THE CONVERGENCE OF CONTRACT AND PROMISE

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

I agree with the general tenor and many of the details of Professor Seana Shiffrin's lucid and closely reasoned account of the relation between standard contract doctrine and the morality of promising. In this brief Response, I take up two points with which I disagree. First, Professor Shiffrin argues that contract doctrine, by making expectation damages rather than specific performance the general or default remedy for breach, diverges from what the morality of promising requires.[1] Second, she makes a similar argument about contract doctrine's imposition of the burden of mitigating damages on the disappointed promisee.[2] In respect to these two arguments she repeats what I think is a frequently made but mistaken argument in the economic literature on promising, which uses these very examples to claim that contract doctrine is not and should not be rooted in the morality of promising, but rather in the economics of efficiency. Professor Shiffrin does not argue for that conclusion. Rather, she would move contract doctrine into closer alignment with what she considers to be the requirements of the morality of promising.[3]

I begin with a general account, one with which I do not suppose Professor Shiffrin would fundamentally disagree, of what I mean by morality and the morality of promising. Every society of any size and complexity, and certainly any such society that seeks the advantages of modernity — such as specialization of functions, accomplishment of time-extended tasks, provision for the future, and accumulation and transmission of knowledge — requires rules to guide the conduct of individuals and to specify the institutions and mechanisms by which those rules are identified, interpreted, enforced, and changed. I think

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[1] *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–24 (2007).

[2] *See id.* at 724–26.

[3] *See id.* at 712–13.

it is an affectation and a quibble to deny these rules the name of law. And to do their work, such systems of rules must display a significant degree of regularity, comprehensibility, and stability — what Professor Lon Fuller has called "the internal morality of law,"[4] a sobriquet that distracts attention from the fact that such a system of rules may be compatible with, and do service to, regimes of very great cruelty, injustice,[5] and oppression.

Morality is concerned with how people should lead their lives and how they should treat each other. The precepts of morality for that reason will address many of the same aspects of behavior that are the subject of rules of law. By morality I do not mean what people think is the way they should live and how they should treat each other, nor how some person or group of persons think people should live their lives. Morality does not in the first degree describe attitudes, beliefs, or demands about these things, any more than mathematics in the first degree is about what people think, teach, or ordain about the domain of numbers and abstract relations. In both cases there is a fact of the matter: the gratuitous infliction of pain is wrong; $2 + 2 = 4$. Only in the second degree is there a subject matter of what people believe and have believed on these scores, and how they come to believe these things. Those inquiries belong to the history, the sociology, the psychology of morals or mathematics, but they are not moral or mathematical inquiries except incidentally.[6] I understand Professor Shiffrin's article to be about morality in the first degree. How else to understand her talk of morality being about people living virtuous lives?

Morality takes as a premise that persons have goals and projects of many sorts. Some of these goals and projects implicate other persons only in the sense that they divert that person's energy from goals that do implicate others. Other goals and projects implicate other persons either by getting in the way of those other persons reaching their goals or by enlisting them in the actor's pursuit. The last is an important, perhaps the most important, subset of human pursuits. That subset may be further subdivided into two different kinds of pursuits: first, those in which an actor enlists others instrumentally in the attainment of his goal, and second, those in which the other person is a constitutive, intrinsic element in that goal. Examples of the first include objectives in pursuit of which the use of a machine or an animal would

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[4] LON L. FULLER, THE MORALITY OF LAW 4 (rev. ed. 1969).

[5] Yes, injustice, and so I deny the claim by some that justice is nothing more than conduct according to a regime of rules, whatever may be their content.

[6] Simon Blackburn, in a recent review in *The New Republic*, quotes Bernard Williams, who "commented dismissively on the 'remarkable assumption that the sociology of knowledge is in a better position to deliver truths about science than science is to deliver truths about the world.'" Simon Blackburn, *No Easy Answers*, NEW REPUBLIC, Jan. 22, 2007, at 29 (book review).

do as well as the use of the other person; examples of the second are any goal that made reference in its very definition to the feelings or activity of another, for instance acts of love, friendship, or sadistic cruelty.

Morality addresses all of these sets and subsets of human activity and human relations. It condemns a way of life indifferent to the well-being of others, and even more strongly condemns pursuits that are constituted by the frustration, humiliation, or destruction of others. By contrast, it enjoins each actor to respect the other's humanity — that is, the feeling, judging, and striving nature of other persons — and celebrates pursuits that involve others not only without disrespecting them (that is, "using" them in Kantian terminology), but also by furthering their own pursuits as they further the actor's pursuit. A string quartet is a paradigmatic example of the last. Trust is the relation between persons who respect each other. It is a relation of mutual respect among persons pursuing individual and common goals.[7] Promising is a deliberate invocation of trust, and breaking a promise is a betrayal of that trust and therefore is immoral.[8] Judging by her other work and the tenor of this article, when Professor Shiffrin invokes morality and the morality of trust, I take her to mean something like this.

When Professor Shiffrin and I (in *Contract as Promise*) relate the legal institution of contract to the moral institution of promising, we see contract as not only an analogy to promising. We see contract and promise not as institutional homonyms for each other, but rather contract as rooted in, and underwritten by, the morality of promising, just as more generally the regime of law and the regime of morality are not mere homonyms. Law can be, should be, but need not be a set of institutions that underwrite, facilitate, and enforce the demands and aspirations of morality in our dealings with each other.[9] It is therefore entirely appropriate that various legal institutions resemble the moral institutions which they partially instantiate. Contract and promise are like that. It is because the legal institution of contract is grounded in the moral institution of promise — as the standard legal doctrine of

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[7] I do not mean a case in which we say of another, "Trust him to do that," where the action is mean or treacherous.

[8] This is a sketch of an argument worked out at greater length in CHARLES FRIED, CONTRACT AS PROMISE 14–17 (1981), and more recently in CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 69–70 (2007). The argument is explicitly and intrinsically Kantian. *See* FRIED, CONTRACT AS PROMISE, *supra*, at 17.

[9] *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 23 (John Ladd trans., Hackett Publ'g Co. 1999) (1797) ("One calls the mere agreement or disagreement of an action with the law, without regard to the motive of the action, *legality*; but, when the Idea of duty arising from the law is at the same time the motive of the action, then the agreement is called the *morality* of the action.").

the subject cited by Professor Shiffrin testifies — that we both expect congruence between the two, but also demand an explanation when the two diverge. It is that divergence that is Professor Shiffrin's subject.

Many theorists of a utilitarian, economic bent[10] explain contract — like many other legal institutions and law in general — in purely instrumental terms, for which efficiency is the compendious explanatory term: how does the institution promote the welfare of individuals, where promotion is defined either in Paretan terms (no one's welfare can be increased without reducing the welfare of at least one other person) or in terms of the Kaldor-Hicks formula (a change must generate enough resources that the winners could compensate the losers, whether or not they do so)? Efficiency theory is, to be sure, a kind of moral theory; it is normative, if not very profoundly so. Other economic theorists of a more positivist bent explain legal institutions, including the institutions of contract, by identifying the groups of persons whose interests appear systematically to be furthered by those institutions. Moral explanations of law are catnip to both kinds of theorists. They delight in the divergences and conclude that they show how morality cannot underlie, explain, or even have anything much to do with law. Once again, Professor Shiffrin's project is to show how the divergence is less than the convergence. And as to those divergences that remain, some are mistaken and should be eliminated in favor of what morality demands (as in the case of seriously intended promises made without consideration),[11] and some can be explained in terms of the different contexts in which they operate. So for instance, the demand for a writing in some parts of contract law responds to the fact that contracts are being enforced by third parties, officials of the state wielding state power, who must be sure of what they are doing.[12] With all of this I agree.

The divergence that most excites Professor Shiffrin is contract law's preference for expectation damages when, she supposes, the morality of promising would demand specific performance. This is the very divergence of which instrumental theorists canonically make their heartiest meal.[13] But to make their point, these theorists invoke far too crude a conception of morality. The case they all talk about is that of the seller who promises (contracts) to deliver 1000 widgets at $2

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[10] *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

[11] *See* Shiffrin, *supra* note 1, at 736–37.

[12] *See id.* at 752.

[13] *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 638–40 (2004); Kaplow & Shavell, *supra* note 10, at 1103–12.

apiece on July 1, but finds that he can make a far greater profit by devoting his distinctive machinery to the manufacture of gadgets uniquely important to another buyer, and is perfectly ready to compensate the original buyer the additional $0.50 the buyer must now spend to get the widget elsewhere. (If it is simply that the market has risen and now another buyer offers $2.50 for the widgets, actual performance and compensation come to exactly the same thing.[14]) Efficiency celebrates breach followed by compensation[15] — this is the doctrine of efficient breach — while morality, so the instrumental theorists proclaim, would demand that the seller doggedly keep his bargain, that he turn out and deliver the promised widgets and frustrate the wishes of the desperate gadgeteer.

This is a conception of morality that I do not recognize. It reminds me of the beautiful Clelia Conti's vow to the Virgin Mary never again to look at her lover Fabizio del Dongo if only her father survives what she supposed was a dose of poison. Her fidelity — almost — to this vow energizes the whole second part of Stendhal's *The Charterhouse of Parma* and includes such fantastical maneuvers as trysts carried out in pitch darkness. But this is not morality; it is magical thinking and a travesty of the account of morality I have offered and I would suppose Professor Shiffrin would offer. Promising is a human institution — albeit a moral one — in which human beings invoke mutual trust and mutual respect to accomplish the human purposes of one or both of them. To be sure, if the seller (or the law) simply blew the disappointed buyer off by telling him that the gadgeteer valued his production more — as might happen by the Kaldor-Hicks test of efficiency when only potential and not actual compensation justifies a change — then the buyer could rightly complain that his trust has been abused, that he has been used to procure an advantage to others.[16] But if he is in business and he is given $0.50 to buy the same widgets on the open market, it is not morality but magical thinking to argue that he has some justified ground of complaint. I suspect many instrumentalists believe that morality is just that, a kind of magical thinking. But Professor Shiffrin knows better.

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[14] *See* Steven Shavell, *Specific Performance Versus Damages*, 84 TEX. L. REV. 831, 847–48 (2006).

[15] Some law and economics scholars have endorsed specific performance on efficiency grounds, especially in the context of unique goods. *See, e.g.*, Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355–65 (1978); *see also* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979). There are, in addition, scholars who argue that expectation damages are inefficient because they do not optimize pre-breach precautions on the part of the promisee. *See, e.g.*, Eric A. Posner, Essay, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 836–37 (2003).

[16] A promise is property, like a call option that can be traded on a futures market and may actually be embodied in a piece of paper.

There is an interesting question, which Professor Richard Craswell notes,[17] whether the greater profit the seller makes on the deal should not belong to the original buyer rather than to the defaulting promisor-seller. The economist-instrumentalist explanation would be that this situation would risk wasting society's resources because it is the seller who is more likely to be aware of the alternative opportunity. The morality of promising offers a different explanation. The original buyer-promisee had, after all, bargained only for the widgets; he had not entered a partnership with the promisor jointly to exploit the seller's facilities and to share whatever gain might be derived from them (not to mention any attendant risks of such an arrangement). Such an arrangement is perfectly easy to envisage, but it is not the one into which the two entered.

In the end, what I suspect lends Professor Shiffrin's complaint plausibility is the well-known fact that rarely do expectation damages make the disappointed promisee completely whole. If he is forced to sue, he will usually not get back his lawyer's fees and court costs, not to mention that he has had to bear the risk of an unjustly unfavorable outcome in that suit. All this is avoided in the case in which the defaulting promisor at the outset offers full compensation measured by the promisee's expectation. That is what the promisor *should* do. That is what morality demands and efficiency does not require otherwise.

The unfairness of saddling the disappointed buyer with his litigation costs is a defect of the American system of justice generally. Unlike the much fairer British system in which the loser pays the winner's costs, American "justice" makes a shibboleth of each party paying his own costs — a shibboleth reversed only in special cases designated by statute. As *Contract as Promise* is not committed to the Panglossian mantra that all is most just in this most just of all possible worlds, I think here is a ripe occasion for reforming the law,[18] though the reform has arrayed against it the formidable political forces of the bar, who wrap themselves in the mantle of equal access to the courts when what they are really concerned about is drumming up more business.

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[17] *See* Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 640–42 (1988); *see also* Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006) (proposing that promisees be given a choice between compelling performance or disgorging the promisor of the gains of a breach, thereby capturing the economic benefits of efficient breach while looking to morality to allocate these gains).

[18] Another place where morality points the way to the reform of actual legal institutions is in respect to gratuitous promises that — if made with sufficient seriousness and reflection — should be as enforceable as those supported by consideration. Professor Shiffrin and I agree about this. *See* Shiffrin, *supra* note 1, at 736–37. I have argued this at length in *Contract as Promise*. *See* FRIED, CONTRACT AS PROMISE, *supra* note 8, at 28–40.

As for the risk of a mistaken outcome that the disappointed promisee is forced to encounter when the defaulting promisor does not tender expectation damages at the outset, that is where Professor Shiffrin's plea for punitive damages has some plausibility.

My argument that expectation damages rather than specific performance is the remedy generally required both by the morality of promising and the efficiency analysis of contract law loses its force when we consider a contract/promise that explicitly provides for specific performance in the event of breach.[19] We do not see many such contractual provisions, and if we did I suspect they would usually relate to performances that are unique or otherwise hard to value, and that is just when both contract law and the moral argument I have been making would require specific performance. But what if we have such a clause in an ordinary sale-of-goods case? Then I am in trouble. I would be inclined to fall back on the nonpromissory and somewhat theoretically desperate notion that unreasonable or unconscionable provisions need not be respected. But the possibility raises a more satisfactory account — that Professor Shiffrin and I really do not disagree that much because in the vast number of cases, the contract does not address the issue one way or the other. Then my rule favoring expectation damages becomes merely a default rule, filling a gap in the explicit bargain, and there is no necessary conflict with Professor Shiffrin's analysis.[20]

A further supposed divergence between the morality of promising and contract law that attracts Professor Shiffrin's attention is the disappointed promisee's duty to mitigate his damages. The economist has little trouble explaining this rule of contract law: it is the promisee who is in the best position to seek out and implement opportunities to mitigate the disappointment he has suffered as a result of the breach. But that explanation does not and should not satisfy Professor Shiffrin, the moralist of promise. Yet here she makes another mistake. She rightly sees promising as a moral and not just an economic institution, but she fails to take into account that promising is not all there is to morality — something I suspect in different contexts she understands perfectly well. Morality, for instance, recognizes a duty to save another from serious loss when the actor can do so with little trouble,

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[19] Thanks to George Triantis for suggesting this point. For an elaboration, see Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004) and Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 516–21 (1989).

[20] There is an enormous law and economics literature on default rules. For recent examples, see Symposium, *Default Rules in Private and Public Law*, 33 FLA. ST. U. L. REV. 557 (2006), and especially Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006), which contains references to leading work in this field.

risk of loss, or harm to himself.[21] The common law does not — except when the person in peril and his potential rescuer have some prior relation, and then law and morality do converge. But is not the disappointed promisee in a position analogous to that of the Good Samaritan, and is not the relation of trust that the moral institution of promising creates between them enough to make the two parties neighbors rather than strangers? The morality of promising is not all there is to morality.[22] Promising is an entailment of the general morality of human concern and respect. Finally, I should say that both in law and morals, the duty of mitigation only arises when the effort is not great, and, I would add (though it is not clear the law follows here), when the defaulting promisor has acted straightforwardly, announced his intentions, and offered compensation.

This conflict between a literalist (I would say magical) and a reasonable conception of promise plays out nicely in that famous legal text, *The Merchant of Venice*. Antonio had borrowed a large sum of money from Shylock and as security gave his bond (promise) allowing Shylock to cut "a pound of flesh . . . Nearest the merchant's heart"[23] in the event of default. When Antonio's ships, quite literally, do not come in, Shylock demands exact performance of the bond (specific performance), even though Antonio's friends are willing to repay the loan — now in default — several times over (expectancy). Shylock refuses. Portia (disguised as a legal expert) first urges Shylock to accept in the famous "The quality of mercy is not strained" speech.[24] But Shylock insists and Portia reluctantly agrees: "It must not be. There is no power in Venice / Can alter a decree established. / 'Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state. It cannot be.'"[25] But she pleads for mitigation:

> Portia: Have by some surgeon, Shylock, on your charge
> To stop his wounds, lest he do bleed to death.
> Shylock: Is it so nominated in the bond?
> Portia: It is not so expressed, but what of that?
> 'Twere good you do so much for charity.
> Shylock: I cannot find it; 'tis not in the bond.[26]

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[21] There are more difficult cases in which the balance is much more even, as well as the claim by some philosophers that we all have a moral duty to help even the remotest persons in need right to the point at which our resources equal theirs. But these are controversial claims.

[22] *Cf. In re* Crisan's Estate, 107 N.W.2d 907 (Mich. 1961) (inferring, absent an actual contract, an obligation on the part of an unconscious patient to pay for medical care).

[23] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, ll. 229–30 (Jay L. Halio ed., Clarendon Press 1993) (1600).

[24] *Id.* ll. 181–99.

[25] *Id.* ll. 215–19.

[26] *Id.* ll. 254–59.

Perhaps Portia's error was to put the cost of mitigation on the disappointed promisee — "on your charge." In the event, she hoists Shylock by his own literalist petard by ruling:

> This bond doth give thee here no jot of blood;
> The words expressly are 'a pound of flesh.'
> Take then thy bond. Take thou thy pound of flesh.
> But in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are by the laws of Venice confiscate
> Unto the state of Venice.[27]

In the end it is not the divergence between contract and promise that is striking but their convergence, and the convergence of both with the economic/efficiency explanation for legal institutions. Moralists often scorn efficiency-like arguments, and economists — who confuse morality with superstition — try to show up moralists as implausible sticklers. But the convergence tells us a good deal about morality and economics. Normative economics is about furthering human goods. Morality too is a human enterprise, and its special case, promising, underwrites human cooperation in furthering human goods, but on terms of equality, trust, and mutual respect. When law diverges from these terms, it should be changed.

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[27] *Id.* ll. 303–09.