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The Correspondence of Contract and Promise

Jody S. Kraus
Columbia Law School, jkraus1@law.columbia.edu

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ARTICLES

THE CORRESPONDENCE OF CONTRACT AND PROMISE

*Jody S. Kraus**

Correspondence accounts of the relationship between contract and promise hold either that contract law is justified to the extent it enforces a corresponding moral responsibility for a promise or unjustified to the extent it undermines promissory morality by refusing to enforce a corresponding moral responsibility for a promise. In this Article, I claim that contract scholars have mistakenly presumed that they can assess the correspondence between contract and promise without first providing a theory of self-imposed moral responsibility that explains and justifies the promise principle. I argue that any plausible theory of self-imposed moral responsibility is inconsistent with a strong correspondence account, which would impose legal liability for all promises, including promises intended not to be legally enforceable. To illustrate the dependence of correspondence accounts of contract law on a theory of self-imposed moral responsibility, I demonstrate how a "personal sovereignty" account of individual autonomy—one of the most familiar and intuitive theories of self-imposed moral responsibility—explains how and why, contrary to existing correspondence theories, promissory responsibility corresponds to the objective theory of intent. I then use the personal sovereignty account to demonstrate why a theory of self-imposed moral responsibility is necessary to determine whether contract remedies correspond to the remedial moral rights and duties that attach to violations of promissory responsibilities. I argue that the personal sovereignty account explains how and why promissory morality corresponds to most remedial contract doctrines, including the bar against mandatory punitive damages, the foreseeability limitation on consequential damages, the mitigation doctrine, and expectation damages, the paradigm example of a contract doctrine alleged to conflict with promissory morality. Finally, I argue that personal sovereignty also explains and justifies the doctrines of consideration and promissory estoppel. Correspondence theorists, therefore, can defend their critiques of contract law only by rejecting the personal sovereignty theory of self-imposed moral responsibility, defending

* Robert E. Scott Distinguished Professor of Law, Professor of Philosophy, Albert Clark Tate, Jr. Research Professor of Law, University of Virginia. I thank Jules Coleman, Stephen Darwall, David Enoch, Daniel Markovitz, Ariel Porat, John Pottow, Michael Pratt, Alan Schwartz, Micah Schwartzman, A. John Simmons, Stephen A. Smith, David Owens, Steven Walt, and workshop participants at the Georgetown Law School Conference on Contract and Promise, the Hebrew University Faculty of Law Conference on Contract Law and Interdisciplinary Perspectives, University of Michigan Law School, University of Pennsylvania Law School Institute for Law and Philosophy, and Yale Law School Center for Law and Philosophy for invaluable comments.

an alternative theory, and explaining why any resulting divergence between contract law and its requirements is objectionable. Absent such a theory, correspondence accounts of contract law have no foundation.

INTRODUCTION

A natural account of the relationship between contract and promise holds that legal liability in contract enforces a corresponding moral responsibility for a promise. For some time, this "correspondence" account has framed attempts to explain and evaluate contract law. For example, Charles Fried's classic contract as promise thesis argues that contract law is justified because it enforces promises.[1] For Fried, liberal individualism requires the state to vindicate the individual right to undertake legally binding, self-imposed obligations, and contract law serves that purpose.[2] More recently, scholars have raised a moral objection to contract law because of its alleged divergence from promise.[3] This objection holds that

1. Charles Fried, Contract as Promise 1 (1981) [hereinafter Fried, Contract as Promise] ("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."); id. at 40 (stating thesis that contract is "grounded in the primitive moral institution of promising").

2. "The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism." Id. at 2.

3. See, e.g., Dori Kimel, From Promise to Contract: Toward a Liberal Theory of Contract 89–115 (2003) (using correspondence account to raise moral objection to alleged divergence, but offering response to defeat objection); Seana Shiffrin, The Divergence of Contract and Promise, 120 Harv. L. Rev. 708 (2007) [hereinafter Shiffrin, Divergence]. Shiffrin's critique has sparked a debate among legal scholars and philosophers. For responses to Shiffrin's article, see Jeffrey M. Lipshaw, Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin, 21 Can. J.L. & Jurisprudence 399 (2008); Michael G. Pratt, Contract: Not Promise, 35 Fla. St. U. L. Rev.

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.[4] The default remedy for breach of contract, however, is expectation damages, not specific performance.[5] The moral objection thus faults contract law for failing to impose a legal duty on breachers that corresponds to their moral duty. To make matters worse, economic analysts have defended the efficient breach hypothesis,[6] which

801 (2008) [hereinafter Pratt, Contract: Not Promise]; Charles Fried, The Convergence of Contract and Promise, 120 Harv. L. Rev. F. 1 (2007), at http://www.harvardlawreview.org/forum/issues/120/jan07/cfried.pdf (on file with the *Columbia Law Review*); Barbara H. Fried, What's Morality Got to Do with It?, 120 Harv. L. Rev. F. 53 (2007), at http://www.harvardlawreview.org/forum/issues/120/jan07/bfried.pdf (on file with the *Columbia Law Review*); Liam Murphy, Contract and Promise, 120 Harv. L. Rev. F. 10 (2007), at http://www.harvardlawreview.org/forum/issues/120/jan07/lmurphy.pdf (on file with the *Columbia Law Review*); see also Brian H. Bix, Contract Rights and Remedies, and the Divergence Between Law and Morality, 21 Ratio Juris 194–95 (2008) (claiming that wide jurisdictional variance of contract remedies establishes "central difference between promises in morality and enforceable agreements in law").

4. Notably, Fried himself does not take exception to the expectation damage default remedy, instead maintaining 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." Fried, Contract as Promise, supra note 1, at 17. Other scholars disagree, arguing that Fried should endorse expectancy only if specific performance is not possible. See, e.g., Kimel, supra note 3, at 95–96; Peter Benson, The Idea of a Public Basis of Justification for Contract, 33 Osgoode Hall L.J. 273, 291–93 (1995); Thomas M. Scanlon, Promises and Contracts, *in* The Theory of Contract Law: New Essays 86, 92 (Peter Benson ed., 2001). R R

5. See Restatement (Second) of Contracts § 344(a) & cmt. a (1981) ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. . . . The interest protected in this way is called the 'expectation interest.'"); 3 E. Allan Farnsworth, Farnsworth on Contracts § 12.1, at 149–50 (3d ed. 2004) (discussing expectation damages as ordinary remedy for contract breach). Indeed, the expectation damages default rule led Oliver Wendell Holmes, Jr., to claim famously that the legal duty to keep a contract is "a prediction that you must pay damages if you do not keep it,—and nothing else." Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897) [hereinafter Holmes, Path of the Law]. 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 301 (Little Brown 1963) (1881). If Holmes is right, then contract law converts the promissory obligation to do X into the contractual duty to do X or pay damages.

6. See, e.g., Douglas Laycock, The Death of the Irreparable Injury Rule 245–64 (1991) (discussing views of Holmes and Posner on efficient breach, and analyzing theory from economic and normative perspectives); W. David Slawson, Binding Promises 122 (1996); John H. Barton, The Economic Basis of Damages for Breach of Contract, 1 J. Legal Stud. 277, 291 (1972) (noting that "[c]ompletion of a contract according to its terms is often not optimal" and hypothesizing that at times "simplicity and certainty are more valuable than allocative perfection" (emphasis omitted)); Robert L. Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273, 284–85 (1969) (arguing it would be socially desirable to encourage "[r]epudiation of obligations . . . where the promisor is able to profit from his default" after paying expectation damages); Richard R.W. Brooks, The Efficient Performance Hypothesis, 116

justifies expectation damages on the ground that it facilitates breach when paying damages instead will make promisors better off. To many, the efficient breach hypothesis suggests that expectation damages actually encourage and thereby endorse breach. So understood, the objection to the expectation damages rule is not merely that it falls short of enforcing the promisor's corresponding moral duty, but that it affirmatively undermines it. In light of the perceived divergence between promissory morality and many other contract doctrines in addition to expectation damages,[7] Seana Shiffrin has recently argued that contract law not only fails to hold moral agents legally accountable for their promissory obligations, but erodes the social foundations of moral agency itself.[8]

Correspondence theorists thus begin by determining whether the legal rights and duties recognized by contract correspond to the moral rights and responsibilities created by promise. By demonstrating their

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Yale L.J. 568, 570–73 (2006) (discussing benefits of allocative efficiency promoted by efficient breach theory, and suggesting modified "efficient performance" theory); Richard Craswell, Contract Remedies, Renegotiation, and the Theory of Efficient Breach, 61 S. Cal. L. Rev. 629, 636–38 (1988) [hereinafter Craswell, Contract Remedies] (discussing efficient breach in light of goal of contract damages—to give compensation); Daniel Friedmann, The Efficient Breach Fallacy, 18 J. Legal Stud. 1, 4 (1989) (arguing that "[t]he essence of the theory is 'efficiency'" and pointing out that "[i]t is not explained why opportunistic breaches should be discouraged even if they are efficient"); Daniel Friedmann, The Performance Interest in Contract Damages, 111 L.Q. Rev. 628, 628, 632 (1995) (pointing out that idea of restitution interest has become widespread in American legal discourse); Ian R. Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 947–50 (1982) (noting that "[t]he doctrine of efficient breach is enshrined in the bible of law and economics" and suggesting ways to strengthen it). For a response to Brooks, see Jody S. Kraus, A Critique of the Efficient Performance Hypothesis, 116 Yale L.J. Pocket Part 423 (2007), at http://www.thepocketpart.org/2007/07/23/kraus.html (on file with the *Columbia Law Review*) (arguing that Brooks's theory is supported by unmotivated moral objections, and is likely to be less efficient than expectation damages). For Brooks's response, see Richard R.W. Brooks, What Efficiency Demands: The Efficient Performance Hypothesis Defended, 117 Yale L.J. Pocket Part 14 (2007), at http://www.thepocketpart.org/2007/07/24/brooks.html (on file with the *Columbia Law Review*).

7. These include the bar on punitive damages, the liquidated damages doctrine, the mitigation doctrine, the foreseeability doctrine governing consequential damages, the consideration doctrine, and promissory estoppel. See infra Part II (analyzing claims of perceived divergence with respect to these doctrines).

8. For Shiffrin, contract law violates three requirements of moral agency:

> First, what legal rules directly require agents to do or to refrain from doing should not, as a general matter, be inconsistent with leading a life of at least minimal moral virtue. . . .
>
> Second, the law and its rationale should be transparent and accessible to the moral agent. Moreover, their acceptance by the agent should be compatible with her developing and maintaining moral virtue. . . .
>
> Third, the culture and practices facilitated by law should be compatible with a culture that supports morally virtuous character. Even supposing that law is not responsible for and should not aim to enforce virtuous character and interpersonal moral norms, the legal system should not be incompatible with or present serious obstacles to leading a decent moral life.

Shiffrin, Divergence, supra note 3, at 718–19. **R**

correspondence, Fried purports to justify contract law.[9] By demonstrating their divergence, critics purport to ground a moral objection to the contract doctrines responsible for the divergence. Both, however, mistakenly presume that it is possible to assess the correspondence of contract and promise without first specifying a foundational normative theory of promissory morality. As a result, Fried unjustifiably concludes that the objective theory of intent creates contractual rights and duties that do not correspond to, and therefore cannot be justified by, promissory rights and responsibilities.[10] The critics unjustifiably conclude that the expectation damages doctrine, among others, creates contractual rights and duties that do not correspond to, and in fact undermine, promissory rights and responsibilities. In this Article, I argue that correspondence accounts of contract law cannot proceed without first identifying the theory of self-imposed moral responsibility on which they take the practice of promise to rest. By identifying the foundational normative commitments

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9. Fried finds correspondence between contract and promise, however, only by literally defining contract as the body of law that enforces promises. For Fried, any alleged divergence between a contract doctrine and promise requires reclassification of that doctrine under noncontract law, even if the doctrine is widely regarded as a core component of contract law. For example, Fried jettisons the doctrine of consideration entirely. See, e.g., Fried, Contract as Promise, supra note 1, at 28–39 ("My conclusion is . . . that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it."). Fried also reclassifies as part of tort law any contractual liability predicated on objective intention or reliance: **R**

> Another of the classical law's evasions of the inevitability of using noncontractual principles to resolve failures of agreement is recourse to the so-called objective standard of interpretation. In the face of a claim of divergent intentions, the court imagines that it is respecting the will of the parties by asking what somebody else, say the ordinary person, would have intended by such words of agreement. This . . . palpably involves imposing an external standard on the parties. . . . [This approach has] its origin in nonpromissory standards of justice . . . .

Fried, Contract as Promise, supra note 1, at 61. **R**

> At first glance the distinction between promissory obligation and obligation based on reliance may seem too thin to notice, but indeed large theoretical and practical matters turn on that distinction. To enforce a promise as such is to make a defendant render a performance (or its money equivalent) just because he has promised that very thing. The reliance view, by contrast, focuses on an injury suffered by the plaintiff and asks if the defendant is somehow sufficiently responsible for that injury that he should be made to pay compensation.

Id. at 4; see also Jody S. Kraus, Philosophy of Contract Law, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 687, 703–32 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Kraus, Philosophy of Contract Law] ("Fried's principal motivation . . . is to support his normative claim that contract law is morally justified because it legally enforces the moral obligation to keep promises.").

10. Fried concedes that contract law imposes liability for merely objective promises. See Fried, Contract as Promise, supra note 1, at 61 (citing Oliver Wendell Holmes, Jr., The Common Law 230 (M. Howe ed., Harvard Univ. Press 1963) (1881); 1 Samuel Williston, A Treatise on the Law of Contract § 94, at 339 (Walter H.E. Jaeger ed., Mt. Kisco 1957) (1936)) (asserting that contractual intent is objective). But he claims that because liability based solely on objective intent is grounded on nonpromissory principles, it is not *genuinely* contractual. See infra note 36. **R** **R**

that justify the practice of promising, the theory of self-imposed moral responsibility clarifies the conditions under which the legal enforcement of promises is morally permissible and explains how the content of promissory rights and responsibilities is determined. To demonstrate how such a theory affects the assessment of the correspondence between contract and promise, I consider how the conception of individual autonomy that Joel Feinberg has called "personal sovereignty" could form the core of an intuitive theory of self-imposed responsibility from which promissory morality can be derived.[11]

Personal sovereignty holds that "respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him."[12] In Rawlsian terms, personal sovereignty recognizes the fundamental right of individuals to choose, revise, and pursue their own system of ends.[13] Personal sovereignty provides a single normative source for both moral "duties," which arise out of moral agency alone, and moral "obligations," which arise solely out of the voluntary undertaking of a moral agent.[14] By affirming the fundamental right of individuals to determine their own actions, personal sovereignty necessarily affirms the

11. Feinberg takes the metaphor seriously: "The politically independent state is said to be sovereign over its own territory. Personal autonomy similarly involves the idea of having a domain or territory in which the self is sovereign." 3 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Self 52 (1986). Feinberg invokes the personal sovereignty conception of autonomy as a normative basis for limiting the exercise of political coercion, rather than as an independent principle of morality. Yet if personal sovereignty provides a normatively compelling ground for limiting political coercion, it must also constitute a fundamental value in any plausible overall theory of morality. See generally id. at 52–97.

12. Id. at 68 (emphasis omitted). Similarly, Feinberg states that "[t]he kernel of the idea of autonomy is the right to make choices and decisions . . . . [T]he most basic autonomy-right is the right to decide how one is to live one's life." Id. at 54. As Joseph Raz describes it:

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives. . . . Autonomy is an ideal of self-creation.

Joseph Raz, The Morality of Freedom 369–70 (1986) [hereinafter Raz, Morality of Freedom]. The personal sovereignty conception of autonomy itself is neutral on the question of how morality determines what moral agents ought to do, all things considered. Of course, there is a rich body of literature exploring competing conceptions of personal autonomy and debating their role in moral theory. See, e.g., Nomy Arpaly, Unprincipled Virtue 117–48 (2003).

13. See John Rawls, Political Liberalism 19 (1993) (arguing that individuals have capacity for conception of the good, which is capacity "to form, to revise, and rationally pursue a conception of one's rational advantage or good"). Similarly, Rawls famously held that moral persons properly "regard themselves as self-authenticating sources of valid claims." Id. at 32.

14. See infra notes 23–26 (discussing distinction between moral duty and moral obligation). **R**

correlative moral duties that prohibit violation of that right—the morality of personal freedom entails the morality of personal responsibility. But personal sovereignty also recognizes the fundamental right of individuals not only to choose their system of ends but also to choose *how to pursue* those ends. Promising constitutes a particularly valuable means for pursuing ends. By promising, an individual credibly communicates to the promisee that he has imposed a moral responsibility on himself, which provides him with a distinctive and powerful practical reason for doing the promised act. The promisee's knowledge of the promise, in turn, changes her practical reasoning by providing her with assurance of the promised performance. Individuals can use the ability to provide such assurance to induce promisees to assist them in realizing their ends.[15] The personal sovereignty conception of autonomy does not entail a comprehensive morality that requires the maximization of autonomy generally and certainly does not require that the content of moral responsibilities and liberties be determined by calculating the extent to which conduct conduces to an autonomous life. But if morality itself can provide individuals a valuable means of pursuing their ends simply by recognizing the individual moral power to undertake self-imposed moral responsibilities, a moral theory committed to personal sovereignty as a fundamental moral value would have no grounds for refusing to recognize such a power. Personal sovereignty therefore counts the moral capacity to undertake self-imposed moral responsibilities as a basic individual liberty. By affirming the fundamental right of individuals to choose how to pursue their desired ends, personal sovereignty necessarily affirms the category of moral responsibility that obligation describes. The moral power to make—and thus the moral obligation to keep—a promise is therefore an axiom of personal sovereignty. I use the personal sovereignty account to illustrate how a theory of self-imposed moral responsibility informs the assessment of the correspondence between contract and promise.

In Part I, I analyze the structure of correspondence accounts of contract law and explain why a theory of self-imposed responsibility is necessary to determine the correspondence between contractual liability and promissory responsibility. Section A demonstrates how such a theory corrects the misleading impression, which Fried's strong correspondence account might give, that any contractual duty that enforces a corresponding promissory obligation is thereby justified.[16] I argue that neither the personal sovereignty account, nor any other plausible theory of self-imposed moral responsibility, is consistent with the legal enforcement of all promises, including promises intended not to be legally enforceable. Be-

15. These ends can be self-regarding or other-regarding. See infra note 35 and accompanying text. **R**

16. Note that despite Fried's insistence that contract law is justified because it enforces promissory obligations, he nevertheless concedes that contract law cannot justifiably enforce promises intended not to be legally enforceable. See infra note 21.

cause such enforcement vitiates, rather than vindicates, the promisor's intent, it cannot be justified under the rubric of self-imposed moral responsibility. In Section B, I reject Fried's claim that subjective intent is required to create a promise and determine its content. I argue instead that a promissory morality derived from the personal sovereignty account predicates promissory responsibility on the objective intent of promisors. On this account, even contractual duties arising from objective intent alone enforce corresponding promissory obligations. In Section C, I explain why the correspondence between contractual *remedies* for breach and promissory morality cannot be assessed without first understanding how the theory of self-imposed moral responsibility affects the remedial moral rights and duties created by the breach of a promise. By insisting that the justification of contractual remedies turns on their correspondence to promissory morality, correspondence theories force the question of how morality determines the content of remedial moral rights and duties generally. Yet, surprisingly, moral philosophy has given scant attention to the distinction, long familiar to legal theory, between liability and remedy. Philosophers typically presume that breach of promise gives rise to a remedial moral right of specific performance.[17] But the content of a remedial moral right cannot be determined by pure logic or brute intuition alone. At a minimum, its content must be consistent with the theory of moral responsibility grounding the right that was violated. Correspondence theories of contract therefore cannot proceed without first specifying how the theory of self-imposed moral responsibility determines the content of the remedial rights and duties recognized by promissory morality.

In Part II, I argue that, on the personal sovereignty account, most of the contract doctrines to which correspondence critics object in fact respect promissory morality, either by refusing to enforce promises intended not to be legally enforceable or by enforcing the corresponding moral rights and duties to which breach of promise gives rise. Once the full implications of the personal sovereignty view of promising are appreciated, most of the contract doctrines alleged to constitute morally objectionable divergences from promise are either not divergences at all—because they create legal rights and duties that correspond to promissory moral rights and responsibilities—or are not morally objectionable. In particular, I argue that the personal sovereignty account of promising is

17. See, e.g., Shiffrin's discussion of contract law and morality:

> If contract law ran parallel to morality, then contract law would—as the norms of promises do—require that promisors keep their promises as opposed merely to paying off their promises. The only difference is that it would require this as a legal, and not merely a moral, matter.
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> . . . Contract law, however, diverges from morality in this respect. Contract law's dominant remedy is not specific performance but expectation damages.

Shiffrin, Divergence, supra note 3, at 722–23. But see Kimel, supra note 3, at 89 (discussing "the apparent discord between the view that the core contractual right and obligation are performance, and the remedial rights that are in practice recognised"). R

consistent with most of the contract doctrines to which correspondence theorists object, including expectation damages, the paradigm example of a contract doctrine alleged to conflict with the moral duties of a promisor.

Finally, I conclude that the personal sovereignty account explains how and why—contrary to existing correspondence critiques—contractual and promissory responsibility in fact largely correspond to one another. Of course, correspondence critics of contract law can reject the personal sovereignty account of self-imposed moral responsibility. But to provide an adequate defense of their critique, they must endorse an alternative theory of both self-imposed moral responsibility generally and promissory morality in particular, and then explain why any resulting divergence between contract and promise is objectionable.

I. The Logical Structure of Correspondence Accounts of Contract

It is natural to suppose that the justification of any particular area of law turns, at least in part, on whether the legal rights and duties it recognizes correspond to individual moral rights and responsibilities. A normative legal theory that takes this "correspondence" approach requires a two-stage analysis. First, it must explain why the correspondence or divergence of law and morality is relevant to the law's justification. Fried makes the strong claim that contract law is justified because it enforces the corresponding rights and responsibilities of promissory morality.[18] Shiffrin makes the weaker claim that contract law is unjustified because of its divergence from promissory morality.[19] Both correspondence accounts presuppose a normative political theory that explains why and how the law's correspondence to morality affects its justification. For present purposes, I assume that some normative political theory provides this explanation.[20] Second, a correspondence account must specify the nor-

18. See supra notes 1–2 and accompanying text. R

19. See supra note 8. R

20. The most obvious political theory is legal moralism, which holds that the state is justified in enforcing morality generally. See, e.g., Patrick Devlin, The Enforcement of Morals 12–13, 59 (1965) (arguing State may "legislate against immorality" to protect against disintegration that occurs "when no common morality is observed" and "[t]he law needs moral support and in return it must be prepared to support public morality"). However, there are well-known objections to legal moralism. See, e.g., H.L.A. Hart, Law, Liberty, and Morality 50–52 (1962) (arguing Devlin wrongly assumes "that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of society"); Ronald Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986, 992 (1966) ("[Devlin's] argument involves an intellectual sleight of hand."). Given these objections, strong correspondence accounts might rely on other political theories that provide a deeper and more limited justification for state enforcement of morality, such as corrective justice theories or Lockean/libertarian theories. For a discussion of corrective justice theories, see generally Jules L. Coleman, The Practice of Principle 3–63 (2001) (discussing "the relationship between tort law and our redistributive institutions, and between the principles of corrective and

mative foundation of the moral rights and responsibilities it claims correspond (or should correspond) to particular legal rights and duties. Correspondence accounts of contract, for example, must specify a theory of promissory morality in order to determine whether the legal enforcement of promissory rights and responsibilities is morally permissible. Even if legal enforcement of promissory rights and responsibilities is not prohibited by normative political theory, such enforcement might nonetheless be incompatible with the moral theory that provides their foundation. In addition, the theory of promissory morality will determine whether or not contract law enforces a promise when, under the objective theory of intent, it imposes contractual liability on an individual who leads another reasonably to believe he has made a promise even though he did not subjectively intend to make a promise. Finally, the theory of promissory morality determines the structure and content of the remedial moral rights and duties to which violations of promises give rise. Specification of a theory of promissory morality is therefore a prerequisite for assessing the correspondence between the remedial *legal* rights and duties to which breach of contract gives rise and the remedial *moral* rights and duties to which promise breaking gives rise.

In this Part, I argue that correspondence accounts of contract are necessarily premised on a theory of the normative foundation of the moral rights and responsibilities to which they claim contract law does or should correspond. Therefore, any account that claims to justify or criticize contract law because of its alleged correspondence to, or divergence from, promissory morality must at least identify the theory of promissory morality on which it rests. A complete correspondence account must also defend that theory. Thus, correspondence accounts of contract law that do not identify the theory of promissory morality on which their account depends are fundamentally incomplete and undefended. To illustrate the role that a theory of promissory morality plays in completing and defending correspondence accounts of contract law, I argue in Section A that a commitment to the personal sovereignty conception of autonomy as the foundation of promissory morality is incompatible with a strong correspondence account, which claims that all promises should be legally enforceable.[21] In Section B, I argue that the personal sovereignty ac-

distributive justice"). For a discussion of Lockean/libertarian theory, see generally A. John Simmons, On the Edge of Anarchy 5 (1993) (discussing Locke's idea of "political relationship . . . [as] a particular kind of moral relationship among free persons, based in consent and consisting of a certain mutuality of rights and obligations"); A. John Simmons, Political Philosophy 89–94 (2008) (explaining how Robert Nozick's libertarian theory builds on John Locke's political theory).

21. Fried's theory has the structure of a strong correspondence theory because he takes contract law to be justified on the grounds that it enforces promises. By that reasoning, contract law should enforce even promises intended not to be legally enforceable. But in a footnote, Fried explicitly concedes that the law should not enforce a promise that is intended not to be legally enforceable. Fried, Contract as Promise, supra note 1, at 38 n.* ("[G]iven the consensual basis of contract as promise, the parties should **R**

count of promissory morality explains why contract law should be understood to be enforcing promises even when it holds individuals contractually bound by promises they did not subjectively intend to make. Personal sovereignty, therefore, justifies the objective theory of intent on the ground that it enforces promissory morality. In Section C, I argue that the personal sovereignty account of promissory morality explains why promisors have control not only over the number and content of the promises they make, but also the content of the remedial moral rights and duties to which breach of their promise gives rise.

A. *Promissory Morality and the Intent Not to Be Legally Bound*

Correspondence accounts have been most successful in tort and criminal law. It is natural to conceive of these areas as legal regimes that enforce the moral responsibilities of individuals not to harm others negligently or intentionally. A strong correspondence account, for example, claims that the legal duties created by tort and criminal law are justified by virtue of their correspondence to the duties morality independently imposes on every moral agent.[22] Strong correspondence accounts of con-

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in principle be free to *exclude* legal enforcement so long as this is not a fraudulent device to trap the unwary."). Fried neither acknowledges the apparent inconsistency of his position nor explains the grounds for carving out this exception to his strong correspondence account.

22. Strong correspondence accounts presuppose 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 a structure that resembles the well-known correspondence theories of truth. See, e.g., George Edward Moore, Some Main Problems of Philosophy 270–87 (1953) (arguing that beliefs are true when and only when they "correspond to a fact"); Bertrand Russell, The Problems of Philosophy 128–29 (Oxford Univ. Press 1959) (1912) (arguing that correspondence between beliefs and objects of those beliefs "ensures truth, and its absence entails falsehood"). For a discussion of correspondence theories of truth, see generally Marian David, The Correspondence Theory of Truth, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2002), at http://plato.stanford.edu/entries/truth-correspondence/#1 (on file with the *Columbia Law Review*). However, some philosophers explicitly deny that any theory that justifies legal liability on the ground that it enforces moral duties must treat those moral duties as conceptually determined prior to the attachment of legal liability. 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, see Coleman, supra note 20, at 32 (arguing that "corrective justice is an account of the second-order duty of repair" incurred when someone has wronged another to whom he owes duty of care, but in itself does not provide full account of all first-order duties protected in tort law). For my argument against Coleman's view, see Jody S. Kraus, Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 Va. L. Rev. 287, 313–20 (2007) (arguing that Coleman's corrective justice theory "leaves the central concepts of tort law largely indeterminate"). R

tract law have the same initial appeal as correspondence accounts of tort and criminal law. A strong correspondence account claims that contract law is justified because it enforces the moral responsibility to keep one's promises.[23] The structural similarity of these two correspondence accounts suggests that they should stand or fall together. But they do not. The moral responsibilities that strong correspondence accounts claim tort and criminal law enforce have a profoundly different normative structure than the moral responsibilities that strong correspondence theories claim contract law enforces: Tort and criminal law enforce moral *duties*, but contract law enforces promises, which create moral *obligations*, not duties.

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.[24] Unlike moral duties, moral obligations are self-imposed.[25] Since

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23. For example, Fried's contract as promise view holds that contract law can be explained and justified on the ground that it 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 in respect for individual autonomy. Fried, Contract as Promise, supra note 1, at 16 ("The obligation to keep a promise is grounded . . . in respect for individual autonomy and in trust."). Fried argues that contract law, by definition, enforces promises. He therefore concludes that any doctrine that fails to enforce a promise, or imposes nonpromissory liability, is either erroneous law or noncontract law. See Kraus, Philosophy of Contract Law, supra note 9, at 706 ("Fried's claim is that all and only those cases decided on the basis of a doctrine supportable by the promise principle qualify as genuine contracts cases. If they can't be supported by the promise principle, they are either defensible as non-contract cases, or indefensible because incoherent."); infra notes 30, 36–37 and accompanying text. **R** **R** **R**

24. See H.L.A. Hart, Legal and Moral Obligation, *in* Essays in Moral Philosophy 82, 101–03 (A.I. Melden ed., 1958) (stating obligations are "deliberately created" and moral duties "are not conceived of as truly created by the deliberate choice of the individual"); see also A. John Simmons, Moral Principles and Political Obligations 11–16 (1979) (stating that term duty is used "independent of any institutional setting or special role" and that "[a]n obligation is a moral requirement generated by the performance of some voluntary act (or omission)"); R.B. Brandt, The Concepts of Obligation and Duty, 73 Mind 374, 375 (1964) ("[According to Hart, w]hat distinguishes obligations from duties is that 'they may be voluntarily incurred or created' (whereas duties arise from position, status, role), and that 'they are *owed to* special persons (who have rights).'").

25. More generally, moral duties provide "content-dependent" reasons for action, while obligations provide "content-independent" reasons for action. The distinction originates with H.L.A. Hart, who explains that "content-independence" is a term used

> to differentiate the notion of obligation from the general notion of what morally 'ought' to be done. Content-independence of commands lies in the fact that a commander may issue many different commands to the same or to different people and the actions commanded may have nothing in common, yet in the case of all of them the commander intends his expressions of intention to be taken as a reason for doing them. It is therefore intended to function as a reason independently of the nature or character of the actions to be done. In this of course it differs strikingly from the standard paradigmatic cases of reasons for action where between the reason and the action there is a connection of content:

promises serve as a mechanism for voluntarily undertaking a moral responsibility, promises create moral obligations rather than duties. The justification for legal enforcement that correspondence accounts offer is necessarily sensitive to this difference in kind between moral responsibilities.

Deontic moral theories often account for the significance of the distinction between duties and obligations by explaining the role each plays in vindicating individual autonomy. However, although both moral duties and obligations can be grounded on respect for individual autonomy, each accords individual volition a different role in explaining the origins of the kind of moral responsibility it describes. The responsibility described by moral duty is limited in application to the voluntary actions of moral agents. In the domain of moral duty, voluntariness serves to limit the range of actions over which individuals can be held morally accountable. Importantly, although individuals are not morally responsible for involuntary conduct, intention (beyond that required for voluntariness) plays no role in explaining the origin of moral duties themselves. The responsibility described by moral obligation is also limited to voluntary 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.[26] In the domain of moral obligation, then, intention 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. Thus, for deontic moral theories with a foundational commitment to the personal sovereignty conception of autonomy, duties provide a "protective framework" for the exercise of personal sovereignty in action (by proscribing conduct that infringes individual liberty), while obligations result from the exercise of personal sovereignty for the purpose of creating new moral relationships.

> there the reason may be some valued or desired consequence to which the action is a means, . . . or it may be some circumstance given which the action functions as a means to such a desired consequence (my reason for shutting the window was that I felt cold).

H.L.A. Hart, Essays on Bentham 254–55 (1982) [hereinafter Hart, Essays on Bentham]; see also Leslie Green, The Authority of the State 41–51 (1988) ("When we keep promises, . . . we often feel that the force of reasons on which we act does not wholly depend on the content of the specific promise . . . which was made."); Raz, Morality of Freedom, supra note 12, at 35 ("A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason."). **R**

26. See, e.g., Michael Pratt, Promises, Contracts and Voluntary Obligations, 26 Law & Phil. 531, 533 (2007) ("An obligation is voluntary in the voluntarist sense if and only if it rests for its validity on the intention of the obligor to acquire it, which intention counts as a positive reason in favor of its imposition."); Joseph Raz, Promises and Obligations, *in* Law, Morality and Society: Essays in Honour of H.L.A. Hart 210, 218 (P.M.S. Hacker & J. Raz eds., 1977) ("Promises are voluntary obligations not because promising is an intentional action, but because it is the communication of an intention to undertake an obligation . . . . To promise is, on this conception, to communicate an intention to undertake by the very act of communication an obligation to perform a certain action.").

The special role played by intention in accounting for the normative significance of the category of moral obligation raises an objection to strong 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 strong 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.[27] 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 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 are otherwise free to avoid.

27. But see supra note 21. **R**

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 any deontic theory that explains the source of the moral responsibility that the correspondence account would legally enforce. Such theories ground the moral responsibility in the individual will of the promisor. On the personal sovereignty conception of autonomy, promisors are held morally accountable for their promises out of respect for their right to choose to undertake moral commitments as they see fit.[28] 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 legally enforcing that obligation violates the will of the very same individual whose autonomy the moral obligation is supposed to vindicate. Strong 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 of personal sovereignty that both underwrites the moral responsibilities they enforce and

28. Indeed, philosophers have long held that obligations are distinguished from duties by virtue of content-independence. Their content is provided only by the exercise of the will of the individuals who incur them. See supra notes 24–25 and accompanying text. Of course, this is not to say that morality imposes no constraints on the content of obligations that individuals may undertake. As H.L.A. Hart explained, moral duties limit the range of content individuals are morally permitted to undertake:

> Since we may promise to do very many different sorts of actions in no way related to each other, the giving of a promise regarded as a reason for doing the action promised has also the feature of content-independence. This is true even though the range of possible actions which one may validly promise to do is not unlimited and does not include grossly immoral actions or those intended to be harmful to the promisee.

Hart, Essays on Bentham, supra note 25, at 255. Moreover, there may be some analytic limits on the extent to which individuals can exercise control over their obligations. For example, in order to undertake an obligation, an individual must subject himself to *some* requirement. Thus, an illusory promise is no promise at all. Similarly, on P.F. Strawson's view of morality, a promisor might well lack the capacity to disclaim, so to speak, moral liability for the reactive attitudes, such as resentment, to which immoral conduct necessarily gives rise. See P.F. Strawson, Freedom and Resentment, *in* Freedom and Resentment and Other Essays 1, 6–13 (1974) (discussing circumstances surrounding resentment). In addition, morality might impose substantive constraints on the content of voluntary obligations that derive from its core principles. For example, a moral theory grounded in the personal sovereignty conception of autonomy might not countenance the voluntary forfeiture of powers or liberties that the theory treats as necessary conditions for moral agency. Thus, it might be impossible, according to such a moral theory, to voluntarily enslave oneself to another. The point, however, is that a moral theory grounded in the personal sovereignty conception of autonomy must *justify* any limitation it imposes on the content of the voluntary obligations moral agents can assume by arguing from the principle of personal sovereignty—the same conception of autonomy that explains the value of the category of moral obligation itself. My claim is that such theories cannot, without risking internal inconsistency, refuse to respect a promisor's intention not to subject himself to legal liability for a promissory obligation he undertakes.

provides the ultimate moral justification for the legal liability they impose.

Strong correspondence accounts of contract, in fact, also face a logical barrier that prevents them from justifying the legal enforcement of all promissory obligations. Promisors who do not wish to incur legal liability 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.[29] 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. A correspondence account of contract could not coherently justify the legal enforcement of a promise that is made conditional on its not being legally enforced.[30]

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

29. Under the law of conditions in the First Restatement of Contracts, the promise would be subject to a condition subsequent. A condition subsequent is a condition that extinguishes a duty, which in this case would occur when the promisee seeks legal enforcement of the promise and would thereby constitute a fact that extinguishes the promissory duty (i.e., obligation). Restatement of Contracts § 250 (1932). Under the Second Restatement, the promisee's seeking to enforce the promise would constitute the occurrence of an event that terminates the promisor's duty (i.e., obligation). Restatement (Second) of Contracts § 230 (1981).

30. Note that individuals could also avoid legal liability for promissory moral obligations by conditioning them on the nonexistence 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 whose occurrence 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 nonexistence of laws making them legally enforceable does not explain how strong correspondence accounts of contract can be reconciled with the personal sovereignty 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 personal sovereignty foundation of correspondence accounts of contract by impermissibly constricting the range of promissory moral obligations individuals can incur.

obligations are created only by virtue of the exercise of the individual will to create them—individuals become subject to moral obligations only by intentionally undertaking 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, correspondence accounts cannot justify the legal enforcement of promises conditioned on the nonoccurrence of legal enforcement. Thus, it is not possible to determine the moral acceptability of particular contract doctrines simply by assessing their correspondence to or divergence from promissory rights and responsibilities. The moral acceptability of such correspondence or divergence itself will turn entirely on the theory that provides the normative foundation for promissory morality.

B. *Promissory Morality and Objective Intent*

Correspondence accounts cannot justify the imposition of legal liability for all promissory obligations while endorsing deontic moral theories that derive those obligations from a foundational commitment to the personal sovereignty conception of autonomy. A legal regime that refuses 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 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 law predicates contractual liability on objective intent. The Second Restatement of Contracts defines a promise as the "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."[31] Contract law therefore can be properly understood 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 to make a promise.[32] Fried's

31. Restatement (Second) of Contracts § 2(1).

32. See supra note 10 (discussing Fried's view of objective theory of intent); see also Fried's discussion of presumed intent: **R**

> [I]n contract law there is a vaguely marked boundary between interpreting what was agreed to and interpolating terms to which the parties in all probability would have agreed but did not. The further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the

claim is certainly grounded on a natural interpretation of deontological moral theory.[33] After all, an obligation is not self-imposed if the self does not exercise its will to incur the obligation. Of course, Fried claims only that subjective intent is a necessary, not sufficient, condition for making a promise. Rather than making a genuine promise, a merely subjective promisor, who subjectively intends to promise but fails to communicate that intent to his promisee, performs the moral equivalent of a silent vow. Both promises and silent vows provide the person who makes them with a moral reason to perform them, but only promises can change the practical reasoning of others.[34] As we have seen, the point of promising is to provide individuals with the means for inducing others to assist them in pursuing their ends. A promisor might seek to induce the promisee to assist him in pursuing either his self-regarding ends, by conditioning a future benefit on that assistance, or his other-regarding ends, by making her an unconditional promise of a future gift to encourage her beneficial reliance.[35] In both cases, the objective is to affect the promisee's behavior by changing her reasons for action. A promise serves this purpose only if it gives the promisee reason to believe the promisor has under-

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> promise principle and the more palpably are they imposing an agreement. . . . So as we move further from actual intention the standard of presumed intention tends to merge into the other substantive standards used to solve the problems caused by a failure in the agreement.

Fried, Contract as Promise, supra note 1, at 60–61. **R**

33. There 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 the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077, 1098–99 (1989) (arguing subjective intent may change as one changes one's mind, and therefore should not impose duty to perform); see also Scanlon, supra note 4, at 96 n.13 (leaving aside question of **R** whether individual can incur genuine promissory responsibility by unintentionally giving another person "good reason to believe" he has made a promise); id. at 104 n.23 (contemplating idea that objective intent might instead give rise to tort-like responsibility for reliance damages).

34. Thus, even Fried agrees that unlike silent vows, promises are by their nature and purpose relational: They take moral effect if and when they are both communicated to and accepted by the promisee.

> [W]hat is [the] additional element that transforms a vow or a commitment to oneself into a promise to another? . . .
>
> The case of the vow shows that a promise is something essentially communicated to someone—to the promisee . . . . A promise is relational; it invokes trust, and so its communication is essential. . . . [A] further necessary condition of promissory obligation [is] *that the promise be accepted*.
>
> The need for acceptance shows the moral relation of promising to be voluntary on both sides.

Fried, Contract as Promise, supra note 1, at 42–43. **R**

35. By providing an individual with assurance that she will receive the promised performance, a bargained-for promise can induce the promisee to assist the promisor in pursuing his *self-regarding* ends, and a gift promise can induce a prospective gift recipient to beneficially rely on the prospective gift, thereby promoting the promisor's *other-regarding* ends by maximizing the benefit his gift confers on the recipient.

taken a moral responsibility to perform the promise. Once the promisee believes the promisor is morally accountable for the promise, she will believe that her promisor has a practical reason to perform and that she has remedial moral rights against the promisor if he fails to perform. As a result, she will increase her estimate of the probability of performance, lower her estimate of her likely losses from nonperformance, and change her behavior accordingly. Thus, promises serve their essential purpose only if by making them a promisor justifies his promisee in believing that he is morally accountable for his promise.

By making subjective intent a necessary condition for making a promise, however, Fried's account conditions promissory obligation on the occurrence of an inherently unverifiable event. The subjective theory of intent thus severely reduces the promisor's ability to assure the promisee that she has received an actual, rather than merely apparent, promise. Manifestations of promises cannot themselves eliminate the risk that an apparent promise is a "merely objective promise": an objective promise made without subjective intent.[36] On the subjective theory, apparent promisees[37] know that nothing prevents an apparent promisor from avoiding promissory responsibility by mentally crossing his fingers when he makes his apparent promise. It appears that a promise will be capable of serving its essential purpose only if the promisee has reasons independent of the apparent promise itself to believe that her promisor subjectively intended to make a promise when he made his apparent promise. If the promisee knows the promisor to be predisposed to tell the truth in general, or under the circumstances in which he promised, then the promisor's apparent promise might assure the promisee that she has received an actual promise. But by conditioning the practical effect of promising entirely on factors external to the practice of promising, the subjective theory threatens to reduce the role of promising to vindicating the intent of only those individuals who make promises to people who already trust them. There would be little reason to make a promise to a promisee who has no independent reason to trust him. But individuals in fact do make such promises. On the subjective theory, the same moral effect could and should have been achieved by making a silent vow.

36. If accurate lie detection technology existed, or sound empirical psychology demonstrated that certain kinds of voluntary conduct were highly correlated with truth-telling, then promisors could use that technology or undertake such conduct in order to assure their promisees that they subjectively intended the apparent promises they made to them. As use of such technology or knowledge became widely dispersed, they would, in effect, eliminate the practical difference between subjective and objective promises.

37. For ease of exposition, I will use the term "apparent promisee" to refer to an individual who is justified in believing that another has made a promise to her based on that person's manifestation of an intention to make a promise, the term "apparent promisor" to refer to the person who manifests such an intention, and the term "apparent promise" to refer to the manifestation of that intention. A "merely objective promise," therefore, is one made by an apparent promisor to an apparent promisee without the subjective intent to promise.

Fried's account therefore seems unable to explain why individuals make promises to people who do not already trust them.

Fried argues, however, that while merely objective promises do not create moral *obligations*, individuals who make them do have a moral *duty* to use reasonable care to avoid misleading others. Individuals who negligently make merely objective promises, and then disappoint the expectations they create, therefore have a moral duty to compensate their apparent promisees, presumably for their detrimental reliance.[38] Presumably, individuals who do so intentionally would be subject to additional moral sanctions as well. Thus, on Fried's account, it is not pointless to make a genuine promise even to someone who has no independent reason to believe the promisor: The apparent promise alone imposes a moral duty even on the merely objective promisor. A merely objective promise creates a practical reason for the promisor to perform and entitles the apparent promisee to remedial moral rights if he fails to perform. In short, when a promisee receives an objective promise, she can be confident that her promisor will be morally accountable for his promise whether or not he subjectively intended the promise. He will be bound by either a moral obligation or duty, both of which entitle the promisee to remedial moral rights if the promisor does not perform. Thus, even if promises create genuine promissory responsibility only when they are subjectively intended, individuals have reason to make genuine promises even to promisees who cannot verify their subjective intent. On Fried's view, it appears that the power of genuine promises to change the practical reasoning of promisees is diminished only by the risk that someone might nonneg-

38. Fried equivocates on the precise nature of the compensation that negligent promisors must pay to their apparent promisees. For example, Fried claims that the actual basis of liability for purely objective promises is revealed by the law's resolution of unilateral mistake cases in which one party failed to take due care:

> [A]s between the two parties the one who had acted reasonably and in the ordinary course should not have his expectations disappointed. He should not be disappointed because . . . if a loss is inevitable and both parties are innocent, the careless man should not be able to cast that loss on the prudent . . . . [This reason] may be referred to consideration of fairness or to the encouragement of due care.

Fried, Contract as Promise, supra note 1, at 62. Here, Fried appears to hold that the party who carelessly made a unilateral mistake should be held to the contract he did not intend to make—the innocent party should not have his "expectations" disappointed. But Fried makes clear that he believes the basis of liability in this case is necessarily noncontractual: "The futile attempt to bring these cases under the promise principle only plays into the hands of those who see nonpromissory principles of fairness at work throughout the law of contract." Id. at 63. But if the liability is noncontractual and grounded in the negligent party's failure to use due care, the appropriate remedy would be reliance damages, not expectation damages. Indeed, Fried states that "it is my contention that mistake [cases] . . . are a species of accident too—contractual accident." Id. at 65. If, as Fried suggests, only subjective intent can create contractual liability, then it follows that liability for a merely objective promise imposed on the basis of the apparent promisor's failure to use due care is a species of tort liability, which triggers a duty to compensate for wrongful losses, not lost expectancy. R

ligently make a merely objective promise by accident. The losses caused by these "no fault," accidental, merely objective promises would be allocated according to principles that fall outside the domain of Fried's autonomy-based moral theory, such as principles of loss sharing grounded in considerations of fairness or equality.[39]

But Fried's defense of the subjective theory fails to recognize that genuine promises and merely objective promises provide promisees with different kinds of reasons for acting. As I argue below, genuine promises create moral obligations, whose violation typically gives rise to the remedial moral right of expectation damages.[40] Merely objective promises are subject to moral duties, whose violation gives rise to the remedial moral right of reliance damages. More fundamentally, I will argue that, unlike the remedial moral rights to which violation of moral duties gives rise, the content of the remedial moral rights to which breach of promise gives rise is within the power of the promisor to determine. Therefore, under the subjective theory, although stranger promisees will know that their promisor will likely be morally accountable for his apparent promise,[41] they will not know whether breach will entitle them only to the remedial moral rights of a tort victim to be compensated for his wrongful losses (reliance damages) or the remedial moral rights of a genuine promisee (typically expectation damages). Compared to the objective theory of intent, the subjective theory undermines the promisor's control over, and typically dilutes, the potential effect that genuine promises can have on the practical reasoning of their promisees.[42] By holding that promisees who receive merely objective promises receive the same remedial moral rights as those who receive genuine promises, the objective theory ensures the intended effect of genuine promises on promisees. Because genuine promises serve their purpose only to the extent that they affect the practical reasoning of promisees, genuine promisors would want to control the effect of their promises on their promisees' practical reasoning. Thus, they would choose to make their promises *objectively binding*—

39. Fried would treat such cases like mistake cases, in which "nonpromissory principles of fairness" apply. Id. at 63.

40. See infra Part II.

41. This would be true unless the promisor objectively promised by accident and without fault. See supra text accompanying note 39. **R**

42. Indeed, Fried himself makes much the same argument in defense of his claim that breach of contract should trigger a duty to pay expectation rather than reliance damages:

> To bind me to do no more than to reimburse your reliance is to excuse me to that extent from the obligation I undertook. If your reliance is less than your expectation . . . , then to that extent a reliance standard excuses me from the very obligation I undertook and so weakens the force of an obligation I chose to assume. Since by hypothesis I chose to assume the obligation in its stronger form (that is, to render the performance promised) . . . , the reliance rule indeed precludes me from incurring the very obligation I chose to undertake at the time of promising.

Fried, Contract as Promise, supra note 1, at 19. **R**

morally effective as genuine promises whether or not they were subjectively intended.

The personal sovereignty account is committed to respecting the right of individuals not only to choose their ends but also to choose how to pursue their ends, consistent with a like liberty for others. Personal sovereignty therefore must endorse the objective theory as necessary to vindicate the right of individuals to choose to make objectively binding promises as a means of pursuing their ends, unless doing so is inconsistent with respect for the personal sovereignty of others. Of course, by holding that purely objective promises entitle promisees to the same remedial moral rights that genuine promises create, the objective theory subjects merely objective promisors to a moral responsibility that they did not subjectively intend to incur. All else equal, personal sovereignty must also respect the right of individuals to be free of moral obligations they did not subjectively intend to undertake. Respect for the intent of merely objective promisors argues against the objective theory of intent.

There is, therefore, an internal tension within the personal sovereignty account between according full respect for the positive right of individuals (who both subjectively and objectively intend their promises) to choose to undertake objectively binding promises and the negative right of individuals (merely objective promisors) to be free from subjectively unintended obligations. The positive right argues for the objective theory of intent, while the negative right argues for the subjective theory.

But at least for some merely objective promisors, all else is not equal. The personal sovereignty rights of genuine promisors, who would choose to make objectively binding promises, *trump* the personal sovereignty rights of individuals who negligently or intentionally make merely objective promises. Were personal sovereignty to refuse to treat objective promises as morally binding, it would infringe the positive liberty of individuals to choose the kinds of obligations they wish to undertake. The only reason to infringe this positive liberty is to avoid infringing the negative liberty of other individuals who make merely objective promises. But personal sovereignty must give priority to respect for the positive liberty of faultless individuals over the negative liberty of blameworthy individuals. It cannot justify a refusal to give moral effect to objective promises solely on the ground that it is necessary to respect the negative liberty of individuals whose own negligence or intentional wrongdoing created the otherwise avoidable conflict between their own negative liberty and the positive liberty of others.

Although Fried's theory holds that merely objective promisors are morally responsible for the direct harm they cause, he limits their remedial moral responsibility to the duty of compensating their promisee's detrimental reliance. This limitation itself, however, prevents Fried's theory from respecting the right of genuine promisors to choose to undertake objectively binding promises. Fried never acknowledges or justifies the sacrifice of personal sovereignty that results from his refusal to treat

merely objective promisors as if they had made a genuine promise. The foundational commitment to personal sovereignty, therefore, insists that even merely objective promises should be treated as genuine promises.

However, personal sovereignty must carve out an exception for individuals who nonnegligently make objective promises by accident. Within the personal sovereignty account, there is no ground for subordinating their negative liberty to be free of unintended moral obligations. It is therefore not possible for the personal sovereignty account to accord full respect for both the positive liberty of individuals to choose to make objectively binding promises and the negative liberty of individuals who nonnegligently make merely objective promises by accident. Full respect for one entails diminished respect for the other. The moral treatment of such accidental promises must therefore be determined by the nonpromissory principles governing nonnegligent accidents contained within a comprehensive moral theory that extends beyond the personal sovereignty account.[43]

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43. David Owens rejects the view that individuals can incur a promissory obligation by making an unintentional promise. But the example on which he relies to make his point establishes only that individuals who accidentally and nonnegligently make objective promises cannot incur a genuine promissory obligation:

> A and B are currently participating in a marriage ceremony, but A is under the false impression that his old flame B is kindly standing in for his true love C at a rehearsal and that the real marriage to C will take place the next day. Suppose there is no doubt that A was under this misapprehension. Is he now under at least a moral obligation to B that should prevent him from marrying C the next day? A has certainly behaved in a way that could reasonably be taken to express an intention to bind himself to B, yet surely A is not obliged to forgo marriage with C. This is especially obvious where there has been no negligence on A's part.

David Owens, A Simple Theory of Promising, 115 Phil. Rev. 51, 60 (2006) (citing Elizabeth Anscombe, Ethics, Religion and Politics 11 (1981)). On the personal sovereignty account, if A's belief was formed negligently but B's was not, A would be subject to (the moral equivalent of) a genuine promissory obligation. (I argue below, however, that this conclusion does not entail that A would be morally required to forgo marrying C, as Owens supposes. Rather, by marrying C, A would violate his obligation to B, which would give rise to whatever remedial moral rights attach to the violation of A's obligation. See infra Part I.C. Further argument is required to establish that this remedial moral right would impose a correlative moral duty on A to forgo marrying C—a version of "injunctive" moral relief.) However, as Owens presents it, the example presents a case in which neither A's nor B's beliefs were negligently formed: A has the objectively reasonable but mistaken belief that B understands she is a mere stand-in at a rehearsal, and B has the objectively reasonably but mistaken belief that A is actually marrying her (and is presumably making the promises required to accomplish that act). Under these circumstances, the personal sovereignty account, like Owens's account, would not impose promissory liability on A. Rather, such a "no fault" accident case would be resolved by the principles governing nonnegligent accidents contained within the comprehensive moral theory that includes but extends beyond the personal sovereignty account. Notably, contract law follows suit, refusing to impose contractual liability for such objective promises and instead treating such cases as accidents that void the promises ab initio on the ground of mutual mistake. See, e.g., Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch.) (holding that no contract was formed due to contracting parties' mutual mistake that they were referring to same ship named "Peerless" when they were in fact referring to two different ships with that name);

This argument for the objective theory of promissory obligation rests on the premise that the nature of promissory obligation is determined by inference from the foundational substantive principle underwriting the theory of moral responsibility that purports to explain and justify the practice of promising. Thus, promissory obligation is objective because a theory of morality grounded in respect for personal sovereignty supports a practice of promising in which individuals incur promissory obligations (or their moral equivalent) when they make objective promises, unless they nonnegligently do so by accident. Alternative approaches to moral theory, however, might object that the conditions under which promissory obligations arise cannot be inferred simply from the foundational substantive commitments of a moral theory: The nature of promissory obligation cannot be definitionally legislated to suit the demands of a substantive moral commitment to respecting personal sovereignty. On such an alternative approach, the nature of particular kinds of familiar moral obligations are not up for grabs, depending on the best substantive moral arguments for defining their features in various ways. Instead, the constitutive features of moral obligations are facts about the world that we must discover, not features of the moral universe that we can fashion to suit our substantive moral commitments. Their structure and substance is determined at least in part by the nature of the concept of a promise. On some views, the character of promissory obligation might be a predetermined conceptual truth. For example, some might argue that self-imposed moral responsibilities are necessarily intentionally incurred (in the same analytic sense of necessity in which all bachelors are necessarily unmarried males). Thus, promissory obligations necessarily must be intentionally incurred. On other views, the character of promissory obligation might be determined, at least in part, by the inferential role the concept of promissory obligation plays in the social practice of promising.[44] Thus, that the practice of promising would fully respect the personal sovereignty conception of autonomy by imposing promissory liability for objective promises provides no reason to believe that the practice of promising in fact imposes objective promissory liability. The question of whether promissory obligations are objective or subjective, then, is a matter to be determined either by conceptual analysis or social convention, not by inference from a fundamental substantive moral commitment.

While it is possible that the character of promissory obligation is constrained or determined a priori by its conceptual structure, this would mean only that the moral responsibility for making objective promises

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Restatement (Second) of Contracts § 152 (1981) (summarizing when mistake makes contract voidable). Any losses are then apportioned according to noncontract doctrines.

44. For two versions of such an approach, see generally Coleman, supra note 20, at 7–12 (explaining and endorsing "inferential role semantics"); Benjamin C. Zipursky, Pragmatic Conceptualism, 6 Legal Theory 457 (2000) (explaining and endorsing "pragmatic conceptualism"). R

could not properly be described as promissory. The fundamental commitment to personal sovereignty, however, would still provide grounds for holding individuals equally morally responsible for objective promises, even if that responsibility cannot properly be described as promissory. The important point is that the basic theory of moral responsibility underlying the promise principle provides grounds for holding individuals equally responsible for apparent promises, whether or not they subjectively intended to promise. The conceptual claim seems to put no more than nomenclature at stake. Likewise, while the social practice view of promising might provide a plausible account of the structure of the obligations created or recognized by the actual practice of promising we have, the argument in defense of the objective theory of promising demonstrates that any practice that falls short of attaching (at least the moral equivalent of) a fully promissory obligation to objective promises is morally objectionable: It is inconsistent with the fundamental commitment to personal sovereignty that underwrites moral obligation, the very category of moral responsibility on which the existence of promissory responsibility depends. That commitment either explains why individuals in fact incur objective promissory obligations notwithstanding the limitations of the social practice of promising (i.e., the practice does not exhaust the mechanisms available for incurring promissory obligations), or argues in favor of revising the social practice to accord with the demands of the foundational theory that underwrites all self-imposed moral responsibility.[45]

C. *The Remedial Rights and Duties of Promissory Morality*

The initial problem facing a correspondence account of legal remedies is to identify the remedial moral duties to which legal remedies might correspond. 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

45. Although Michael Pratt denies the conceptual possibility of subjectively unintended promissory obligations, he acknowledges the force of the argument for holding that individuals who make objective promises are subject to the same moral consequences of making a subjective promise:

> It may be that, having conveyed to you an intention to obligate myself to do X without actually possessing that intention, I become subject to the same moral requirement (to do X, say) as if I had in fact made a promise. It may be appropriate, in other words, that I be treated *as if* I promised despite the fact that I did not do so. An important function of the practice of promising is to provide an easy solution to small coordination problems by enabling people to provide others with reliable assurances about the future. To serve this purpose, the practice must permit one to rely on what, by *outward appearances*, is a promise. . . . Reasons of this sort might plausibly provide moral grounds for requiring of me precisely what morality would require of me had I actually made a promise.

Pratt, Contract: Not Promise, supra note 3, at 815. R

explain promissory obligation typically lack an account of the nature or content of the remedial moral duty to which breach gives rise.[46] A strong correspondence account of contract cannot justify a remedial legal duty on the ground that it corresponds to the first-order moral obligation to keep a promise unless that obligation entails a second-order (remedial) moral duty for its breach. Likewise, a weak correspondence account cannot fault contract law for failing to enforce a first-order moral obligation to keep a promise unless contract law fails to enforce the second-order (remedial) moral duty to which breach of promise gives rise.

The moral objection to expectation damages summarized at the outset holds that in order to justify the legal enforcement of A's promise to B to do X on the ground that it enforces the promissory obligation created by A's promise, 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.[47] But 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. 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.[48] But while it is certainly true that a promise to do X entails the promissory obligation to do X, the violation of that obligation neither

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46. Two salient exceptions include the extensive philosophical literatures on the moral theory of punishment and the political theory of reparations for historical wrongs. For a discussion of the moral theory of punishment, see generally Hugo Adam Bedau, Punishment, pt. 3, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta, 2003), at http://plato.stanford.edu/entries/punishment/#3 (on file with the *Columbia Law Review*). For a discussion of the political theory of reparations for historical wrongs, see generally Tamar Meisels, Territorial Rights (2d ed. 2009); Reparations (Jon Miller & Rahul Kamar eds., 2007); Jeremy Waldron, Settlement, Return, and the Supersession Thesis, 5 Theoretical Inq. L. 237 (2004); Jeremy Waldron, Superseding Historic Injustice, 103 Ethics 4 (1992).

47. As we have 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. See supra text accompanying note 9. R

48. Consider Dori Kimel's puzzlement over Fried's argument for expectation damages:

> [W]hen [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 applicable, 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, supra note 3, at 95. R

conceptually implies nor logically entails a remedial duty to do X.[49] The content of remedial moral duties does not necessarily correspond to the content of the first-order moral responsibilities whose breach they remedy. Only a substantive, rather than conceptual, argument can bridge the gap between the violation of a first-order moral responsibility and the content of the remedial moral duty to which that violation gives rise. Moreover, accounts of the remedial moral duties for violations of promissory obligations are subject to different substantive constraints than accounts of the remedial moral duties for violations of moral duties. 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.[50] A moral theory that mandates the content of the remedial moral duties arising out of violations of first-order moral *duties* is not necessarily inconsistent with the moral theory from which those first-order moral duties derive. But a moral theory that mandates the content of the remedial duties created by breach of promissory *obligations* would be inconsistent with the personal sovereignty conception of autonomy from which those obligations derive. A foundational commitment to personal sovereignty, therefore, requires any moral theory that imposes 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 the personal sovereignty conception of individual autonomy would be hard pressed to explain why that individual should not have this option.[51] If personal sovereignty explains and justifies promissory obligations on the ground that they vindicate the will of the individuals who incur them, then the remedial moral duties, if any,

49. In 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 nonrepudiation. 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.

50. See supra Part I.A for a discussion of the relationship between legal duties and first-order promissory obligations, and the argument that promissory morality would forbid the enforcement of promises intended not to be legally enforceable.

51. As noted earlier, on Strawson's view of the nature of moral discourse, it follows (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. See supra note 28. **R**

that attach to the violation of those obligations should also be subject to the will of the individuals who create the obligations.[52] If autonomy underwrites the moral liability, so to speak, then it should also underwrite the moral remedy.

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 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 the right of individuals 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 personal sovereignty 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.[53]

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52. Of course, individual will here is to be construed objectively. See supra Part I.B.

53. Shiffrin appears to reject this claim:

> One might attempt to recharacterize the divergent contract rules that I identify instead as 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 . . . . A promise may make a nonobligatory action obligatory, but only because the object of the obligation is within the promisor's power in the first place . . . . By contrast, the power to alter the significance and appropriateness of *others'* reactions to a broken obligation is not within the power of the promisor. It does not seem to be the sort of thing that could be altered by consent or made *part* of the content of the promise. In response to another's wrong, we have the elective power to forgive, but forgiveness involves, among other things, recognition of a past wrong . . . .

Shiffrin, Divergence, supra note 3, at 727–29. **R**

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, on a Strawsonian view, 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. See generally Strawson, supra note 28. If so, then aggrieved promisors cannot alter the moral legitimacy **R** of an aggrieved promisee's reactions to suffering the moral wrong of breach. That promisors lack that power, 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.

I have argued that objective intention (typically) gives rise to either promissory obligation or a moral equivalent.[54] 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 strong correspondence account of contract, the remedial legal duty must correspond to the remedial moral duty that the promisor expressly undertook. A strong 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 strong 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 such 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 a few possible exceptions,[55] contract default rules are best understood as attempts to impute into contracts terms that most similarly situated parties

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54. The proviso accommodates the exception to promissory responsibility for merely objective promises made by accident. See supra note 43 and accompanying text. **R**

55. One exception is the so-called "information forcing" or "penalty" default rule. See Barry E. Adler, The Questionable Ascent of *Hadley v. Baxendale*, 51 Stan. L. Rev. 1547, 1549 (1999) (describing information forcing or penalty default rule as forcing "the disclosure of information that will yield efficient contractual relationships"); Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 91 (1989) (explaining penalty defaults are "purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or third parties"); Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules, 101 Yale L.J. 729, 735–36 (1992) (noting penalty default serves as "counterexample to those who would argue that default rules should simply replicate the contracts that a majority of parties would make in the absence of transaction costs"); Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 Cal. L. Rev. 261, 263–64 (1985) (discussing interplay between default and privately negotiated rules); Jason Scott Johnston, Strategic Bargaining and the Economic Theory of Contract Default Rules, 100 Yale L.J. 615, 616 (1990) (describing penalty default as forcing "revelation of information which the revealing party might generally wish not to reveal"). There is, however, some doubt about whether any existent default rules actually qualify as penalty defaults. See generally Eric A. Posner, There Are No Penalty Default Rules in Contract Law, 33 Fla. St. U. L. Rev. 563 (2006). However, any penalty default that turns

would have wanted to include had they considered them. Majoritarian default rules maximize the probability that the terms to which promisors are being held correspond with the ones they intended but failed to express or imply, and they save the majority of individuals the costs of specifying those terms, which respects their personal sovereignty by decreasing the barriers to creating promissory obligations. Thus, majoritarian default rules can be justified as a method of interpreting promises grounded on the personal sovereignty conception of autonomy. Of course, the default rule approach to promissory interpretation creates the risk that some promisors will be held to terms that 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.[56] Fried would insist that if the promisor formed, but failed to indicate, his subjective intention, the imposition of a contrary moral responsibility would necessarily conflict with, rather than constitute, a moral obligation.[57] 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 adverting to default rules. He just insists that the resulting moral and legal liability they impose sound, respectively, in nonpromissory moral responsibility and noncontract law.[58]

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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 nonmajoritarian 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.

56. See supra notes 10, 32 & 38. **R**

57. Fried does argue, however, that a promissory obligation does not bind until it is accepted by the promisee, which requires the promisor to communicate it. Fried, Contract as Promise, supra note 1, at 40–43. Yet he also claims that any moral responsibility that **R** conflicts with a subjectively intended moral responsibility, or fails to correspond to one, is by definition not a promissory obligation. Kraus, Philosophy of Contract Law, supra note 9, at 703–06 (outlining Fried's contract theory). **R**

58. See Kraus, Philosophy of Contract Law, supra note 9, at 717–30 (drawing distinction between interpretation and interpolation in contract law as necessitating resolution in contract law and noncontract law, respectively, based on subjective intention of parties).

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 the personal sovereignty conception of autonomy is not only compatible with, but likely requires, an objective theory of intent for promissory obligations.[59] Similarly, that commitment supports a majoritarian default regime for interpreting promissory obligations. Just as the commitment to personal sovereignty 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: In equilibrium, default rules provide 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. Through ordinary understanding, morality must by default imply terms into promises absent a promisor's contrary manifestation of 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 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.[60] 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. Thus, a promissory morality that fails to hold promisors morally bound by majoritarian default terms unnecessarily increases the costs of promising, thereby violating the positive liberty of individuals to undertake moral obligations as they see fit. A personal sovereignty account of autonomy cannot countenance a promissory regime that gratuitously exacerbates, rather than minimizes, the costs of exercising the individual liberty to make promises.

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 im-

59. See supra Part I.B.

60. In 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.

posed is not promissory.[61] 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. But the question of whether the moral responsibility 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 the personal sovereignty conception of autonomy supports the use of (economically justified) majoritarian default rules for resolving disputes over the content of promises that promisees cannot verify by reference to objective intent.

A strong correspondence account of contract, then, would determine the appropriate content of legal remedies for breach by identifying the corresponding remedial moral 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. A strong 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 strong 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.[62] 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 theories of contract.

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61. See, e.g., supra notes 10, 32 & 38; see also Kraus, Philosophy of Contract Law, supra note 9, at 717–30 ("Fried's theory clearly requires that contractual obligation be based on shared subjective intentions, and therefore rejects the objective theory of contract because it imposes contractual liability in the absence of such intentions.").

62. For a general discussion and overview of the literature, see Benjamin E. Hermalin et al., Contract Law, *in* The Handbook of Law and Economics 3, 99–127 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Craswell, Contract Remedies, supra note 6; Richard Craswell, Instrumental Theories of Compensation, 40 San Diego L. Rev. 1135 (2003); Paul Mahoney, Contract Remedies: General, *in* 3 Encyclopedia of Law and Economics § 4600, at 117 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). See generally Robert Cooter & Thomas Ulen, Law & Economics 245–79 (5th ed. 2007).

II. Assessing Divergence

I began this Article 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 enforces promissory 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.)[63] But contract law also enforces promissory morality 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 do X if he breaches his promise. Moreover, if promissory morality is grounded in the personal sovereignty conception of autonomy, it would not recognize 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 remedial moral duty is incompatible with a foundational commitment to personal 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).[64] 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 legal wrongs, moral remedies do not cure moral wrongs, including breach of promise. Economic analysts of contract law tend to regard such distinctions in moral obligation as superfluous. For

63. Thus, contract law's refusal to enforce an express penalty damages clause (in excess of expectation damages) clearly fails to enforce the parties' moral obligations. See infra text accompanying notes 71–78 (analyzing punitive and liquidated damages). R

64. See Holmes, Path of the Law, supra note 5, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."). R

purposes of their models, they presume that all they need to know is the price of performance and the price of breach.[65] 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 alternative 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

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65. Indeed, economic analysts often fail even to note that the efficient breach hypothesis might be interpreted as approving immoral conduct. The classic texts explaining the theory of efficient breach have no discussion of the possible tension between the law's facilitation of efficient breaches and the immorality of breaking a promise. See, e.g., Cooter & Ulen, supra note 62, at 208–12 (discussing efficient breach but explicitly limiting analysis to promisors whose "concern with breach may not go beyond his or her liability"); Richard A. Posner, Economic Analysis of Law 118–22 (7th ed. 2007) (explaining efficient breach, "which from an economic standpoint is the same case as that of an involuntary breach"). Steven Shavell recently defended a variation on the economic account of the theory of efficient breach. See Steven Shavell, Is Breach of Contract Immoral?, 56 Emory L.J. 439 (2006) [hereinafter Shavell, Is Breach Immoral?]. Shavell claims that promisors should not break their promises because doing so is immoral, but that truly efficient breaches of contract are often not immoral: R

> If damages tend to be fully compensatory, we could say . . . breach tends to be moral, as breach should occur if and only if contracting parties would have allowed nonperformance had they addressed in their contracts the contingencies that engendered breach. But if damages are not really compensatory, breach might be immoral.

Id. at 450. In his view, most breaches occur when the express promise underlying the contract is underspecified. In those cases, he argues, promissory morality fills the gap by imposing on the promisor the term to which he and his promisee would have agreed had they specified an express term governing the gap. That term, he argues, would always permit the promisor to breach (not perform) and pay (fully compensatory) expectation damages:

> [W]hen the measure of damages equals the expectation measure, sellers will be led to commit breach if and only if the cost of performance exceeds the value of performance to buyers. But this is exactly when a seller would have been excused from performing in an explicit complete contract . . . . Accordingly, *breach should not be characterized as immoral* under our assumptions.

Id. at 449. Thus, by allowing promisors to breach and pay expectation damages under these circumstances, contract law is not endorsing the immoral act of breaking a promise. For criticism of Shavell's view, see Seana Shiffrin, *Could* Breach of Contract Be Immoral?, 107 Mich. L. Rev. 1551 (2009) [hereinafter Shiffrin, Immoral] (arguing Shavell's position is unjustified and promise to perform morally does not mean promise to perform or pay). For Shavell's reply, see Steven Shavell, Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts, 107 Mich. L. Rev. 1569 (2009) (explaining breach as function of contract's incompleteness as to all contingencies).

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 relational) norms to regulate their agreement.[66] 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 for noncompliance. Thus, economic analysts err when they disregard the additional costs parties incur by undertaking and then breaching moral obligations. Parties not only risk incurring instrumental harm in the form of reputational costs, but, to the extent promisors have internalized moral norms and are therefore motivated to conform to moral demands, nonconformance imposes intrinsic (psychological) costs as well. In other words, if given the option to choose between making one of the two promises above—(1) a promise to do X or pay money for breach of the promise to do X, or (2) a promise to do X or pay money, where payment of money constitutes performance—most promisors would charge more for the first. The first imposes on the promisor not only the costs of doing X or paying money, but also the risk of incurring 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 requires him to breach a promissory obligation. Unless a promisor and promisee are 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 analyst 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 reinterpreting it not to counsel breach, but to claim that most promisors who make legally enforceable single promises intend them to be morally alternative promises and that promisees understand them as such.

Thus, when A promises B to do X against the background of the default remedy of expectation damages, 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

66. For an overview of the economic analysis of the role of legal and non-legal (or relational) norms in contract design, see generally Jody S. Kraus & Robert E. Scott, Contract Design and the Structure of Contractual Intent, 84 N.Y.U. L. Rev. 1023, 1029–31, 1058–62 (2009).

insist that A undertake a moral obligation to do X, rather than to do 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," the efficient breach hypothesis supposes that many parties—and most commercially sophisticated parties—will intend and understand the promisor to be discharging his moral obligation by compensating the promisee, rather than paying damages for breach of a moral obligation. In other words, the efficient breach hypothesis presumes that many parties use the remedial default rules of contract to specify a morally acceptable alternative to performance of their promised act instead of writing an explicit alternative promise contract.[67]

It remains true, however, that even on the alternative promise interpretation of nominally (legally dominated) single promise cases, the promisor's refusal either to do X or pay compensation absent a court order could constitute both a legal and moral breach. Thus, Shiffrin writes:

> It is out of bounds to say: "I solemnly promise to do *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. Moreover, it

67. There is a modest but growing empirical literature on the question of individuals' attitudes toward breach of contract. See, e.g., David Baumer & Patricia Marschall, Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?, 65 Temp. L. Rev. 159, 171–72 (1992) (analyzing results of survey presenting business community's reaction to deliberate breach); Shavell, Is Breach Immoral?, supra note 65, at 452–55 (presenting empirical study confirming Shavell's contention that individuals are less likely to view breach as immoral if parties would have agreed to allow promisor to breach and pay expectation damages under circumstances in which breach in fact occurred); Tess Wilkinson-Ryan & Jonathan Baron, Moral Judgment and Moral Heuristics in Breach of Contract, 6 J. Empirical Legal Stud. 405, 405 (2009) (summarizing empirical study suggesting that "people are quite sensitive to the moral dimensions of a breach of contract, especially the perceived intentions of the breacher"); Daphna Lewinsohn-Zamir, Beyond the Bottom Line: The Complexity of Outcome Assessment 28 (Aug. 2009) (unpublished manuscript, on file with the *Columbia Law Review*) (reporting results of empirical study demonstrating that "the outcome of receiving expectation damages was still regarded as significantly worse than the outcome of voluntary performance of the contract"). R

> 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.[68]

Shiffrin here rightly points out that *if* the promise is to do X, and not to do X or pay compensation, then no manner 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 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, respectively, 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 moral right to insist on the legal adjudication of any good faith dispute.

Shiffrin would clearly err, however, were she to insist that no promise can permit a promisor to escape moral responsibility for failing to do a promised act by paying compensation for that failure. By stipulating that payment of such compensation constitutes performance, an alternative promise accomplishes precisely this objective, and runs afoul of neither legal nor moral prohibition.[69] The promisor would also be morally free to exercise the payment option just 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 adjust 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—i.e., a failure to do X constitutes a breach of promise followed by the imposition of damages for wrongful conduct. But this is a contentious and undefended interpretation of the efficient breach hypothesis, the Holmesian conception of a promise, and the 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

68. Shiffrin, Divergence, supra note 3, at 728. R

69. Shiffrin in fact acknowledges the moral permissibility of alternative promises. See id. at 722 ("Absent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised."). In another article, Shiffrin states that she is "not suggesting that parties could never permissibly and explicitly make an agreement to 'perform or pay.' Rather, there is reason to resist 'perform or pay' as the default interpretation of all promises that do not explicitly rule it out." Shiffrin, Immoral, supra note 65, at 1568. R

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. Rejecting this view requires denying the empirical claim that sophisticated parties treat their nominally single promises as morally equivalent to alternative promises, or defending the general view that parties either cannot, or should not be able to, create the moral obligation of an alternative promise by using legal language that, according to its plain meaning, creates a single promise.[70] Philosophical arguments cannot provide the former and have yet to attempt the latter.

Shiffrin claims that the contract doctrines governing punitive, liquidated, and consequential damages, as well as mitigation and consideration, also constitute morally objectionable instances of divergence between contract and promise. However, I argue below that most of these doctrines can be defended on the ground that they ensure contract law's respect for a promissory morality based on personal sovereignty. Consider each in turn.

A. *Punitive Damages*

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).[71] 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."[72] Shiffrin's objection here is just another form of the objection against the Holmesian view of promise. As discussed above, 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 single promise.[73] 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 per-

70. For relevant empirical literature on the question of individuals' attitudes toward breach of contract, see supra note 67. R

71. See Farnsworth, supra note 5, § 12.8, at 194–96 ("[A] court will not ordinarily award damages that are described as 'punitive,' intended to punish the party in breach . . . . Punitive damages may, however, be awarded in tort actions, and a number of courts have awarded them for a breach of contract that is in some respect tortious." (citing Restatement (Second) of Torts § 908 (1979))). R

72. Shiffrin, Divergence, supra note 3, at 723–24. R

73. See supra text accompanying notes 63–69. R

formance duty, which the law then enforces by entering a judgment requiring payment of expectation damages.[74] Contract law's refusal 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 fundamentally, 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 personal sovereignty must delegate to promisors not only the right to decide whether to assume a promissory obligation, but also the right to determine what remedial moral duties will attach to it. Although Shiffrin may be correct that some incidents of breach are conceptual or conventional 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 have 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 morality grounded in respect for personal sovereignty. When it comes to the legal enforcement of moral obligations, as opposed to

74. Again, Shiffrin is right that forcing a suit in bad faith would be morally wrong even on the alternative promise view. But, short of violations such as those under Rule 11 of the Federal Rules of Civil Procedure, courts are hardly in a position to determine the difference between good and bad faith litigation. Further, as I have 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. See supra notes 68–69 and accompanying text. Notably, when courts do find litigation to be in bad faith, monetary sanctions are sometimes awarded. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991) (affirming imposition of sanctions for party's bad faith conduct); Barnes v. Dalton, 158 F.3d 1212, 1214–15 (11th Cir. 1998) (affirming award of sanctions by district court for finding of bad faith). See generally Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse §§ 27–28 (4th ed. 2008) (discussing bad faith as prerequisite for imposition of sanctions and reviewing types of sanctions). Similarly, if a promisor refuses to pay a judgment, the law of judicial contempt imposes seriously condemnatory penalties, including jail time. See, e.g., Am. Oil Co. v. Suhonen, 248 N.W.2d 702, 702 (Mich. Ct. App. 1976) (approving court order threatening jail time for noncompliance); State ex rel. Daly v. Snyder, 72 P.3d 780, 783 (Wash. Ct. App. 2003) ("We hold that the court's authority to use contempt proceedings against recalcitrant child support obligors . . . includes incarceration."). 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. See supra notes 68–69 and accompanying text. R

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.

B. *Liquidated Damages*

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.[75] Surprisingly, Shiffrin is reluctant to conclude that 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 ensure 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 willing parties are not permitted to elect them in advance through legally enforceable agreements."[76] 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 a breach that exceeds 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 also 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 as alternative promises. Indeed, a substantial body of case law struggles to delineate a principled distinction between the two.[77] Given the liquidated damages doctrine,

75. The U.C.C. describes the prohibition as follows:

> 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.

U.C.C. § 2-718(1) (2003).

76. Shiffrin, Divergence, supra note 3, at 726. **R**

77. Compare ADP-Fin. Computer Servs. v. First Nat'l Bank, 703 F.2d 1261, 1264 (11th Cir. 1983) (finding it was not parties' intent to treat "monthly minimum charge" clause as "liquidated damages provision" but simply as "the price to be paid for ADP's services"), and In re Cmty. Med. Ctr., 623 F.2d 864, 867 (3d Cir. 1980) (finding "only reasonable interpretation" of "minimum payment provision" was as "alternative contract" rather than

courts may not enforce supracompensatory 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 often can be construed as an impermissible penalty or a permissible alternative performance. Construed as providing for an alternative performance, the ban on supracompensatory 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 term is construed instead as a "supracompensatory" 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 "supracompensatory." It is supracompensatory 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 any (rational) promisor would charge 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 liquidated damages to be a morally permissible alternative to performance of the promised act.[78]

C. *Mitigation*

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

liquidated damages clause), with Allen v. Smith, 114 Cal. Rptr. 2d 898, 903–04 (Ct. App. 2002) (finding that "[i]n the absence of a reasonable relationship between the liquidated damages and the actual damages the parties could have contemplated for breach," such clause constitutes impermissible penalty); see also Chandler v. Doran Co., 267 P.2d 907, 910 (Wash. 1954) ("The difficulty lies in determining whether or not the contract pleaded contains a true alternative promise."); Restatement (Second) of Contracts § 356 cmt. c (1981) (stating that parties may create alternative performances in good faith but that courts "will look to the substance of the agreement to determine whether" provision is permissible alternative promise or impermissible penalty provision); 2 Samuel Williston, The Law of Contracts § 781, at 1488–90 (1st ed. 1920) (providing intent-based test to distinguish alternative promises from liquidated damages).

78. As I noted above, however, 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.

transaction to obtain the goods or services elsewhere following notice of the promisor's breach. A failure to cover in a timely manner would bar the promisee from recovering any losses she incurred as a result—for example, any increase in the market price between the time when she should have covered and the time she actually covered. Shiffrin argues:

> Following 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 or justification for nonperformance. Were a substitute unavoidable or justified, promissory norms would ordinarily place the burden on the promisor, rather than promisee, to locate and provide it. It may sometimes be permissible for the promisor to ask the promisee to shoulder this burden when the substitute is much easier for the promisee to obtain or when the promisor is ill-suited to select a replacement . . . . [I]t 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 when the occasion for the work is the promisor's own wrongdoing. That expectation is especially distasteful when its rationale is that it makes the promisor's wrongdoing easier, simpler, more convenient, or less costly.[79]

The moral grounds for Shiffrin's complaint against the mitigation doctrine, however, evaporates once the so-called duty to mitigate[80] 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 his 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 he chose to assume.[81]

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79. Shiffrin, Divergence, supra note 3, at 724–25. R

80. Technically, 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. See Farnsworth, supra note 5, § 12.12, at 231 (claiming it is "misleading" to say that "the injured party is under a 'duty' to . . . mitigate damages" because "the injured party incurs no liability to the party in breach by failing to take such steps [but] is simply precluded from recovering damages for loss [sic] that it could have avoided" (citation omitted)). I will nonetheless follow common practice and refer loosely to the avoidable loss doctrine and "the duty to mitigate." R

81. Again, 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 right to compensation for losses incurred because of her failure to mitigate.

Again, a personal sovereignty account of promissory morality provides no grounds for denying the promisor the power to so limit his remedial moral duty. But to subject their compensatory moral duty to the avoidable loss doctrine, promisors need not express an intention to do so. 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 the promisor's 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 rights 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 that they likely did want, but failed to express, or would want had they considered it. It 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 of 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 a moral theory of promising derived from the personal sovereignty conception of autonomy—the doctrine vindicates, rather than undermines, promissory obligations.

D. *Foreseeability*

This same response also answers Shiffrin's objection to the foreseeability limitation on the recovery of consequential damages.[82] Properly understood, that doctrine constitutes a default rule imputing a term into

82. Shiffrin states:

> [U]nder the *Hadley* rule, promisors are liable only for those consequential damages that could reasonably have been foreseen at the time of the contract's formation. From a moral perspective, this is quite strange. If one is bound to perform but without excuse voluntarily elects to breach one's duty, a case could be made that the promisor should be liable for all consequential damages. If foreseeability should limit this liability at all, what would matter morally is what was foreseeable at the time of breach rather than at the time of formation. Whereas the former reflects the idea that breach is a wrong for which the promisor must take responsibility, the latter fits better with the idea that the contract merely sets a price for potential promissory breach.

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 ongoing debate among economic analysts of law, in which some argue it constitutes an efficient majoritarian default and others claim it constitutes an efficient countermajoritarian penalty default rule (which forces efficient information disclosure). In either case, if the foreseeability limitation is an economically efficient default rule, it is justified on the ground that it provides parties with the contract terms they are most likely to prefer. By excluding recovery for unforeseeable damages, promissory morality vindicates personal sovereignty by maximizing the probability that the parties' remedial moral rights and duties will align with their subjective intent. In the event that they form no subjective intent concerning unforeseeable damages, it maximizes the expected joint value of their promise. A promissory morality that refuses to impute majoritarian terms into promises, or to subject the process of determining the content of promises to a majoritarian default regime, perversely undermines the likely subjective intent of promisors and the purposes they intend their promises to serve.

E. *Consideration (and Promissory Estoppel)*

Finally, Shiffrin argues that contract law diverges from promissory morality because the doctrine of consideration prevents it from enforcing some morally binding promissory obligations.[83] Because the doctrine of promissory estoppel also prevents some promises from being legally enforceable, she would presumably object to it as well.[84] I argued above that an autonomy-based, deontic moral theory, such as the personal sovereignty account, would be incompatible with a legal regime that enforced promises made with the 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 of these promises—and only these promises—are legally enforced, then they would be not only consistent

> The law thereby fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price.

Shiffrin, Divergence, supra note 3, at 724 (citations omitted). R

83. Shiffrin, Divergence, supra note 3, at 728, 736–37. The Restatement defines consideration as "a performance or a return promise" that is "bargained for." Restatement (Second) of Contracts § 71(1) (1981). It further provides that a "performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Id. § 71(2). R

84. As the Restatement explains:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90(1).

with but required by the moral theory underlying promissory obligation. In fact, 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 refuse to enforce the kinds of promises that most promisors would not intend to be legally enforceable.[85]

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 ensure 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 obligations 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 personal sovereignty conception of autonomy that underwrites promissory obligation. The divergence for which the consideration and promissory estoppel doctrines are responsible, therefore, is morally commendable. These doctrines create morally objectionable divergence only when they operate to prevent the legal enforcement of gratuitous promises intended to be given legal effect. If a promisor makes a morally binding promise that he intends to be given legal effect, a strong correspondence account of contract has no grounds for refusing to enforce it.

CONCLUSION

Correspondence accounts insist that the moral and political justification of a body of law cannot be determined without first assessing the extent to which the legal rights and duties it recognizes correspond to rights and responsibilities in the moral domain. Whether particular legal rights and duties in fact enforce corresponding moral rights and responsibilities, and whether such correspondence is consistent with the moral and political justification of the law, however, cannot be determined without first identifying the normative foundation of the moral rights and responsibilities in question. Correspondence accounts of contract law, therefore, cannot proceed even to assess the correspondence of contract and promise—let alone to approve or object to any alleged correspondence or divergence—without first specifying a theory of promissory mo-

85. See, e.g., Robert E. Scott & Jody S. Kraus, Contract Law and Theory 172–75 (4th ed. 2007) (arguing consideration and promissory estoppel doctrines provide "a good proxy for determining whether the promisee could have reasonably believed that the promisor intended his promise to be legally binding"); Randy Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 319 (1986) (describing "consent theory" as one where "[c]ontractual enforcement . . . will usually reflect the will of the parties"); see also Charles Goetz & Robert E. Scott, Enforcing Promises, 89 Yale L.J. 1261, 1301–09 (1980) (arguing that nonreciprocal promises should not be legally enforced unless they are made in a reciprocal context in which parties would benefit from legal enforcement).

rality. That theory must explain not only why morality recognizes the individual capacity to make promises and the obligation to keep them, but also how morality determines their content.

To illustrate, I have outlined a personal sovereignty theory of the foundation of promissory morality and argued that it largely reconciles contract and promise. It explains why contract law's failure to enforce some promises is consistent with the demands of promissory morality, and why most of the doctrines alleged to diverge from promissory morality in fact correspond to it. I have argued that the doctrines of consideration and promissory estoppel serve to prevent legal enforcement of promises likely intended not to be legally enforceable—a policy that ensures respect for the very intent promissory morality serves to vindicate. Rather than holding individuals morally accountable for promises they did not make, the objective theory of intent in fact enforces promissory obligations. In order to respect the positive liberty of individuals to undertake objectively binding promises—the only kind that can serve most of the practical purposes for which promises are made—promissory morality itself imposes promissory obligations even on individuals who make objective promises that they do not subjectively intend to make. Contract law therefore enforces corresponding moral obligations even when it holds individuals legally liable for their merely objective promises.

Finally, on the personal sovereignty account of promissory morality, many of contract law's remedial default rules can be understood as enforcing the corresponding remedial moral rights and duties to which breach of promise gives rise. In particular, the expectation damages doctrine—the prime doctrinal target of the moral critiques of contract law—can be understood as enforcing the remedial moral rights and duties that most promisors do or would intend to attach to their promissory obligations. On the personal sovereignty account of promissory morality, individuals have the power to determine not only the content of their promissory obligations, but also the content of the remedial moral duties to which breach of those obligations gives rise. Similarly, many of contract law's collateral remedial doctrines, such as the mitigation doctrine, the rejection of mandatory punitive damages for intentional breach, and the foreseeability doctrine, should be viewed as enforcing, rather than undermining, the rights and responsibilities of promissory morality. On the personal sovereignty account, these doctrines are justified as majoritarian default rules. Because they interpret promises according to the content most individuals do or would want, majoritarian default rules respect personal sovereignty—by maximizing the likely convergence between individuals' promissory obligation and their subjective intent—and by increasing the benefits and reducing the costs of exercising the positive individual liberty to undertake self-imposed moral obligations.

Correspondence accounts of contract law rightly inquire into the relationship between contractual and promissory rights and responsibilities in order to assess contract law's moral and political justification. But the

correspondence inquiry, in the final analysis, requires moral theory to precede legal theory: The relationship between contract and promise cannot be determined and evaluated without first engaging in the moral theorizing necessary to understand the structure and content of promissory morality. Although I have not defended a normative foundation for promissory morality, the personal sovereignty account I have sketched illustrates how moral theory matters in determining the structure and content of the promissory rights and responsibilities to which contract law might correspond. Correspondence theorists of contract law, then, can proceed either by accepting and defending the personal sovereignty account or offering an alternative theory of promissory morality. Either way, the conclusions correspondence theorists reach will be necessarily dependent on that account.