This article defends the strong claim that contract law does not impose obligations to perform. This is not because there are no such obligations or because contract law is disconnected from morality. Far from it. This article argues that, rather than enforcing the obligations of promises, contract law concerns complaints against promissory wrongs. In order to draw out the distinction between these ideas, I begin with an account of the doctrine of substantive unconscionability. This account avoids the oft-issued charge of paternalism, but also starkly contrasts with an alternative non-paternalist account offered by Seana Shiffrin. My claim is that the doctrine of unconscionability can be explained by the way in which an exploiting party loses his or her moral complaint. This distinction between enforcing obligations and recognizing complaints can, I argue, be used to provide a broader defense of the relationship between the contract law and the morality of promising against recent attacks from both economic and philosophical camps.
I. INTRODUCTION

This article offers some mild heresy: contract law does not impose an obligation to perform. It is not that contract law is disconnected from morality and the realm of promissory obligation, as is sometimes suggested. In fact, this article defends the view that contract law is based on the morality of promises. My claim is that contract law concerns complaints against promissory wrongs, not obligations to keep one’s promise. I believe that drawing this distinction can advance the long and rich debate about the structure and justification for contract law generally.

If one assumes that valid moral complaints arise always and only when an obligation has been violated, then this distinction will not seem meaningful. A valid complaint would imply the breach of a duty, and the inability to assert a complaint would imply the lack of any breach. Contractual liability would be simply the flipside of contractual obligation. I believe, however, that there is an important difference between having a complaint and being the victim of a breached obligation.

In order to draw out the difference, this article offers an account of the doctrine of substantive unconscionability, contrasting it with recent work of Seana Shiffrin. My claim is that the unconscionability doctrine is best understood not as nullifying a contractual obligation, but as undermining an entitlement to complain. In short, a party who takes advantage of wildly unfair terms cannot complain upon breach. This account is simple; it draws on basic moral concepts; it avoids the oft-issued charge of paternalism; and it explains how unconscionability coheres with other contract law doctrines.

Ultimately, the distinction between enforcing obligations and recognizing complaints at work in this account of the unconscionability doctrine can, I argue, be used to provide a broader defense of the relationship between contract law and the morality of promising. What the distinction illuminates is the way in which contract law is inherently ex post. Once one severs complaints from obligations, it becomes clear that contract law is about the former rather than the later. This picture of contract law as inherently ex post and not concerned with imposing obligations dissolves the challenge raised by the alleged divergence of contract and promise. That challenge is built around the idea that contract law does not impose the same sort of obligations that are imposed by the morality of promises. Armed with the distinction between obligations and complaints, I argue that this is beside the point. Contract law recognizes complaints based on the breach of a promise in much the same way that morality does.

This article proceeds in four parts. 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 views the basic features of contract law to be explicable from within morality whereas the later sees contract law as explained
primarily from outside morality. Part II focuses on the doctrine of unconscionability. Two different explanations of the doctrine are considered, the first focused on the interests of the state in having such a doctrine and the second focused on accounting for the doctrine in terms of moral relationships. This second explanation draws on a distinction between moral obligations and moral complaints. Part III suggests several reasons for preferring the second explanation. Among these reasons is that fact that the same sort of distinction between obligation and complaint can be used to explain other areas of contract law, such as duress and fraud. Part IV uses these insights to develop a more general theory of contract law according to which it concerns promissory complaints. 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.

II. TWO THEORIES OF CONTRACT LAW

Recent years have seen a burst of literature on the underlying theories of contract law.\(^2\) One focal point of this literature is the relationship between contract law and morality. Although there are many variations, basically two conceptions of this relationship exist. According to one view, contract law is essentially a legal structure built around the moral norms of promising. Thus, contract law necessarily reflects moral norms. According to the opposing view, contract law is a state institution with its own purposes. 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?\(^3\)

The classic articulation of the view that contract law should be understood from within morality is Charles Fried’s 1981 book, *Contract as Promise*.\(^3\) The core idea is that contracts are binding as the self-imposed obligations of contracting parties. 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


\(^3\) CHARLES FRIED, CONTRACT AS PROMISE (1981).
assume voluntarily an obligation—is itself a form of freedom. Other scholars, who differ with 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.

The key point here is that contractual obligations arise in the same way that promissory obligations arise. Of course, describing why, morally speaking, promises are binding is itself no small task and has generated controversy of its own. But whatever the explanation for why voluntarily promising generates 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 structure can explain contract law. As a result, 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. The success of this view, therefore, turns on how well moral principles can 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.

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4 See, e.g., Markovitz, supra note X (arguing that contract, like promise, must be understood in terms of a community created between promisor and promisee); T.M. Scanlon, Promises and Contracts, in THE THEORY OF CONTRACT LAW 86 (Peter Benson ed., 2001) (defending a view of contract law that parallels an account of promising that turns on the significance of providing assurance to another).

5 Fried invokes a conventional account of promising. Fried, supra note X, at 11-17. This conventional account of promising has been criticized. See T. M. Scanlon, WHAT WE OWE TO EACH OTHER, ch. 7 (1998). 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 that fact. What Scanlon adds is the idea that promising involves giving assurance. But he does not reject the thought that bindingness 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 avoided the latter topic. For further discussions of this question, see generally WILLIAM VITEK, PROMISING (1993); Niko Kloodny & R.J. Wallace, Promises and Practices Revisited, 31 Phil. & PUB. AFFAIRS 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).

6 The view that contract is deeply connected with morality draws some support from recent empirical work suggesting that citizens do regard at least some breaches of contract as a moral wrong. See Tess Wilkinson-Ryan & Jonathan Baron, Moral Judgment and Moral Heuristics in Breach of Contract, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).
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. But the state’s role, on this view, 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.” Contract law is a separate 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.” 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.

The opposing view holds that contract law is systematically divergent 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.

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

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7 See Scanlon, *Promises and Contracts*, supra note X.
9 FRIED, supra note X, at 21.
10 See FRIED, supra note X, at 21 (“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 it a promise one is taking responsibility not only for one’s present self but for one’s future self.”).
11 See, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722 (2007) (“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 this judgment.”); 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 that 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.”).
12 See generally Shiffrin, *Divergence*, supra note X.
First and most significantly, contract law gives expectation damages. A breaching party is normally required to pay the financial value of performance to the other party. Only in rare instances is specific performance required. 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 doesn’t truly impose a duty not to breach one’s contract, but rather the disjunctive duty either to fulfill the promise or pay its value.13 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.”14 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.

The point here is not only what contract law gives—expectation damages—but what it doesn’t give—anything further. Contract law typically does not award specific performance. And there are other things that contract law doesn’t give as well. Contract law does not provide for punitive damages.15 That is, contract law does not provide for additional damages that are based on the perceived badness of the behavior. Unlike in tort law, where more egregious conduct results in punitive damages reflecting the court’s condemnation of the action, contract law does not allow for punitive damages.16 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.17 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,18 contract law allows no such

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13 See Oliver Wendell Holmes, Jr., 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.").

14 Id. at 724.

15 See Restatement (Second) of Contracts § 355 (1981).

16 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.

17 See, e.g., Shiffrin, supra note X, 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.").

18 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
freedom, requiring the value of a contract to be the economic expectations. 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 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. Because the promisor may have occasion to gain more through breach than the promisee will lose, the theory of efficient breach holds that the best outcome is for the promisor to breach the contract. 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 breach.

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 it’s a good thing too!

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19 Liquidated damages, for example, are permitted only to the extent that they are a reasonable measure of the estimated economic damages ex ante. See Uniform Commercial Code §2-719; Wassenaar v Towne Hotel, N.W.3d 357 (Wisc. 1983).

20 See, e.g., Robert Birmingham, Breach of Contract, Damages 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.”).


22 This should be qualified by noting that some proponents of efficient breach will not see this as a divergence from morality in that they will view morality as having the same or 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 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. 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
This does not mean that the second approach—the view that contract is a distinct social institution—excludes moral considerations from contract law.\textsuperscript{23} Rather, moral considerations enter in a different way—as one set of reasons in the calculus of 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 values and then apply that rule to the particular act.\textsuperscript{24} Morality is a factor behind a rulemaking decision rather than providing 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 seems 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 similar argument is available that focuses on contract law’s demands of the promisee. Contract law, it is said, requires mitigation. When a party breaks a contract, the promisee does not get expectation damages if she might have avoided those damages by her own actions.\textsuperscript{25} If you break a contract with me, I cannot collect losses that I willingly permit to pile up. In this sense, a party in contract is expected to take steps to reduce the damages needed to compensate him or 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 with me, I am under no moral obligation to clean up your mess.\textsuperscript{26}

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\textsuperscript{24} See John Rawls, \textit{Two Concepts of Rules}, 64 Phil. Rev. 3 (1955). It seems to me that economic analysis views the common law judge as engaged in what Rawls calls “justifying a practice.” In contrast, the opposing approach views the common law judge as engaged in “justifying an act falling under a practice.”

\textsuperscript{25} See \textit{Restatement (Second) of Contracts} § 350 (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 recovery . . . to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”).

\textsuperscript{26} See Shiffrin, supra note X, 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.”).
In *Contract as Promise*, Fried defends the mitigation requirements of contract law as reflecting an altruistic duty on the part of the promisee.\(^\text{27}\) 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 from the full consequences of his wrong.”\(^\text{28}\) 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. And in this sense, contract law appears to demand more of the promisee than morality does.

Here again, the point is that the norms of contract and promise are different. Any one of these 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.”\(^\text{29}\) Thus the second view—that contract law reflects considerations apart from the morality of promising.

Two cautions are worth noting on here. First, the views that I am describing are not entirely rigid, 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.\(^\text{30}\) 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, Seana Shiffrin contends that, because their subject matter overlaps, it is important that contract law not impose directives directly

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\(^{27}\) Fried, *supra* note X, 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 const, since the victim of the breach is never worse off for having mitigated.”).


\(^{29}\) Id. at 719.

opposing those given by morality. Thus, while she rejects the idea that contract law reflects moral norms, she contends that it should accommodate those norms. On this view, contract law doesn’t reflect morality, but it also isn’t a public policy choice made without concern for moral norms. Although I consider both Craswell and Shiffrin to be examples of the second view—the view that contract law does not reflect moral principles—they both allow some role for morality to play in shaping contract law.

Second, the distinction that I am drawing is not isomorphic 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 results of particular legal rules, which is more frequently the concern of an economist. But there is no necessary correspondence here. 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. 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. Shiffrin seems to hold something like this view. 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 is not correct and should be resisted.

III. TWO THEORIES OF UNCONSCIONABILITY

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

32 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. Dori Kimel, From Promise to Contract 79 (2003) (“[C]ontract emerges not as promise, but as a substitute for promise.”).
33 Something like this view might be attributed to Eric 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.”).
34 See Shiffrin, The Divergence of Contract and Promise, supra note X, at 711 (“[L]aw is a cooperative activity of mutual governance that takes institutional form . . . .”).
A. The Doctrine of Substantive Unconscionability

According to the substantive unconscionability doctrine, a court may refuse to enforce a contract the terms of which it deems to be sufficiently unfair. Consider four examples:

**Niemiec v. Kellmark Corp.**³⁵ – Defendant was a club that sold membership. Members were then offered retail merchandise at supposedly reduced prices. The membership could not be cancelled, even on the death of the member. Merchandise could not be returned and orders could not be cancelled. The plaintiffs bought a membership, but changed their minds the next day. The court found the membership contract was “grossly” unconscionable.

**Williams v. Walker-Thomas Furniture Co.**³⁶ – 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. By the terms of the contract, all payments were credited pro rata on all outstanding accounts due. The effect of this was to keep a balance due on all items until all balances were paid off. In 1962, Williams bought a stereo set on which she defaulted shortly thereafter. The furniture company sought to retake all items purchased since 1957. The appeals court held that the contract was not enforceable because the contract contained an “element of unconscionability.”

**Paragon Homes v. Carter**³⁷ – Paragon Homes is a New England company. It contracted with Carter, a Massachusetts resident, to have work done on homes in Massachusetts. The terms of the contract, however, gave exclusive jurisdiction to Nassau County, New York. The only apparent reason for this clause was to make litigation costly and difficult for the defendant. The court held the clause of the contract “grossly unfair and unconscionable.”

**Glassford v. BrickKicker & GDM Home Services**³⁸ – Plaintiffs contracted to buy a home, contingent on a home inspection. Defendant provided the home inspection services. The home inspection contract limited liability to the inspection fee paid, which was $285. It also required binding arbitration, which required an initial

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³⁵ 581 N.Y.S. 2d 569 (N.Y. 1992)
³⁶ 350 F.2d 445 (D.C. Cir. 1965).
³⁷ 56 Misc.2d 463 (N.Y. 1968).
³⁸ 2011 VT 118, 35 A.3d 1044.
arbitration fee of $1350. The court found the clauses unconscionable because they created a “disingenuous” and “illusory” remedy scheme.

In each of these examples, the contract is not enforced because of the grossly unfair nature of its terms. While the unconscionability doctrine often is used to invalidate contracts with procedural irregularities, making it simply an extension of the law’s protections against fraud and duress, this 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 substantially different than when any ordinary person accepts a credit card offer. But according to what is called ‘substantive unconscionability,’ a contract may be unenforceable based only on the unfairness of its terms. 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. 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 court fails to respect individuals’ freedom to determine the course of their own lives. The concern is that unconscionability, 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.

There is a second 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 (what has been called the “will theory”). On this view, enforcing voluntarily assumed obligations is a way of respecting individual autonomy. 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

39 “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.” Maxwell v. Fidelity Financial Services, Inc. 907 P.2d 51, 59 (Ariz. 1995).
40 As Charles 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 not take him seriously as a person. We infantalize him, as we do quite properly when we release the very young from the consequences of their choices.” CONTRACT AS PROMISE 20-21.
41 “In order that I may be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.” Id. at 13.
42 How promising actually binds the individual is not important here. The important claim is simply that a promise is morally binding if it is freely undertaken. (This is may be too strong. What is important is that, without the invocation of some exceptional circumstance, a freely-made promise binds the promisor in light of that fact, and irrespective of any reliance by the promisee.) Fried invokes a conventional account of promising. FRIED, CONTRACT AS PROMISE 11-17. This
contract law should not refuse to enforce certain voluntary contracts merely because one party made a poor choice in imposing an obligation on himself or herself.

While the two are naturally run together, the concern about paternalism is distinct from concerns 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). The conflict with the will theory, in contrast, arises because the will theory holds that a contract should be enforced if it is freely entered and the doctrine of substantive unconscionability holds that there are some freely entered contracts that should not be enforced. The difference is that the problem of paternalism might be avoided if there were non-paternalist reasons that were sufficient to justify the doctrine of unconscionability. 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.

B. A State-Regarding Theory of Substantive Unconscionability

One strategy for defending the doctrine of substantive unconscionability against the charge of paternalism involves articulating a non-paternalist basis for refusing to enforce the contract. Seana Shiffrin has developed just such an account. The basic idea is that the state need not be motivated by paternalist aims in order to

conventional account of promising has been criticized recently. See T. M. SCANLON, WHAT WE OWE TO EACH OTHER ch. 7 (1998). I think that the challenge raised by the unconscionability doctrine is no less challenging for Scanlon’s theory, in that he too thinks that intentionally undertaken promises are binding in light of that fact. What Scanlon adds is the idea that promising involves giving assurance. But he does not reject the thought that bindingness arises out of the voluntary making of the promise.

43 For a nice discussion of this type of response to alleged paternalism and the difficulties therein, see Peter de Marneffe, AVOIDING PATERNALISM, 34 PHIL. & PUB. AFFAIRS 68, 68-76 (2006).

44 My primary concern is the apparent divergence between contract and the morality of promises. As such, I am somewhat less concerned with the particular charge of paternalism that is more the focus of Shiffrin’s paper. In my view, paternalism is often permissible, as a protection that agents do (or should) want. Because I think that my family, friends, community, and government often know better than I what is good for me, I accept that they should treat me in paternalist sometimes (as long as this does not dominate their attitude towards me). See de Marneffe, supra note X. But even if this defense of the unconscionability doctrine is available, it would still suggest that contract law is substantially different than the morality of promises—and that is my main target in this paper.

45 Of course, put this way, the will theory appears too strong. Few people think that contracts to do illegal things, for example, should be enforced even if they were voluntarily chosen. But even if one doesn’t hold such an absolute version of the will theory, there is still a gap between thinking that the doctrine of unconscionability is not paternalist and thinking that the doctrine is compatible with the will theory of contract.
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, “the 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.” Thus, the state’s own interests in choosing which agreements to enforce can provide a non-paternalist basis for refusing enforcement.

Shiffrin’s strategy has two familiar roots. First, the search for non-paternalist justifications as a means for escaping a charge of paternalism is common. This is, for example, the same strategy involved in justifying mandatory seatbelt laws on the basis of reducing public health care expenditures. Second, the appeal to the state’s role as contract enforcer is also familiar. The idea is, as Shiffrin acknowledges, 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. In that case, the Supreme Court held that a court could not enforce a covenant because the court was prohibited from discrimination by the Fourteenth Amendment. That is, the enforcement was rejected because of the role of 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, however, relies on at least partially detaching contract law from the morality of promises. Making the question of whether the state will choose to enforce an agreement independent of whether the underlying promise was morally binding means that questions of contract law are not transparent to questions in the morality of promises. 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. The Complainant-Focused Account

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, 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

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46 Id. at 224.
47 Id. at 233 n.34.
48 334 U.S. 1 (1948).
49 Notice that this is almost structurally essential to the approach. The search for nonpaternalist reasons for not enforcing the contract implies that there be reasons that do not concern the promisor. And this implies that the basis for enforcing agreements is not the promisor.
nonetheless not have 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 arguendo the core idea of the will theory—that voluntarily assumed obligations are binding as such—the fact that the promisor acts wrongly in violating her voluntarily assumed duty does not imply that the promisor can complain. \footnote{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 as the hands of the promisee and those willing to aid him.” \textit{Id.} 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.} The gap between these two ideas is missed if one assumes that obligation and complaint are part of the same moral package.

But, 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, you casually respond, “Arsenal is a bunch of whiners and cheaters.” 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. Ex hypothesi, you have acted \textit{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 guy who hit you first can legitimately complain that he has been wronged. By striking you, he has surrendered any position to complain 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.”

What the example illustrates is the fact 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 standing \footnote{See G.A. Cohen, \textit{Casting the First Stone: Who Can and Who Can't, Condemn the Terrorists?} in \textit{FINDING ONESelf IN THE OTHER} 119, 115-133 (2013) (“[A] person many seek to silence, or to blunt the edge of, a critics condemnation… [by] seeking to discredit her critics assertion of her standing as a good faith condemnor of the relevant action.”); \textit{cf.} \textit{STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT} 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.”).} to complain because of his or her own misconduct. \footnote{For an interesting discussion of these sorts of cases, see Saul Smilansky, \textit{The Paradox of Moral Complaint}, 18 \textit{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, so long as one insists that all impermissible action is grounds for a complaint—precisely what I am arguing that we should abandon as unreflective of our moral experience. Smilansky argues that rejecting the connection between obligation 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.” \textit{Id.} at 290. I do not share this view because I think the concept of obligation is perfectly intelligible without the concept of accountability.} My claim is...
that something like this is what happens in unconscionable contracts. One party loses its position to complain when the contract is breached because of its own bad conduct beforehand. 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. For example, the party who contracts into the abusive loan scheme may have an obligation to pay up, while at the same time the loan operation itself may not be in a position to complain if the contract is broken. That is, the loan operation cannot complain when those they are trying to exploit refuse to be exploited. In short, the claim that a breach of contract is against one’s obligations does not imply that the breach creates a moral complaint in the other party.

In the previous example, the party loses his complaint because of his nearly identical behavior. The person who punches cannot complain about being punched back. In this sense, the complaining party has already disregarded the very norm that he or she 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 didn’t breach the contract, so why shouldn’t it be able to complain about the customers’ breach?

While identical conduct opens the possibility of a tu quoque criticism, I don’t believe that this is the only way that a party can fail to be in the position to complain. The same thing occurs, I believe, where the party’s own misconduct leads to the other party’s subsequent conduct.

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. For example, promissory estoppel prevents a party from withdrawing a promise that another has reasonably relied upon to his detriment. The idea is that one cannot assert one thing 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 consequent 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.

If the moral wrong of breaking a promise consists in its being a form of exploitation, see Tess Wilkinson-Ryan & David A. Hoffman, Breach Is For Suckers, 63 VAND. L. REV. 1003 (2010) (offering empirical evidence that people view breach as a form of exploitation of trust), then the wrong acts would actually be quite similar. But I do not believe that strict similarity is necessary, so I do not pursue this line of argument.

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 X at 122-23.
responsible for something similar or worse yourself but because you bear at least some responsibility for the very thing that you seek to criticize.\textsuperscript{56} 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 to undermine the party’s standing to complain. Distinguishing these ideas, one can see that the bar fight example involves an over-determined lack of position to complain: the would-be complainant both did the same thing (\textit{tu quoque}) and provoked the complained-of conduct (different than \textit{tu quoque}).

Thus, while the bar fight example involves a party losing his complaints based on nearly identical misconduct, this sort of tight similarity is not necessary. An appropriate connection (like a causal connection) between the different misconduct can play the same role.\textsuperscript{57} For example, suppose that you believe that I am a good friend. In this belief, you promise to read the 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 of whether you should, nevertheless, keep your promise. My wrongdoing would prevent me from being in a position to complain, even if its true that you should still keep the promise.

In this example, it is no doubt significant that the promise was made under non-ideal circumstances. Had you known about my bad behavior, you might never have made the promise. To say this is importantly not to say that the promise was conditional. But it 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 in his drink or insulted his appearance. Neither of these wouldn’t have been conduct identical to his, but he still could not, I think, complain.\textsuperscript{58}

What these examples suggest is that inappropriate conduct need not be perfectly identical in order for a party to lose his or her ability 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.\textsuperscript{59}

\textsuperscript{56} Cohen, \textit{supra} note X at 123.
\textsuperscript{57} \textit{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.”)
\textsuperscript{58} Of course, if you escalated the conflict by throwing a grenade instead of a punch, he would be in a position to complain about that. But as long as the response was provoked and non disproportionate, it seems like he is in no position to complain.
\textsuperscript{59} There is an obvious question about what sort of relationship will produce this loss of complaint results. I will not try to describe the contours of this relationship. Clearly the mere fact that you told
Exploiting an opportunity for an imbalanced exchange may be just this sort of bad act.\footnote{See generally ALAN WERTHEIMER, EXPLOITATION (1996).} 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 in part precisely 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 benefitting 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.\footnote{It is noteworthy that, 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 bad aspects of exploitation despite the consent of the exploitee, see WERTHEIMER, supra note X; JOEL FEINBERG, HARMLESS WRONGDOING 179 (1984) (“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.”); see also Hillel Steiner, A Liberal Theory of Exploitation, 94 ETHICS 225 (1984) (arguing for a trilateral account of exploitation in which the exploiter benefits from injustice to the exploitee by a third party).} My suggestion is that the law is simply tracking this familiar aspect of morality.\footnote{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 Henry E. Smith, The Equitable Dimension of Contract, 45 SUFFOLK L. REV. 897 (2012). I agree with Smith that equitable doctrines suggest the important role that morality plays in contract law, and I agree that the equitable doctrines are importantly ex post. There are, however, noteworthy differences. Most importantly, Smith seems to view the ex post nature of equitable doctrines as in 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 of shrinking surplus and he views the legal doctrines as serving the instrumental purpose of discouraging this evil. Thus, for him, “the 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 view the use of equitable doctrines as concerned with shaping people’s conduct to conform with morality or economic efficiency.} The only reason for the state to refuse to lend its resources is if there

\textit{...to facilitate and an unworthy...}
is something wrong with one party taking advantage of unfair terms.

IV. Arguments for the Morality-Based Approach

A. Can One Complain Morally?

Why prefer one theory 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 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 were it not for the state’s self-regarding concerns, the promisee would have a legitimate complaint. Shiffrin’s theory is superfluous if one accepts that there are no grounds for moral complaint, but necessary if there is. I want to offer some considerations that suggest that the promisee is not in position to complain and that this is the concern of the unconscionability doctrine.

First, note the implausible sound that the exploiting party’s complaint would have. Imagine that party exclaiming, “What have you done?” Such an exclamation strikes us as disingenuous because the party’s own action contributed to that very transgression. He or she bears some responsibility for the violation. Within certain bounds, one who has treated another wrongly does not seem to be in a position to complain when they find themselves treated wrongly in response. Similarly, one who has exploited others with patently unfair contracts does 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 cannot be heard to say that the act in question was a wrong to them.

investment of time and energy.” At times, Shiffrin backs off 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 228. 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 non-moral ways. Moreover, the only way that unconscionable contracts would seem to be unworthy endeavors is insofar as they are somehow wrong to one of the parties.

64 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.

65 Putting it this way may sound like it is blaming the victim. Unlike pernicious victim blaming, however, here (a) the “victim” has done something wrongful, and (b) saying that the “victim” has no standing to complain is not to condone or absolve the secondary wrongdoer.

66 The connection with the similar moral phenomenon of tu quoque does create a possible challenge for my account. 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 think that there is much worth investigating about how exactly the moral and legal responses line up. Nevertheless, 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 [defendant] might properly reply tu quoque, and a
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 up for services rendered, the state will not enforce the contract. That case, I am inclined to think, 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 consideration.

The unconscionable contract does not appear like this. We do not feel any sense that the exploiting party has been done an injustice, as we do toward the stiffed Roxanne. In an unconscionable contract, it is not that one party has truly been wronged and yet the state will not give damages. Rather, the exploiter has no complaint at all.

This is why Shiffrin’s proposal seems to miss the mark. I have a similar feeling toward the Shelley v. Kraemer strategy that Shiffrin mimicks. While one might say that racially restrictive covenants cannot be enforced by the government, this really seems to dodge the important issue. The more illuminating explanation is that the racist who demands enforcement simply has no legitimate complaint. The Shelley strategy implies that the landowner really commits a wrong by selling to a black family, just a wrong with no remedy. I think that, morally speaking, this can’t be correct.

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 be insisting upon its own exploitation. For example, suppose that the customers in Paragon Homes were the ones insisting (perhaps entirely against their interests) on the exclusive jurisdiction on Nassau County, New York, and it was the corporation who was seeking to waive the clause (perhaps to avoid the public court of conscience would leave the parties concededly in pari delicto where it finds them.”). Secondly, there is a very open question about the scope of the tu quoque phenomenon in morality. See G.A. Cohen, Ways of Silencing Critics in FINDING ONESELF IN THE OTHER 134-42 (2012) (cataloguing different views of tu quoque’s moral scope). 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. To the extent that there is some difference in the extent to which these phenomena are present, that may be due to practical considerations.

I think that Shelley seems like such a clever opinion because it is clearly based on a bit of legal gymnastics. The constitutional protections at issue are supposed to apply to state action. The court applied them in Shelley to an apparently private agreement by saying enforcement itself would be state action. But this undermines the private/state action distinction. 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 Mark D. Rosen, Was Shelley v. Kraemer Incorrectly Decided? Some New Answers, 95 CAL. L. REV. 451 (2007).
appearance of total unfairness towards its customers). In such a case, Shiffrin’s account would suggest that such a claim 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 on who is seeking to enforce the clause.\textsuperscript{68} Contracts aren’t merely unconscionable; they are unconscionable \textit{to particular parties}.\textsuperscript{69}

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 they 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.\textsuperscript{70} Similarly, the state’s self-regarding reasons may not seem to justify a refusal if the state sometimes does assist similar

\textsuperscript{68} 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. \textit{See}, e.g., James River Mgmt. Co. v. Kehoe, 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 \textit{voidable by the party upon whom the provision was unconscionably imposed}; it is not void.” (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 \textit{voidable by Mrs. Gross}.” (emphasis added)); Kelley v. Caplice, 23 Kan. 474, 477 (Kan. 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 \textit{she cannot recover on the agreement}.” (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 procedurally unconscionable and that Palmer Ridge cannot enforce the . . . warranty’s limitations against the Mattinglys.”).

\textsuperscript{69} 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.

\textsuperscript{70} \textit{See} Rebecca Stone, \textit{Unconscionability, Exploitation, and Hypocrisy}, J. OF POL. PHIIL. (forthcoming).
exploitation and seems to deploy its self-regarding reasons inconsistently.\(^{71}\) 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.

Finally, even the features of contract law that Shiffrin highlights actually point strongly in favor of the complainant-focused view. 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. And she notes that courts focus on the wrongdoing of one party rather than the protection of the other party.\(^{72}\) Both these facts are strongly suggestive that the exploiting party loses his ability to 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 that causes the loss of the complaint, not the weakness of the exploited party. If the state’s reasons were, as Shiffrin’s account suggests, self-regarding, 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 be planted squarely on the wrongdoing of the complaining party.

### B. Fraud and Duress

A second strength of the complainant-focused approach is its applicability beyond the unconscionability doctrine. In fact, I think a number of cases in which contract law refuses to enforce contracts are better construed in terms of an inability to complain rather than in terms of a lack of voluntary agreement. In particular, I believe that contract doctrines of fraud and duress can be explained in this way.

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, “the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them.”\(^{73}\) 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. I suggest an opposite assimilation. I do not think that fraud and duress necessarily

\(^{71}\) 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).

\(^{72}\) See Shiffrin, *Paternalism*, at 229 (“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.”).

make agreements involuntary. It is not that voluntary assent of the promisor is undermined, but rather that the position of the promisee to complain is undermined.

Some misrepresentations result in the refusal to enforce a contract. But contract law distinguishes fraudulent and non-fraudulent misrepresentations leading to a contract. If a misrepresentation is not fraudulent (e.g. the person didn't know that it was false), then the contract is only void if the misrepresentation is shown to be material.\textsuperscript{74} 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 of whether the misrepresentation is “material.”\textsuperscript{75} 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 didn’t matter to the other party, then it can’t have undermined the legitimacy of their assent. But the strategy I suggested for the unconscionability doctrine can explain this: the party committing fraud loses his or her legitimate complaint by virtue of the fraud. This is essentially how Williston explains the rule:

\begin{quote}
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 the misrepresentations which have effectively served a fraudulent purpose were material.\textsuperscript{76}
\end{quote}

That is, the party who commits fraud loses the ability to complain when the contract is not fulfilled, whether or not the fraud actually made a difference.\textsuperscript{77} Contract law refuses to enforce all fraudulent contracts not because non-material fraud undermines voluntary consent, but because it undermines the position of the defrauding party to complain.

\textsuperscript{74} See, e.g., Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 159 N.E. 700 (N.Y. 1928).
\textsuperscript{75} RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (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 De Joseph v. Zambelli, 139 A.2d 644, 647 (Pa. 1958) (“Fraud renders a transaction voidable even where the misrepresentation is not material.”); Equitable Life Assur. Soc. 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 . . .”).
\textsuperscript{76} SAMUEL WILLISTON, THE LAW OF CONTRACTS §1490 (1920).
\textsuperscript{77} Cf. Richard Epstein, Unconscionability: A Critical Reappraisal, 18 J. OF LAW & ECON. 293, 298 (1975) (“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.”).
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. Thus, a party may lose his or her breach of contract claim on grounds of committing 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 who is the complainant. A party seeking to assert a complaint faces special requirements. One such requirement, I am suggesting, is having a moral standing to complain.

Second, 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, it is more complicated than that.

Suppose that I meet a mugger who says he will kill me if I don’t give him $100. I know he is speaking the truth; unfortunately, I don’t 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. In this light, one cannot straightforwardly explain a court’s refusal to enforce the contract by asserting that I did not actually will that I be under an obligation—in fact, I desperately wish to be able to bind myself in order to satisfy my attacker.

As I have been suggesting, 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 is filing suit for a breach of contract—my mugger would be asserting a grievance against me. 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

78 See Restatement (Second) of Torts § 538 (“Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.”).

79 See, for example, Judge Posner in Selmer v. Blakeslee-Midwest Co., 704 F.2d 924, 926-27 (7th Cir. 1983) (“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.”); see also Justice Holmes in Union P. R. Co. v. Pub. Serv. Comm’n, 248 U.S. 67, 70 (1918) (“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.”).
influence exerted over the promisor.\textsuperscript{80}

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 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 forego 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 for it. Legal systems agree; third-party duress is generally not grounds for rescission.\textsuperscript{81}

The differential 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.

V. 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.

\textsuperscript{80} See Selmer, \textit{supra} note, at 927 (“The fundamental issue in a duress case is therefore 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. 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.

\textsuperscript{81} See, e.g., Restatement (Second) of Contracts §175 (1981), Illustration 10 (“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.”). K. Zweigert, \textit{International Encyclopedia of Comparative Law}, Vol. VII, Ch. 11, p.229 (“[N]o generally accepted requirements have emerged for avoiding a contract on the ground of duress by a third party.”).
A. Contract as a Law of Complaints

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 I ought to do what I have said that I will do. In this sense, the commitment is action-guiding.

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’s 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.\footnote{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 (2003). 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.} Contract law does not, however, impose norms of permissibility.\footnote{Cf. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note (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 [the] breach.”).} 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.\footnote{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.} What it determines is whether or not the other party has a complaint if you don’t. As the examples already considered illustrate, these two questions can come apart, and, when they do, contract law addresses the second question.\footnote{But cf. Barbara Fried, The Limits of a Nonconsequentialist Approach to Torts, 18 LEGAL THEORY 231 (2012). 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. 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 don’t believe that private law includes a
One might think that, if correct, this characterization 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.86

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 apologizing to giving compensation. In other words, morality comes with a whole package of ex post and remedial concepts, practices, and relationships.

The question of 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 contract law, in its ex post and remedial form, with the morality of promises, as a source of norms, is to compare apples with oranges.87

“prohibition question,” except insofar as it must indirectly decide what counts as morally prohibited conduct.

86 Something like this idea is at work in Michael G. Pratt, Contract: Not Promise, 35 Fla. St. U. L. Rev. 801, 809-10 (2008) (“The objection to the claim that contracts are promises, which I have been pressing, 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 simply promises to pay damages if one doesn’t perform and not promises to perform. But it is revealing that Pratt conflates contracting with conditionally agreeing to pay damages. 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 X (arguing 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 isn’t addressed to the moral question of obligation. While I am in agreement with this latter point, I do not think it follows that contract law isn’t based on morality, because I believe morality concerns relationships other than that of obligation.

87 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 X, 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 with Kraus’s idea that correspondence theories have focused on the wrong comparison. I am less sympathetic with the idea that this is uniquely because contracting parties can choose their remedial rights and obligations. For one thing, this creates an obvious regress problem. What are the remedies
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 view, I want to return to the areas of contract law where others have found a divergence between contract and promise. First and most importantly, 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. 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 says something about what contract law demands in terms of conduct.

for a violation of the remedial rights? Are some point, they cannot have been chosen. Moreover, it seems to me that the gap between the obligation owed and what can be demanded may exist just as much outside of promissory or contractual obligations as within it.

88 There are certain parallels here with the argument offered by Gold, supra note X, at 1926 (“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.”). 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. Thus, even if a promisor in breach ought to perform, a promisee may only be entitled to demand an equivalent. 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, As If It Had Never Happened, 48 WM. & MARY L. REV. 1957, 1981-82 (2007) (“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 on a promise, one wrongs the promisee. For example, if I promise to meet you for lunch tomorrow and I don’t show up, then I have done you a wrong and you have a complaint. I owe you an apology, and you may reasonably resent my behavior. The magnitude in which these responses are appropriate is generally in proportion to the expected benefits that you would have obtained. If the promise had low stakes and merely deprived you of a little company, I have done you a lesser wrong than had the lunch been a key strategic meeting with very high stakes. That is, morality ordinarily measures wrongs done in terms of expectation damages. Moreover, like contract law, substitute performance will be acceptable if it fulfills the substantial purpose of the original agreement, but otherwise not. If I send David Beckham—of whom you are a big fan and whose company excites you far more than my own—to lunch in my stead, then, depending on the purpose of our original agreement, you might not have

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89 In responding to Shiffrin, Liam Murphy suggests some of the problematic features of Shiffrin’s comparison between contract and promise. He suggests that the morality of promising is about obligations and does not have the remedial aspect that contract law has. 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.” Contract and Promise, 120 Harv. L. Rev. F. 10, 17 (2007). 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. Note that it would by 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 “I’m sorry I missed lunch, let me give you this stick of gum to make up for it,” is surely not.

90 One detail of Shiffrin’s argument appeals to the Hadley rule, which limits damages in contract to those foreseeable at the time of contract. The Hadley rule is troublesome, and I do not have fully developed thoughts on it here. But I will note that on one reading, it fits very nicely with the account I am offering. One might described the Hadley rule as follows: the promisee cannot complain over losses that they ought to have disclosed were possible. That is, the rule is another example of a party losing the position to complain on the basis of their own failure. For example, in Hadley, the mill (according the court) should have disclosed that the mill would be shutdown without the mill shaft, and they could not claim consequential damages because they failed in this disclosure. On the other hand, there may be reason to doubt the wisdom of the Hadley rule generally. See Barry E. Adler, The Questionable Ascent of Hadley v. Baxendale, 51 Stan. L. Rev. 1547 (1999).
any complaint because there would be no injury to complain about.\footnote{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 lunch date was for entertainment and personal enjoyment, then David Beckham will surely advance that purpose better than I could. But if the purpose of the lunch date was something else, David Beckham might not be a substitute. For example, if you wanted to have lunch because you are distraught that your wife has left you and you need a shoulder to cry on, my sending Beckham may only compound the damages. 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 lunch dates, 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. \textit{Cf.} Markovits, \textit{Contract and Collaboration}, \textit{supra} note X.}

That our corrective moral concepts typically operate with expectation damages should already begin to refute the suggested divergence with regard to punitive damages. I think that this same point allows a response to the argument based on punitive damages. Many commentators argue that the absence of punitive damages in contract suggests a divergence from morality. This, it is argued, is because punitive damages are the way to “express the judgment that the behavior represents a wrong.”\footnote{Shiffrin, \textit{The Divergence of Contract and Promise}, \textit{supra} note X, at 723.}

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 wrongdoing are based 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 (time, pain, 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.\footnote{See, e.g., Cass R. Sunstein et al., \textit{Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)}, 107 \textit{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”).} It may be helpful 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 inappropriate.\footnote{I am inclined to think of punitive damages in non-moral ways. They serve to deter bad behavior, and award those who litigate against practices that hurt more than just them. 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 the one sort of damages that are not based on remedying a wrong done.}

\textit{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. Contrary to what Shiffrin suggests, it does not seem to me that contract law requires promisees to mitigate. Rather, contract law merely limits the complaint available to promisees who do not mitigate. I don’t think that contract law is any different in this regard than the morality of promises. A promisee who might have avoided harm from the promisor’s breach cannot complain 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 didn’t, you can hardly complain about the harm that you received from not having a car (although you might still complain simply 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 doesn’t seem to me that it is about norms of permissibility at all. What it is about is the remedial task of recognizing and responding to legitimate complaints. This is a retrospective notion. Morality also contains a retrospective notion—wronging. 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 Seana Shiffrin is indicative. Fried argues that specific performance is no more the norm in morality than it is in 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.

For an argument consistent with the one made in this paragraph, see George Letsas & Prince Saprai, Mitigation, Fairness and Contract Law, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (Gregory Klass et al. eds., forthcoming).
contract law. Fried rejects a conception of morality that requires perfect faithfulness to one’s promises. He says, “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.” For Fried, a promise does not create an obligation to perform, but rather an invocation of trust. When expectation damages are willingly paid, there is no violation of this trust according to Fried. In other words, for Fried, neither contract law nor morality strictly says that you should keep your promise—they both say that you should keep your promise or give adequate compensation.

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.

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.

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’s responds by assimilating morality to contract law—morality, it turns out, isn’t 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 suggests 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

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97 Id. at 7.
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 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.”

What should be noted is that when Fried says that morality has expectation damages, he means something very different than I do. Fried means by this that the moral obligation created by a promise is more conditional than the obligation to faithful performance. I don’t 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. And this is completely compatible with the claim that morality requires faithful performance. In this sense, my understanding of the morality of promises is closer to Shiffrin’s than 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 the private law as related to morality and as importantly 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

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98 Shiffrin, *The Divergence of Contract and Promise*, supra note X, 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.

99 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 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.” *Promises and Contracts*, at 92, in Peter Benson, Ed., *The Theory of Contract Law* (2001). 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.
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.” 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.

Corrective justice theorists, however, do not draw the distinction between obligation and complaint that I have emphasized. In fact, just the opposite. 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.

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 isn’t the enforcement of remedial moral obligations. Instead, private law consists in the legal power to seek redress when first-order obligations have been violated. 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,

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100 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.

101 See, e.g., WEINRIB, supra note X, at 63 (“[C]orrective justice requires the actor to restore to the victim the amount representing the actor’s self-enrichment at the victims expense.”); Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 IND. L. REV. 349, 365 (1992) (“Corrective justice requires annulling wrongful gains and loses.”)

102 See, e.g., RIPSTEIN, supra note X, 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 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—itself an embodiment of your freedom because I transferred it to you—been exercised as I was obligated to do.”).

103 See Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 GEO. L.J. 695, 755 (2003) (“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.”).
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.” 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. According to the civil recourse theorist, there is a tort law duty of care and a contract law duty to fulfill one’s contract. 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. As a result, decoupling first-

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104 See Benjamin C. Zipursky, Substantive Standing, Civil Recourse, and Corrective Justice, 39 FLA. ST. U. L. REV. 299, 304-307 (2011); John P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 TEX. L. REV. 917, 957-60 (2010). The corrective justice theorist means by “substantive standing” that there have been a right of the plaintiff that was violated. Of course, this understanding of substantive standing is very different than 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.


106 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 Civil Recourse and the 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
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. 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 flipsides of the same coin. But detaching obligation and complaint in the way that I have suggested calls this picture into question.

For these reasons, I see the picture of contract law described herein as near to corrective justice and civil recourse theories but further along the spectrum of available positions. 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, in my opinion, this shift does not go far enough in detaching the question of whether a party has a complaint from whether a first-order legal obligation was violated. Only once the distinction is fully drawn, I have been suggesting, is the connection between private law and morality properly appreciated.

VI. 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, for example, in situations where one party loses his or her standing to complain, regardless of whether there is an obligation being violated. And I have argued that, once this distinction is recognized, it is clear that contract law is concerned exclusively with complaints.

What this means is that contract law does not actually impose obligations. It is worth noting that, in a way, the theory of efficient breach turns out to be partially correct. Contract law does not offer a norm against breach of contract. This is

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.

107 See Zipursky, Substantive Standing, supra note X 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.”).

108 Another way to put the difference would be as follows: The 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.
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. It is hardly a coincidence that a proceeding in contract law begins with one party filing, literally, 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 mistaken to think that contract judges breach to be legally impermissible; but it is also mistaken to think that contract law considers breach to be legally permissible. Contract law is about recognizing and responding, in a legal way, to the complaints that breach can produce, insofar as it is wrong. 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.