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## CONTRACT AND PROMISE

*Liam Murphy\**

Responding to Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

A contract theory is an attempt both to make normative sense of contract law as an institutional type and to come up with criteria for the evaluation of the law of any particular place. There is no precise rule telling us how far the prescriptions of a theory can deviate from actually existing contract law and still be a theory of contract — rather than a political proposal to replace contract law with something else. But we can say roughly that contract theory aims to provide normative foundations for the type of legal institution that enforces (some) agreements and unilateral commitments. Having provided an account of the point of having an institution of that general kind, the theory can then be used to evaluate existing examples.

So the very idea of contract law makes it hard to see how contract theory can ignore the ethics of promising. Professor Shiffrin starts her Article by noting that in U.S. law contracts are self-consciously described as legally enforceable promises.<sup>1</sup> That is not the case everywhere, and in my experience the idea that contracts are promises tends to strike civilian lawyers, and even some English lawyers, as odd or at least misleading. But it obviously does not matter whether we *say* that contracts are promises. As Professor Shiffrin notes, the inescapable fact is that they are the same kind of thing: voluntary commitments, either mutual or unilateral.<sup>2</sup> Theorists who insist that the considerations that should determine the content of contract law have nothing to do with the considerations that help us to understand promissory morality make a claim that is implausible on its face, and so owe us some explanation of this surprising divergence.

All comprehensive theories of contract need at the same time to offer at least a rudimentary theory of promise since even an explanation of why contract has nothing to do with promise would require an account of promise. But Professor Shiffrin makes a different and in a way stronger point about the relationship between contract and promise. Suppose that we become convinced that the rules of contract law

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\* Herbert Peterfreund Professor of Law and Professor of Philosophy, New York University.

<sup>1</sup> See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007).

<sup>2</sup> See *id.* at 742.

should diverge starkly from familiar ethical norms concerning promises. We might argue, for example, that contract law is most important in the commercial realm, where considerations of efficiency are paramount, while the ethics of promise appropriately respond to considerations of trust and loyalty, which, are more relevant in more personal contexts. Such an position is not obviously hopeless. Professor Shiffrin's important insight, however, is that even if we can offer plausible reasons in favor of a divergence between contract and promise, the fact that contracts and promises are the same kind of thing forces us to consider, as an aspect of contract theory, what effect contract law might have on our ethical lives as promising creatures.

Stated abstractly and roughly, the general principle behind this idea seems entirely right to me: normative legal theory ought to consider the effects legal structures are likely to have on our ethical lives. However, Professor Shiffrin elaborates this thought in a particular way, in terms of the accommodation of moral agency: "[T]he content and normative justification for the legal practice must be acceptable to a reasonable moral agent with a coherent, stable, and unified personality."<sup>3</sup> The argument is subtle and complex; I will not be able to do justice to it here. Let me just say that I do not see why a conflict between (correct) ethical norms and (accepted) legal rules and their rationale need make the development of moral *agency* difficult. Even if the law makes it less likely that I will do the right thing, morally speaking, that does not seem to threaten my ability to understand the difference between right and wrong and to act accordingly. People who are brought up with a pernicious ethical view, say a racist one, might end up acting worse than they otherwise would, but they haven't necessarily had their moral agency compromised. It seems that Professor Shiffrin's demand is really that the law must accommodate *moral* moral agency — that is, the moral agency of a person who generally acts rightly, morally speaking. This explains why the demand for accommodation of moral agency is more fully spelled out in terms of three principles that speak largely to the effect on a person's "moral virtue."<sup>4</sup> So what seems salient is not so much a concern about agency as such, but rather the thought that accepting the law and its rationale should not make it hard for us also to do the right thing, ethically speaking. If we could not avow both the law and the truth about ethics without falling into incoherence, thus compromising our agency, that would be bad, but we only reach this possible problem once we have established that it must be possible to avow both the law and the truth about ethics.

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<sup>3</sup> *Id.* at 717.

<sup>4</sup> *See id.* at 718–19.

Professor Shiffrin's focus on moral agency sits well with her theory of promise, which sees the ability to commit oneself through promises as a condition of the development of autonomous agency among equals.<sup>5</sup> That is an original and important theory of promising, but it may or may not be right and I prefer to think that Professor Shiffrin's point has quite general application.

So what first needs to be defended is the claim that the law or its rationale should not make it difficult to act rightly, or decently, or with minimal virtue. Professor Shiffrin's formulations about maintaining moral virtue will strike some people as a bit moralistic. But her case does not depend just on "the intrinsic importance of moral agency to the person" but also on various other bad effects, such as the fact that "a just political and legal culture depends upon a social culture in which moral agency thrives."<sup>6</sup> The way I would like to understand this is as follows: It is myopic to think that we can ignore the law's effects on people's ethical lives — its effects on how they act in extralegal contexts — since there is not going to be any law pursuing aims, or at any rate, any just law pursuing just aims, if people do not make the extralegal decisions necessary to support the maintenance of just institutions over time. Just institutions, especially in a democracy, cannot simply be enforced on an amoral public. In other words, it is a mistake to reason about the law as if it is simply going to be imposed by an omnipotent Hobbesian sovereign. This strikes me as an very important contribution to legal theory in general.

I think it is consistent with Professor Shiffrin's argument, though perhaps not really within the spirit of it, to consider more mundane bad effects as well — such as the effects on overall welfare of people acting, in extra-legal contexts, less well than they otherwise would.

So I am interpreting Professor Shiffrin as proposing that all acceptable normative legal theories will satisfy the following instrumental criterion: the proposed legal structure must not unduly interfere with people living well, ethically speaking. In the context of contract law, since contracts are the very same kind of things as (even if they are not to be called) promises, what has to be considered are the effects of contract law on the aspects of our ethical lives that involve promises. This is a powerful demand, since all varieties of contract theory must respond to it, even those whose proponents have thought that they could leave ethics to another discipline.

Contract theories may be grouped into three main types. Invoking H.L.A. Hart's notion of legal moralism,<sup>7</sup> we can label "moralistic" any

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<sup>5</sup> See *id.* at 714.

<sup>6</sup> *Id.* at 712.

<sup>7</sup> See H.L.A. HART, *LAW, LIBERTY AND MORALITY* 6 (1963).

theory that sees the point of contract law as the enforcement of moral obligations or the promotion of virtue.<sup>8</sup> On such a view, divergence between actually existing contract law and whatever is the truth about promissory morality or virtue would obviously be a problem. But Professor Shiffrin rejects such views on familiar liberal grounds.<sup>9</sup>

Views of the second type ground the justification of the enforcement of contracts in corrective justice: the point of contract law is the righting of — compensation for — wrongful harms. The most obvious position to take within this group, but strangely the one least often defended, finds the normative foundation of contract law in promissory morality and the rights of promisees to performance of the promise.<sup>10</sup> Since, from the moral point of view, promisees are entitled to the option of actual performance, this theory should *prima facie* condemn the common law of contract on the ground that the default remedy for breach should be specific performance rather than expectation damages. But again, for this type of theory we do not need Professor Shiffrin's demand for ethical accommodation to explain why divergence is a problem.

That demand starts to have teeth when we consider another corrective justice view, one which locates the wrongful harm in reasonable detrimental reliance.<sup>11</sup> Despite its sometime popularity, this is an extremely implausible contract theory because it offers no plausible moral account of the underlying wrong that contract law is supposed to correct. We do not have a compelling account of when reliance on another's statements about what they plan to do is reasonable. And it obviously will not do to say that at least we know that reliance on promises is reasonable, since if a promise is involved, the salient harm is the lost expectancy. But leaving its implausibility aside, it is instructive to consider the implication of Professor Shiffrin's position for this kind of view. If we suppose that the reliance position were actually implemented (as it nowhere is) with reliance damages as the default remedy for breach, the kinds of corrosive effects Professor Shiffrin is concerned about would seem to be a real possibility. For though a breaching party could always decide to perform after all or, if it is too late, pay expectation damages, the fact that she knows that her legal duty is only to compensate for detrimental reliance may undermine her

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<sup>8</sup> For an example of the former, see CHARLES FRIED, *CONTRACT AS PROMISE* (1981). For an example of the latter, see James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW* 265 (Peter Benson ed., 2001).

<sup>9</sup> See Shiffrin, *supra* note 1, at 710–14.

<sup>10</sup> See Stephen A. Smith, *Towards a Theory of Contract*, in *OXFORD ESSAYS IN JURISPRUDENCE*, 4TH SERIES (Jeremy Horder, ed., 2000). I believe that part of the argument of FRIED, *supra* note 8, at 16–17, is also naturally read as supporting this view.

<sup>11</sup> See, e.g., P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

understanding of and commitment to what Professor Shiffrin takes for granted as a matter of ethics — that when you make a promise, you should keep it.<sup>12</sup> For example, knowledge of the legal remedy may lead us to think that no wrong is done to a promisee if a promisor warns that he will not be performing before any reliance has occurred.

For a different kind of illustration, suppose that, with contract law as it actually is — expectation remedies are standard — the most popular theory out there is not that of the economists, but that of the reliance theorists. Suppose further that it is widely believed, and stated in judicial opinions, that expectation damages are really just a good proxy for reliance damages in circumstances in which opportunity costs can be assumed to be part of the reliance loss but are hard to verify.<sup>13</sup> The conflict between promise and the rationale of contract law would be stark: the rationale for the law that is offered holds that promisees are wronged when promises are breached to the extent that they have relied to their detriment on the promise. Again, there does seem to be the possibility that this would have detrimental ethical effects.

The third general type of contract theory is made up of instrumental theories of a variety of very different kinds. What unites such views is that they aim neither to promote morally right behavior or virtue, nor to compensate for wrongful harms, but to achieve some general social good. The position Professor Shiffrin outlines in Part V of her Article is in part an instrumental view in my sense, since it identifies as a central aim of contract law providing support for the “political and public values associated with promising.”<sup>14</sup> (Insofar as “protecting parties from the consequences and harm caused by breaches”<sup>15</sup> is also an aim of contract law, Professor Shiffrin’s view is also, in part, a corrective justice view.) My own view is rather similar. Treating the morality of promise as itself parasitic on a social practice that is worth having because of its good effects, I see contract law as valuable primarily because it supports, and in fact partly constitutes, that social practice. Without contract law, many mutually beneficial agreements would go unmade for want of mutual confidence of performance. Professor Shiffrin rejects the practice theory of promise and denies that contract law is, from the point of view of ethical theory, just a requirement of nonideal theory — necessary because without legal sanctions people cannot be counted on to act as they should.<sup>16</sup> But at an

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<sup>12</sup> See Shiffrin, *supra* note 1, at 709–10.

<sup>13</sup> See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 74–75 (1936).

<sup>14</sup> Shiffrin, *supra* note 1, at 752.

<sup>15</sup> *Id.* at 751.

<sup>16</sup> See *id.* at 750–51.

abstract level of legal theory we agree: at least part of the point of contract law is to promote values that promises also promote. Contract theorists that agree with this are unlikely to recommend the kind of divergence between contract and promise that Professor Shiffrin finds troubling.

But of course the most prominent instrumental theory of contract today, that of the economic analyst, justifies institutions of contract law in terms of their contribution to aggregate social welfare, and that justification at no point runs through the instrumental value of the extralegal practice of promising. Here, Professor Shiffrin's constraint is clearly significant, since the values associated with promises are unlikely all to be reducible to considerations of welfare. But even if they were, her constraint would still be significant. Let us suppose that we agree with the economists that welfare is the only relevant value. We can assume also that the practice of making and keeping promises is welfare promoting, just as it stands. Even for a pure welfarist, then, there is reason to look for a set of rules of contract law which dovetail with the practice of promising. In my view, it is a serious failing of standard welfarist accounts of contract that they fail to consider this issue.

Consider for example the exemplary discussion of the economic analysis of contract remedies by Professor Richard Craswell.<sup>17</sup> He convincingly argues that, from the economic perspective, there is no natural, correct remedy; economic analysis is not going to provide a case for choosing one from the familiar list of reliance, expectation, restitution, and specific performance. The correct remedy, if there is a unique one, will be arrived at as the result of a complex all-things-considered judgment, taking into account incentive effects on a range of relevant decisions that contract parties, real and potential, need to make. For all we know, the best remedy, from this perspective, is money damages to the tune of two-thirds of the promisee's expectancy. Now, all this seems entirely right, but it serves to reveal the myopia of the economic approach. Such a contract remedy would be wildly divergent from the ethical norms of promising; it is hard to believe that it would leave the practice of promise untouched. Welfarists ought to consider whether the effects of the legal remedy on the ethical practice would leave us, overall, better or worse off. The answer to this question is not at all obvious, but the latter would seem to be the view to beat. In an informal ethical practice there are no institutions to figure out what two-thirds of a promisee's expectancy is. Looked at from a narrow welfarist point of view, the value of the informal practice of promising seems likely to depend greatly on its simplicity: when a per-

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<sup>17</sup> Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000).

son promises to do something, that means that he should do it. But even if we could replace the ethical practice with something that was just as good, that does not mean that this is what would happen if our contract law diverged sharply from the ethical practice we now have. We would find ourselves most likely with a weakened ethical practice rather than with a different one that was just as strong.

Thus far I have been expressing agreement with Professor Shiffrin's insistence that no theory of contract can ignore the connection between contract and promise. In what follows I will briefly indicate why I doubt that there currently exists any troubling divergence in the United States.

Professor Shiffrin is surely right that one cannot at the same time believe that if you make a promise you ought to keep it and that expectation damages are properly awarded for breach of contract because that gives promisors the right self-interested incentives over the decision whether to perform or breach.<sup>18</sup> So if the theory of efficient breach were generally known, and if judicial reasoning that explicitly invoked the theory of efficient breach were typical, then perhaps there would be a detrimental impact on the ethical practice of promise. But this theory is not terribly widely known. In fact, since expectation damages turns out not to be the only remedy that gives promisors incentives to breach just when that would be efficient,<sup>19</sup> it seems that any threat to the culture coming from the economic analysis of law will in the future have to come from the propagation of the very idea that it is desirable to breach promises when that promotes overall welfare. But if that is so, then the concern, stated at the right level of generality, would be that the entire reductionist project of the economic analysis of law has corrosive effects on the culture.

In any case, Professor Shiffrin seems inclined to accept that distinctively legal rationales may be sufficient to justify expectations damages, rather than specific performance, as the default remedy.<sup>20</sup>

In the case of several other divergences Professor Shiffrin identifies, I am inclined to disagree either with her description of the ethics of promising or her assumptions about the purposes of contract law. I have in mind in particular the general unavailability of punitive damages for breach of contract, the promisee's "duty" to mitigate damages, and the foreseeability limitation on damages. Now, it may be because I am inclined towards a practice-based account of promising, which has the consequence that the "rules" of promising may vary somewhat arbitrarily from place to place and time to time, but my strong sense is

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<sup>18</sup> See Shiffrin, *supra* note 1, at 732–33.

<sup>19</sup> See Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006).

<sup>20</sup> See Shiffrin, *supra* note 1, at 733.

that the ethics of promising is even less determinate than Professor Shiffrin's minimal assumption would have it.<sup>21</sup> Beyond the idea that promises should be kept (barring release by the promisee or some kind of generally recognized excuse), there seems to be significant room for reasonable disagreement.<sup>22</sup>

But my disagreement with Professor Shiffrin is not just that I find doubtful some of what she presents as clearly so. It is that if I had to take a stance it would be one different from hers. The ethics of promising does not provide clear "remedies" for breach in the same sense in which contract law does. If you make a promise you should keep it; we all think that. But if you do not, it is not obvious what you should do about it. Of course if the promisee has handed over money to you in anticipation of your performance, you have to give it back. This much does seem to be common sense, but it may follow from intuitive ideas of property entitlement or unjust enrichment. When it comes instead to the idea of *compensation* for breach, I think ethical common sense typically has nothing much to say. Or if it does, I think what it tells us is that there would be something a little awkward about offering compensation for lost expectancy. Especially when trust was involved, that seems like a bad move, ethically speaking. Professor Shiffrin's discussion of the moral position on foreseeability and mitigation does not ring true to me, and I think this is due to the ethical oddness of trying to "remedy" a breach of trust by offering a substitute for performance.

In some contexts it might be ethically appropriate to offer, in addition to restitution, compensation for reliance damages.<sup>23</sup> I am not sure about this, or about how to explain it if it is true. But if paying over cash to compensate for detrimental reliance is ethically required, what ethical intuitions I have on the matter strongly support some kind of mitigation principle and some kind of foreseeability limitation.

It is true that, especially when trust is involved, the breached-against promisee might feel entitled to some kind of apology or perhaps some gesture in the form of a gift. And it is true that, more than any restitutive or compensatory remedy, these practices seem to serve as an acknowledgement that a wrong was done. Do we run into trouble if the law does not similarly mark out in a distinctive way that a wrong is done when a contract is breached?

I do not think so. The remedial aspect of contract law should be understood primarily as an enforcement device — it aims to force peo-

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<sup>21</sup> *Id.* at 720.

<sup>22</sup> If this is right, contract law is desirable in part for providing greater determinacy in contexts in which that is necessary.

<sup>23</sup> Perhaps this explains Fuller and Perdue's puzzlement about the legal remedy of expectation damages. See Fuller & Perdue, *supra* note 13, at 56–57.



ple to do what they agree to do. Before performance is due, this can be done literally. After the due date, a late (actual) performance may still be possible, together with cash to make up for the costs of the delay to the promisee. And when performance is no longer possible, it is usually possible to give the promisee cash that will have a value roughly equivalent to that of the lost performance. It is precisely because this is the natural way to understand contract remedies that it would be so disruptive to our ethical practice to replace expectancy remedies with anything else.

Overall, the enforcement device that is the legal remedy for breach is worth having because it makes more agreements possible. In contrast with tort law, the point of contract law is neither to coerce people to take the kinds of remedial steps post-breach that would be appropriate in the ethical domain nor to give people *ex ante* incentives to perform their agreements; it is rather literally to force people, within acceptable limits, to keep (some of) their agreements. Nothing corresponds to this in the ethical domain. The fact that contract law does not add to its enforcement mechanism some public sign of disapprobation is not likely, it seems to me, to undermine anyone's sense of right and wrong. After all, there are many ways in which we can wrong people by breaching their trust, and most of them are not legal wrongs at all.

Adequate pursuit of these issues would take me into a much longer discussion of where I agree and where I disagree with Professor Shiffrin on both promise and contract. But the fact that, on my own understanding of the ethics of promise and the point of contract law, current doctrine has no troubling consequences for our ethical lives does not take away from my agreement with Professor Shiffrin's main point. She is right that legal theory cannot simply ignore the effects legal doctrine may have on our ethical lives. And some widely defended theories of contract do run into trouble in precisely this way. Proper appreciation of Professor Shiffrin's main point would, I think, have a significant impact on legal theory generally — and for the better.