach.

²³One exception is the so-called "information forcing" or "penalty" default rule. *See* Goetz & Scott, Ayres & Gertner, Jason Johnston, Barry Adler, etc.. There is, however, some doubt about whether any existent default rules actually qualify as penalty defaults. *See* Eric Posner. However, any penalty default that turns out to be economically justified on the ground that it reduces informational barriers would also enjoy the support of an autonomy-based moral theory. In addition to penalty default rules, there are also paternalistic default rules, typically designed to protect consumers, that deliberately impute non-majoritarian terms into contracts. In some cases the terms are mandatory. In others, they are so-called "legal information forcing" rules designed to force sophisticated commercial parties to make consumers aware of their contractual rights and duties. If their purported justifications are sound, all of these alternative default rules would likely be supported by an autonomy-based moral theory of promising.

understood as attempts to impute into contracts terms that most similarly situated parties would have wanted to include had they considered them. Majoritarian default rules can be justified as a solution for interpreting promises in a deontic moral theory of promising on the ground that they maximize the probability that the terms to which promisors are being held correspond with the ones they intended but failed to express or imply. They also save the majority of individuals the costs of specifying those terms, which promotes their autonomy by decreasing the barriers to creating promissory obligations. Of course, the default rule approach to promissory interpretation creates the risk that some promisors will be held to terms which they did not intend, because they either intended but failed to indicate an incompatible term or failed to form any relevant intention. In those cases, individuals would be subject to a promissory obligation at odds with or unsupported by their subjective intention. As we have seen, deontic moral theorists such as Fried argue that a (subjectively) unintended promissory obligation is a contradiction in terms. Fried would insist that if the promisor formed, but failed to indicate, his subjective intention, that intention nonetheless gives rise to a promissory obligation. The imposition of a contrary moral responsibility would necessarily conflict with, rather than constitute, a moral obligation. Similarly, for Fried, in any true gap case— a case in which the promisor formed no relevant intention— no promissory obligation could arise, thus relegating the solution to disputes over matters arising under but not governed by promises to other areas of moral responsibility enforced by other areas of the law, such as torts and restitution. Notably, Fried does not necessarily object to the resolution of such disputes by advertent to default rules. He just insists that the resulting moral and legal liability they impose sounds, respectively, in non-promissory moral responsibility and non-contract law.

Fried's objection to the default rule approach to promissory interpretation shares the basic premise of his objection to the objective theory of intent: respect for individual autonomy entails that promissory liability must arise from subjective intent. Yet I have argued that a foundational commitment to individual autonomy is not only compatible with but likely requires an objective theory of intent for promissory obligations. Similarly, that commitment supports a majoritarian default regime for interpreting promissory obligations. Just as the commitment to autonomy justifies the use of objective intent as the best means of facilitating

the voluntary creation of moral responsibility, it also justifies the use of majoritarian default rules on the ground that, in equilibrium, it provides the regime most likely to maximize the convergence of objective and subjective intent with respect to all the terms of promissory obligations, while minimizing the costs of creating those obligations in the first place. Once the default rules are understood, individuals will be on notice of the terms that morality, through ordinary understanding, will imply into their promises absent a contrary manifestation of their intention. Just as individuals operating under a promissory regime based on objective intent can avoid an unintentional promissory obligation by learning to conform their outward manifestations of intention to their subjective intentions, individuals can also learn to take majoritarian promissory default rules into account when they make and receive promises, thereby decreasing the occasions on which they incur promissory obligations with terms that conflict with their subjective intent. Moreover, since the default rules, by hypothesis, impute terms that most individuals would want in their promises, the probability of a conflict between subjectively and objectively intended terms is minimized.²⁴ Finally, in those cases in which promisors failed to form a relevant intention, majoritarian default rules maximize the chance that the resolution of their dispute reflects the terms they would have chosen had they considered them. The assurance that promissory gaps will be filled in a manner congenial to their interests decreases the expected costs, and increases the expected benefits, of promising.

As I noted above, Fried would not necessarily object to the use of majoritarian default rules to resolve disputes over matters not governed by subjective intention, but would insist that the moral responsibility imposed is not promissory. I have argued that majoritarian default rules should be used to interpret promises when resolution of a dispute cannot be determined on the basis of objective intent. In my view, the resulting moral responsibility could properly be viewed as a promissory obligation even though it is not derived from subjective intent. However, given that moral theory has no greater power than contract law to determine the presence or content of subjective but unexpressed intentions, the question of

²⁴In addition, on average, individuals intending idiosyncratic terms might be more likely to be aware of their idiosyncrasy and thus to manifest their idiosyncratic intentions clearly.

whether the liability imposed by interpretive default rules qualifies as promissory or falls within some other category of moral responsibility may not matter. My claim is simply that deontic moral theories of promising support the use of (economically justified) majoritarian default rules for resolving moral disputes that cannot be resolved by subjective or objective intent because they are consistent with, and indeed necessary to uphold, the principle of autonomy that underwrites promissory obligation.

A correspondence account of contract, then, would determine the appropriate content of legal remedies for breach by identifying the corresponding moral remedial duty that attached to a breached promissory obligation. If that duty cannot be established by identifying the promisor's objective intention, then a majoritarian default rule should be used to determine it. If most individuals would choose expectation damages, then the promisor has the remedial moral duty to pay expectation damages and a correspondence account of contract would make that duty legally enforceable. If most individuals would choose specific performance instead, then the promisor has the moral duty to perform following breach and the promisee has the right to demand performance following breach. A correspondence account would then enforce that right by legally requiring specific performance. There is, of course, an extensive and complex literature in law and economics addressing the question of which contract remedies would maximize the joint expected value of promises at the time they are made, and therefore would be preferred by most promisors. The correct default rules are, in many areas, subject to dispute. But the controversy surrounding default rules only shows that the question of promissory interpretation to resolve disputes over matters not governed by objective intention is difficult. Nonetheless, I maintain that moral theories of promise can no more avoid it than can contract law and theory.

4. Assessing Divergence

I began this essay with the standard moral objection to expectation damages. That objection implicitly invokes a correspondence account of contract as grounds for criticizing contract law for its failure to force the promisor to perform his breached promise. By now it should be clear that the objection misunderstands the relationship between contract and

promise. Contract law certainly converges with morality to the extent that it enforces the promisor's explicit intention to assume a remedial obligation. (To the extent it does not, contract no doubt diverges from promise).²⁵ It also converges, or at least aspires to converge, with promise when it imposes the default remedy of expectation damages. Expectation damages can be justified as the law's best guess about the remedial moral duty that most promisors would prefer. And in any event, specific performance does not enjoy a presumption in its favor. When A promises B to do X, there is no conceptual or other ground for inferring that A also intends to assume a remedial moral duty to X if he breaches his promise. Moreover, autonomy-based moral theories would forbid any mandatory constraints on the content of the remedial moral duties A is permitted to attach to his moral obligation to do X. A one size fits all remedy moral duty is incompatible with a foundational commitment to autonomy.

It is important to note, however, that this understanding of the content of remedial moral duties, and thus of the proper basis for assessing the correspondence of contract and promise, does not reduce to a Holmesian view of promise (Holmes's actual view is about contract, not promise). If A promises B to do X (and thus makes a "single" promise), but assumes a remedial moral duty only to pay B's detrimental reliance due to breach, it does not follow that A's promise can be properly translated into a promise to do X or pay money (a true "alternative" promise). A crucial moral distinction is lost in this translation. If A promises B to do X or pay money, then when A pays money he *discharges* his moral obligation. But if A promises B to do X and thereby also undertakes only the remedial moral duty to pay B's reliance upon breach, then when A fails to do X he breaches his moral obligation and wrongs B. When A compensates B's reliance losses, he discharges his remedial moral duty but does not thereby right the moral wrong of his breach. Just as legal remedies do not right moral wrongs, remedial moral duties do not cure the moral wrong of breach. Economic analysts of contract law tend to regard such distinctions in moral obligation as superfluous. For purposes

²⁵Thus, contract law's refusal to enforce an express penalty damages clause (in excess of expectation damages) clearly fails to enforce the parties moral obligations.

of their model, they presume that all they need to know is the price of performance and the price of breach. From their perspective, there is no difference between the single promise case, in which the promisor has the *legal* option of performing by doing X or paying money as damages for breach, and the single promise case, in which the promisor has the option of performing by either doing X or paying money. Call it what you will, the single and alternative promisor both face the costs of doing X or paying money, period. Why should economic analysts care whether the payment of money is denominated as the discharge of a remedial moral duty for breach or the discharge of a performance duty? The names don't change the price.

Recent developments in the economic analysis of contract law, however, clearly demonstrate that an economic model that fails to take into account the distinction between performance and breach fails to capture an important and monetizable dimension of the costs and benefits of promising. The economic theory of contract design now recognizes that contracting parties use a combination of legally enforceable (or formal) and legally unenforceable (or informal) norms to regulate their agreement. The optimal mix of these norms for any given agreement depends in part on how likely they are to motivate the parties to conform to them. Informal norms change parties' motivations by imposing costs on their non-compliance with them. Thus, economic analysts err when they disregard the additional costs parties incur by undertaking and breaching moral obligations. Parties not only risk reputational harm but, to the extent promisors are intrinsically motivated to conform with moral demands, nonconformance imposes intrinsic costs. In other words, if given the option to choose between making one of two promises above— (1) a promise to do X or pay money for breach of the promise to do X, and (2) a promise to do X or pay money, where payment of money constitutes performance— most promisors would charge more to make the first promise than the second. The first not only imposes costs of doing X or paying money, but should he fail to do X, he not only has to pay money but also bears the reputational and personal costs of breaching a moral obligation. The second provides the promisor the option of doing X or paying money, neither of which require him to breach of promissory obligation. Unless a promisor and promisee are motivationally indifferent to morality, the Holmesian reduction of

promises whose breach triggers a duty to pay compensatory damages to true alternative promises cannot be sustained, even for the economic analysts of contract.

The moral distinction between single and alternative promises also clarifies the merits of the moral objection to the efficient breach hypothesis. Recall that the objection condemns the efficient breach hypothesis for counseling the immoral act of breach whenever doing so would be in the promisor's interest. The objection insists on taking the doctrinal language of promise and breach literally. But the efficient breach hypothesis can be readily defended simply by re-interpreting it not to counsel breach but to claim that most promises are best understood as alternative promises masquerading as single ones. Thus, when A promises B to do X against the background of the default remedy of expectation damages, ordinarily A should be understood to be promising to do X or pay B the value he would have realized from A's doing X. Under ideal conditions, X and the payment of damages are equivalent in value to B, so B should be indifferent between them. Given B's indifference, it seems perverse to suppose that B would nevertheless insist that A undertake a moral obligation to do X rather than X or pay B the monetary equivalent of X. If B is indifferent, then she would be unwilling to pay the premium A would charge for the additional costs of bearing the moral obligation to do X, which would morally prohibit him from taking a superior alternative to performance even if he pays B the equivalent value of performance. The efficient breach hypothesis, then, really amounts to the claim that most contracting parties will find it mutually beneficial to permit the promisor, both legally *and* morally, to pay damages as an alternative to performing the promised act. While the promisor's payment in lieu of performance is legally denominated breach and payment of damages, most parties intend and understand the promisor to be discharging his moral obligation by compensating the promisee, rather than paying damages from breach of a moral obligation. In other words, most parties use the remedial default rules of contract to specify a morally acceptable alternative to performance of their promise instead of writing an explicit alternative promise contract.

It remains true, however, that even on the alternative promise interpretation of nominally single promise cases, the promisor's refusal either to do X or pay compensation

absent a court order would constitute both a legal and moral breach. Thus, Shiffrin writes:

It is out of bounds to say: “I solemnly promise to X but I may fail to do so if something better comes along; moreover, if it does, you can only expect x’s market value from me, although you may need to enlist the help of others to pry it out of my clenched fist. Further, let us now declare that should I fail, it will not be the sort of thing deserving of moral reprobation so long as eventually, you are made whole monetarily and it is not the sort of thing you may be upset with me over or view as showing my bad character.” This is not a full-fledged promise.²⁶

Shiffrin here rightly points out that *if* the promise is do X, and not to do X or pay compensation, then no matter of temporizing in the preamble or postscript of the promise can transform breach into performance, and thereby insulate the promisor from all the consequences of breach. She is also right to imply that even if the promise is an alternative promise to do X or pay compensation, by requiring the promisee to sue him and get a judgment before he pays, the promisor may be in violation of his moral obligation. If the promisor knows performance requires doing X or paying compensation and he refuses to do either, thereby forcing the promisee to sue, then he is in breach of the moral obligation created by his alternative promise. But if the promisor in good faith believes either that he is not obligated to do X or pay compensation (for example, because he believes a condition precedent to his duty has not occurred) or that he has performed by doing X (even though the promisee disagrees), then a refusal to do X or pay compensation is not necessarily morally wrong, even if a court ultimately decides he breached his promise. It may be fair to read into legally enforceable promises each party’s intention to preserve the right to insist on the legal adjudication of any good faith dispute.

Shiffrin clearly errs, however, if she means to insist that morality cannot permit a promisor to make a promise that allows the promisor to choose to do X or pay compensation, so that the promisee will have no moral grounds for complaint, let alone a further moral right of remediation or punishment, once the promisor pays the compensation. An alternative promise would accomplish precisely this objective and runs afoul of neither legal nor moral prohibition. Nor would there be any moral impropriety if the promisor decides to exercise the

²⁶Shiffrin, 18.

payment option because “something better comes along.” The promisor has moral license to restrict or expand his performance options as he sees fit (and the promisee will accordingly increase or reduce the price she pays for the promise). Shiffrin’s real objection boils down to the claim that the nominal promise to do X backed by the default remedy of expectation damages should be taken literally— as entailing that a failure to do X constitutes a breach of promise followed by the imposition of damages for wrongful conduct. But this is a distinctly uncharitable interpretation of the efficient breach hypothesis, of the Holmesian conception of a promise, and of the entire tradition of the economic analysis of contract law that interprets nominally single promises as the functional, and normative, equivalent of an alternative promise. While the economic account overlooks the moral and economic importance of the difference between genuinely single promises and nominally single promises that are de facto alternative promises, its claim is that most parties— especially the sophisticated corporate and commercial parties to which it is usually applied— would likely intend and understand their nominally single promises as alternative promises.

Shiffrin also claims that the contract doctrines governing punitive and liquidated damages, mitigation, consequential damages, and consideration also constitute morally objectionable instances of divergence between contract and promise. Contract law does not award punitive damages, even for intentional breach (although punitive damages are available if the promisor’s behavior also constitutes an intentional tort). Shiffrin argues that the law generally awards punitive damages to “express the judgment that the behavior represents a wrong,” but by failing to make them available for intentional breach, “[contract law] thereby fails to use its distinctive powers and modes of expression to mark a judgment that breach is impermissible as opposed to merely subject to a price.”²⁷ Shiffrin’s objection here is just another form of the objection against the Holmesian view of promise. As we’ve seen, charitably interpreted, the Holmesian view does not approve breach, or fail to disapprove it, but rather speculates that most parties view the default remedy of payment of damages as a morally acceptable alternative performance, even though the promisor makes a nominally

²⁷Shiffrin, at 14.

single promise. The lack of availability of punitive damages for intentional breach reflects the same judgment— that properly understood (i.e., as the parties likely understand their own agreement), failure to perform the promise simply triggers the promisor’s alternative performance duty, which the law then enforces by entering a judgment requiring payment of expectation.²⁸ Contract law’s failure to award punitive damages for the intentional failure to perform the act promised by a commitment expressed as a single promise might reflect the view that most such promises are only nominally single. Thus, the promisor’s choice to pay damages instead of performing is so unlikely to constitute a violation of a moral obligation that, for evidentiary reasons, contract law conclusively presumes it is not.

More importantly, however, were the law to impose punitive damages for intentional breach, it would be usurping the promisor’s authority to determine his remedial moral duty at the time he makes his promise. Moral theories committed to respecting and promoting individual autonomy must delegate to promisors not only the right to decide whether to assume a promissory obligation, but also to determine what remedial moral duties will attach to it. Although Shiffrin may be correct that some incidents of breach are conceptual entailments (such as the promisee’s right of condemnation), there is no inherent requirement that the promisor undertake the remedial moral duty to pay punitive damages for breach. A promisee who insists that she has the right to punitive damages for breach can simply reject the offer of a promise to which a remedial moral duty to pay punitive damages does not attach. If she accepts the offer, she has no moral grounds for complaining that breach does not entitle her to punitive damages. Thus, by imposing a mandatory remedial legal duty to pay punitive damages, contract law would undermine, rather than enforce, the promissory responsibilities of an autonomy-based morality. When it comes to the legal enforcement of moral obligations, as

²⁸Again, Shiffrin is right that forcing a suit in bad faith would be morally wrong even on the alternative promise view, but, short of Rule 11-like violations, courts are hardly in a position to determine the difference between good and bad faith litigation. And as I’ve explained above, it is doubtful that litigating in good faith violates a moral obligation to keep a promise intended to be legally enforceable, even when the promisor loses the case. Notably, when courts do find litigation to be in bad faith, monetary sanctions are in fact sometimes awarded. Similarly, if a promisor refuses to pay a judgment, the law of judicial contempt imposes seriously condemnatory penalties, including jail time. When courts believe promisors are intentionally flouting their moral and legal obligations, they do not hesitate to impose sanctions that unequivocally express disapproval. But as I argue below, such sanctions may conflict with, rather than conform to, the moral norms governing promise.

opposed to moral duties, the law is not free to use legal remedies as it pleases to express its moral disapproval. Nor does its failure to do so indicate its moral indifference or approval. Instead, it represents the law's respect for the reasoning that explains and structures the category of moral obligation itself.

The liquidated damages doctrine allows promisors to specify damages for breach only if expectation damages are likely to be difficult to prove and the damages they specify constitute a reasonable approximation of expectation damages. Liquidated damages clearly in excess of expectation damages are deemed void as a penalty.²⁹ Surprisingly, Shiffrin is reluctant to conclude this doctrine diverges from the moral requirements of promise. Her principal concern is that it cuts off a self-help alternative for parties who want to insure that breach is punished by an award of punitive damages, notwithstanding contract law's refusal to award them as a matter of course: "Not only are punitive damages unavailable as a response to garden-variety, intentional breach, but they may not be elected in advance within legally enforceable agreements by willing parties."³⁰ Her hesitancy stems from her view that moral agents cannot control the degree of severity of their moral wrongs. Thus, the liquidated damages doctrine might be understood as preserving correspondence with morality by denying promisors the right to attach legal consequences to breach that exceed its (independent) moral seriousness. Shiffrin's analysis of liquidated damages, however, again fails to distinguish both between promises that are genuinely single promises and those that are only nominally denominated as single promises but are really alternative promises, and between promissory obligations and the remedial moral rights that attach to them.

Shiffrin's reluctance to conclude that the liquidated damages doctrine diverges from the morality of promise is surprising because liquidated damage clauses can easily be conceived of

²⁹See e.g., U.C.C. §2-718(1) ("Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.")

³⁰Shiffrin, at 16.

as alternative promises. Indeed, a substantial body of case law struggles to delineate a principled distinction between the two. Given the liquidated damages doctrine, courts may not enforce supra-compensatory damages clauses. But if the damage payment is instead construed as an alternative promise, courts must respect the right of the promisor to choose among the alternatives provided in his agreement. Thus, the same term can be construed as an impermissible penalty or a permissible alternative performance. Construed as providing for an alternative performance, the ban on supra-compensatory liquidated damages is certainly inconsistent with the moral theory of promising. There is no (autonomy-based) moral ground for denying the promisor the power to undertake an alternative, rather than single, promissory obligation. But the same logic applies even if the alternative is construed instead as a “supra-compensatory” damage term. The promisor is, as I have argued, free to choose the remedial moral duty he wishes to attach to his promissory obligation. Because it refuses to give legal effect to the promisor’s chosen remedial moral duty, the liquidated damages doctrine cannot be understood to be grounding its remedial legal duties for breach on the promisor’s corresponding remedial moral duty. Moreover, so viewed, it is misleading to characterize such a damage term as “supra-compensatory.” It is supra-compensatory only relative to the default rule of expectation damages for breach. But it also is a duty that the promisor agreed to undertake, and one for which the promisor charged the promisee in the form of a price premium at the time of their agreement. It is, therefore, difficult to justify its characterization as a remedial moral duty. In reality, the parties that agree to liquidated damages clauses—especially ones that exceed expectation damages—likely intend payment of the liquidated damages to be a morally permissible alternative to performance of the promised act (though I concede, as before, that morality certainly permits the parties to make the failure to perform the promised act a breach, which remains morally wrong even after the promisor pays the liquidated damages).

The mitigation doctrine allows promisors to avoid compensating any losses the promisee reasonably could have avoided following breach. For contracts over goods and services sold in a competitive market, the mitigation doctrine effectively requires the promisee to enter into a cover transaction to obtain the goods or services elsewhere following notice of

the promisor's breach. A failure to timely cover would bar the promisee from recovering any losses she incurred as a result—for example, any increase in their market price between the time when she should have covered and the time she actually covered. Shiffrin argues that

[f]ollowing the norms of promising, promisors would not readily expect the promisee to accept a substitute for the promised performance— at least not without a strong excuse. Were a substitute unavoidable or justified, promissory norms would standardly place the burden on the promisor to locate and provide it, not on the promisee. Although it might be permissible for the promisor to *ask* the promisee to shoulder this burden if the substitute were much easier for the promisee to find or if the promisor were ill-suited to find a replacement, . . . it would usually be unacceptable for the promisor to insist were the promisee to refuse. . . . It is morally distasteful to expect the promisee to do work that could be done by the promisor, the occasion for which is the promisor's own wrongdoing, where the rationale for the expectation is that it makes the promisor's wrongdoing easier, simpler, more convenient, or less costly.³¹

The moral grounds for Shiffrin's complaint against the mitigation doctrine, however, evaporate once the so-called duty to mitigate³² is construed as a component either of the promissory obligation or of the remedial moral duty attached to the promissory obligation. Construed as a component of the promissory obligation, the duty to mitigate simply indexes the compensatory alternative performance to the value of expectation damages less avoidable losses. By paying that sum to the promisee, the promisor discharges its moral obligation. Construed as a component of the remedial moral duty, the duty to mitigate simply specifies part of the formula the promisor used in calculating the specific content of the remedial moral duty it chose to assume.³³ Again, an autonomy-based moral theory provides no ground for denying the promisor the power to so limit its remedial moral duty. But to subject their compensatory moral duty to the avoidable loss doctrine, promisors need not express an intention to do so.

³¹Shiffrin, at 15.

³²Technically, the promisee is not subject to a duty to mitigate. Rather, the promisor can raise failure to mitigate as a defense against an action to recover compensation for losses the promisee reasonably could have avoided. I will nonetheless follow common practice and refer loosely to the avoidable loss doctrine and “the duty to mitigate.”

³³Again, however, the duty to mitigate does not actually require the promisee to mitigate, as Shiffrin's critique implies (only a promise from the promisee can impose a moral obligation on the promisee), but instead provides her with an incentive to mitigate by denying her the right to compensation for losses incurred because of her failure to mitigate.

Instead, the mitigation doctrine can be justified as a majoritarian default rule for specifying the content of the remedial moral duties promisors assume in the absence of their indication otherwise. If the promisor and promisee intend the promisor to be morally liable to pay expectation damages for its failure to perform a single promise— as the expectation default remedy presumes— it behooves *both* the promisor and promisee to subject the promisee's remedial moral duties to the avoidable loss doctrine. From the parties' perspective *at the time of their agreement*— that is, from their ex ante perspective— they minimize the expected joint costs and maximize the expected joint gains from their agreement by agreeing that the promisee will be unable to recover avoidable losses. This remains true even if the parties do not intend payment of damages to constitute performance of the promissory moral obligation or the legal duty to which it corresponds. The mitigation doctrine is therefore justified as an ordinary majoritarian default rule that imputes terms into parties' promises which they likely did want, but failed to express, or would want had they considered them. It therefore reduces the costs and increases the benefits of promising, while maximizing the probability that the objective promissory obligations to which promisors are held correspond with their subjective promissory intentions. At bottom, Shiffrin's objection rests on the view that the mitigation doctrine derives from an alien normative source outside of the realm promissory morality. But its justification is easily provided from *within* the norms of promising. From the ex ante perspective— which is the only perspective that matters for an autonomy-based moral theory of promising— the doctrine vindicates, rather undermines, promissory obligations.

This same response also answers Shiffrin's objection to the foreseeability limitation on the recovery of consequential damages. Properly understood, that doctrine constitutes a default rule imputing a term into promises, absent the promisor indicating an intention not to include it, that increases the expected value of their contract at the time of their agreement. The foreseeability limitation is subject to an on-going debate among economic analysts of law, in which some argue it constitutes an efficient majoritarian default and others claim it constitutes an efficient counter-majoritarian, penalty default rule (which forces efficient information disclosure). But either way, if the foreseeability limitation is an economically efficient default rule, it is justified on the ground that it promotes the value of autonomy that

promissory obligations are designed to serve.

Finally, Shiffrin argues that contract law diverges from promissory morality because the doctrines of consideration and promissory estoppel prevent it from enforcing some morally binding promissory obligations. I argued above that an autonomy-based moral theory would be incompatible with a legal regime that enforced promises made with an intent not to be legally bound. A correspondence account of contract, then, would adopt doctrines that impose legal liability only for those promises. If the enforcement doctrines are effective means of ensuring that all and only these promises are legally enforced, then they would be not only consistent with but required by the moral theory underling promissory obligation. In fact, a number of both deontic moral theorists and economic analysts have persuasively argued that contract law's enforcement doctrines can be explained and justified on the ground that they enforce only the kinds of promises that most promisors would intend to be legally enforceable.³⁴ On this view, the enforcement doctrines vindicate, rather than vitiate, promissory morality. They are consistent with the requirements of a correspondence account of contract because they insure that every legally enforceable promise corresponds to a promissory obligation that can justifiably be given legal effect. While the doctrines indeed prevent contract law from enforcing promissory obligation undertaken with the intent not to incur legal liability, the refusal to impose a legal duty corresponding to these moral obligations is in fact required by, not inconsistent with, the autonomy-based moral theory that underwrites promissory obligation. The kind of non-correspondence for which the consideration and promissory estoppel doctrines are responsible, therefore, is morally commendable. The only morally objectionable non-correspondence these doctrines create is to prevent the legal enforcement of gratuitous promises that are intended to be given legal effect. If a promisor makes a morally binding promise that he intends to be given legal effect, a correspondence account of contract has no grounds for refusing to enforce it.

³⁴See e.g., Randy Barnett, *A Consent Theory of Contract*, xx Colum. L. Rev. Xx (1985); Charles Goetz & Robert E. Scott, *Enforcing Promises*, xx Va. L. Rev. Xx (198?).

5. Conclusion