The Practice of Promise and Contract

Liam B. Murphy
NYU School of Law, MURPHYL@exchange.law.nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp
Part of the Contracts Commons, and the Jurisprudence Commons

Recommended Citation
http://lsr.nellco.org/nyu_plltwp/458

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracythompson@nellco.org.
The Practice of Promise and Contract

Liam Murphy

1. Contract Theory

A philosophical theory of promising attempts to justify some account of promissory obligation. It does not, at the outset, attempt to justify any particular social practice or set of prevailing ethical commitments. This is why the dependence of promissory obligation on an actual social practice is a discovery worth remarking upon. Of course, one’s beliefs about promissory rights and obligations—beliefs embedded in a social practice—are the initial data from which any theory of promise is constructed. There is nowhere else to start. But in most philosophical reflection about substantive moral issues the prospect of revisionary conclusions is part of the point of engaging in the inquiry. Few philosophers believe that pretheoretical moral commitment or “intuition” should be treated as sacrosanct.

Whatever the right methodology in moral theory may be, it is clear enough that normative legal theory should not treat existing law as presumptively good and seek only to show why this is so. Law is obviously a social, indeed a political, artifact. We don’t need critical theory to tell us that law has a certain genesis and serves certain functions and that it would be

---

1 Herbert Peterfreund Professor of Law and Professor of Philosophy, New York University. Thanks to Oren Bar-Gill, Kevin Davis, Martijn Hesselink, Lewis Kornhauser, George Letsas, Seana Shiffrin, and audience members at the UCL conference and a seminar at the Center for the Study of European Contract Law at the University of Amsterdam for comments and criticism. The support of the Filomen D’Agostino and Max E. Greenberg Research Fund of New York University School of Law is gratefully acknowledged.

pervasive simply to assume that it deserves our approval.\(^3\)

Of course, it is an essential project to uncover the internal normative structure (if there is one) of a particular branch of law in a particular place. Such an understanding is obviously crucial for the making of arguments within that legal practice. But it’s also the right starting point for normative legal theory.\(^4\) Though the main point of normative legal theory as most see it is evaluative, aiming at least to produce criteria by which particular legal doctrines and practices can be judged, it would obviously be a waste of time to try to design an ideal system of contract law (or even to try to come up with a set of goals contract law should serve, leaving the problem of concrete institutionalization to someone else) in ignorance of how societies have been thinking about the topic over the centuries. Though it is possible that all actual contract law is all wrong, it is very unlikely to be so, and any theory claiming this has the burden of explaining how we all went astray. (I think it quite likely that New Zealand was right to abandon the whole of accident law, but we do need an account of why the rest of the world is unmoved by this revolution.) In any event, as with the moral case, where else can we start than with existing ideas about why and how law should enforce agreements?

In practice, the connection between normative legal theory and actual law is often

---

\(^3\) The formalist approach to legal theory of ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995), and Peter Benson’s work on contract theory may seem to reflect a different view. But in the end I do not believe this is the best way to understand their work. On Benson, see note 4 infra.

\(^4\) For some, for example Jules Coleman in tort theory and Peter Benson in contract theory, it’s also the endpoint, at least of their inquiry. Having presented an analysis of the normative structure of tort law, Coleman leaves it to others to determine whether such an institution is worth having; see, e.g., Jules Coleman, RISKS AND WrONGS (2002). And Benson, while arguing that uncovering the implicit normative structure of contract doctrine provides a “public justification of contract,” leaves it open whether this justification can be given a deeper philosophical or moral foundation; see The Unity of Contract Law in PETER BENSON, THE THEORY OF CONTRACT LAW (2001), 118, 124.
stronger than this. It is typical for writers to attempt to fit a theory of, say, contract, as closely as possible to some particular actual legal system, even if their ultimate motivation is critical. This is in a way surprising, since if one sees existing law as just initial data for theory construction, a comparative approach—drawing on as wide a variety of legal systems as possible—would clearly be preferable. But existing English-speaking legal theory, at any rate, is notably parochial. This is probably partly attributable to the prevailing monolingualism of contemporary scholars in the English-speaking world—in stark contrast with what seems to have been the norm a hundred years ago. But it is also surely partly because legal theorists typically have mixed aims. They mostly do wish to advance a normative and not just a descriptive or explanatory legal theory. But by training and profession they also tend to be experts on a particular legal system and so have a natural interest in making reformist proposals that have a chance of success in their own legal world; the closer the evaluative theory matches existing law in a particular place, the more likely arguments for or against reform made in its name will be heeded.

The approach of Stephen Smith deserves special mention. Smith’s discussion of contract theory is offered as an interpretation of existing law, along the lines of Dworkin’s theory of how to figure out the content of the law in force. Such an interpretation, simplifying greatly, aims both to fit the existing legal materials and show them in their morally best light.

---

5 See also Jody Kraus, The Philosophy of Contract Law in The Oxford Handbook of Jurisprudence and Philosophy of Law (Jules Coleman and Scott Shapiro, eds., 2004), 687.
6 A good example is Charles Fried, whose theory in Contract as Promise (1981) leaves him with no choice but to repudiate the doctrine of consideration but who strives to justify as much as possible of the rest of U.S. law on the contract as promise model.
Smith therefore aims to go beyond uncovering the normative structure of contract law; he aims to provide the best available justification for the way that it is. Now Dworkin’s theory of how to determine the content of the law may be correct.\(^8\) But if it is evaluative contract theory we are doing, rather than trying to make the best sense of the law we have, the method of showing existing legal materials in their best light is inappropriate. Evaluative or critical legal theory is not constrained to fit existing materials. Though existing materials are the starting point of the discussion, there is no loss, so far as the theory is concerned, if it explains why some well-established feature of the law should simply be dropped; less fit is not in itself a count against the theory. To use Smith’s helpful taxonomy, I am interested in “prescriptive” rather than “interpretive” contract theory.\(^9\)

2. Legal Enforcement of Agreements

The basic question to ask about contract law is why (some) agreements or promises should be enforced by the state. An answer to this question will provide criteria for determining which agreements and promises should be enforced, and which should not. It will also carry with it an account of what enforcement amounts to: an account of the appropriate remedy for breach.

It might seem that in stating the problem in this way, I have already restricted myself to the common-law world, where it is entirely natural to lawyers and theorists to think of contract law in terms of the enforcement of agreements and promises, and left behind the civil-law tradition, in which the question is typically posed as one about the conditions under which a

\(^{8}\) For discussion, see Murphy, *What Makes Law* (forthcoming, 2013)

\(^{9}\) *Smith, supra* note 7, at 4.
person has taken on a legal (contractual) obligation. But the difference is actually superficial, since even if we don’t think of contract law in terms of the enforcement of independently existing promises or agreements that might have moral force, contractual obligations everywhere are legal obligations to perform one’s side of an agreement or stand-alone commitment. Whether or not we think of contract law as arriving on the scene of a moral practice of making promises and agreements and choosing to add legal force to some of them, we can agree that contract theory aims to provide normative foundations for the type of legal institution that enforces (some) agreements and unilateral undertakings.

For a body of law as comparatively settled as contracts, it is perhaps surprising that so many very different answers to the basic questions have been proposed. But then perhaps it is not surprising: like property, contract is a fundamental legal category and a lot is at stake here for a society’s moral and political self-understanding.

We can organize the most important options in contract theory into three broad camps. First, there are moralistic accounts—those that see contract law as aimed at either enforcing moral obligation or promoting a virtuous character. Second, there are corrective justice accounts, according to which the aim of contract law is to allow the victims of a certain kind of wrongdoing to extract compensation (rectification) from the wrongdoers. Last, there are instrumental accounts, which find the point of contract law in the morally significant social effects that flow from it. One might of course subscribe to some pluralistic mix of some or all of these basic types, but I will first introduce each type in its pure form.

The labels could mislead. Though I label only the first view (and this somewhat
tendentiously) moralistic, all the contract theories I consider are grounded in considerations of political morality. Even the economic theory of contract, despite the ideological disavowals of some of its practitioners,\textsuperscript{10} depends on the assumption that economic efficiency is a value legal institutions should promote. And of course all corrective justice views are moral views. What makes the first group of views worthy of the label “moralistic” is that they understand the point of contract law to be the enforcement of moral obligation, or the promotion of virtue, for their own sake. The distinction is familiar from criminal law theory. All accounts of criminal law attempt to provide moral justification for this most coercive branch of the law. And all agree that most defensible criminal prohibitions dovetail with what most people would acknowledge as their moral obligations. But only the kind of view H. L. A. Hart called legal moralism will hold that the point of the criminal prohibition is to enforce the associated moral obligation.\textsuperscript{11} On instrumental accounts, to take one contrasting case, the content of the law is justified because and to the extent that enforcement of these criminal duties does some good.

If all contract theories are at the broadest level grounded (in part) in moral theory, it is also true that there is a sense in which they are all instrumental: They hold not that the legal regulation of agreements has intrinsic value but rather that it is valuable as a means to certain good effects—including, perhaps, the enforcement of moral obligation.\textsuperscript{12} Those theories I label instrumental are so in a more particular, narrower sense: they reject the idea that the point of

\textsuperscript{10} See, e.g., RICHARD POSNER, PROBLEMATICS OF MORAL AND LEGAL REASONING (2002).

\textsuperscript{11} See HART, LAW, LIBERTY, AND MORALITY (1963). For defense of legal moralism in the criminal law, see MICHAEL MOORE, PLACING BLAME (1997).

\textsuperscript{12} Even Ronald Dworkin’s theory of law, which perhaps has more to say about the value of law than any other, is instrumental in this sense: the ordering of social life through law is not intrinsically valuable, rather, its value lies in its role in creating a certain kind of political community. See RONALD DWORKIN, LAW’S EMPIRE (1986); Ronald Dworkin, \textit{In Praise of Theory} 29 Ariz. St. L. J. 353 (1997).
contract law is to do justice to the moral dimensions of the relationship between the parties.
Thus they deny that the point of contract law lies with the moral standing of the promisor (the moralistic view) or with the rights and legitimate interests of the promisee (the corrective justice view). Rather, they find the point of contract law in society-wide morally significant consequences. It is appropriate to call such theories instrumental, because they treat as mere instruments in service of an entirely distinct goal legal rights and duties that most people, on first thought, would treat as tracking real and significant moral rights and duties held by the parties to the agreement against each other.

I favor an instrumentalist contract theory, though not of the narrowly economic variety. I begin with a review of the most important alternatives on their own terms. Much of the argument that follows does not depend upon any particular account of promise.

3. Moralistic Contract Theory
Charles Fried’s main aim in Contact as Promise is to establish the centrality of promise to contract theory. His sets himself against those who downplay the importance of promise to contract either by taking a purely instrumental view in which the morality of promise does not figure, or by explaining contract in corrective justice terms but with reference to the promisee’s reliance rather than expectation interest.

In Fried’s account of promise, the value of the practice lies in its contribution to human autonomy: In providing a mechanism whereby people can secure others’ trust and therefore cooperation, the practice expands freedom. But Fried does not explain the obligation to keep
promises instrumentally, in terms of the promotion of autonomy.\textsuperscript{13} Rather he gives a
deontological account of why it is wrong to violate the rules of the practice. To do so is to
intentionally invoke another’s trust and then abuse it, and to do that is to use a person, in the
Kantian sense—to fail to show them appropriate respect.\textsuperscript{14} Now this account of promissory
obligation is subject to essentially the same circularity problem faced by non-practice
accounts.\textsuperscript{15} We might think that trust can be invoked out of thin air if a promisor can give moral
grounds for the promisee to expect performance.\textsuperscript{16} Fried claims that this happens
automatically. “An individual is morally bound to keep his promises because he has
intentionally invoked a convention whose function it is to give grounds—moral grounds—for
another to expect the promised performance.”\textsuperscript{17} The trouble, the circle, is that there are no
moral grounds to expect performance unless the individual is already bound to keep his
promise.\textsuperscript{18}

Be that as it may, it is plain that Fried takes the conclusion of his account of promise to be that promisors have a deontological obligation to perform and that promisees have the
correlative right to performance. Fried’s discussion of contract law starts downstream of this
moral conclusion. And is not undermined by his unpersuasive argument for that conclusion,

\textsuperscript{13} Thus Richard Craswell’s characterization of Fried’s theory of promise (and contract) as an “autonomy” theory, in Contract Law, Default Rules, and the Philosophy of Promising 88 Mich. L. Rev., 489 (1989) is misleading. Unfortunately, this terminology has been widely adopted by contract theorists.

\textsuperscript{14} Fried, supra note 6, 16-17. For sympathetic discussion, see Dori Kimel, From Promise to Contract, chap. 1 (2003).

\textsuperscript{15} See Niko Kolodny and R. Jay Wallace, Promise and Practice Revisited, 31 Phil. & Pub. Aff. 119 (2003); Murphy, supra note 2.

\textsuperscript{16} Though even in that case I do not think that trust will automatically generated.

\textsuperscript{17} Fried, supra note 6, 16.

\textsuperscript{18} Stephen Smith makes essentially the same objection to Fried’s account of promise in Towards a Theory of Contract, in Oxford Essays in Jurisprudence, 4th Series (Jeremy Horder, ed.,2000). But he takes it to undermine Fried’s contract theory, which I do not.
since there are other ways to argue for a deontological basis of the duty to keep promises—even others, such as Rawls’s, that also invoke the value of the practice of promise.\textsuperscript{19}

What is most important in Fried’s contract theory, and what justifies treating his as the exemplary moralistic account, is the focus on the moral obligation of the promisor as the main justifying ground of contract law.

The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case—that special case in which certain promises have attained legal as well as moral force. But since a contract is first of all a promise, the contract must be kept because a promise must be kept.\textsuperscript{20}

The message is clear enough. Just as legal-moralist theories of criminal law hold that the legal duty not to murder has as its point the enforcement of the moral duty not to kill, moralistic contract theory holds that the legal duty of contractual performance has as its aim the enforcement of the moral duty of performance of promise.

Fried believes that the standard common law remedy for breach of contract, expectation damages, achieves this aim: “If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance.”\textsuperscript{21} Fried’s advocacy of expectation damages has drawn considerable criticism, not all of which is effective.\textsuperscript{22} The main question to ask is why, if

\begin{flushleft}
\textsuperscript{20} Fried, supra note 6, 17.
\textsuperscript{21} Ibid.
\textsuperscript{22} See Richard Craswell, supra note 13, and Against Fuller and Perdue, 67 Univ. of Chi. L. Rev. 99 (2000); Gillian Hadfield, Of Sovereignty and Contract: Damages for Breach of Contract by Government, 8 S. Cal. Interdisc. L. J. 467 (1999). Craswell’s well-known complaint that the remedy of expectation damages “cannot be derived solely from
enforcement of moral obligation is the aim, the appropriate remedy is not to be figured out on retributive and/or deterrence grounds. Whatever normative force we give to the boundary between criminal and civil law is irrelevant here, since the civil law does have the option of punitive damages.

An argument can be made for the nonpunitive remedy of specific performance. In the case of a promise, there is a very straightforward way in which the obligation can be enforced by law: the state can force the promisor to perform. In this respect promissory obligation differs from most of the obligations the legal moralist takes to be the business of the criminal law, which may only be “enforced” by way of deterrence and retribution. Though in some cases the time for performance without loss to the promisee has passed by the time of litigation, when that is not the case the injunction simply is the legal enforcement of the moral obligation. Of course, one could go further and argue for a punitive sanction for all who waver in the performance of their obligation, but the very idea of legal enforcement of moral obligation does not require that purely retributive element.

Moralistic theories do face a further decision: Should the court’s order of performance be backed up with the full range of criminal sanctions, including imprisonment, as is the case in Germany and, in principle, in the common law world via the mechanism of criminal contempt of court, or should only some weaker civil enforcement of the injunction be available, as in France?\textsuperscript{23} But this is a choice about the lengths to which the law should go in enforcing courts’ injunctions, or this one in particular, not a choice about whether the enforcement of

\textsuperscript{10} the value of individual freedom and autonomy,” Craswell, supra note 13, 517, misreads Fried as offering an instrumental account of promise and contract. \textsuperscript{23} On France and Germany, see HEIN KÖTZ AND KONRAD ZWEIGERT, INTRODUCTION TO COMPARATIVE LAW (1998).
contractual obligation should be inherently punitive, since in all cases the promisor will be in the clear if she complies with the injunction.

So a good case can be made for a natural association between moralistic contract theory and the remedy of specific performance. Whether or not legal enforcement of promissory morality should go beyond this, it should do at least this much. The relevant complaint to make against Fried’s discussion in *Contract as Promise* would seem to be that he ignored the important differences between specific performance and expectation damages from the promisee’s point of view.\(^{24}\) Expectation damages aim to put the promisee in as good a position as she would have been in had the promise been performed, and so in that sense they are ideally the financial equivalent of the promised performance for the promisee. But in a situation where a promisor could commit the promised performance to a higher-paying third party, pay expectation damages to the original promisee, and still come out better off, paying expectation damages is not the equivalent, for the promisee, of performing as promised.

In his most recent writing on this issue Fried suggests that expectation damages are best understood as a default rule, justified as the rule that most parties would choose or on instrumental grounds.\(^{25}\) (I discuss the idea that the remedy for breach is for the parties to determine *ex ante* below.) This does not mean that Fried thinks that nonperformance is not always morally and legally wrong.\(^{26}\) The promisor should keep his promise. But if he does not,


\(^{26}\) Courts typically do not have to take a stand on that precise issue, since, in the common law world, the expectation damages rule is so well entrenched. But there is usually a way for foundational issues to make it to the surface of doctrine: In the wonderful case of Ahmed Anguilla Bin Hadjee Mohamed Salleh Anguilla v. Estate and Trust Agencies (1927) Ltd., [1938] A.C. 624, the question was whether the executor of an estate was required to
and legal enforcement is required, and the parties have not stipulated specific performance in advance, then an accurate award of expectation damages gives the promisee no more nor less than was agreed to.\(^\text{27}\)

In any event, the important objection to the moralistic theory lies not with its implications for the remedy, but, in its very foundation as an application of legal moralism to contract law.\(^\text{28}\)

Fried writes that, “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.”\(^\text{29}\) It is this view about the proper role of legal coercion that sets Fried’s contract theory apart in a special category and, for many of us, allows us to set it aside. For Millian liberals, who reject coercion merely for the sake of improving a person’s own welfare, or enforcing their obligations, or making them more virtuous, the moralistic view of contract law does not get off the ground.\(^\text{30}\)

Having said this, it seems clear that Fried does not regard the enforcement of people's obligations just for its own sake as the sole point of contract law. He clearly regards more ordinary instrumental benefits as part of the point.\(^\text{31}\) Perhaps if it did not also produce
significant economic benefits a legal apparatus that enforced promissory obligation would not be worth the cost. Furthermore, much of what Fried writes aligns him closely with the broadly Kantian, expectation-based corrective justice view defended by Ernest Weinrib, discussed in the next section. So we should class Fried as a pluralist contract theorist—but as one who nonetheless stands out for holding that one aim of contract law, an aim that constrains its content, is the enforcement of promisors’ moral obligations.


Corrective justice views of private law see the point of contract, or tort, as the righting of wrongs in the particular sense of compensation for, or undoing of, the harm suffered as a result of another’s wrongdoing. Taking this perspective on contract law, our focus is on the promisee. As we know, corrective justice accounts of contract could understand the wrong done to the promisee as lying with his expectation or performance interest or instead with his reliance interest.

There are at least two importantly different ways a performance-interest account could be further spelled out. The first is that promises transfer property rights from the promisor to the promisee.

Peter Benson’s brilliant, though to my mind Quixotic,32 reconstruction of common law contract doctrine along these lines—finding the essence of contract in the transfer of personal

---

32 Benson goes so far as to attempt to provide an independently plausible normative rationale for the common law doctrine of consideration. The Idea of Consideration 61 U.T.L.J. 241 (2011). For many contract scholars, this is almost a reductio ad absurdum of Benson’s project.
proprietary rights\textsuperscript{33}—is limited in its justificatory aims, since his project is to uncover the normative structure of contract doctrine.\textsuperscript{34} To take this line of thought further, so that it generates standards for the evaluation of contract law rather than a thick description of it, we would have to agree that the transfer of rights recognized by contract law flows from the morality of property. I have rights to my person and my legitimately acquired holdings, and implicit in these rights is the right to alienate them. Two wills are required for the effective transfer of the right, since we cannot force property rights on others without their consent. When two wills have joined in an agreement, or a gratuitous promise (on this view, gratuitous promises must be accepted by the promisee to take effect, as Kant emphasizes and civilian contract law requires), the promisee acquires a new right, and if the promisor fails to perform, she violates that right. Contract law ensures that such wrongdoing is appropriately compensated. There is no mystery about what form that compensation should take: it should undo the violation of right by requiring performance or something just as good, along with disgorgement of any profit made by the promisor from violation of the promisee’s property right.

My own objection to this approach is again fundamental: I reject moral property rights in the Lockean sense, and especially the idea of self-ownership.\textsuperscript{35} So though it is true that if natural property rights along Lockean lines made sense, then the right to alienate would be a natural implication that would offer a straightforward justification for contract law, I cannot accept the foundations of this argument. A defense of this rejection of the Lockean view is

\textsuperscript{33} See Peter Benson, \textit{Contract as Transfer of Ownership}, 48 Wm. & Mary L. Rev. 1673 (2006-2007).
\textsuperscript{34} See Benson, \textit{supra} note 4.
obviously beyond my scope here. But even apart from this theoretical objection, there is a
prima facie oddness to the assimilation of contract to property since contracts for services are
not most naturally thought of as transferring a property right to (some part of) a person’s
freedom of action.

The second possible expectation-focused corrective justice account is on its face much
more plausible. Instead of locating the relevant moral interests of promisees in the morality of
property, it lays out an independent morality of contract.

The kind of view I have in mind is set out with exemplary clarity by Ernest Weinrib.\textsuperscript{36}
The aim of providing a remedy for breach of contract, on this view, is to restore to the plaintiff
that which is rightfully his; specific performance or expectation damages do this, and are thus
the proper remedies. The promisee’s right under a contract is not a property right, or any kind
of right to the subject-matter of the contract. Rather, as Kant emphasizes, the promisee’s right
is to the promisor’s performance.\textsuperscript{37}

Now this kind of view makes excellent sense of the structure and content of contract
law as it is found virtually everywhere, including the fact that contract remedies are not
generally aimed at punishment of the promisor, or disgorgement of her gains. Contract
remedies simply require the promisor to give to the promisee what was rightfully his all along,
the promised performance or its monetary equivalent. But such a view depends upon an
independent account of why exactly a promisee acquires a right to the promisor’s performance.

The inspiration for this kind of view is Kant’s remarks on contract in the \textit{Metaphysical

\textsuperscript{37} \textit{Ibid.} 67; see Kant, \textit{The Metaphysics of Morals} 6:273.
Principles of Justice. But what Kant writes is very disappointing, since it too is heavy on form and light on justification. We are told that the simultaneous joining together of two wills in contract transfers a right. (Kant’s philosophical exertion is limited to an almost parodic transcendental argument that two empirically nonsimultaneous assents must be conceivable as noumenally simultaneous, lest contract be impossible.) While contract as the joining of wills may be a satisfactory descriptive account of some legal regime, it fails to explain why such a regime would make sense or be desirable.

The natural place to look for such a justification would be in the morality of promise. But there is no plausible deontological account of promise that would establish that promisees have a right to the promised performance. Rawls’s practice-based account of promise does provide a deontological reason for keeping a promise: someone who makes, and then breaks, a promise can be seen as free-riding on a beneficial social practice in which he participates voluntarily. This is an attractive account of the morality of promise and it does ground a deontological reason for fidelity to promise. But that reason relates to the interests of everyone engaged in the practice; it does not ground an account of why breach violates the rights of a particular promisee. And of course a practice-based account of the purely consequentialist variety does not ground a deontological reason for fidelity to promise: the reason to perform promises made, is there is one, turns on the harm that noncompliance would do to the valuable social practice.

For all practice-based accounts (other than Fried’s, discussed above) the reasons to keep

---

38 See Murphy, supra note 2.
a promise—one made at arm’s length, at any rate—relate to the practice of promising at large, and are not grounded on the rights or interests of the promisee. In the case of promises made to intimates there can be special kinds of expectations the disappointment of which would do significant harm. But there is no reason to think that the harm nonperformance would do is just the same as the loss in value to the promise from nonperformance.\(^3^9\)

It is no doubt because Fuller and Perdue did not consider the possibility that promisees simply had a right to performance that they believed that expectation damages to be, on the face of it, an unjustified remedy. They declare that the expectation interest of promisees has very little moral importance.\(^4^0\) The way they write about it, it is as if unfulfilled expectations on the part of all promisees should be likened to a child’s disappointment at not getting a promised ice-cream. But on the corrective justice view, the remedy of expectation damages is appropriate not because the promisee has a specially valuable interest, or because she will suffer a loss from nonperformance, but because she has a right to performance. Just as, if we believe in property rights, restoring my stolen property is morally appropriate (since I have a right to the property) even when the loss did not set back my welfare interests at all.

Similarly, Joseph Raz argues that expectation damages for the sake of the promisee alone (as opposed to the social good) are incompatible with Mill’s harm principle.\(^4^1\) As with Fuller and Perdue’s discussion, Raz here seems to believe that expectation losses, since they are in an important sense hypothetical, measured against a baseline of what might have been, are not real harms. On the corrective justice view now being considered, we are not looking to

\(^{3^9}\) See Murphy, supra note 2.


\(^{4^1}\) See Raz, supra note 28.
prevent material harm, but protect rights.

It is worth pointing out that Fuller and Perdue’s skepticism about the importance of the promisee’s expectations is fully compatible with recognizing that promisees under a valid contract have a legitimate expectation of performance. A promisee’s legitimate expectations can be understood to flow not from the promisor’s natural duty to perform, but from her participation in a legitimate practice justified on other grounds. Where contract law must be justified on other grounds, promisees’ expectations, even though they are legitimate once the system is up and running, do not provide any additional justification for having such a system. We mustn’t confuse a moral side-effect of the system with its underlying justification. Take a welfare system that is justified by some account of social justice. Individuals living under that scheme have a legitimate expectation to the delivery of what they are legally entitled to. But those expectations do not explain why the welfare system is a good idea. The key point to make about Fuller and Perdue, then, is that they simply did not consider that contract law might be justified as a way to enforce the independently generated right of promisees to the promised performance.42

I conclude that Weinrib’s Kantian corrective justice account is the most eligible candidate non-instrumental contract theory, particularly in making sense of existing law is such a clear and compelling way. As a normative reconstruction of the law—which may also be all that either Kant or Weinrib thought believed they were offering—it is far superior to accounts that link contract to property, or, the account we turn to next, those that focus on reliance. The

42 See Weinrib, supra note 36 at 63-4.
problem with this account is where it stops. It offers no argument at all for the idea that all
promisees have moral rights that it is the business of the law to protect. I cannot defend the
claim here, but it is my view that promisees have no such rights.

5. Corrective Justice II: Compensation for Detrimental Reliance.

Though in the end I agree with Fuller and Perdue in rejecting an expectation-focused corrective
justice account, I cannot see any plausibility in the view they put in its place—the idea that
contract law is about compensation for detrimental reliance.

Despite its popularity in the twentieth century, and despite its affinity with the U.S.
doctrine of promissory estoppel, the “reliance theory” of contract is perhaps the least plausible
of the views considered so far. The only way it can be saved from incoherence is by
transforming into a view that no one could accept.

In a nutshell, the theory is that breach of promise (usually) causes reliance losses, that
the wrong inflicted on the promisee just is the infliction of these losses, and that therefore
corrective justice requires their compensation, which is what contract law aims to ensure. In
justification of this account, one could put forward the moral view that any induced reliance is
the responsibility of the inducer, independent of promise. If Bruce induces Alice to buy an
aeroplane ticket to Australia by saying in public that he is on his way there, Bruce is responsible
for Alice’s loss if he fails to go. But it’s pretty clear, I think, that this is an unacceptable moral
view—our responsibility for losses others incur in reliance on their expectations about what we

19
will do cannot possibly be as extensive as this.\textsuperscript{43} There are legal doctrines, such as the recently forged Australian doctrine of “equitable estoppel” which recognizes a (very limited) cause of action for reliance damages in the absence of promise, and some have defended this doctrine by appeal to an entirely general principle of responsibility for induced reliance.\textsuperscript{44} But if ever a flood-gates objection were appropriate in legal argument, it would be here. (The Australian doctrine stops the flood by including unconscionability as a condition of recovery.)\textsuperscript{45}

The way reliance theorists of contract typically limit the scope of compensatory responsibility is by insisting that it is only reliance on promises that counts. Not all reliance is the responsibility of the inducer of it, only that induced by promise. But this, presumably, can only be because the promisor ought to keep his promise.\textsuperscript{46} And if that is right, it is hard to see why the responsibility of the promisor is limited to reliance losses—if the promise is the ground of the responsibility in the first place, why is the promisor not responsible for the promisee’s expectation losses? So the problem with the reliance theory is not just that it implies a remedy, reliance damages, that is nowhere awarded for breach of contract (the U.S. doctrine of promissory estoppel providing only a partial exception), though that is very important; the problem is rather that the very idea that promises (alone) generate responsibility for reliance losses makes little sense.

Patrick Atiyah attempted to avoid this problem by taking a formal view of the role of

\textsuperscript{43} See Murphy, supra note 2.
\textsuperscript{44} See Michael Spence, PROTECTING RELIANCE (1999).
\textsuperscript{45} See Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 62 ALJ 110.
\textsuperscript{46} Fried, supra note 6 at 10-11, 20, makes all the important points about reliance theories with great clarity.
promise in contract.\textsuperscript{47} Atiyah recognized that not all induced reliance could be the responsibility of the inducer of it; on his view, responsibility is limited to cases of reasonable reliance. And the relevance of a promise, on his account, is not that the moral force of the promise itself generates responsibility for reliance, but rather that to make a promise is to “admit” that reliance is reasonable. But a promise doesn’t at all seem like an admission. And even if it were, admitting one is responsible doesn’t make it so. Generally, one’s responsibility is not determined by what one declares one is responsible for.

6. Instrumental Contract Theory

If contract law is not grounded in the idea that the moral obligation to keep promises should be enforced by law, or that the law should protect and compensate for the violation of the rights of promisees, we are left, by process of elimination, with instrumental accounts. Contract law does not have as its main justification some goal of policing the moral significance of the relationship between promisors and promisees, but rather one of promoting, protecting, and policing the social practice of making and keeping of agreements and promises.

The most popular instrumental theory is that of the economic analysis of law. Many articles on contract theory contrast the economic approach with that of the philosophers. That is seriously misleading, since the economic approach needs to be just as philosophical as any other if it is to provide a justificatory or critical account of contract law. Defense of the economic approach requires an argument of relative plausibility: Do we have more reason to

\textsuperscript{47} See Patrick Atiyah, Promise, Morals, and Law (1983).
embrace this particular instrumental contract theory as opposed to some other, or some noninstrumental account? The answer to this question cannot be determined by declaring disciplinary affiliation.

I agree with economic analysts that the best contract theory will not try to track the moral duties and interests of parties to particular agreements but will rather take a broader view, finding the point of the institution in the overall social good it produces. What is wrong with the traditional economic approach is its impoverished criterion of the social good—that of economic efficiency. Economic contract theory is a very strong theory, in the sense that it tries to justify a lot with extremely little; on the face it, it would be surprising if the resulting account were adequate.

This is not the place to review the deficiencies of economic efficiency as a social aim. There are reasons why economists abandoned a more plausible version of welfarism that allowed for comparisons among people’s absolute levels of welfare and thus also distributive information—reasons having to do with misguided worries about the “meaningfulness” of interpersonal comparisons of welfare and excessive appreciation for the theorems of welfare economics. But suffice it to say that the instrumental approach to contract theory I embrace does not limit itself to economic efficiency as the proper aim. The aim of contract law, on any instrumental theory, is to make things go better. In my view the proper aim is plural, comprising total or average welfare and its distribution along with nonwelfarist aspects of social justice such as equality of social status, as well, perhaps, as the prevention of the unfairness that

---

48 See Amartya Sen, On Economic Inequality (2nd ed., 1997).
results from free-riding on a fair practice.\textsuperscript{49}

Economic analysis of law makes its invaluable contribution to instrumental contract theory not by postulating an impoverished account of the social good, but in offering the only sustained attempt at explaining how legal rules affect behavior.\textsuperscript{50} Any instrumental theory of any area of law requires a theory of how law achieves good things. The only way changing law can make things better is by inducing people to act in ways that make things better; so any instrumental theory of contract law requires a theory of behavior. Only economic theory has attempted to explain just how legal rules affect people’s decisions about how to act. It is here also that contemporary economic analysis is making the most progress in recent years, moving beyond the implausible assumption that people always react to legal rules as prices affecting their rational calculations of self-interest. Behavioral law and economics attempts to take into account the rather obvious fact that we are not always fully rational.\textsuperscript{51} And very recently Rebecca Stone has made the crucial step of acknowledging the equally obvious fact that people don’t always simply react to legal rules as prices. Stone offers us a theory of how to model behavior of those who accept legal rules, in H.L.A. Hart’s sense of treating them (for some reason or other) as providing standing reasons for action.\textsuperscript{52}

Any instrumental contract theory must draw heavily on the contributions of the

\textsuperscript{49} From the point of view of individual morality, a deontological duty not to free ride on a fair practice may have great weight for a participant in the practice. But from the point of view of third parties and the law, the importance of preventing the unfairness that results from free-riding may be insignificant compared to the beneficial effects of the practice itself. A full account of the social goods contract law should be aiming at, including their relative weights, is beyond the scope of this chapter.


\textsuperscript{51} For a state of the art study, see OREN BAR-GILL, SEDUCTION BY CONTRACT (2012)

\textsuperscript{52} Rebecca Stone, \textit{Economic Analysis of Contract Law From the Internal Point of View} unpublished ms. (2013).
economic analysis of contract law as many of its results are easily generalizable to instrumental accounts generally. But on one topic—the foundational topic of remedies for breach—the influential idea of efficient breach has led many astray. The points I will make about efficient breach are not especially novel, but it is worth rehearsing them to highlight the danger of myopia in instrumental legal theory—by which I mean a tendency to apply the analysis retail, forgetting that it always the entire scheme that requires justification.

7. Instrumental Remedies.

There are two rather different ways of conceptualizing the issue of the choice of contract remedies. We could, first, see the remedy as supplied by the law in just the way tort remedies are: this is what you get if the other side breaches. Call this the fixed remedy approach. The alternative is to regard the enforcement of agreements—specific performance—as the inescapable background remedy. We then allow that parties have the option to choose ex ante, within limits, a noninjunctive remedy, or the ex-post option of one, as a term of their contract. Call this the model of remedies by agreement. (Though that is potentially misleading in that the model of course builds on the fixed remedy that the agreement will be enforced as written. The idea that the remedy for breach is or should be entirely up to the parties—all the way down, as it were—is incoherent.\footnote{See T.M. Scanlon, Promises and Contracts in BENSON, supra note 4, 107.}) The two models can overlap. Suppose it is said that the fixed remedy supplied by law is expectation damages. We could also present this in terms of the model of remedies by agreement by saying that expectation damages is a mandatory term

---

\footnote{See T.M. Scanlon, Promises and Contracts in BENSON, supra note 4, 107.}
of all agreements.

On the whole, since contract law in most places allows some control over remedies by the parties, the model of remedies by agreement allows for more clarity. Recent economic analysis of contract remedies tends to employ this model.

There is a potential problem, however, with the remedies by agreement model, which is that it might be thought to countenance unjustified interference with the judicial role. Parties might agree to punitive damages but, it could be said, courts cannot simply be required to honor that agreement. But it is implausible to think that any agreement on remedies is an infringement on the proper authority of the courts. When the U.S. government enters into procurement contracts, it generally insists on a “termination for convenience” term that stipulates that the government can cancel at any time, incurring liability for reliance losses only.\footnote{For discussion, see Hadfield, supra note 22.} There is nothing objectionable about the courts honoring such a term. The concern about judicial authority is better expressed this way: the law can always legitimately set limits to what terms (remedial or otherwise) it will enforce.

Now the termination for convenience clause found in government contracts might be understood not as an agreement about the remedy for breach, but as a promise in the alternative: the government will either perform or cover its contract partner’s out of pocket expenses. Perhaps. But not all limitations on damages can be seen that way—thus for example the very common exclusion of consequential damages is clearly an agreed limitation on the remedy available in the event of breach.
Using the model of remedies by agreement, what remedy does the economic analysis of contract law recommend? It was once thought that since expectation damages gave efficient incentives for the decision whether to perform or breach, economic analysis supports the common law’s mandatory remedy of expectation damages. (More fully, the mandatory remedy is expectation damages or less, as the parties might agree ex ante, with injunctive relief potentially available at the discretion of the court where money damages are clearly inadequate). But it was quickly pointed out that the decision whether to perform or breach was just one decision contract parties or potential parties had to make; others include how much to spend in reliance on the other party’s performance, with whom to contract, whether to enter a contract at all, and so on. Work has been done on what might be the efficient remedy in respect of the incentives provided for these other decisions. It seems clear that it will be impossible to come up with an answer to the question of what remedy is efficient, all relevant decisions considered. But the main point to make about the economic theory of contract remedies is not that it is indeterminate, but rather that, as Craswell has so clearly explained, there is no reason to expect that the efficient remedy will line up with one of those standardly discussed by contract theorists.\textsuperscript{55} In particular, there is no reason to think economic analysis would be able to justify the performance or expectation damages remedies provided for breach of contract everywhere. For all we know, Craswell writes, the most efficient remedy, all things considered, might be 66% of expectation damages.

Be that as it may, there is a fundamental and important problem in the text-book

\textsuperscript{55} See Craswell, supra notes 13 and 22; Craswell, “Two Economic Theories of Enforcing Promises,” in Benson, supra note 4.
presentation of the argument that expectation damages is efficient with respect to the decision whether to perform or breach.

The text-book argument that expectation damages provide the right incentives for the decision whether to perform or breach is familiar. The right incentive is one where a party will be moved to breach just in case breach leaves at least one person better off and no person worse off than performance would; that will be a Pareto improvement. Under the common law, this is exactly the incentive parties have, since they will be moved to breach just in case this will leave them better off even after paying damages that aim precisely to leave the promisee no worse off than performance.

Now there is considerable discussion about whether specific performance would do just as well as expectation damages, since the original promisee may be able to deal with a higher-valuing third-party, and even if not, the two original parties may be able to reach a deal that will release the original promisor. Everything turns on what we believe about the ability of courts accurately to determine expectations damages, relative to the outcome of the parties’ bargain over release from an injunction, and the relative costs of these two processes.56 But my issue with traditional efficient breach analysis is different. It is that there is no reason why the interests of the original promisee should be singled out as especially important.

Under either the Pareto or Kaldor-Hicks criteria of efficiency, an efficient breach is one that yields enough surplus to the promisor that would enable him to fully compensate the promisee for his lost expectancy. But the question is this: Why should the promisee’s

expectancy as measured against a baseline of the contract be of any significance at all? Here we find another respect in which Fuller and Perdue got it right. Leaving aside hurt-feelings, or any kind of psychic harm of disappointment, denying a promisee his expectation interest is not to make him worse off. Denial of the expectancy makes a promisee worse-off relative to a baseline of performance of the contract. But that baseline cannot simply be taken for granted; it is a product of the very system of contract law that we are trying to justify. We cannot help ourselves to the idea that the promisee has an entitlement to performance when trying to give an instrumental justification for contract remedies.

There are two aspects to the objection I am raising: Why the promisee’s interests only? Any why measure these against the baseline of the contract? When making her decision about breach versus performance, the promisor is supposed to be concerned that the promisee can be made indifferent between performance or breach. But what about anyone else who might be interested in the subject-matter of the contract? The promisor could give the goods away to a bystander; that bystander prefers breach with gift to him to performance, so why does that not figure in the calculation? And when thinking about the promisee’s preferences, why is the contract price assumed to be the right baseline? Suppose the promisee values the good at $10, but the contract price is $2; we say he needs a full $8 before he is indifferent between performance and breach. But the baseline of the contract price has significance only on the assumption that the promisee is already in some way entitled to performance of the contract.

The story of efficient breach takes the structure of contract law for granted, and helps itself to the idea that a promisee is entitled to his expectancy, since that, after all, is how we all
see it. But we only see it that way because we take for granted that enforcement of contracts is a good idea. Considered as a stand-alone defense of expectation damages, the standard theory of efficient breach is entirely question-begging.

An analogy can be drawn here to standard discussions of tax justice in public finance economics. In those discussions, it is said that tax fairness consists in criteria of vertical and horizontal equity in the burdens of taxation, where those burdens are measured against a baseline of pretax income. To use that baseline is myopic because taxation is only one part of the whole set of economic and legal institutions that structure a market economy. We cannot treat pretax income as if it were in some sense an entitlement within the system, against which tax burdens can properly be assessed, since pretax incomes are affected by legal rules, including rules of taxation.

The fundamental insight of Fuller and Perdue was that an account of the significance of the expectation interest is required, since lost expectancy is not, as it were, a natural loss; it is a theoretically constructed loss. Treating it as a loss requires justification for the entire system of contract law or else some account of the moral rights of promisees. It is therefore a mistake to argue for a particular remedy—a foundational element of the overall system—by simply assuming that it is a loss. It is a loss from the perspective of a system of contract rules of which the rule governing remedies is a central part. If we are going to justify expectation damages, we have to lift our eyes from particular transactions, and argue that it finds its place in an overall scheme of contract law that produces the best results.

If we do lift our eyes, it is obvious that the most important reason to protect promisees’
performance or expectation interests is to give people reason to enter into mutually beneficial
agreements that otherwise, for want of confidence in performance, would not be entered into.
I thus agree with economic analysts Schwartz and Scott, who write:

Contract remedies are thought to protect injured promisees . . . by awarding the
expectation interest. This view is true but shallow. If contracts were not enforceable,
sophisticated commercial parties seldom would put themselves in positions where they
needed the law’s aid. . . . Enforcement . . . in sum, permits parties to make believable
promises to each other when reputational or self-enforcement sanctions will not avail.59

Now these points not only show that the standard text-book defense of expectation
damages as the remedy for breach is question-begging. They also undermine the thought that,
whatever the law may be, it will be efficient to breach so long as the promisee is given her
expectancy. Suppose there is no remedy for breach of contract. We cannot say that the
promisor should breach when that would leave her better off even after paying the promisee
her lost expectancy. The loss of the promisee’s expectancy is not a harm in the sense relevant
to Pareto efficiency. Neither can we say that breach whenever the gain to the promisor from
breach is greater than the promisee’s loss of expectancy will lead to allocative efficiency.
Suppose that an original buyer at $5 values the subject matter of the sale at $10. Tertius comes
along and offers $9 for the item, which he values at $11. The seller will not gain from breach if
she has to transfer $5 to the original buyer, so she will not breach, and Tertius, the highes-

valuing user does not get the goods. It is time to drop the phrase “efficient breach” from our discourse altogether.

Now, the textbook account of why expectation damages give efficient incentives over the decision whether to perform is not the only argument that economic analysis offers for expectation damages. The alternative approach adopts the remedies by agreement model. The fundamental idea is that, within limits, it makes sense to enforce whatever rational parties do or would agree to by way of remedies for breach. So we should not think of contract remedies as compensatory of a harm we can independently make sense of. What we are doing is enforcing agreements. Of course, there are limits. Two days in the stocks as a penalty for breach is presumably out, and perhaps penalty liquidated-damages clauses should not be enforceable in consumer contracts.

An argument can be made that rational contracting parties will elect expectation damages rather than specific performance in the standard case, since the additional costs to a breaching promisor of bargaining her way out of an injunction will lead her to demand a higher price, ex ante. If that is so (and much could be said about the assumptions this argument requires), then we have a case for expectation damages as a default rule, since that would save rational parties the trouble of writing down what they want. (Such an argument cannot justify

---

61 See Steven Shavell, Damage Measures for Breach of Contract 11 Bell J. of Econ. 466 (1980). For a recent statement of this argument, see Daniel Markovits and Alan Schwartz, The Myth Of Efficient Breach: New Defenses Of The Expectation Interest, 97 Va. L. Rev. 1939 (2011), though Markovits and Schwartz further argue that the rationality of choosing expectation damages ex ante justifies interpreting the content of the agreement as perform or pay. For criticism of this additional claim, see Gregory Klass, To Perform or Pay Damages, 98 Va. L. Rev. 143 (2012); Seana Valentine Shiffrin, Must I Mean What You Think I Should Have Said?, 98 Va. L. Rev. 159 (2012).
the common law rule, however, since if in a particular case the parties prefer specific performance ex ante, the common law will not necessarily enforce that preference.)

It would be good to have some evidence that in legal systems where specific performance is the background remedy but parties can choose damages ex ante as a term of their contract and have that choice honored by the courts—Germany, for example—sophisticated parties do choose damages in order to lower the price. I have not been able to find any such evidence, even anecdotal. Be that as it may, there is a more general concern about an approach that puts all the weight on what rational contracting parties do or would have agreed to.

Once again, the approach is myopic. Why would the appropriate rule be the one that particular parties might choose, rather than the one that does best overall, for society at large? Most commentators simply take for granted that these are equivalent. Steven Shavell, the pioneer of this approach, does not. But he writes that the “utility of damage measures to contracting parties themselves is no doubt a and perhaps the major aspect in which the social advantage of damage measures inheres.”62 This seems plausible but, mostly, I believe, because we take for granted the ongoing stability of the system of private ordering without which we cannot even make sense of what two parties to a contract might rationally agree to.

There is no guarantee that what is best for each contracting pair is best for all of us. Suppose expectation damages are best for each contracting party. Suppose further that parties cannot simultaneously hold in their minds the knowledge that if they breach they are legally

---

62 Shavell, supra note 61, 489.
liable for expectation damages only and the thought that it is a norm, a requirement of the social practice they are engaged in, that they perform their agreements. No harm is done to anything if one contracting pair start to believe that performance is optional, so long as the legally required compensation is paid. But if everyone believes that, then things have gone badly awry.

Now in fact unless the unfortunate idea of efficient breach is in the air, there is no reason why contracting parties cannot regard themselves as obliged to perform while fully aware that if they do not perform, all that will happen to them is that they will have to pay damages which may be less than the gains from breach. This is the situation, for example, of participants in the American cotton industry as described by Lisa Bernstein, where the damages awards provided by the private arbitral tribunals are undercompensatory, but the norm of performance remains extremely strong.63 The important point here is that this is the level at which instrumental analysis must focus: the level of generally accepted norms and overall social practice.

8. Contract and Promise.

Against the text-book efficient breach analysis, I have said that an evaluation of contract remedies cannot assume that promisees are entitled to their expectation when discussing whether that is what they should get. It is only once we have concluded that promisees are entitled to their expectancy that it makes sense to regard denying it as a harm to them. Against

economic arguments for expectation or other damage measures that turn on what rational parties would agree to, I have argued that this analytic framework risks losing sight of the normative significance of the social and legal practice within which it makes sense to discuss what rational pairs might choose. The first order of business, when thinking about remedies, and rationales for them, is the health of that background practice.

The most obvious way to support the practice of making and keeping agreements is to enforce them—by ordering performance or something just as good. Absent special circumstances such as a close-knit commercial community where nonlegal sanctions are especially effective, any remedy short of performance or expectation damages seems very likely to lead to fewer agreements being made. This, of course, is not something the economist need disagree with. It seems unlikely that the choice between performance or expectation damages would have any effect on the background practice one way or another. But it does seem likely that general recognition of the idea of a good—because socially beneficial—breach would do so. Here disagreement is reached.

The simplest way to state the point of contract law is that it supports and shapes the social practice of making and keeping promises and agreements. \(^{64}\) And within that social practice, the expectation is that when people make agreements, they should keep them. My claim is that while departures from a performance remedy may do no harm, a publicly accepted justification of a such a legal regime according to which breach is often the right thing to do from a social point of view will tend to undermine the practice of promise and contract.

\(^{64}\) See Raz, supra note 28, 933.
My argument resembles that of Seana Shiffrin, especially in its reference to the effects of certain understandings of the justification of legal rights and obligations on the political and legal culture. But Shiffkin’s concern lies with the effects of departures in contract law from the morality of promise on moral agency. I see promissory morality as itself largely of instrumental significance, to be promoted because of its overall good social effects, and my claim is that departures from the conventions of the practice of promise within contract law will tend to undermine the former, and thus also the point of the latter—which is to strengthen, not weaken, the socially beneficial practice of making and keeping agreements.

The mere fact that the common law remedy is not a performance remedy is not itself, in my view, a departure from the practice of promise. After all, in our ordinary ethical lives, we do not have an account of remedies at all. If you make a promise you should keep it. What if you don’t? Here there is no clear answer. Certainly there is no clear practice of providing compensatory damages. What we expect in the moral domain is performance, and it is hard to see how this practice could be made more sophisticated.

This point immediately brings to mind an objection, however. Let’s forget about informal promises, or noncommercial promises that might be legally enforceable. Let’s restrict contract theory to commercial transactions between medium-sized sophisticated firms. Such actors need not confuse contract law with any moral practice; they are quite capable of distinguishing the two domains. Even if in a broad sense both the legal and nonlegal practices

65 See Shiffrin, supra note 24.
66 Within limits, of course. Even in the absence of excusing conditions such as duress, misrepresentation, mistake, and impracticability, the informal practice does not always demand performance where that would involve, for example, enormous expense to correct a minor mistake. Most legal systems reflect this common sense view.
67 See Schwartz and Scott, supra note 59.
aim to bring about some good through facilitating beneficial cooperative arrangements, there is no reason why they should take exactly the same form. For such parties, who may insist on performance when the promisor is their friend, there may be no harm done to the moral practice if they believe that it is all right to breach commercial agreements so long as damages are paid. For that matter, damages of 66% of the promisee’s expectancy may be enough to encourage them to deal with others in the first place.

It cannot be denied that this is a possibility. My main reaction to it is that there is ample evidence that sophisticated commercial parties expect performance from their promisors. Economists rightly emphasize the role of reputational factors, even among sophisticated parties. If harm is done to your reputation when you breech an agreement, that simply shows that what is expected is performance. Hugh Collins’s discussion of these issues is especially illuminating.68 Collins’s account closely resembles that of Hume, according to which legal sanctions are a back-up system of enforcement, to ground confidence when informal sanctions turning on reputation would not be sufficient to generate confidence in performance.69 For Hume, the need for coercive enforcement by the state only arises when societies become big enough to make it plausibly rational not to perform your side of an agreement. But the role of nonlegal sanctions doesn’t disappear once government appears on the scene to enforce agreements. The two systems of enforcement work together in tandem. The “construction of markets,” to use Collins’s phrase, is a social process that take place both outside of law and within it.

69 Hume, supra note 2.
Now none of this so much as proves that it would not be better for contract law to break free from nonlegal expectations regarding decent commercial behavior. Perhaps it could be done, but the result would be a very different social world, and there is no reason to think it would be a better one. Absent a compelling reason to make this drastic change, it is overwhelmingly plausible to insist that in our thinking about what the best legal remedy would be, and what the proper public justification for that remedy would be—both by legal theorists and judges—we should count as a serious cost any tendency to undermine the banal but beneficial disposition to regard breach of contract as bad practice.