

2016

A Complainant-Oriented Approach to Unconscionability and Contract Law

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ARTICLE

A COMPLAINANT-ORIENTED APPROACH TO UNCONSCIONABILITY AND CONTRACT LAW

NICOLAS CORNELL[†]

This Article draws attention to a conceptual point that has been overlooked in recent discussions about the theoretical foundations of contract law. I argue that, rather than enforcing the obligations of promises, contract law concerns complaints against promissory wrongs. This conceptual distinction is easy to miss. If one assumes that complaints arise whenever an obligation has been violated, then the distinction does not seem meaningful. I show, however, that an obligation can be breached without giving rise to a valid complaint. This Article illustrates the importance of this conceptual distinction by focusing first on the doctrine of substantive unconscionability. I claim that the doctrine can be best explained by the way in which a party who engages in exploitative behavior may lose her moral standing to complain. It is because such a party has lost her moral standing to complain that the law, through unconscionability doctrine, bars her from bringing a legal complaint. This explanation avoids the oft-issued charge of paternalism and it also offers benefits over an alternative state-oriented account developed recently by Seana Shiffrin. Using the conceptual distinction behind this account of unconscionability, this Article further argues that recent theoretical debates about the relationship between contract law and morality have been largely misconceived. Those debates have focused on whether contract law and morality impose parallel obligations. Once one appreciates the difference between imposing obligations and recognizing complaints, the comparison

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looks quite different. Contract law recognizes valid complaints against broken promises, much as morality recognizes moral complaints.

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INTRODUCTION

The theoretical underpinnings of contract law have been subject to several major debates in recent years. Descriptively, there is an ongoing dispute about how well the legal institution of contracting tracks the moral institution of promissmaking.¹ Normatively, there is an ongoing dispute about what values we should want and expect the institution of contract law to advance.² And doctrinally, there is an ongoing dispute about how contract law is or is not

¹ Compare Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 718-19 (2007) [hereinafter Shiffrin, *Divergence*] (claiming that contract law fails to hold moral agents legally accountable for their promissory obligations), with Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1607-08 (2009) (arguing that contracting cannot be understood “without first identifying the theory of self-imposed moral responsibility on which [one] take[s] the practice of promise to rest”).

² Compare Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 686 (1986) (advocating for an efficiency-based view of contract law based not on “whether the law of damages should deter breach but rather [on] how much deterrence is desirable and what remedies induce this optimal amount of deterrence”), with Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 57 (2003) (arguing, from the perspective of corrective justice, that contract law imposes damages in order to “undo, so far as money can, the defendant’s violation of the plaintiff’s right”).

distinguishable from other areas of the law—in particular, torts and property.³ These disputes are interrelated, but the resolution of each does not necessarily hinge on the others. For example, two people might agree that, as a matter of fact, contract law tracks morality quite poorly, and yet they might disagree on whether this is regrettable or not. Or two people might agree that contract law tracks our moral ideas about wrongdoing but disagree about whether this means that contract law collapses into tort law.

Although these disputes take place at a relatively high level of abstraction, they hold pervasive and inescapable practical significance. One cannot engage with any important topic in contract law without quickly arriving at the question of what the institution is designed to do. For example, if one wants to understand how the implied duty of good faith applies to noncognized employment discrimination, one will naturally want to know how courts conceptualize such a duty, whether it be in terms of fairness or economic efficiency.⁴ Or, if one wants to consider the enforceability of electronic terms-of-use agreements, one will need to reckon with the role of knowing and voluntary assent in contract law.⁵ Thus, each new and important practical question in contract law inevitably draws scholars back into the fundamental theoretical disputes about contract law's underpinnings. And so the debates continue.

This Article argues that these debates have been afflicted by conceptual confusion. Scholars generally inquire about the obligations of contract law. Do these obligations line up with the obligations that morality imposes? Should our law impose such obligations? Are these obligations similar to or distinct from the obligations of tort and property law? I believe these are the wrong questions.

Contract law, I will argue, concerns the complaints that we have when agreements are broken. It is not about imposing obligations. Despite how we often talk, contract law does not actually impose an obligation to perform. Rather, it addresses whether a party can legitimately complain about having been aggrieved by another's breach.

³ See, e.g., Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 774-75 (2001) (describing efforts in different legal regimes to classify rules as grounded in contract or in property and noting that “[a]ll this effort at repackaging and relabeling suggests that the distinction between property and contract has important legal consequences, but also that there is considerable uncertainty about the boundary between the two bodies of law”); Andrew Robertson, *On the Distinction Between Contract and Tort* (arguing that “a sharp distinction cannot be drawn between contract and tort”), in *THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES* 87, 88 (Andrew Robertson ed., 2004).

⁴ See Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 5-13 (examining various ways of conceptualizing good faith, including the “excluder-analysis,” which looks more to fairness, and the “foregone opportunities” approach, which looks more to economic efficiency).

⁵ See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 464-72 (2006) (describing assent as a fundamental principle in contract law and using assent as a lens through which to analyze the enforceability of certain electronic agreements).

This conceptual distinction can be hard to appreciate. Most people naturally assume that whenever someone breaches a contractual obligation, then the other party is in a position to complain. Complaint and obligation thus seem to be flip sides of the same coin; contractual liability appears to be the mirror image of contractual obligation. But careful philosophical examination of these concepts reveals that they are not linked as we typically assume.⁶ I aim to show that, as a conceptual matter, it is possible for one party to breach an obligation while the other party has no valid complaint against that breach. One way that this happens, I suggest, is if a nonbreaching party has lost the moral standing to complain by virtue of his or her own misconduct. Complaint and obligation, then, can come untethered from one another.

In order to illustrate this conceptual point, this Article begins by focusing on the doctrine of substantive unconscionability. The law typically understands substantive unconscionability to work by releasing imprudent bargainers from their voluntarily assumed obligations.⁷ Put this way, one naturally wonders why we should so relieve freely acting parties of their obligations. Seana Shiffrin has recently argued that the explanation for such a release concerns the state's interests in not facilitating exploitation.⁸ In contrast, I think that the unconscionability doctrine is best understood not as releasing an obligation, but instead as recognizing legally that the plaintiff is not in a position to complain. The doctrine reflects the idea that a party who takes advantage of wildly unfair terms cannot complain when those terms are breached. This account is simple and intuitive, draws on basic moral concepts, avoids the oft-issued charge of paternalism, and explains how unconscionability coheres with other contract doctrines. If nothing else, this Article thus offers a new way to understand the doctrine of substantive unconscionability.

Unconscionability, though, is just one locus—albeit an especially perspicuous one—of a conceptual error that is widespread. Contract law is typically characterized as imposing an obligation to perform.⁹ As a result, debates about the nature of contract law are cast in terms of the nature of the obligation to

⁶ For a discussion of the importance of this kind of conceptual work, see John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1652-53 (2012).

⁷ See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294 (1975) (criticizing the fact that the unconscionability doctrine would “allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable”).

⁸ See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 227-28 (2000) [hereinafter Shiffrin, *Paternalism*] (“[I]t seems then that a state’s refusal to enforce an unconscionable contract could reflect an unwillingness to lend *its* support and its force to assist an exploitative contract because it is an unworthy endeavor to support.”).

⁹ See, e.g., *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10, 20 (1864) (“The obligation of a contract is a duty of performing it recognized and enforced by the laws.”); Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 238 (2011) (“The law may not punish contract breakers, but it is clear that there is a legal duty to perform a contract and that this duty is not fulfilled by paying damages.”).

perform. But this characterization derives from the assumption that, whether courts grant litigants relief or not, they are necessarily deciding questions of obligation. It is assumed that one can pursue a complaint in contract law if the other party has breached her obligation. As I aim to show, this assumption is false: one can be the victim of a breach and yet have no complaint.¹⁰ Theorists and jurists have overlooked the fact that the breach of an obligation is not sufficient to ensure a valid complaint.

Although the conceptual distinction here is admittedly subtle, when the classic debates about the nature of contract law are reframed in light of it, I believe that they take on a different character. Gone are questions about the obligations of contract law. In their place are questions about what sorts of complaints we can level against one another. And, with this reoriented perspective, the alleged divergence between contract law and morality dissipates. The supposed divergence, it turns out, was built around the idea that contract law does not impose the same sort of obligations that are imposed by the morality of promises. But this construction misunderstood the function of contract law. Contract law is inherently *ex post*. It is about how we respond to complaints after alleged wrongdoing; it is not directly about what we are obligated to do. And, *ex post*, contract law recognizes complaints in much the same way that morality recognizes complaints.

This Article proceeds in an hourglass structure—beginning broadly with debates about the nature of contract law, narrowing in to a focal point concerning unconscionability, and then broadening back out to the larger debates about contract law’s foundations. In this spirit, Part I describes the tension between theories of contract law that view it as fundamentally concerned with interpersonal morality and theories that view it as fundamentally an institution of the state. The important difference is that the former view the basic features of contract law as explicable from within morality, whereas the latter view contract law as explained primarily from outside morality. Part II focuses on the doctrine of unconscionability. I consider two different explanations of the doctrine: the first focuses on the interests of the state in having such a doctrine, and the second focuses on the moral standing of the complainant. This second explanation draws on the key conceptual distinction between obligations and complaints. Part III describes several reasons for preferring this second explanation. I believe that the complainant-oriented approach offers an intuitively satisfying explanation for the doctrine, gives it a moral foundation, and coheres better with existing legal doctrine. This approach also explains the parallels between unconscionability and the associated doctrines of duress and

¹⁰ Though not the subject of this Article, I also suspect that the opposite conditional—that a party can have a complaint in contract law only if there is a breach of an obligation owed to that party—is similarly false. For some reasons supporting this belief, see generally Nicolas Cornell, *The Puzzle of the Beneficiary’s Bargain*, 90 TUL. L. REV. 75 (2015).

fraud. Broadening back out, Part IV uses the conceptual gains from unconscionability to suggest a more general approach to thinking about contract law. I argue that contract law is inherently *ex post* and that, as such, it is not concerned with enforcing promissory obligations. It is, however, concerned with recognizing promissory wrongs, and, in this sense, it is an institution tied deeply to the morality of promising.

I. TWO THEORIES OF CONTRACT LAW

A persistent topic of modern contract scholarship has been the connection between contract law and morality.¹¹ Even as theorists have recently tried to cultivate new approaches to contract law, the same questions persist about the relationship between contract law and morality.¹² Although there are many variations, two basic conceptions of this relationship exist. According to one view, contract law is essentially a legal structure built around the moral norms of promising.¹³ Thus, contract law necessarily reflects moral norms. According to the opposing view, contract law is a state institution with its own purposes.¹⁴ Thus, contract law reflects aims and values outside morality. Or, to put the difference another way, one view sees the features of contract law as largely understood from within the morality of promising, whereas the opposing view sees contract law as explained from outside morality.

As these descriptions suggest, both views recognize that contract law is a state institution distinct from morality—that is, that the legal norms are not the same thing as the moral norms. The dispute is over the relationship between the two realms: Is it one of dependence and explanation, or not?

¹¹ See, e.g., Kraus, *supra* note 1, at 1609 (arguing that no “plausible theory of self-imposed moral responsibility . . . is consistent with the legal enforcement of all promises, including promises intended not to be legally enforceable”); Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801, 809-10 (2008) (“[A]t least some contractual undertakings generate nothing like the moral obligation to perform that attaches to the making of a binding promise.”); Shiffrin, *Divergence*, *supra* note 1, at 708 (“[T]he legal norms regulating these promises diverge in substance from the moral norms that apply to them.”). See generally DORI KIMEL, FROM PROMISE TO CONTRACT (2003) (analyzing issues related to the moral underpinnings of contractual obligations, and arguing that law can replace existing social institutions); Gregory Klass, *Promise Etc.*, 45 SUFFOLK U. L. REV. 695, 695-97 (2012) (describing contracts as creating moral obligations that are chosen by the promisemaker).

¹² See, e.g., Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1896-1907 (2011) (offering a new approach to contract law where “private law is grounded in a wronged party’s moral enforcement rights”); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1420 (2004) (developing a new theory that claims “promises generally, and contracts in particular, establish a relation of recognition and respect—and indeed a kind of community—among those who participate in them”); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 543 (2011) (discussing the evolution of contract law and arguing that “[c]ontractual liability consists of *ex ante* consent to retaliation in the event of breach—a retaliation limited and civilized through litigation”).

¹³ See *infra* notes 15–23 and accompanying text.

¹⁴ See *infra* notes 24–46 and accompanying text.

The classic articulation of the view that contract law should be understood from within morality is Charles Fried's 1981 book *Contract as Promise*.¹⁵ The core idea is that contracts are binding as the self-imposed obligations of contracting parties.¹⁶ Contracts, like promises, are the result of voluntary acts performed with the intent to place the actor under an obligation. The ability to bind oneself in this way—to assume voluntarily an obligation—is itself a form of freedom. Other scholars, who differ from Fried on the source of promissory obligations, agree with Fried that the rules of contract law are to be understood by reference to the source of promissory obligations.¹⁷

The key point here is that contractual obligations arise in the same way that promissory obligations arise. Of course, describing why promises are morally binding is itself no small task and has generated controversy of its own.¹⁸ But whatever the explanation for why voluntary promises generate a moral obligation, that same explanation can potentially be used to describe why contracts create obligations. That is, the moral obligation to keep one's promises can underwrite the legal obligation to fulfill one's contracts, in the sense that one can offer parallel accounts of each. Whatever explains the morality of promising, the same justification can explain contract law. Consequently, the character of contractual obligations will necessarily reflect the character of morality. Breach of contract will be wrong in the way that breaking a promise is wrong.¹⁹ The success of this view turns on how well moral principles can

¹⁵ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (Oxford Univ. Press 2d ed. 2015) (1981).

¹⁶ *Id.* at 1.

¹⁷ See, e.g., Markovits, *supra* note 12, at 1448-51 (arguing that contract, like promise, must be understood in terms of a community created between promisor and promisee); T. M. Scanlon, *Promises and Contracts* (defending a view of contract law that parallels an account of promising that turns on the significance of providing assurance to another), in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86, 93-99 (Peter Benson ed., 2001).

¹⁸ Fried invokes a conventional account of promising. FRIED, *supra* note 15, at 11-17. This conventional account of promising has been criticized. See, e.g., T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* ch. 7 (1998). But the puzzle raised by the unconscionability doctrine that is the subject of this Article is no less challenging for Scanlon's theory. He too thinks that intentionally undertaken promises are binding in light of being so formed. What Scanlon adds is the idea that promising involves giving assurance. But he does not reject the thought that a binding duty arises out of the voluntary making of the promise. Because my concern is with the relationship between contract and promise rather than the details of why promises are binding, I have generally attempted to avoid the latter topic. For further discussions of this question, see generally WILLIAM VITEK, *PROMISING* (1993); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 *PHIL. & PUB. AFF.* 119 (2003). For an account of contract law as reflecting the morality of promising that builds on the conception of promises as binding in light of the reliance they induce, see Joseph Raz, *Promises in Morality and Law*, 95 *HARV. L. REV.* 916 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)).

¹⁹ The view that contract is deeply connected with morality draws some support from recent empirical work suggesting that citizens regard at least some breaches of contract as a moral wrong.

explain principles of contract law. Accordingly, its proponents seek to demonstrate the explanatory fit between morality and various contract doctrines.

What is largely absent from this description is any reference to the state. On this view, my obligation to fulfill a contract is explained by my own voluntary action in making the contract, not by some independent requirement imposed by the state. And the character of my obligation to fulfill the contract will reflect the morality of promises and not a policy choice by the state.

This is not to deny that contract law is a state institution. Contractual obligations are legal obligations and, in that sense, involve the state's coercive power.²⁰ But, on this view, the state's role is to offer its resources in support of the moral practice or in service of the same values that support the moral practice. In Joseph Raz's words, "The purpose of contract law is primarily supportive. It recognizes and reinforces the social practice of undertaking voluntary obligations."²¹ Contract law is a distinct state institution, but one that supervenes on the moral institutions. Thus, the particular contours of contract law are derived from the morality of promising, not from the public policy choices of the state. As Fried puts it, "Since contracts invoke and are invoked by promises, it is not surprising that the law came to impose on the promises it recognized the same incidents as morality demands."²² The state simply mediates and enforces the already existing relations between citizens. By thus assisting citizens in imposing binding obligations on themselves, the state fosters the freedom and moral relationships of those citizens.²³

The opposing view holds that contract law systematically diverges from morality because it serves different purposes. Contract law is not simply an analog of our promissory obligations, but rather a distinct set of obligations imposed by the state. Because contract law is conceived of as a public policy, its doctrines are viewed as reflecting public policy objectives rather than particular moral norms. As Shiffrin puts it, "[B]ecause law is a cooperative activity of mutual governance that takes institutional form, its normative

See generally Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

²⁰ *See* Scanlon, *supra* note 17, at 99 (elaborating on the differences between promises and legal contracts and stating that the latter presuppose a social institution "centrally concerned with what is to be done when contracts have not been fulfilled").

²¹ Raz, *supra* note 18, at 933.

²² FRIED, *supra* note 15, at 21.

²³ *See id.* ("The freedom to bind oneself contractually to a future disposition is an important and striking example of this freedom (the freedom to make testamentary dispositions or to make whatever present use of one's effort or goods one desires are other examples), because in a promise one is taking responsibility not only for one's present self but for one's future self.").

values and principles may well be distinct from, though informed by, those comprising interpersonal morality.”²⁴

Naturally, this view emphasizes a perceived divergence between contract doctrine and the principles of morality. If the content of particular contract doctrines systematically diverges from the content of morality, then contract law must reflect something other than the reasons that morality gives us.²⁵ In making this argument, several features of contract law tend to draw attention.

First and most significantly, contract law gives expectation damages.²⁶ A breaching party is normally required to pay the financial value of performance to the other party.²⁷ Only in rare instances is specific performance required.²⁸ That is, contract law generally does not force a breaching party to fulfill its contract—it only forces the party to pay the value of the contract to the other party. According to commentators, this means that contract law does not truly impose a duty not to breach one’s contract, but rather imposes the disjunctive duty *either* to fulfill the promise *or* pay its value.²⁹ This is thought to be in contrast with the moral demands of promising. Morality requires that promisors keep their promises. A promisor cannot discharge her moral obligation merely by paying the promisee its value. Rather, a promise is, morally speaking, an obligation to perform. Thus, whereas morality seems to say that one has a duty to keep one’s promises, contract law seems to impose no such duty to fulfill one’s contract. As Seana Shiffrin puts it, “The law . . . fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price.”³⁰ Implicit in this argument is the well-trodden premise that the remedy offered describes the nature of the right: by offering a particular remedy, the law creates a certain form of obligation.

²⁴ Shiffrin, *Divergence*, *supra* note 1, at 711-12; see also Jeffrey M. Lipshaw, *Duty and Consequence: A Non-conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321, 323 (2006) (“Contracts . . . are constructs of a system of law, whereby the state agrees to enforce certain promises entered into in a certain form, subject to the limits of the language used in articulating the promise [T]here is nothing moral about the contract versus the underlying promise and . . . the conflation of the two is the source of the confusion over the limits of the law of contract. The moral or transcendental aspect of the contract is the underlying promise—its soul, so to speak—but the law can only doctor its body—what shows in the contract. To me, that is the limit of the law.”).

²⁵ See Shiffrin, *Divergence*, *supra* note 1, at 722 (“Contract law would run parallel to morality if contract law rendered the same assessments of permissibility and impermissibility as the moral perspective, except that it would replace moral permissibility with legal permissibility and it would use its distinctive tools and techniques to express and reflect those judgments.” (footnote omitted)).

²⁶ RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

²⁷ *Id.*

²⁸ *Id.* § 359.

²⁹ See, e.g., O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”).

³⁰ Shiffrin, *Divergence*, *supra* note 1, at 724.

The point here is not only what contract law gives (expectation damages) but what it does not give: anything further. Contract law typically does not award specific performance. And there are other things that contract law does not give: contract law does not provide for punitive damages.³¹ That is, contract law does not provide for additional damages that are based on the perceived badness of the behavior. This is unlike tort law, where more egregious conduct results in punitive damages reflecting the court's condemnation of the action.³² This feature of the law is taken to show that contract law does not treat breach of contract as impermissible—as the appropriate target of censure—in the way that morality does.³³ Moreover, parties generally cannot specify additional damages in advance, even if they would like to do so. Thus, whereas morality seems to allow parties the freedom to specify certain actions as particularly significant and thereby shape their relationship,³⁴ contract law allows no such freedom, requiring the value of a contract to be the economic expectations.³⁵ This is yet another way that contract law does not seem to impose a duty not to breach, but only the conditional duty that one pay up if one does breach.

The idea that expectation damages allow for a breach comes to a particular head in the literature on efficient breach. This law and economics idea maintains that the law should not discourage breach of contract where the breach would be economically efficient.³⁶ Because the promisor may have occasion to gain more through breach than the promisee will lose, the theory of efficient breach

31 See RESTATEMENT (SECOND) OF CONTRACTS § 355 (AM. LAW INST. 1981) (“Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”).

32 It is not clear to me whether Shiffrin would accept that tort law is more convergent with moral norms, but her argument suggests that view.

33 See, e.g., Shiffrin, *Divergence*, *supra* note 1, at 723 (“[I]ntentional promissory breach is not subject to punitive damages, that is, to those legal damages that express the judgment that the behavior represents a wrong.” (footnote omitted)).

34 See *id.* at 726 (“[P]romises occupy an interesting part of moral territory because, through them, agents themselves can alter the moral valence of some future conduct. A promise may render an action mandatory and important, when it otherwise would have been optional and, perhaps, unimportant Within our moral practices of promising, agents can signify an understanding that there is a commitment but that it is fairly loose and flexible”).

35 Liquidated damages, for example, are permitted only to the extent that they are a reasonable measure of the estimated economic damages *ex ante*. See U.C.C. § 2-718 (AM. LAW INST. & UNIF. LAW COMM’N 2013) (“Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach”); *cf.* *Wassenaar v. Panos*, 331 N.W.2d 357, 363 (Wis. 1983) (providing that one factor for determining the reasonableness of liquidated damages is whether they are “a reasonable forecast of the harm caused by the breach”).

36 See, e.g., Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) (“Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.”).

holds that the best outcome is for the promisor to breach the contract.³⁷ This thought explains why expectation damages are an appropriate remedy in contract law and why punitive damages are not—expectation damages alone will deter inefficient breaches without deterring efficient breaches.³⁸ The theory does not view contract law as tracking morality, but rather as promoting economic efficiency. In short, the demands of contract are different than the demands of morality—and that is a good thing!³⁹

This does not mean that the second approach—the view that contract is a distinct social institution—excludes moral considerations from contract law.⁴⁰ Rather, moral considerations enter in a different way—as one set of reasons in the calculus of deciding what legal rules to impose. For the second view, the role of the judge is not to evaluate a particular act in light of existing moral rules. Rather, the role of the judge is to determine what rule will serve the desired

³⁷ *Id.*

³⁸ See Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 746 (2006) (explaining that the general policy against awarding punitive damages is because “many breaches are involuntary rather than willful . . . [and] even deliberate breaches may be efficient and therefore socially desirable rather than wrongful”).

³⁹ This should be qualified by noting that some proponents of efficient breach will not see this as a divergence from morality because they will view morality as having the same or a similar structure. That is, one might think that it is morally wrong to break a promise only insofar as the costs to the promisee are less than the costs of performance to the promisor. See, e.g., W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 122 (1996) (“People ought not to be liable for punitive damages merely for breaching a contract. They have done nothing wrong if they pay full compensation. Indeed, society loses if people do *not* breach contracts that would cost them more to perform than to pay compensation for breaching.”). For example, one might think that moral obligation depends on what parties would have agreed upon and that, in general, breach will occur in situations where parties would have agreed to allow breach because it was economically efficient. See, e.g., Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 452 (2006) (“[B]reach could be immoral or moral. To know which is the case, we have to inspect the reasons for breach and the knowledge of the party committing breach.”). Thus, the divergence of contract and promise in the economic approach is not conceptually necessary. One might think that our moral norms ought to be those that will maximize welfare and that the institutions of morality and law are sufficiently close that they produce the same norms. Put another way, one might think that there is, or ought to be, a theory of efficient breach in the morality of promises. But in such an account, the convergence of contract and promise would ultimately be a contingent feature of the similar purposes served by moral norms and legal norms, not any conceptually required convergence. The only sense in which the convergence would not be contingent would be insofar as the view assumed there is ultimately only one value to be pursued—social welfare—and that this explains why contract and promise inevitably converge.

⁴⁰ Compare Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 211-12 (1980) (claiming that production for others “has no inherent moral value if [the producer] acts with the intention of benefiting only himself” because moral value consists solely “in the will or intentions of the actor”), with Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 247-48 (1980) (disagreeing with Dworkin’s characterization of wealth maximization and arguing that it can have a moral component).

values and then apply that rule to the particular act.⁴¹ Morality is only a factor informing a rulemaking decision; it does not provide the rules themselves. This is the crucial difference. According to one view, contracting already involves acting within a certain set of rules—namely, those of morality—and contract law reflects these rules. According to the opposing view, contract law is its own institution, the rules of which society is free to shape according to what values it sees fit to advance, interpersonal morality being simply one among many.

The arguments catalogued thus far in favor of the second view draw attention to particular ways that the norms of contract law require different things of a promisor than the norms of morality. In particular, the norms of contract law normally require only expectation damages, and therefore seem to diverge from morality's stronger requirement that a promisor be faithful to the promise. Morality, unlike the law, requires specific performance, often includes a punitive judgment of wrongdoing, and allows parties to modify the appropriate level of sanction.

A parallel argument is available that focuses on contract law's demands of the promisee. Contract law includes a mitigation requirement. When a party breaks a contract, the promisee does not get expectation damages if she might have avoided those damages by her own actions.⁴² If you break a contract with me, I cannot collect losses that I willingly permit to accumulate. In this sense, a party to a contract is expected to take steps to reduce the damages needed to compensate her. Morality, however, may not seem to require that a promisee mitigate the losses that she will suffer from a broken promise. If you break your promise to me, I am under no moral obligation to clean up your mess.⁴³

In *Contract as Promise*, Fried defends the mitigation requirement of contract law as reflecting an altruistic duty on the part of the promisee.⁴⁴ This explanation has reasonably come in for a fair share of criticism. As Atiyah put it, "Considering the otherwise limited role of altruism in the liberal theory of contract, it does seem remarkable that one of its chief functions is to shield the promise-breaker

41 See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 29-30 (1955). It seems to me that economic analysis views the common law judge as engaged in what Rawls calls "justifying a practice." *Id.* at 3. In contrast, the opposing approach views the common law judge as engaged in "justifying an action falling under" a practice. *Id.* at 32.

42 See RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW INST. 1981) ("[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation The injured party is not precluded from re[c]overy . . . to the extent that [h]e has made reasonable but unsuccessful efforts to avoid loss.").

43 See Shiffrin, *Divergence*, *supra* note 1, at 725 ("It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing.").

44 See FRIED, *supra* note 15, at 131 ("If the victim of a breach can protect himself from its consequences he must do so. He has a duty to mitigate damages This is a duty, a kind of altruistic duty, toward one's contractual partner, the more altruistic that it is directed to a partner in the wrong. But it is a duty without cost, since the victim of the breach is never worse off for having mitigated.").

from the full consequences of his wrong.”⁴⁵ Even if one accepts that the morally upstanding promisee would altruistically mitigate the harm caused by the promisor, this seems more like an imperfect duty of charity than a strict duty of right. Morally speaking, the responsibility for harm seems to fall on the wrongdoer and not on the victim who could have done more. But contract law, it would seem, has it the other way around. It thus appears to demand more of the promisee than morality does.

Here again, the point is that the norms of contracts and promises are different. Any one of the apparent divergences might be explained away, either as a problematic feature of contract law that should be abandoned or as an overlooked feature of morality. But, according to the view that contract law does not simply reflect the morality of promising, the constellation of these differences shows that the content of contract law systematically diverges from the content of morality. As Shiffrin summarizes, “[C]ontract law expects less of the promisor and more of the promisee than morality does.”⁴⁶ This, then, leads us to the second view—that contract law reflects considerations apart from the morality of promising.

It is worth noting that the views I am describing are not entirely rigid and without room for intermediate complexity. For example, Richard Craswell has argued that philosophical accounts of promising simply lack the precision to justify particular legal doctrines concerning remedies and default rules.⁴⁷ This position does not reject the idea that contract law may be broadly underwritten by moral norms, but it insists that most particular legal doctrines must be explained as policy choices rather than as a reflection of moral principles. One might say that Craswell’s position allows for reflection of moral norms at a broad level, but not at the doctrinal level.

Somewhat differently, Shiffrin contends that, because their subject matter overlaps, it is important that contract law not impose obligations directly opposing those imposed by morality.⁴⁸ While she rejects the idea that contract law reflects moral norms, she contends that it should nonetheless accommodate these norms.⁴⁹ On this view, contract law does not reflect morality, but neither is it a public policy choice made without concern for moral norms. Although I consider both

45 P. S. ATIYAH, *ESSAYS ON CONTRACT* 124-25 (1986); see also KIMEL, *supra* note 11, at 109-12 (discussing Atiyah’s comments).

46 Shiffrin, *Divergence*, *supra* note 1, at 719.

47 Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 503-05 (1989).

48 See Shiffrin, *Divergence*, *supra* note 1, at 749 (“Moral agency must be accommodated either out of respect for agents’ basic, reasonable interests in leading moral lives, or because a robust culture of promissory commitment is necessary for a flourishing political society.”).

49 See *id.* at 711-12 (“[B]ecause law is a cooperative activity of mutual governance that takes institutional form, its normative values and principles may well be distinct from, though informed by, those comprising interpersonal morality.”).

Craswell and Shiffrin to be examples of the second view⁵⁰—the view that contract law does not reflect moral principles—they both allow for morality to play an important role in shaping contract law.⁵¹

II. TWO THEORIES OF SUBSTANTIVE UNCONSCIONABILITY

I want to examine these two different views of contract law's relationship to the morality of promising by focusing on the doctrine of substantive unconscionability. In this Part, I consider two approaches to explaining this seemingly anomalous doctrine—one approach representing the idea that contract law involves a policy choice made by the state and the other approach representing the idea that the doctrine should be understood as reflecting interpersonal morality.

A. *The Doctrine of Substantive Unconscionability*

According to the substantive unconscionability doctrine, a court may refuse to enforce a contract if its terms are deemed sufficiently unfair. Consider four examples:

- *Niemiec v. Kellmark Corp.*:⁵² Defendant was a club that sold membership.⁵³ Members were then offered retail merchandise at supposedly reduced

⁵⁰ Dori Kimel also represents a more complicated version of the second view. Although he sees contracts as creating voluntary obligations in the mold of promises, he views them as advancing different relationships: personal trust versus personal detachment. See KIMEL, *supra* note 11, at 79 (“[C]ontract emerges not as *promise*, but as a *substitute for promise*.”).

⁵¹ It is also worth noting that the distinction that I am drawing is not perfectly aligned with either the distinction between autonomy-based theories and consequentialist theories or the distinction between philosophical theories and economic theories. As a matter of correlation, it is probably true that philosophers tend to focus more on the rights of particular parties as individuals rather than on the broader social welfare impacts of particular legal rules, which are more frequently the concern of an economist. But this is not always the case. For example, an economist with a consequentialist conception of morality might view contract law as reflecting moral norms, which themselves reflect those rules that advance social welfare. Cf. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 4 (2000) (“The law is always imposed against a background stream of nonlegal regulation—enforced by gossip, disapproval, ostracism, and violence—which itself produces important collective goods.”). Alternatively, a nonconsequentialist philosopher might reject the idea that contract law reflects moral principles, viewing it instead as one aspect of the political structure accepted in some form of social contract and therefore reflecting a political agreement. Cf. Shiffrin, *Divergence*, *supra* note 1, at 712 (“[L]aw must be made compatible with the conditions for moral agency to flourish—both because of the intrinsic importance of moral agency to the person and because a just political and legal culture depends upon a social culture in which moral agency thrives.”). In short, while it can be easy to slip into thinking of the difference between those who view contract as a reflection of morality and those who do not as simply a dispute between nonconsequentialist moral philosophers and consequentialist economists, this conclusion is not correct and should be resisted.

⁵² 581 N.Y.S.2d 569 (Tonawanda City Ct. 1992).

⁵³ *Id.* at 569.

prices.⁵⁴ Membership dues could not be refunded, even upon the death of the member.⁵⁵ Merchandise could not be returned and orders could not be cancelled.⁵⁶ The plaintiffs bought a membership, but changed their minds two days later.⁵⁷ The court found the membership contract was “grossly” unconscionable.⁵⁸

- *Williams v. Walker-Thomas Furniture Co.*:⁵⁹ Williams purchased furniture from Walker-Thomas Furniture on a monthly payment scheme with title remaining in the hands of the store until full payment was made.⁶⁰ By the terms of the contract, all payments were credited pro rata on all outstanding accounts due.⁶¹ The effect of this scheme was to keep a balance due on all items until all balances were paid off.⁶² In 1962, Williams bought a stereo set on which she defaulted shortly thereafter.⁶³ The furniture company sought to retake all items purchased since 1957.⁶⁴ The appeals court held that the contract was not enforceable because the contract contained an “element of unconscionability.”⁶⁵
- *Paragon Homes, Inc. v. Carter*:⁶⁶ Paragon Homes was a Maine company.⁶⁷ It contracted with Carter, a Massachusetts resident, to have work done on a home in Massachusetts.⁶⁸ The terms of the contract, however, gave exclusive jurisdiction to Nassau County, New York.⁶⁹ The only apparent reason for this clause was to make litigation costly and difficult for the customer.⁷⁰ The court held the exclusive jurisdiction clause of the contract “grossly unfair and unconscionable.”⁷¹

⁵⁴ *Id.* at 569-70.

⁵⁵ *Id.* at 570.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 570-71.

⁵⁹ 350 F.2d 445 (D.C. Cir. 1965).

⁶⁰ *Id.* at 447.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 449.

⁶⁶ 288 N.Y.S.2d 817 (Sup. Ct. 1968).

⁶⁷ *Id.* at 818.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 819.

- *Glassford v. BrickKicker*:⁷² Plaintiffs contracted to buy a home, contingent on a home inspection.⁷³ Defendant provided the home inspection services.⁷⁴ The home inspection contract limited liability to the inspection fee paid, which was \$285.⁷⁵ It also required binding arbitration, which required an initial arbitration fee of \$1350.⁷⁶ The court found the clauses unconscionable because they created a “disingenuous” and “illusory” remedy scheme.⁷⁷

In each of these examples, the contract was not enforced because of the grossly unfair nature of its terms. While the unconscionability doctrine is often used to invalidate contracts with procedural irregularities—making it simply an extension of the law’s protections against fraud and duress—the notion of *procedural* unconscionability is only one part of the doctrine. In the cases above, although a slight haze of fraud or duress might be in the air, neither can provide the basis for invalidating the contract. The parties formed the contracts in ways that are not significantly more problematic than when any ordinary person accepts a credit card offer. Conversely, according to *substantive* unconscionability, a contract may be unenforceable based only on the unfairness of its terms.⁷⁸ That is, a contract may be unenforceable without any claim that the contract was not knowingly and voluntarily accepted by the parties involved.

One might say that the substantive unconscionability doctrine operates to prevent the exploitation of individuals’ voluntary choices. It protects contracting parties from agreements that they would not have agreed to had they been fully rational.⁷⁹ This way of putting things has the ring of paternalism—and the doctrine has frequently been criticized on precisely that basis. By refusing to enforce freely assumed obligations, the courts fail to respect individuals’ freedom to determine the course of their own lives.⁸⁰ The concern is that unconscionability,

⁷² 35 A.3d 1044 (Vt. 2011).

⁷³ *Id.* at 1046.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1046-47.

⁷⁷ *Id.* at 1049, 1054.

⁷⁸ See, e.g., *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) (en banc) (“[A] claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies.”).

⁷⁹ For two quite different defenses of unconscionability along these lines, see generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-29 (1982) (appealing to social theory concerning unequal power); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (appealing to psychological evidence of irrationality).

⁸⁰ As Fried puts it, “If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor’s conception of the good that led him to assume it, to that extent we do

by letting agents out of autonomously created obligations because the courts deem such an excuse to be in the agent's interest, fails to respect the capacity of parties to bind themselves.⁸¹

B. *A State-Regarding Approach*

One strategy for defending the doctrine of substantive unconscionability against the charge of paternalism involves articulating a nonpaternalist basis for refusing to enforce the contract. Shiffrin has developed just such an argument—that the state need not be motivated by paternalist aims in order to substitute its judgment for that of the contracting party. Rather, the state may simply be motivated by its own interest in not assisting exploitation. As Shiffrin puts it, “[T]he motive may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action. Put metaphorically, on moral grounds, the state refuses, for its own sake, to be a codependent.”⁸² Thus, the state's own interests in choosing which agreements to enforce can provide a nonpaternalist basis for refusing enforcement.

Shiffrin's strategy has two familiar roots. First, the search for nonpaternalist justifications as a means for escaping a charge of paternalism is common. This

not take him seriously as a person. We infantilize him, as we do quite properly when we release the very young from the consequences of their choices.” FRIED, *supra* note 15, at 20-21.

⁸¹ There is a further problem that arises for those who believe that the obligations of contract law, like the obligations of promises, are self-imposed by the voluntary act of contracting parties. (This has been called the “will theory.”) On this view, enforcing voluntarily assumed obligations is a way of respecting individual autonomy. *See generally, e.g., id.* In a nutshell, the will theory creates the following conflict with the doctrine of substantive unconscionability: if contract law is based on the morality of promising, and promises are binding as voluntarily self-imposed obligations, then contract law should not refuse to enforce certain voluntary contracts merely because one party made a poor choice in imposing an obligation on herself. While the two naturally run together, the concern about paternalism is distinct from the concern about the will theory. The problem of paternalism is that the doctrine of unconscionability seems to restrict individuals' capacity to determine what happens to them out of a concern for their interests—as though they cannot themselves be the judge of that. In contrast, the conflict with the will theory arises because the will theory holds that a contract should be enforced if it is freely entered into, while the doctrine of substantive unconscionability holds that there are some freely entered into contracts that should not be enforced. The difference is that the problem of paternalism might be avoided if there were nonpaternalist reasons that were sufficient to justify the doctrine of unconscionability. *See* Peter de Marneffe, *Avoiding Paternalism*, 34 PHIL. & PUB. AFF. 68, 69 (2006) (“[T]he government has a general moral obligation to recognize and protect against paternalistic interference a sufficiently wide range of important life-shaping decisions to ensure that we have adequate control over our lives, enough to achieve genuine autonomy and independence [S]ince some paternalistic policies are compatible with this general obligation, there is no compelling reason to think that paternalism is always wrong.”). While such reasons might eliminate the problem of paternalism, the conflict with the will theory would persist insofar as the state would still be refusing to enforce certain voluntarily entered agreements. One might put the difference another way: the prohibition on paternalism demands that certain considerations *not* be the basis for refusing to enforce the contract. The will theory, in contrast, demands that only certain considerations be the basis for refusing to enforce the contract.

⁸² Shiffrin, *Paternalism*, *supra* note 8, at 224.

is, for example, the same strategy involved in justifying mandatory seatbelt laws on the basis of reducing public healthcare expenditures. The idea is that one can justify a seemingly paternalistic policy on the basis of some other interest of the state. Second, the appeal to the state's role as contract enforcer is also familiar. This idea is, as Shiffrin acknowledges,⁸³ essentially an application of the reasoning used by the Supreme Court to reject racially restrictive covenants—that is, agreements not to sell a property to a certain race—in *Shelley v. Kraemer*.⁸⁴ In that case, the Court held that a court could not enforce a racially restrictive covenant because the court itself was prohibited from discriminating by the Fourteenth Amendment.⁸⁵ That is, the enforcement was rejected because of the role that the government would have to play, and not based on any defect in the covenant itself. Shiffrin's account of unconscionability is analogous: the state will not enforce the contract because it does not want to be complicit in the agreed upon action.

Shiffrin's strategy relies at least partially on detaching contract law from the morality of promises.⁸⁶ If the question whether the state will choose to enforce an agreement is independent of whether the underlying promise was morally binding, then questions in contract law are not mere reflections of questions in the morality. In this way, Shiffrin's strategy resonates with what I described as the second view about the relationship between contract and promise. The unconscionability doctrine can be explained by driving a wedge between the state institution of contract and the moral institution of promise, and then appealing to state-regarding reasons that are not concerned with the interpersonal moral norms at work.

C. *A Complainant-Oriented Approach*

I mean to suggest a quite different defense of the doctrine of substantive unconscionability—one that does not rely on a divergence of contract and promise or, more generally, law and morality. My claim is that, in cases of substantive unconscionability, a promisor may have a freely assumed contractual obligation and the promisee may nonetheless lack a valid complaint if the promise is broken. This is because acting wrongly towards another party does not necessarily imply that the other party has grounds to complain. Thus, even if one assumes for the sake of argument the core idea of the will theory—that voluntarily assumed obligations are binding—the fact that the promisor

⁸³ *Id.* at 233 n.34.

⁸⁴ 334 U.S. 1 (1948).

⁸⁵ *Id.* at 23.

⁸⁶ Notice that this is almost structurally essential to her approach. The search for nonpaternalist reasons for not enforcing the contract implies that there must be reasons that do not concern the promisor. This implies that the basis for enforcing agreements is not the promisor.

acts wrongly in violating her voluntarily assumed duty does not imply that the promisor can complain.⁸⁷ The gap between these two ideas is missed if one assumes that obligation and complaint are part of the same moral package.

In fact, even in morality, obligation and complaint systematically come apart. Acting wrongly does not necessarily imply a legitimate complaint for a wrong done. Consider an example: You are in a pub discussing sports with some locals. Sick of their baseless praise for their preferred team, you casually respond, “Arsenal is a bunch of whiners and cheats.” The man at the stool next to you immediately lands a right hook to your chin. Suppose that the correct thing to do is to turn the other cheek. But you give in to your temptation and retaliate with a swing of your own. You have acted *wrongly*. Your grandmother at the other end of the bar has every reason to be appalled by your behavior. But I do not think that the man who hit you first can legitimately complain he has been wronged. By striking you, he has surrendered any complaint about an analogous injury done to him in response. Consider how ridiculous it would sound for him to suddenly say, “You have wronged me—I demand your apology for this act of unnecessary violence.”⁸⁸

What the example illustrates is that a wrong act may still fail to give rise to a legitimate complaint in the other party. The other party loses the position—the standing⁸⁹—to complain because of her own misconduct.⁹⁰ My argument is

⁸⁷ Shiffrin, for example, writes, “Because her commitment was freely assumed, a breaching promisor may be accountable, the proper subject of blame, and perhaps even liable to suitable, proportionate enforcement measures at the hands of the promisee and those willing to aid him.” Shiffrin, *Paternalism*, *supra* note 8, at 222. Shiffrin assumes for the sake of argument that the freely made promise creates an obligation for the promisor, and she moves rather freely from this idea to the fact that the promisor may be accountable and subject to blame.

⁸⁸ For a more literary but brutal example, consider the story of Hermotimus the eunuch, as told by Herodotus. Hermotimus, one of Xerxes’s favored guardians, finds the man who castrated him and forces him to castrate his children and then be castrated by his children. Hermotimus exclaims, “What harm did I, either in my own person or in any of my people, do to you or any of your people, that instead of a man you made me into a nothing? You thought that the gods would not notice what you did then. You have acted vilely, and they in justice of their laws have brought you into my hands, so that you cannot complain of the vengeance that will come to you from me.” HERODOTUS, *THE HISTORY* 595 (David Grene trans., 1987). We might agree that the man “cannot complain” about being castrated after having inflicted that very fate onto Hermotimus, but we would still conclude it is very wrong.

⁸⁹ See G. A. Cohen, *Casting the First Stone: Who Can, and Who Can’t, Condemn the Terrorists?* (“[A] person may seek to silence, or to blunt the edge of, a critic’s condemnation . . . [For example, s]he can seek to discredit her critic’s assertion of her standing as a good faith condemner of the relevant action.”), in *FINDING ONESELF IN THE OTHER* 115, 119 (Michael Otsuka ed., 2013); cf. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 14 (2006) (“There is . . . a general difference between there being normative reasons of whatever weight or priority for us to do something—its being what we ought to or must do—and anyone’s having any authority to claim or demand that we do it.”).

⁹⁰ For an interesting discussion of these sorts of cases, see Saul Smilansky, *The Paradox of Moral Complaint*, 18 *UTILITAS* 284 (2006). Smilansky argues that morality seems to both insist on the existence of a complaint and yet also deny it, creating a paradox. There is only a paradox, however, if one insists that all impermissible action is grounds for a complaint—precisely what I am arguing we should abandon as unreflective of our moral experience. Smilansky argues that rejecting the connection between obligation

that something like this happens in unconscionable contracts. One party loses her position to complain when the contract is breached because of her own bad conduct before the breach.⁹¹ If this is right, then one can accept that a party has acted wrongly by voluntarily taking on an obligation and not fulfilling it, while also holding that the other party has no complaint based on this breach.⁹² For example, in *Walker-Thomas*, the purchaser may have an obligation to pay up, while at the same time the exploitative furniture company may not be in a position to complain when the purchaser resists returning all her purchases. In *BrickKicker*, the homebuyers may be doing something wrong by signing an agreement to arbitrate and then going straight to court, but the inspection company can hardly complain when the homebuyers refuse to pay for a worthless remedy. In cases like these, the companies demanding exploitative agreements cannot complain when those they are trying to take advantage of refuse to be exploited. However, the absence of standing to complain does not necessarily imply that there was not an obligation breached.

In the bar fight example, the party loses his complaint because of his nearly identical behavior. The man who punches cannot complain about being punched back. In this sense, the complaining party has already disregarded the very norm that he seeks to invoke. This seems to open the complaining party to a *tu quoque* criticism. One might point out that unconscionable contracts are not like this. The membership club in *Niemiec* did not breach the contract, so why should it be unable to complain about the customers' breach?

and complaint is unhelpful because “[i]ts systematic rejection, and what this would imply, seems merely to change the paradoxicality rather than to solve it.” *Id.* at 290. I do not share this view because I think the concept of obligation is perfectly intelligible without the concept of accountability.

⁹¹ Cf. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 14 (1980) (“Those who deny rights do so at their own peril. This does not mean that efforts to secure the fulfillment of the demand constituting a right ought not to observe certain constraints. It does mean that those who deny rights can have no complaint when their denial, especially if it is part of a systematic pattern of deprivation, is resisted.”).

⁹² There are certain similarities between this account and the concept of estoppel. In a case of estoppel, a party is prevented from making certain legal claims based on their past actions or assertions. See *Estoppel*, BLACK’S LAW DICTIONARY 667 (10th ed. 2014) (“A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.”). For example, promissory estoppel prevents a party from withdrawing a promise that another has reasonably relied upon to his detriment. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981). The idea is that one cannot assert something and then turn around and deny it after the other party has relied on it. As a result, promissory estoppel has the appearance of creating a contractual obligation where there was none. I am suggesting that one cannot act badly and then turn around and complain about the consequential bad action of another. As a result, unconscionability has the appearance of eliminating contractual obligation where there was none. In both cases, the legal situation changes because one party is prevented (or estopped) from making certain claims.

While identical conduct opens the possibility of a *tu quoque* criticism,⁹³ I do not believe that this is the only way that a party can fail to be in a position to complain. The same thing occurs, I believe, where the party's own misconduct leads to the other party's subsequent conduct.⁹⁴ As G. A. Cohen puts it, "In this second type of silencing response you are disabled from condemning me not because you are responsible for something *similar* or worse yourself but because you bear at least some responsibility for the *very thing* that you seek to criticize."⁹⁵ In other words, where a party's wrongful action leads to, provokes, or is responsible for the subsequent bad act of another, that fact may undermine the party's standing to complain. Distinguishing these ideas, one can see that the bar fight example involves an overdetermined lack of position to complain: the would-be complainant both did the same thing (*tu quoque*) and provoked the complained-of conduct (different than *tu quoque*).

So while the bar fight example involves a party losing his complaint based on nearly identical misconduct, this sort of tight similarity is not necessary. An appropriate connection (like a causal connection) between different misconduct can play the same role.⁹⁶ For example, suppose you believe that I am a good friend. On the basis of this belief, you promise to read a draft of my novel. But it turns out that I am not a good friend; my affection has been largely feigned for strategic reasons. When you need my assistance, I make no effort to help you. It seems to me that, if you break your promise to read my novel, I am probably not in a position to complain. One can reach that conclusion while leaving open the question whether you should, nevertheless, keep your promise. My wrongdoing would prevent me from being in a position to complain, even if it is true that you should still keep the promise.

⁹³ The wrong acts would be quite similar if the moral wrong of breaking a promise also consisted in it being a form of exploitation. See Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1017 (2010) (offering empirical evidence that people view breach as a form of exploitation of trust). I do not believe that strict similarity is necessary, so I do not pursue this line of argument.

⁹⁴ Cohen notes the same distinction in related phenomena:

Two ways of discrediting a condemning critic's standing will concern me here. They both occur widely in moral discourse For that first type of would-be discrediting response I have three good labels: "look who's talking," "pot calling the kettle black," and "tu quoque."

For my contrasting second type I have no good vernacular or Latin tag. But I will point you in the right direction by reminding you of retorts to criticism like "You made me do it," and "You started it," even though those phrases don't cover all the variants of the second type. I shall name the second type "You're involved in it yourself."

Cohen, *supra* note 89, at 121-23.

⁹⁵ *Id.* at 123.

⁹⁶ Cf. *De Cicco v. Schweizer*, 117 N.E. 807, 810 (N.Y. 1917) (Cardozo, J.) ("The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.")

In this example, it is no doubt significant that the promise was made under nonideal circumstances. Had you known about my bad behavior, you might never have made the promise. This is not to say that the promise was conditional. It merely acknowledges a relationship between the promise and my bad action. My misconduct played a role in inducing your breach. In this respect, the example is like a retaliation that is wholly different in kind. In the bar fight, a punch is the response to the punch. But the retaliation could have been something different. You might have spat at his feet or insulted his appearance. Neither of these would have been conduct identical to his, but he still could not complain.⁹⁷

What these examples suggest is that inappropriate conduct need not be perfectly identical in order for a party to lose her moral standing to complain. Where an appropriate relationship exists between the two forms of misconduct, a wrongdoer may be unable to complain against the wrongful act of another.⁹⁸

Exploiting an opportunity for an imbalanced exchange may be just this sort of bad act.⁹⁹ There is a familiar question about how exploitation is wrong insofar as it is not a straightforwardly involuntary exchange. I will *not* seek to answer this question. But the puzzle arises partly because there is a general sense that exploitation can constitute a wrong. We do not consider it virtuous to “use” or “take advantage of” another. By willfully benefiting from the inability of another to negotiate an equitable transaction, one opens oneself to moral criticism. While exploitation may not always justify state intervention, its morally suspect nature may undermine the position of an exploiter to complain against resulting bad acts.¹⁰⁰ My suggestion is that when the law refuses to enforce an exploitative contract, it is simply tracking this familiar aspect of

⁹⁷ Of course, if you escalated the conflict, for example by throwing a grenade instead of a punch, the other party would be in a position to complain about that. But as long as the response was provoked and not disproportionate, it seems like he is in no position to complain.

⁹⁸ There is an obvious question about what sort of relationship will produce the resulting loss of complaint discussed. I will not try to describe the full contours of this relationship, although I do believe there are some evident parameters. Clearly the mere fact that you told a lie once before does not mean that you lose your ability to complain if you are lied to in the future. In order for this loss to occur, the misconduct must all occur in the course of a unified course of events. The misconduct also must be towards the person who subsequently acts wrongly. Finally, the misconduct must be of similar or more severe magnitude; one does not lose a complaint for a grievous wrong because of some slightly bad act.

⁹⁹ See generally ALAN WERTHEIMER, *EXPLOITATION* (1996).

¹⁰⁰ According to this view, the exploiter may lose his ability to complain because of his poor behavior even if he does not himself violate any right of the exploited party. For some accounts of the morally wrong aspects of exploitation despite the consent of the exploitee, see generally *id.* See also 4 JOEL FEINBERG, *HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW* 176 (1990) (“But a little-noticed feature of exploitation is that it can occur in morally unsavory forms without harming the exploitee’s interests and, in some cases, despite the exploitee’s fully voluntary consent to the exploitative behavior.” (emphasis omitted)); Hillel Steiner, *A Liberal Theory of Exploitation*, 94 *ETHICS* 225, 233-34 (1984) (arguing for a trilateral account of exploitation in which the exploiter benefits from injustice to the exploitee by a third party).

morality.¹⁰¹ Note that Shiffrin's strategy similarly relies on the idea that unconscionable contracts are exploitative as the basis for the state's refusal to lend its resources to their enforcement.¹⁰² The only reason for the state to refuse to lend its resources is if there is something wrong with one party taking advantage of unfair terms.

III. ARGUMENTS FOR THE COMPLAINANT-ORIENTED APPROACH

A. Can One Complain Morally?

Why prefer one approach over the other? The main difference between the two views is whether the moral complaint is available. According to my view, the plaintiff in an unconscionability case is not in the position to complain morally. The unconscionability doctrine is then explained directly on these grounds. In contrast, by appealing to the interests of the state as the basis for not enforcing the contract, Shiffrin implicitly assumes that there is a moral complaint based on an unconscionable contract. For Shiffrin, the state will not enforce the private agreement because of its own self-regarding concerns. Shiffrin's theory would be superfluous if there were not grounds for moral complaint, but necessary if there were. I want to offer some considerations that

¹⁰¹ There are parallels between my overall strategy and Henry Smith's argument that equity operates to provide an ex post safety valve to prevent opportunism. See generally Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK L. REV. 897 (2012) [hereinafter Smith, *Equitable Dimension*]. I agree with Smith that equitable doctrines suggest the important role that morality plays in contract law, and I agree that it is important that the equitable doctrines are ex post. There are, however, noteworthy differences. Most important, Smith seems to view the ex post nature of equitable doctrines as a contrast to the common law rules—an ex post safety valve to the ordinary set of ex ante rules—whereas my view is that the entire endeavor of contract law operates ex post. To my mind, even the ordinary common law rules operate ex post. Second, Smith's argument has a somewhat more consequentialist bent to it. Smith views opportunism as an evil in part because it shrinks surplus, and he views legal doctrines as serving the instrumental purpose of discouraging this evil. For him, "[T]he moral and consequential accounts of contract law can agree on much of the content of contract law." *Id.* at 914. It is not clear to me that the evil that I am focused on—exploitation—necessarily involves inefficiency. And I do not believe the use of equitable doctrines is concerned with shaping people's conduct to conform with morality or economic efficiency.

¹⁰² It is the fact that the stronger party is acting wrongly that allows the state to object "on moral grounds" and believe that enforcement would "implicate" it. See Shiffrin, *Paternalism*, *supra* note 8, at 224, 227. Shiffrin's self-regarding refusal to help is based on the refuser's unwillingness "to direct her energies to facilitating an exploitative relationship, believing it both to be immoral to facilitate and an unworthy investment of time and energy." *Id.* at 227. At times, Shiffrin backs away from the moral language and suggests that the state's refusal may be based on the fact that "it is an unworthy endeavor to support." *Id.* at 227-28. It seems to me that "unworthy" must be read in a moral way here. The state lends its resources to agreements that may be unworthy in any variety of nonmoral ways. Moreover, the only way that unconscionable contracts would seem to be unworthy endeavors is insofar as they are wrong to one of the parties.

suggest that the promisee is not in a position to complain and that this is the justification for the unconscionability doctrine.

First, note how sanctimonious the exploiting party's complaint would sound. Imagine that party exclaiming, "How dare you?!" Such an exclamation strikes us as disingenuous because the party's own action contributed to that very transgression.¹⁰³ The exploiting party bears some responsibility for the violation.¹⁰⁴ Within certain bounds, those who have treated others wrongly do not seem to be in a position to complain when they find themselves treated wrongly in response. Similarly, those who have exploited others with patently unfair contracts do not seem to be in a position to complain when the contracts are not fulfilled. As I have noted, this is not the same phenomenon as *tu quoque*, but there are strong connections. In both instances, we might say that the complaining party *should not be heard to say* that the act in question was a wrong to them.¹⁰⁵

Second, substantive unconscionability contrasts with other cases in which the community refuses to lend an agreement its enforcement. If Roxanne and John enter into a prostitution contract and then John refuses to pay for services rendered, the state will not enforce the contract. This example really is a case where the courts simply refuse to give damages even though the party has been genuinely wronged in a moral sense. Roxanne has a legitimate moral complaint, but the state refuses to recognize a legal complaint based on public policy considerations.

The unconscionable contract is not like this. We do not feel that the exploiting party has been done an injustice. In an unconscionable contract, it is not that one party truly has a moral complaint and yet the state will not give damages. Rather, the exploiter has no complaint at all. Consider, intuitively, the position of the

¹⁰³ It has the feel of Captain Renault's exclamation, "I am shocked, shocked to find that gambling is going on in here!" followed immediately by the croupier's, "Your winnings, sir," in the film *Casablanca*. CASABLANCA (Warner Bros. 1942).

¹⁰⁴ Putting it this way may sound like it is blaming the victim. But here (1) the "victim" has done something wrongful, and (2) saying that the "victim" has no standing to complain does not condone or absolve the secondary wrongdoer.

¹⁰⁵ The connection with the similar moral phenomenon of *tu quoque* raises a possible challenge. One might think that, if moral phenomena like this are at the root of private law, then *tu quoque* should generally operate as a legal defense, which it does not. I am not deeply troubled by this putative disanalogy. For one thing, *tu quoque* arguments do operate in the law through assorted equitable doctrines like estoppel, unclean hands, and so on. See, e.g., *Frost v. Carse*, 108 A. 642, 643 (N.J. Ct. Err. & App. 1919) ("To this [the defendant] might properly reply, Tu quoque, and a court of conscience would leave the parties concededly in *pari delicto* where it finds them."). For more on this point, see *infra* subsection III.B.3. Additionally, there is a very open question about the scope of the *tu quoque* phenomenon in morality. See generally G. A. Cohen, *Ways of Silencing Critics* (cataloguing different views of *tu quoque*'s moral scope), in *FINDING ONESELF IN THE OTHER*, *supra* note 89, at 134. In light of these two facts, it is hard to say that there is a substantial disanalogy. Both the law and morality seem to be responding to similar factors.

furniture company in *Walker-Thomas* or that of the home inspection company in *BrickKicker*. Unlike stifled Roxanne, neither had been wronged at all.

This is why Shiffrin's proposal seems to miss the mark. The same point applies to *Shelley v. Kraemer*,¹⁰⁶ from which Shiffrin's argument draws. While one might say that racially restrictive covenants cannot be enforced by the government, this seems to dodge the important issue.¹⁰⁷ The more illuminating explanation for the unenforceability of racially restrictive covenants—which *Shelley* fails to offer—is that the racist who demands enforcement actually has no legitimate complaint that she was wronged. The *Shelley* strategy implies that the landowner does commit a wrong by selling to a black family—just a wrong with no remedy. I think that, morally speaking, this cannot be correct. We should say that the racist has no moral complaint, not that she has a complaint that the government is unable to recognize because it is bound by other commitments.

Third, Shiffrin's proposal would suggest that a substantively unconscionable contract should not be enforced by a court regardless of which party seeks to enforce it. While not a likely case to arise in practice, suppose the exploited party were to bring suit against the exploiting party. There is no conceptual reason that a party could not insist upon its own exploitation. For example, suppose the customers in *Paragon Homes* were the ones insisting (perhaps entirely against their interests) on the exclusive jurisdiction of Nassau County, New York, and suppose it were the corporation seeking to waive the clause (perhaps to avoid the public appearance of total unfairness towards its customers). In such a case, Shiffrin's account would suggest that the contract would be unenforceable. After all, the community would have the same interests in not contributing its own resources to exploitation (especially so, given that the exploiter no longer wishes to exploit). This strikes me as the wrong result. Whether a court should refuse to enforce a clause based on substantive unconscionability should depend

¹⁰⁶ 334 U.S. 1 (1947).

¹⁰⁷ Part of what makes *Shelley* such a clever opinion is its use of legal gymnastics. The constitutional protections at issue are supposed to apply to state action. *Id.* at 12-13. The Court applied them in *Shelley* to an apparently private agreement by saying enforcement itself would be state action. *Id.* at 14. But this undermines the distinction between private and state action. It would invalidate any contract the terms of which could not have been made as a statute. For example, contracts that restrict speech in various ways would be clearly unenforceable. As a result, courts have generally rejected *Shelley's* rationale. See generally Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (2007).

on who is seeking to enforce the clause.¹⁰⁸ Contracts are not merely unconscionable; they are unconscionable *to particular parties*.¹⁰⁹

Fourth, if the unconscionability doctrine is about the validity of the complaint and not about the self-regarding reasons of the state, then the doctrine would apply even where the state's self-regarding reasons would not prevent enforcing the contract. Even if the state generally has self-regarding reasons to avoid assisting exploitation, there is no guarantee that such a reason will always justify refusing such assistance. For example, Rebecca Stone has argued that appealing to the state's self-regarding reasons not to participate in exploitation may open the state to charges of hypocrisy if the state itself should have prevented the background injustice that allowed such exploitation.¹¹⁰ Similarly, the state's self-regarding reasons may not seem to justify a refusal if the state sometimes does assist similar exploitation and seems to deploy its self-regarding reasons inconsistently.¹¹¹ My sense is that even if the state is responsible for the underlying injustice and even if it does frequently assist other exploitation, the unconscionability doctrine would—and should—still apply. The complainant-oriented approach explains this fact because unconscionability is not about the state's position but about the parties' positions.

108 Courts often describe unconscionability in such party-relative terms, explaining that it allows one party (and perhaps implicitly not the other party) to avoid the unconscionable contract terms. See, e.g., *James River Mgmt. Co. v. Kehoe*, No. 3:09cv387, 2010 U.S. Dist. LEXIS 10106, at *10 (E.D. Va. Feb. 5, 2010) (“[T]he . . . provision . . . , albeit unconscionable and unenforceable by the party imposing the provision, is *voidable by the party upon whom the provision was unconscionably imposed*; it is not void.” (emphasis added)); *Kelley v. Caplice*, 23 Kan. 474, 477 (1880) (“Morally, Mrs. C. ought to have given [her signature], without making the extortionate demand she did She thought herself in a condition to exact an unconscionable bargain, and for service worth only a few cents she demanded and received a written promise for the payment of nearly five hundred dollars [W]e are of opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that *she* cannot recover on the agreement.” (emphasis added)); *Gross v. Gross*, 464 N.E.2d 500, 510 (Ohio 1984) (“[W]e find the provisions for maintenance within this agreement to be unconscionable as a matter of law and *voidable by Mrs. Gross*.” (emphasis added)); cf. *Mattingly v. Palmer Ridge Homes LLC*, 238 P.3d 505, 513 (Wash. Ct. App. 2010) (“We hold that the circumstances surrounding the [warranty] agreement’s formation was [sic] procedurally unconscionable and that Palmer Ridge cannot enforce the . . . warranty’s limitations against the Mattinglys.”).

109 One can illustrate the point in terms of a classic joke. The masochist says to the sadist, “Hit me, hit me,” and the sadist says, “No.” Now suppose it were a contract dispute. The sadist agrees to pay the masochist a dollar for the pleasure of hitting him. He then realizes that the masochist will enjoy it and he therefore backs out of the agreement. The agreement does seem substantively unconscionable (the masochist could back out on such ground if he were so inclined). But the sadist cannot appeal to this unconscionability as an excuse for his breach—he would be saying, “I do not owe you a dollar because our agreement was unconscionably sadistic.” Such an agreement is unconscionable to the person being punched but not unconscionable to the person paying a dollar.

110 See generally Rebecca Stone, *Unconscionability, Exploitation, and Hypocrisy*, 22 J. POL. PHIL. 27 (2014).

111 For an example of the concern that the unconscionability doctrine is applied inconsistently, see Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995).

Finally, even the features of contract law that Shiffrin highlights actually point strongly in favor of the complainant-oriented approach. She points to the well-known notion that the unconscionability doctrine operates as a shield and not a sword: one cannot receive damages for being the victim of an unconscionable agreement.¹¹² And she notes that courts focus on the wrongdoing of one party rather than the protection of the other party.¹¹³ Both these facts strongly suggest that the exploiting party loses her ability to complain. The unconscionability doctrine operates as a shield because it is a mechanism for undermining the complaint of an exploiter. Unconscionability is a way of disarming the plaintiff. The courts focus on the wrongdoing of the exploiting party because it is this misconduct, not the weakness of the exploited party, that causes the loss of the complaint. If the state's reasons were self-regarding, as in Shiffrin's account, then one would expect courts' focus to be at least partially self-regarding, as it was in *Shelley*. But the lens of the court in unconscionability cases tends to focus squarely on the wrongdoing of the complaining party.

B. *Cohesion with Connected Doctrine*

Aside from its direct appeal, a strength of the complainant-oriented approach is its applicability beyond the unconscionability doctrine. A number of contexts in which contract law refuses to enforce contracts may be better construed in terms of an inability to complain rather than in terms of a lack of voluntary agreement. This construction allows us to see unconscionability as harmonious and continuous with other contract doctrine and other equitable defenses. That is, the complainant-oriented approach seems cohesive with the law surrounding unconscionability—in particular, fraud, duress, and unclean hands.

1. Fraud

Connections between the doctrine of unconscionability and the more familiar ideas of fraud and duress are not uncommon. Many argue that unconscionability is a way to protect against subtle cases of fraud and duress. For example, Richard Epstein writes, “[T]he unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them.”¹¹⁴ This assimilation of unconscionability to fraud and duress is thought to make the doctrine seem less problematic—it is not a refusal to enforce voluntary agreements, but rather a protection against subtle threats to voluntary assent.

¹¹² Shiffrin, *Paternalism*, *supra* note 8, at 229.

¹¹³ *See id.* (“A survey I conducted of many leading unconscionability cases reveals that in nearly every successful claim the court focused on the conduct of the stronger party, not the weakness or needs of the weaker party.”).

¹¹⁴ Epstein, *supra* note 7, at 302.

I suggest an opposite assimilation. The best explanation of fraud and duress doctrine may—at least some of the time—not be that they render agreements involuntary. Instead, it may be that the complainant has forfeited her complaint. That is, it is not that voluntary assent of the promisor is undermined, but rather that the position of the promisee to complain is undermined. Careful examination of the nuances of how these doctrines operate point in this direction.

Consider the following. Some misrepresentations result in the refusal to enforce a contract. But contract law distinguishes fraudulent and nonfraudulent misrepresentations leading to a contract. If a misrepresentation is not fraudulent (e.g., the person did not know that it was false), then the contract is only void if the misrepresentation is shown to be “material.”¹¹⁵ If, however, the misrepresentation is fraudulent (that is, known to be false and aimed to induce assent to the contract), then the contract is voidable regardless whether the misrepresentation is material.¹¹⁶ That is, a showing of fraud is enough on its own to invalidate a contract.

This distinction will appear perplexing to many people. Voluntary assent to the contract would appear to be undermined only when a misrepresentation is material. If the fraud did not matter to the other party, then it cannot have undermined the legitimacy of their assent. But the complainant-oriented strategy I suggested for the unconscionability doctrine can explain this: the party committing fraud loses her legitimate complaint by virtue of the fraud. This is essentially how Williston explains the rule:

If . . . a party to a bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations, it seems that the former should not be allowed to deny that misrepresentations which have effectively served a fraudulent purpose were material.¹¹⁷

That is, the party who commits fraud loses the standing to complain when the contract is not fulfilled, whether or not the fraud actually made a difference.¹¹⁸

¹¹⁵ See, e.g., *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 159 N.E. 700, 702 (N.Y. 1928).

¹¹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”). The requirement is a disjunction—either the misrepresentation must be fraudulent *or* it must be material. See *id.* cmt. b (“[M]ateriality is not essential in the case of a fraudulent misrepresentation.”); see also *Equitable Life Assurance Soc’y of U.S. v. Phillips*, 141 S.W.2d 861, 862 (Ky. Ct. App. 1940) (“The law is definitely established in this state in cases of this character by a long line of decisions. The rule is . . . that where a misrepresentation is fraudulently made by the insured to procure a policy of insurance the element of materiality is unnecessary . . .”); *De Joseph v. Zambelli*, 139 A.2d 644, 647 (Pa. 1958) (“Fraud renders a transaction voidable even where the misrepresentation is not material . . .”).

¹¹⁷ 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1490 (1920).

¹¹⁸ Cf. Epstein, *supra* note 7, at 298 (“As a moral matter, a person should not profit by his own deceit at the expense of his victim The conduct of the promisee alone is sufficient to allow the promisor to repudiate the agreement.”).

Contract law refuses to enforce all fraudulent contracts not because nonmaterial fraud undermines voluntary consent, but because it undermines the position of the defrauding party to complain.

Note that, in this context, fraud is being used as a defense—as a way to defeat a complaint alleging a breach of contract. When fraud is asserted as the basis for a legal wrong, as when someone alleges the tort of fraud, materiality is a required element.¹¹⁹ Thus, a party may lose her breach of contract claim on grounds of having committed fraud even though that party is not liable for the legal offense of fraud. This statement sounds paradoxical, but it is not as long as one understands that the law will sometimes regard an issue differently depending upon the identity of the complainant. A party seeking to assert a complaint faces special requirements. One such requirement, I suggest, is having the relevant kind of moral standing.¹²⁰

2. Duress

It is a familiar fact that duress may operate as a defense in contract law. For example, if someone puts a gun to my head and makes me sign a contract giving him \$100 (the classic “Your money or your life”), a court will not enforce this contract. It is natural to explain this by saying that duress undermines voluntary consent. But, as has been frequently observed, matters are more complicated than that.¹²¹ Suppose that I meet a mugger who says he will kill me if I do not give him \$100. I know he is speaking the truth; unfortunately, I do not have any money on me. Desperate, I offer to sign a contract to give him \$100 in one week. I genuinely wish to impose upon myself an obligation to pay, to make my promise credible to the mugger, such that he will refrain from killing me now. In this light, one cannot straightforwardly explain a court’s refusal to enforce the contract by asserting that I did not actually will

¹¹⁹ See RESTATEMENT (SECOND) OF TORTS § 538(1) (AM. LAW INST. 1977) (“Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.”).

¹²⁰ This approach may also be part of the explanation why certain defensive misrepresentations—perhaps including misrepresentations of one’s reservation price—are not considered fraudulent. In such cases, the party who would complain of the fraud has induced the misrepresentation through metaphoric aggression. See Alan Strudler, *Deception Unraveled*, 102 J. PHIL. 458, 463-65 (2005) (explicating permissible deception in terms of self-defense).

¹²¹ See, e.g., *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 926-27 (7th Cir. 1983) (Posner, J.) (“If you extract a promise by means of a threat, the promise is unenforceable. This is not, as so often stated, because such a promise is involuntary, unless ‘involuntary’ is a conclusion rather than the description of a mental state. If the threat is ferocious (‘your money or your life’) and believed, the victim may be desperately eager to fend it off with a promise.” (citation omitted)); see also *Union Pac. R.R. Co. v. Pub. Serv. Comm’n*, 248 U.S. 67, 70 (1918) (Holmes, J.) (“It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”).

that I be under an obligation—in fact, I desperately wish to be able to bind myself in order to satisfy my attacker.¹²²

As I have suggested, however, the fact that breach violates one's voluntarily assumed obligations need not imply that the party who is not in breach has a legitimate moral complaint. This same idea can be applied to duress. Even if I promise to pay \$100, my mugger cannot complain if I fail to carry out this promise. And this fact is sufficient to explain why a court will not enforce the contract. My mugger is in no position to complain. It is worth noting the structure of a contract case: it would be my mugger who would file suit against me for breach of contract. In refusing to enforce the contract, the court is refusing to accept this complaint. This is why, in duress cases, the focus is on the severity of the misconduct by the promisee rather than on the level of influence exerted over the promisor.¹²³

In these examples, it may be tempting to think that obligations and complaints go hand-in-hand. That is, it might seem that the reason the mugger has no complaint is because I do not violate any obligation (which is explained by the fact that my supposed obligation was formed under duress). To see the difference, it may be helpful to introduce a third party. Suppose the mugger demanded not that I pay him, but that I enter a contract with a starving child, Charlie. In this contract, I promise to buy Charlie's fingernail clippings for \$100. Finding the terms amenable, Charlie readily accepts this agreement. Suppose also (1) that Charlie does not have any knowledge of the mugger's activities, and (2) that Charlie lives such an impoverished life that there is nothing he can do or forgo that would constitute reliance on my promise (and no one else wants his fingernail clippings anyway). Here again, the mugger cannot complain if I do not follow through, but it is not as clear that I owe no obligation to Charlie. I am inclined to say that I do owe \$100 to Charlie but also that the mugger owes me reimbursement. Legal systems agree: third-party duress is generally not grounds for rescission.¹²⁴

¹²² For an excellent discussion of what is actually wrong in such cases of coercion, see generally Japa Pallikkathayil, *The Possibility of Choice: Three Accounts of the Problem of Coercion*, PHILOSOPHERS' IMPRINT, Nov. 2011.

¹²³ See *Selmer*, 704 F.2d at 927 (“The fundamental issue in a duress case is . . . not the victim's state of mind but whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a ‘threat.’”). Notice the similarity with the economic approach here. See *supra* note 39. But while the economic approach suggests that we create a practice of not recognizing such claims, I suggest that morality in fact does not recognize such claims.

¹²⁴ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. e, illus. 10 (AM. LAW INST. 1981) (“A, who is not C's agent, induces B by duress to contract with C to sell land to C. C, in good faith, promises B to pay the agreed price. The contract is not voidable by B.”); 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11, § 459 (Arthur von Mehren ed., 2008) (“[N]o generally accepted requirements have emerged for avoiding a contract on the ground of duress by a third party.”).

The different treatment of direct duress and third-party duress cannot be explained by differences in consent, but it can be readily explained by differences in the promisees' positions to complain. One who places another under duress can hardly complain if the elicited promise is not performed. In other words, the complainant-oriented approach can explain the law of duress better than focusing exclusively on assent and formation.

3. Unclean Hands

The complainant-oriented approach bears evident connections to the equitable doctrine of unclean hands. Unclean hands operates as a defense when a plaintiff has committed some moral or legal wrongdoing in connections with the lawsuit.¹²⁵ Here is how the Supreme Court has described the doctrine:

[W]henever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.¹²⁶

In other words, a complainant may lose the entitlement to obtain a remedy based on having committed a wrong of his or her own. In this light, it is tempting to say that I have been suggesting an explication of unconscionability in terms of unclean hands.

Although unconscionability is similarly complainant-oriented, the analogy between unclean hands and unconscionability ought not be drawn too tightly. For one thing, unclean hands concerns the complainant's conduct in a manner quite different than does unconscionability. Earlier, I noted the distinction, also drawn by Cohen, between two kinds of silencing defenses: *tu quoque* (i.e., "Look who's talking") and wrongful provocation or inducement (i.e., "You started it").¹²⁷ I have been suggesting that unconscionability may be understood as an example of the latter. Unclean hands, in contrast, seems to operate along the lines of the former.¹²⁸ Unclean hands may be invoked to prevent a plaintiff

¹²⁵ See, e.g., *Clean Hands Doctrine*, BLACK'S LAW DICTIONARY 306 (10th ed. 2014) ("[A] party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith.").

¹²⁶ *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (quoting 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4th ed. 1918)).

¹²⁷ See *supra* note 94–97 and accompanying text.

¹²⁸ See Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 171, 171 (2011) (noting that both unclean hands and *tu quoque* "are doctrines of standing that deflate the illocutionary force (and not the truth-value) of normative speech acts directed against wrongdoers by those guilty of similar or connected wrongdoing").

from exploiting or defrauding some party external to the lawsuit at hand.¹²⁹ For example, imagine that a tort plaintiff sues for damages based on lost income, but, in the course of proceeding, it is revealed that the plaintiff has evaded filing her income taxes in recent years.¹³⁰ Such a plaintiff, by virtue of her unclean hands, may lose her complaint for lost income. This is much closer to *tu quoque* silencing; it is not about the connection between plaintiff and wrongdoing she alleges, but about plaintiff's standing with regard to others, in this case the IRS. In this way, unclean hands seems to instantiate a different, though related, loss of the moral standing to complain.

Second, the doctrine of unclean hands has traditionally been limited to barring equitable remedies and inapplicable in actions for damages.¹³¹ Unclean hands evolved as a mechanism to prevent the abuse of unduly powerful equitable remedies like injunctive relief and specific performance.¹³² A party might, for example, have been led to provide as security some much more valuable bond or real property, and unclean hands served as a mechanism to prevent plaintiffs from using equity courts to recover far more than the underlying promissory obligation was actually worth.¹³³ In recent years, the doctrine of unclean hands has expanded and some courts have begun applying it to bar claims for damages.¹³⁴ For example, the tax evader can lose her claim to tort damages for

¹²⁹ See, e.g., *Manown v. Adams*, 598 A.2d 821, 825 (Md. Ct. Spec. App. 1991) (applying unclean hands to enforcement of loans where plaintiff had “defrauded both his wife and his creditors by hiding his assets” in defendant’s name), *rev’d on other grounds*, 615 A.2d 611 (Md. 1992); see also *Byron v. Clay*, 867 F.2d 1049, 1051 (7th Cir. 1989) (Posner, J.) (“The doctrine of unclean hands, functionally rather than moralistically conceived, gives recognition to the fact that equitable decrees may have effects on third parties—persons who are not parties to a lawsuit, including taxpayers and members of the law-abiding public—and so should not be entered without consideration of those effects.”).

¹³⁰ These are roughly the facts of *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103 (D. Md. 1989).

¹³¹ See, e.g., *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 14 (Pa. 1968) (“[A]lthough it has been said that the clean hands doctrine applies in courts of law as well as in courts of equity, it generally has been held that the doctrine operates only to deny equitable, and not legal, remedies.” (citations omitted)).

¹³² See generally Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877 (1949). This makes unclean hands possibly a stronger example of Shiffrin’s state-oriented justification for denying a remedy. The Supreme Court has described unclean hands as “rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abetter of iniquity.’” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 247 (1848)). But see Herstein, *supra* note 128, at 183-91 (criticizing the judicial integrity explanation for unclean hands).

¹³³ See generally Chafee, *supra* note 132 and cases cited therein.

¹³⁴ See generally T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63, 73-99 (2010) (collecting cases).

lost income. Nevertheless, unconscionability has very different origins¹³⁵ and no such traditional limitation.¹³⁶

These important differences aside, the doctrine of unclean hands represents another way in which the complainant-oriented approach to contract law coheres with a wide range of contract law concepts. Unclean hands reflects another context in which courts deny legal relief to those who lack moral standing to complain. The complainant-oriented approach thus views unconscionability as continuous with its equitable brethren¹³⁷—a continuity that is only strengthened by noting the connections between unclean hands and other equitable doctrines like estoppel and *in pari delicto*.¹³⁸ Thus, again, the complainant-oriented approach seems to cohere with other elements of private law.

IV. THE ALLEGED DIVERGENCE OF CONTRACT AND PROMISE

I have been emphasizing that a promisor failing in a voluntarily assumed obligation and a promisee having a complaint are two distinct phenomena—two different moral relations. A party may lack a complaint without implying that the other party had no obligation. This feature of morality, I have argued, can be used to explain various defenses that exist in contract law, beginning with unconscionability but also including others like fraud and duress. In fact, I believe that distinguishing between one party having a valid complaint and the other party having violated an obligation can generally clarify the relationship between contract and promise—private law and interpersonal morality.

A. Contract Law as Complainant Oriented

What the distinction illuminates, I believe, is the way in which contract law is inherently *ex post*. The focus on whether a complaint exists contrasts with morality, where forward-looking obligation is central. Promises create norms of permissibility. When I make a promise, I place myself under a moral obligation. This is normative. It says that, all else equal, I ought to do what I have said that I will do. In this sense, the commitment is action-guiding.

¹³⁵ See generally Alexander J. Black, *Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada*, 17 NEW ENG. J. INT'L & COMP. L. 47 (2011) (discussing the origins of unconscionability in undue influence).

¹³⁶ As shown *supra* Section II.A, unconscionability may be used to avoid any suit for breach of contract, even for damages.

¹³⁷ Cf. generally Smith, *Equitable Dimension*, *supra* note 101.

¹³⁸ T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 566-73 (2010) (describing the connections between unclean hands and others equitable doctrines). For more on estoppel, see *supra* note 92. “*In pari delicto*” describes cases in which a court denies any remedy because it deems both parties to be equally at fault. See *In Pari Delicto*, BLACK’S LAW DICTIONARY 911 (10th ed. 2014).

In contrast, I do not believe that contract law creates norms of legal permissibility that are analogous to norms of moral permissibility. This is because contract law does not create norms of permissibility at all. It is simply not about that. In general, contract law provides a legal remedy to those who have complaints arising out of broken agreements. It is purely retrospective; it concerns the relations that occur once something impermissible is done.¹³⁹ What it does not do is impose norms of permissibility.¹⁴⁰ Contract law is thus unlike criminal law—at least under a conception according to which criminal law prohibits certain actions. In particular, contract law does not always say whether you should or should not fulfill your side of any given agreement.¹⁴¹ What it determines is whether or not the other party has a complaint if you do not.¹⁴² As the examples already considered illustrate, these two questions can come apart, and when they do, contract law addresses the second question.¹⁴³

¹³⁹ This view is shared with a civil recourse conception of contract law and private law generally. See Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 543 (2011) (“Contractual liability consists of ex ante consent to retaliation in the event of breach—a retaliation limited and civilized through litigation.”); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735-38 (2003) [hereinafter Zipursky, *Civil Recourse*] (arguing that the right to compensation through tort law is based on the law’s creation of a new right against the perpetrator, not based on the perpetrator’s duty to repair the damage done). The civil recourse approach similarly focuses on the essentially ex post nature of contractual liability. In my view, however, the civil recourse theories go too far in severing the connection between the underlying obligation and the remedy. I agree with the shift away from corrective justice accounts, according to which the remedy essentially involves the restoration of the right. But by severing this connection, the civil recourse approach seems unable to adequately connect the right to damages with the underlying violation. In some ways, I view the approach that I am describing as a compromise between corrective justice theories and civil recourse theories.

¹⁴⁰ Cf. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1981) (“The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach.”).

¹⁴¹ Of course, often contract law will have to determine whether you should or should not fulfill your promise. I have emphasized doctrines that direct the court’s focus away from that question. But many, probably most, contract cases will involve deciding whether there was a breach of obligation. My claim is simply that such a determination is not the focal point of contract law.

¹⁴² For further evidence of this claim drawing on rules about third-party beneficiaries, see Cornell, *supra* note 10, at 117-23 (arguing that third-party beneficiaries’ standing to complain cannot be understood in terms of their being owed a contract duty, and that this point may generalize to all contract plaintiffs).

¹⁴³ *But cf. generally* Barbara H. Fried, *The Limits of a Nonconsequentialist Approach to Torts*, 18 LEGAL THEORY 231 (2012). Barbara Fried forcefully argues that thinking one can answer the “compensation question” without also answering the “prohibition question” is a major mistake in philosophical approaches to private law. *E.g., id.* at 239. As a criticism of many corrective justice approaches, which attach the ex post question of compensation to the ex ante questions about rights, I think Fried’s argument has some merit. But, unlike Fried or even the corrective justice theorists, I do not believe that private law includes a “prohibition question,” except insofar as it must indirectly decide what counts as morally prohibited conduct.

One might think that this characterization, if correct, shows that contract law and the morality of promising are fundamentally divergent after all. Morality is normative and action guiding; contract law is retrospective and remedial.¹⁴⁴

But this is not correct, because morality also has its own retrospective and remedial side. Just as you might have a legal complaint, so too might you have a moral complaint. If I violate a moral obligation owed to you, then you may rightfully feel aggrieved. You may complain against my action, asserting your resentment or demanding an apology. The moral wrong might make it appropriate for me to take remedial steps, from merely apologizing to actually giving compensation. In other words, morality comes with a whole package of ex post and remedial concepts, practices, and relationships.

The question whether contract law is based on the morality of promising should be focused on whether the rules of contract law can be understood in terms of the moral practices surrounding promissory wrongs and complaints. To compare as sources of norms contract law, in its ex post and remedial form, with the morality of promises is to compare apples with oranges.¹⁴⁵

¹⁴⁴ A somewhat related idea is at work in Pratt, *supra* note 11, at 809-10 (“The objection to the claim that contracts are promises . . . exploits the fact that at least some contractual undertakings generate nothing like the moral obligation to perform that attaches to the making of a binding promise.”). Pratt’s argument depends on the idea that one can make a contract without binding oneself morally to perform. *See, e.g., id.* at 809 (“But if promises are undertakings to which certain definite moral norms attach, including a requirement that they be performed, *then contracts are not promises . . .*”). Pratt is wrong to think that this means that there can be contracts without promises. It shows only that some promises are promises to pay damages if one does not perform rather than promises to perform. But it is revealing that Pratt conflates contracting with conditionally agreeing to pay damages. *See id.* at 807-08 (describing a supposed case of contracting without promising in which one party “said that he would fully guarantee his work by contract”). This mistake is plausible precisely because contract law is fundamentally about the remedial question—i.e., the complaint. In a different way, the conception of promises as normative and contract as purely remedial also seems to motivate Lipshaw, *supra* note 24, who argues that promise and contract are separate because the former concerns obligations and the latter concerns consequences. Unlike Pratt, Lipshaw does not maintain that there could be contracts without promises, but he insists that contract law is not addressed to the moral question of obligation. *Id.* at 327. While I am in agreement with this latter point, I do not think it follows that contract law is not based on morality, because I believe morality concerns relationships other than that of obligation.

¹⁴⁵ Other defenders of the relationship between contract and promise have emphasized this point, albeit in slightly different ways. For example, Jody Kraus argues that autonomy should mean that contracting parties are able to select not only their duties but also their remedies and that, as a result, the important question is whether contractual remedies correspond with remedial moral rights. *See* Kraus, *supra* note 1, at 1610 (“By insisting that the justification of contractual remedies turns on their correspondence to promissory morality, correspondence theories force the question of how morality determines the content of remedial moral rights and duties generally.”). I am very sympathetic to Kraus’s idea that correspondence theories have focused on the wrong comparison. I am less sympathetic to the idea that this is because contracting parties can uniquely choose their remedial rights and obligations. For one thing, this creates an obvious regress problem. What are the remedies for a violation of the remedial rights? At some point, they cannot have been chosen. Moreover, the gap between the obligation owed and what can be demanded may exist just as much outside of promissory or contractual obligations as within them.

I believe that, when the comparison is properly made, the parallels are strong. When and to what extent a person has a complaint in contract law largely tracks when and to what extent a person has a moral complaint. In this way, I believe it is correct that contract law is best understood from within the morality of promising.

B. *The Alleged Divergence*

To develop this comparison, I want to return to the areas of contract law where others have found a divergence between contract and promise. First and most important, those who view contract law as an institution best understood in terms of state policy objectives rather than in terms of morality tend to focus on expectation damages. The divergence view argues that because contract law awards expectation damages rather than specific performance, it therefore expects less of the promisor than does morality.

If one distinguishes complaints from obligations, then awarding expectation damages has nothing to do with what is required.¹⁴⁶ Expectation damages are a default measurement of how much the promisee has been wronged. When we award expectation damages, we have determined that the promisor has not performed and that the promisee now has a complaint. The purpose of private law is to recognize and respond to such a complaint. It operates retrospectively. So it is a mistake to think that the use of expectation damages instead of specific performance says anything about what contract law expects in terms of conduct.

¹⁴⁶ There are certain parallels here with the argument offered by Gold, *supra* note 12:

The key insight is to see that, even in cases in which there is a remedial duty to perform, this does not automatically mean the promisee has a moral right to require performance The important distinction here involves the line between what the promisee has a moral right to in terms of remedies and what the promisee has a right to in terms of *coercing* remedies.

Id. at 1926. Gold's distinction is between having a right and being able to enforce that right coercively. For Gold, what one is entitled to in private law is limited to what one could coercively demand from another, which is often less than the other person is morally obligated to do. *Id.* Thus, even if a promisor in breach ought to perform, a promisee may only be entitled to demand an equivalent. *Id.* I am very much in solidarity with Gold's focus on what the injured party can demand, rather than on what the injurer was obligated to do. But I disagree with Gold's focus on coercive enforcement as opposed to remedial moral duties. *See id.* at 1927 ("Remedial moral rights can differ in content from primary moral rights; so too moral enforcement rights can differ in content from remedial moral rights."). Unlike Gold, I am not willing to grant that the remedial moral duty will involve performance. And furthermore, it is not clear to me that, absent a state institution like contract law, someone would have a right to coercively extract expectation damages; having been wronged does not automatically give a person the right to coerce. *See* Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1418 (2006) ("Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger."); *see also* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 159-68 (2009) (arguing that rights of enforcement cannot exist absent some social contract that gives them content).

In ordinary morality, when one fails to perform a promise, one wrongs the promisee. For example, if I promise to drive you to work tomorrow and I do not show up, then I have done you a wrong and you have a complaint. I owe you an apology, and you reasonably may resent my behavior. The magnitude in which these responses are appropriate is, at least generally, in proportion to the expected benefits that you would have obtained.¹⁴⁷ If the promise had low stakes and merely forced you to take the bus, I have done you a lesser wrong than had you missed a key strategic meeting with very high stakes. That is, morality ordinarily measures wrongs done in terms of expectation damages.¹⁴⁸ Moreover, like contract law, substitute performance will be acceptable only if it fulfills the substantial purpose of the original agreement. If I send David Beckham—of whom you are a big fan and whose company excites you far more

¹⁴⁷ Shiffrin mentions, as a divergence from morality, the rule from *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 151 (L.R. Exch.), which limits damages in contract to those foreseeable at the time of contract. Shiffrin, *Divergence*, *supra* note 1, at 724. The point is that the rule seems to make contract law unlike morality in which one is responsible for whatever consequences result from one's wrongdoing. The *Hadley* rule is troublesome, but on one reading, it fits nicely with the account I am offering. Under the *Hadley* rule, the promisee cannot complain over losses that she ought to have disclosed were possible. 156 Eng. Rep. at 151. That is, the rule is another example of a party losing the position to complain on the basis of her own failure. For example, in *Hadley*, the mill (according to the court) should have disclosed that it would be shut down without the mill shaft, and could not claim consequential damages because it failed to make this disclosure. *Id.* On the other hand, there may be reason to doubt the wisdom of the *Hadley* rule generally. For a challenge to *Hadley*'s penalty-default analysis, see Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999).

¹⁴⁸ In responding to Shiffrin, Liam Murphy points out some of the problematic features of Shiffrin's comparison between contract and promise. Liam Murphy, *Contract and Promise*, 120 HARV. L. REV. F. 10, 17 (2006). He suggests that the morality of promising is about obligations and does not have the remedial aspect that contract law has. *Id.* I think Murphy is right to think that contract law is about remedies rather than obligations. I think he is mistaken, however, when he suggests that morality does not provide for guidance in giving out remedies. He writes, "When it comes instead to the idea of *compensation* for breach, I think ethical common sense typically has nothing much to say. Or if it does, I think what it tells us is that there would be something a little awkward about offering compensation for lost expectancy." *Id.* After having initially separated the normative from the remedial, Murphy here conceives of compensation in terms of an obligation to do something. But the question about compensation is a question about how big of a complaint the injured party has. I see no reason why everyday morality cannot provide insight into this question. Surely he is right that it would be a bit shady to simply offer money when one breaks a promise. This awkwardness is probably attributable to the uncouthness of bringing the dirtiness of cash into a personal interaction. It would be much more normal for the person who has broken a promise to offer to do some other service in repayment ("Let me make it up to you"), or for the injured person to request some service as repayment ("Don't worry about it, but could you . . ."). But even in personal interactions, money may occasionally be appropriate ("Please let me buy you a new one"). More importantly, morality does have something to say about the nature of the compensation—in particular about measuring the magnitude of the wrong done. "I'm sorry I missed lunch, let me make it up to you by taking you out next week," may be perfectly acceptable, but it is clear that "I'm sorry I missed lunch, let me give you this stick of gum to make up for it," is not.

than my own—to give you a ride in my stead, then you might not have any complaint because there would be no injury to complain about.¹⁴⁹

That our corrective moral concepts typically operate with expectation damages should already begin to refute the suggested divergence with regard to punitive damages. Morality makes certain actions right and wrong, but that does not mean that it is punitive. Many commentators argue that the absence of punitive damages in contract suggests a divergence from morality.¹⁵⁰ This, it is argued, is because punitive damages are the way to “express the judgment that the behavior represents a wrong.”¹⁵¹

I do not think this is the case. Ordinarily, when morality deems something wrong, it demands a corrective response, the severity of which typically depends on the lost interests. Our moral emotions and practices of wronging are based significantly around the idea of lost interests: I resent you for the time you wasted, you forgive me for the hurt I caused, I compensate you for your losses. These forms are how morality acknowledges a wrong done—and they are not about punishment, but about damaged interests, such as time, pain, and losses. Awarding compensatory damages—like apologizing or offering to compensate someone—is a way of acknowledging that a wrong was committed.

What punitive damages add is the idea of punishment. We impose punitive damages where we want not merely to recognize a private wrong, but also to recognize and discourage a violation of public norms.¹⁵² It may be helpful here to contrast the private law of contracts with a hypothetical criminal law of contracts. The state could make breach of contract illegal and therefore punishable—perhaps by fine. In this system, the state would be creating a legal norm that made breach of contract legally impermissible. The private law of contracts, however, does no such thing, and this is why punitive damages are

¹⁴⁹ I say “might” because there are some cases in which you would still have a complaint. First, it depends on the purpose of our original agreement. If the ride were really about transportation, then David Beckham can potentially advance that purpose better than I could. But if the purpose of the ride were something else—for example, you wanted the emotional support of a close friend en route to a stressful event—David Beckham might not be a substitute. In short, substitute performance must actually be a good substitute. On a related point, substitute performance may not be sufficient to avoid a moral complaint when it goes against the trust implicit in our agreement. If I have a habit of sending “replacement friends” to our arranged meetings, you may still be damaged by the implicit message about the significance I place on our friendship. That is, the disrespect of breach may sometimes constitute damage itself. Cf. Markovits, *supra* note 12, at 1431 (“[The promisor who breaches an honest promise] estranges herself from [her promisee], and violates the command that she treat him as an end, because she pursues (through her breach) an end in which he cannot possibly share.”).

¹⁵⁰ See, e.g., Shiffrin, *Divergence*, *supra* note 1, at 722–24. See generally Curtis Bridgeman, Note, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237 (2003).

¹⁵¹ Shiffrin, *Divergence*, *supra* note 1, at 723.

¹⁵² See, e.g., Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2075 (1998) (discussing the purpose of punitive damages as “penalizing defendants enough ex post that they will undertake optimal precautions ex ante”).

inappropriate.¹⁵³ Contract law is not aimed at providing a state-issued sanction against breach. Rather, it is aimed at providing a remedy for those who have a particular sort of moral complaint against others.

Mitigation also does not represent a divergence between contract and promise, as long as the concept is viewed as part of corrective morality rather than as a normative obligation.¹⁵⁴ Contrary to what Shiffrin suggests,¹⁵⁵ it does not seem that contract law requires promisees to mitigate. Rather, contract law merely limits the complaint available to promisees who do not mitigate. A complainant-oriented perspective on contract law makes this evident.

I do not think that contract law is any different from the morality of promises regarding mitigation. A promisee who might have avoided the harm that the promisor's breach inflicted cannot complain morally about the harm in the way that someone who could not have mitigated the harms might complain. For example, if I promise to lend you my car, but then fail to do so, I have wronged you more if you had no other recourse. If, however, you could easily have borrowed your roommate's car, but simply did not, you can hardly complain about the harm that you received from not having a car (although you might still complain about the fact that I broke my promise—and the wasted energy that resulted). The magnitude of your complaint, morally speaking, has to do with the harm done to your interests and projects. And how much your interests and projects are set back depends on the available alternatives.

This is precisely the view that contract law takes. Contract law does not require that a party mitigate damages. Rather, contract law is only willing to give damages for the amount that the other party's interests were set back. And this depends on the level of alternatives that are available. When a breach occurs, but the other party could easily avoid any losses as a result of the breach, the severity of the wrong is rather small—and so too are the damages in contract.

In sum, I find the basic argument for the view that contract law diverges from the morality of promising somewhat perplexing. I agree that contract law does not provide norms of permissibility and impermissibility that track morality. In fact, it does not seem that it is about norms of permissibility at all. What it is about is the remedial task of recognizing and responding to legitimate complaints.

¹⁵³ I am inclined to think of punitive damages in nonmoral ways. They serve to deter bad behavior, and reward those who litigate against practices that hurt others besides themselves. In this sense, punitive damages are the one sort of damages that are not based on remedying a wrong done. That is, punitive damages are a way to sneak a bit of public or criminal law into the private law system. I suspect this is why they often prove so troublesome.

¹⁵⁴ For an argument consistent with the one made in this paragraph, see generally George Letsas & Prince Saprai, *Mitigation, Fairness and Contract Law*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 319 (Gregory Klass et al. eds., 2014).

¹⁵⁵ Shiffrin, *Divergence*, *supra* note 1, at 724-26.

This is a retrospective notion. Morality also contains a retrospective notion: wrongdoing. Contract is based on morality, but on its retrospective components.

C. *The Mistaken Defense*

Even defenders of the view that contract law is based on the morality of promising are occasionally misled into viewing the relevant comparison as a comparison of norms. Charles Fried's response to Shiffrin is indicative. Fried argues that specific performance is no more the norm in morality than it is in contract law.¹⁵⁶ Fried rejects a conception of morality that requires perfect faithfulness to one's promises: "This is a conception of morality that I do not recognize . . . 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."¹⁵⁷ For Fried, a promise does not create an obligation to perform, but rather an invocation of trust.¹⁵⁸ When expectation damages are willingly paid, there is no violation of this trust.¹⁵⁹ In other words, neither contract law nor morality strictly says that you should keep your promise; rather, they both say that you should keep your promise *or* give adequate compensation.¹⁶⁰

But this response is problematic, as Fried acknowledges, because one might make explicit the stringency of the promise. He writes,

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. We do not see many such contractual provisions . . . But what if we have such a clause in an ordinary sale-of-goods case? Then I am in trouble.¹⁶¹

Why is he in trouble? Well, in this case, it seems clear that the promise entered into genuinely does demand performance, but courts would still only give expectation damages. So, even if Fried is right that ordinary promises do not require specific performance, some special promises might. Recall that one of Shiffrin's claims was that morality, unlike contract, allows parties to set the stringency of the obligation created.¹⁶²

¹⁵⁶ Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 5 (2007).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* (stating that it is "magical thinking" to believe morality demands a seller "doggedly keep his bargain").

¹⁶¹ *Id.* at 7 (footnote omitted).

¹⁶² *See supra* note 34 and accompanying text.

This problem reveals the confusion in Fried's response. Fried, like Shiffrin, is thinking of the remedies as translatable into norms of conduct. Shiffrin argued that contract law is less demanding than morality. Fried responds by assimilating morality to contract law—and morality, it turns out, is not as demanding as Shiffrin thought. The trouble arises because there might be a promise that explicitly was this demanding, but contract law would still only give expectation damages.

The absurdity of the trouble that Fried gets into is suggestive of confusion. Fried mentions that a contract specifying specific performance would be trouble. But why? Why would explicitly requiring specific performance change the nature of a promise at all? It is as though one might strengthen the promise "I promise to do *X*," by adding, "And I promise to really perform my promise." If the addition of this clause changes the initial promise, something in the account has gone very wrong.

I have already suggested that I think Fried is correct in thinking that expectation damages are the remedy in morality. So where does Fried go wrong? He goes wrong by assuming that the remedial question corresponds to the strength of the obligation. As a result, he thinks that one might change to another sort of remedy (i.e., specific performance) by making a different sort of promise (i.e., a stronger one). But this is not the case. If expectation damages are the remedy in morality as well as contract law, then if one says, "I promise to do *X* and I promise to give specific performance," one would owe expectation damages for the second of these promises no less than for the first. If broken promises get expectation damages, then there is no reason that a broken promise to perform should be any different. As Shiffrin puts it, "I doubt that one may alter by declaration or by agreement the moral significance of a broken promise."¹⁶³

But when Fried says that morality has expectation damages, he means something very different than I do. Fried means that the moral obligation created by a promise is more conditional than the obligation of faithful performance. I do not mean this at all. What I mean is that when we fail to faithfully perform, the ordinary measure of how great a wrong we have committed is based on lost expectations.¹⁶⁴ And this is completely compatible with the claim that

¹⁶³ Shiffrin, *Divergence*, *supra* note 1, at 729. Because I think this is right, I take it to refute Shiffrin's claim that morality allows parties to set the stringency of commitment. We can make different promises (as I think "I promise to come if I can" is different from "I promise to come no matter what") but we cannot alter by declaration the moral significance of the same broken promise.

¹⁶⁴ T.M. Scanlon writes,

If one fails to fulfill a promise, one should compensate the promisee if one can, but the obligation one undertakes when one makes a promise is an obligation to do the thing promised, not simply to do it or compensate the promisee accordingly The central concern of the morality of promises is therefore with the obligation to perform; the idea of compensation is of at most secondary interest.

morality requires faithful performance. In this sense, my understanding of the morality of promises is closer to Shiffrin's than to Fried's. I agree with Shiffrin that the morality of promising requires that we perform our promises (as opposed to requiring that we either perform or pay up).

D. *Corrective Justice and Civil Recourse*

I want to offer some brief and general remarks about how the view that I have been describing may relate to existing theories about private law. Two competing conceptions of private law—corrective justice theories and civil recourse theories—both, in different ways, view private law as related to morality and as inherently *ex post*. The interpretation of contract law that I am suggesting has important similarities with both these views, especially civil recourse theory. Ultimately, however, I think that the interpretation of contract law that I have sketched is more radically *ex post* and thus represents a position even further along the spectrum of available views.

I have been suggesting that contract law reflects a retrospective aspect of morality. I take this to be harmonious with Ernest Weinrib's claim that private law is "the locus of a special morality that has its own structure and its own repertoire of arguments."¹⁶⁵ I believe that private law is very much the locus of a retrospective and remedial morality. In this basic sense, my view is in solidarity with corrective justice theories. Corrective justice theorists view the private law as *ex post* in the sense that its obligations are based on the moral relationships that arise once a transgression has occurred. The focus is on second-order obligations of repair rather than first-order duties of conduct.¹⁶⁶

Corrective justice theorists, however, do not draw the distinction between obligation and complaint that I have emphasized. In fact, the corrective justice approach is painstakingly built around the idea that legal remedies correspond with moral obligations. It is a hallmark of the corrective justice approach that the imposition of liability is the fulfillment of what is owed.¹⁶⁷

Scanlon, *supra* note 17, at 92. I agree with the first sentence wholeheartedly, but I must respectfully disagree with the second. The idea of compensation—that is, the remedial moral notion—is significant in its own right. It is, I have argued, the basis for contract law.

¹⁶⁵ ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 2 (1995). I fear, however, that Weinrib himself fails to appreciate fully the way in which this morality is "special." By intimately linking the nature of an obligation with the wrong committed, Weinrib does not recognize the distinctly *ex post* perspective of private law and the morality with which it connects.

¹⁶⁶ See, e.g., *id.* at 63 ("[C]orrective justice requires the actor to restore to the victim the amount representing the actor's self-enrichment at the victim's expense."); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 365 (1992) ("Corrective justice requires annulling wrongful gains and losses.").

¹⁶⁷ See, e.g., RIPSTEIN, *supra* note 146, at 82 ("What is hindered . . . is not wrongful action but its impact on the external freedom of others So, for example, if I injure you or damage your property, you are entitled to compensation. You must be made whole, so that the embodiments of

The distinction that I have drawn maintains that, even if an obligation is owed, the imposition of liability may not be appropriate. Liability is viewed as something other than the enforcement of a moral obligation.

In this regard, my account is more in line with civil recourse theories of private law. In contrast with the corrective justice theories, civil recourse theories maintain that liability is not the enforcement of remedial moral obligations.¹⁶⁸ Instead, private law consists in the legal power to seek redress when first-order obligations have been violated.¹⁶⁹ Private law is viewed as *ex post* in the sense that it consists of legal powers that arise after a wrong has been committed. This approach, like mine, severs the tight connection between legal liability and the enforcement of a moral obligation.

In one way, I believe that the account that I have offered might be read as compatible with a civil recourse theory of private law. In particular, the requirement that a party be in a position to complain might be interpreted as parallel to what civil recourse theorists have described as “a substantive standing requirement.”¹⁷⁰ My argument has been that one precondition for making a valid complaint is having the standing to complain about the relevant wrongdoing, which can be lost by virtue of a party’s own misconduct. Thus, certain defenses in contract law that focus on the misconduct of the complaining party can be interpreted as challenges to the standing of the complaining party. In addition to the substantive requirement that a complaining party have suffered a violation of a right, there is a further substantive requirement that a victim be in a position to complain against such a violation.

In a deeper way, however, the account that I have sketched is at odds with civil recourse theory. Like the corrective justice theorist, the civil recourse theorist views private law as involving first-order legal obligations.¹⁷¹ According

your external freedom are as they would have been had I not wronged you. The same applies if I fail to honor a contract I have made with you. You are entitled to be put in the position you would have been in had my choice—itsself an embodiment of *your* freedom because I transferred it to you—been exercised as I was obligated to do.”).

¹⁶⁸ See Zipursky, *Civil Recourse*, *supra* note 139, at 755 (“The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties.”).

¹⁶⁹ *Id.*

¹⁷⁰ John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 957-60 (2010); Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 304-07 (2011) [hereinafter Zipursky, *Substantive Standing*]. By “substantive standing,” the corrective justice theorist means that one of the plaintiff’s rights was violated. Of course, this understanding of substantive standing is very different from the sense of standing that I have described. But the general idea that private law involves a right of action preconditioned on a standing to complain is the same.

¹⁷¹ See generally John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

to the civil recourse theorist, there is a tort law duty of care and a contract law duty to fulfill one's contract.¹⁷² An important aspect of the civil recourse approach is to view the power to seek redress as necessarily connected with the violation of a first-order obligation that is owed to the person seeking redress.¹⁷³ As a result, decoupling first-order obligations and the complaints based upon them, as I have suggested, is at odds with even civil recourse theories.

Unlike the civil recourse theories, I have suggested that there are no first-order legal obligations in contract law. Contract law does not include an obligation to fulfill one's side of an agreement. Such questions of permissibility are simply not part of its scope. It is essential to the civil recourse theory to hold otherwise, because for it, the violation of a first-order duty that is owed to a particular individual is what gives that individual standing to bring a legal action.¹⁷⁴ A person is in a position to complain if and only if a duty owed to her is violated. The first-order obligations and the standing to complain are flip sides of the same coin. But detaching obligation and complaint in the way that I have suggested calls this picture into question.

For these reasons, the picture of contract law described here presses further than do corrective justice and civil recourse theories. Corrective justice theory correctly emphasizes the ex post and remedial side of morality. Civil recourse theory correctly shifts the focus from the obligation of the wrongdoer to the legal claims of aggrieved party. But this shift does not go far enough in detaching the question whether a party has a complaint from whether a first-order legal

¹⁷² See generally *id.*

¹⁷³ This feature of civil recourse theory is the basis for a convincing criticism offered by Arthur Ripstein. Ripstein argues that civil recourse faces a dilemma: either the recourse available is shaped by the nature of the obligation that gives rise to the action, in which case the theory collapses into corrective justice, or the recourse is not shaped by the obligation, in which case the theory defends mere revenge or instrumentalism. See Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 203 (2011) ("With respect to what we might call the narrow principle of civil recourse, according to which plaintiff has a power to enforce a right, civil recourse is not merely consistent with, but required by, corrective justice . . . [T]he attempt to distinguish a more ambitious idea of civil recourse, understood as domesticated anger and retaliation, must fail. Not only does it fail to integrate with the relational nature of duty; it also falls into the very sort of functionalist instrumentalism that pragmatic conceptualism sought to leave behind."). I agree that, once one accepts that private law includes a system of first-order relational duties, then it is hard not to slide into a corrective justice view. My view avoids this criticism because, unlike the civil recourse theory, it does not accept the connection between first-order obligations and wrongs. In responding to the civil recourse theorists, Ripstein remarks that "the . . . equation of having a duty with the prospect of direct enforcement by a public authority leads ineluctably to the conclusion that tort law does not include duties of non-injury, as a public authority does not directly enforce them either." *Id.* at 201. In a very rough sense, my view accepts this horn of Ripstein's dilemma.

¹⁷⁴ See Zipursky, *Substantive Standing*, *supra* note 170, at 306 ("Substantive standing rules say that a right of action for P in a certain tort T against D is dependent upon D's having done the tort T upon P in the manner enjoined by the relational directive corresponding to the tort T; that P has a right of action for T against D only if P was among those upon whom D was enjoined not to commit T, and D did commit T upon P.").

obligation was violated.¹⁷⁵ Only once the distinction is fully drawn is the connection between private law and morality properly appreciated.

CONCLUSION

I have argued that an important distinction exists between the *ex ante* realm of obligations and the *ex post* realm of complaints. This distinction is evident in situations where one party loses her standing to complain, even if an obligation may have been violated. And I have argued that, once this distinction is recognized, it is clear that contract law is concerned with complaints.

What this means is that contract law does not actually impose obligations. In a way, then, the theory of efficient breach turns out to be partially correct. Contract law does not offer a norm against breach of contract. This is not—as the theory of efficient breach would suggest—because contract law judges breach of contract permissible when the costs are high enough. Contract law simply does not determine permissibility. If it did, it would be like the criminal law, imposing general permissions and prohibitions. But it is not.

It is instead a form of private law with one party asserting a complaint against another. Indeed, it begins with a filing that is called a “complaint.” And the question with which contract law concerns itself is whether that complaint is valid against the other party. This process is intrinsically *ex post* and intrinsically about justice as between the two parties.

It is a mistake to think that contract deems breach to be legally impermissible, but it is also a mistake to think that contract law considers breach to be legally permissible. Contract law is about recognizing and responding to, in a legal way, the complaints that breach can produce. Such complaints are a familiar part of everyday morality. If this is right, then contract law is based on the morality of promises after all. But it is not directly based on the moral obligations that promises create—rather, it is based on our response to promissory wrongs.

¹⁷⁵ Another way to put the difference is as follows: civil recourse theories attempt to draw a distinction between wrongs and remedies, but they accept the corrective justice account of the connection between duty and wrongs. My view draws the important distinction between duties and wrongs, not between wrongs and remedies.

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