Thoughts on The Divergence of Promise and Contract

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Discussion

Thoughts on the Divergence of Contract and Promise

Ian Bartrum

In her recent work, Seana Shiffrin has explored several normative divergences between the legal requirements of contract law and the social conventions of promising. She laments a "problematic" discrepancy between the two sets of norms, which she sees thrusting responsible moral agents onto the horns of a destructive dilemma. Her argument has inspired a prompt wave of response and reaction, to which this essay is, I suppose, a somewhat belated addition. In what follows, I suggest that the fundamental flaw in Shiffrin’s approach is her failure to provide separate accounts of the different consequentialist and deontological justifications that underlie the institutions of promise and contract, both of which provide us with “moral” reasons for acting. Instead, she seems to treat promises as giving rise to undifferentiated “moral” reasons, which she then contrasts with the “legal” reasons a contract creates. While there are certainly good deontological and consequentialist reasons both to honor our promises and to perform on our contracts, I argue here that our conception of promissory duty sounds primarily in deontology, while our ideas about contract rely most heavily on consequentialism. Once this muddy water is cleared, it becomes apparent that contracts and promises very often serve different functions in our lives, and that contract law—as an institution of state coercion—primarily addresses the harms a breach causes, and leaves any interpersonal wrongs occasioned by a broken promise for the relevant moral agents themselves to resolve. Seen in this way, the divergence between promise and contract may actually facilitate, rather than inhibit, the exercise of authentic moral agency: it gives the virtuous actor greater space to fulfill her residual obligations for purely personal reasons.

A major shortcoming of Shiffrin’s approach is that it fails to provide a substantive account—either consequentialist or deontological—of how promises give rise to

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“moral” reasons, although her argument seems to assume that promises impose “duties,” presumably with deontological underpinnings. To fill this gap for the purposes of this paper I rely on David Owens’s “authority-interest” account of promising, which offers a persuasive explanation of the transfer of a “moral power” (authority over one’s future actions) that promising entails. As Owens has it, when we make a promise we voluntarily renounce our right to make decisions for certain kinds of reasons in the future—we willingly bestow that bit of our autonomy upon another—and this gives our promisee the authority to oblige us. We may choose to enter into promises for any number of purposes, some of which may be particularly personal or profound, and which may thus seem inappropriate contexts for a contract. Think, for example, of a promise of fidelity to a lover, or of a promise made to a friend—or even a stranger—as she lies dying. The strength or vitality of these kinds of promises seems rooted in some sense of obligation, some deontological emotion, that might arise out a particular relationship or context; and in such a situation a contract may seem unnecessary or perhaps even immoral. That is, these may be the kinds of promises we do not think it appropriate for the state to enforce.

On the contrary, there are circumstances—perhaps those when significant financial interests are at stake, or in normal business relationships between strangers—when a contract seems perfectly appropriate as state-enforced insurance against the possible harms a broken agreement might bring about. In such circumstances, we may not feel—or may not want to rely upon—the personal or contextual deontology of promising because, in truth, we are concerned only about the impersonal (and largely fungible) harms the broken contract may cause. Here it is acceptable—even desirable—for the state to remedy these harms in impersonal and fungible kinds of ways. We depend upon the assurances of contract law in such circumstances to help provide stability and reliability in our economic and commercial endeavors, but we do not rely on the law to enforce our deontological obligations. At least in certain paradigmatic cases, then, it is easy enough to see the normative differences between the consequentialist reasons underlying contracts and the deontological reasons underlying promises.

There are, of course, many circumstances in the middle; those where we may have both deontological and consequentialist reasons for fulfilling either a promise or a contract, and where both kinds of remedies for breach—moral reprobation and legal damages—may be appropriate. But in remembering the paradigm cases of both institutions, I think, it is easier to keep track of which institution is (at least primarily) imposing which kinds of norms, and in so doing it may be easier to understand and account for the divergences in the appropriate kinds of remedy. That is what I hope to do below, and my account begins with a brief summary of Shiffrin’s divergence argument and the worries she has for the wider culture of moral agency. I then begin my critique by summarizing David Owens’s account of promising. Finally, I look to John Stuart Mill and Immanuel Kant to help provide my own explanation of the different roles that promises and contracts fill in the life of a virtuous moral agent. Indeed, I suggest that there may be good reasons why the liberal state should ground “legal” requirements—those backed by the
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threat of state coercion—in consequentialist reasoning, but can, and should, leave the fulfillment of deontological duties to the discretion of individual actors.

Seana Shiffrin: The Divergence of Promise and Contract

Shiffrin is concerned about the corrosive effects that too much divergence between “moral” and “legal” norms can have, both on individual moral agents and on the broader moral culture. Because she accepts a weak version of the separation thesis (“there is no direct and reliable route from the content of interpersonal morality to the appropriate content of the corresponding area of law”), she must explicitly define the particular kinds of divergence that are problematic in this regard. She chooses to explore the divergence between the “moral” norms of promising and the “legal” norms of contract as an exemplar of a potentially larger problem. She begins by identifying several divergences between the two institutions, and then identifies the problematic ways that these divergences operate to frustrate individual moral agents. She then goes on to suggest that “the culture created by contract law and its justifications make it more difficult to nurture and sustain moral agency [generally].”

Shiffrin’s argument begins with two problematic assumptions, to which I will devote more attention in the next section. First, she seems unflinchingly to accept the Restatement’s definition of a contract as “a promise”; although she does at times seem to recognize contracts as a special species of promise—or as legal arrangements that merely rely on an underlying promise. Second, she simply assumes, without theoretical justification or explanation, that promises operate to impose “moral” duties or obligations on their makers. Building on these assumptions, Shiffrin identifies a number of specific divergences between promising and contracting.

First, she points out that contract law generally does not enforce specific performance as a remedy for breach. Rather, the default remedy is expectation damages, wherein the promisor must pay to place the promisee in the position she would have occupied had the contract been performed. Thus, absent special circumstances, the law requires financial, but not actual, performance—even when actual performance may still be possible. This, Shiffrin argues, is at odds with the norms of promising, which require a promisor to perform when possible, rather than simply pay off the promisee. Further, Shiffrin objects to the Hadley v. Baxendale rule, which limits damages to those consequences of breach that were reasonably foreseeable to the promisor at the time the contract was made. Again, she contends that promissory norms hold one who breaks a promise responsible for all the resulting damages—or, at the very least, for those damages that were foreseeable at the time the promise was broken, not made.

Second, Shiffrin explores the mitigation doctrine, which requires a promisee to do what she reasonably can to alleviate the damages a breach may cause. If the promisee fails to mitigate, the law will not compensate her for the damages she

3. Shiffrin, supra note 1 at 713-14.
4. Ibid. at 712-13.
might have avoided through self-help. Again, Shiffrin contends that the law does not reflect promissory norms here, which do not require a frustrated promisee to take such action. While we would certainly encourage promisees not to allow damages to mount unheeded, a promise imposes no affirmative duty to mitigate, as does the law. Shiffrin wonders briefly whether a promisee would have a moral duty to honor a mitigation request from the promisor, but concludes that such a question would depend on a number of interpersonal factors “to which the law is insensitive.”5 Thus, promise and contract diverge regarding the mitigation doctrine.

Finally, Shiffrin turns to punitive or liquidated damage clauses, which contract law generally refuses to enforce. Though she concedes that this is not as definitive a case of divergence as the first two, she suggests that our social normative practices do permit us to indicate how seriously we take our promises by stipulating the consequences of a failure to perform. She then argues that we can regard “the ability to specify punitive damages as a very rough legal counterpart to the poorly defined mechanisms through which parties mark a particular promissory relation as especially serious or not.”6 So, by failing to honor liquidated or punitive damage clauses, contract law again diverges from the normative institution of promising.

Shiffrin then sets about demonstrating that these divergences are problematic and not beneficial or benign. She begins by discounting the common justifications for contract law’s reliance on expectation damages. The most problematic of these justifications—and the only one I will mention here—is the doctrine of “efficient breach,” which suggests that a promisor may (or should, in the strong version) break a contract when the total costs of performing would exceed the costs of paying expectation damages. Indeed, all-things-considered such a breach actually benefits society (so the theory goes), and the law should not impose any kind of punitive damages that would discourage it. This is a straightforward consequentalist justification; yet, perhaps incongruously, Shiffrin’s objection is that the doctrine seems to give people legal permission to forego the deontological duties that their promises entail. In the end, she worries that this asks people to choose between what “morality” requires and what the law does—which is exactly the problem she identifies with divergence in the first place. Thus, she rejects the efficient breach doctrine as a satisfactory justification of expectation damages at least partly because she blurs together consequentialist and deontological kinds of reasons for acting. That is—as in other notable instances—consequentialist and deontological moral views may point us in different directions; but this should hardly come as a surprise.

After rejecting several other legalistic justifications, Shiffrin makes the affirmative argument that the corrosive influence that the divergence between “moral” and “legal” norms has on the culture of moral agency. Here she makes her larger case—though never, it seems, explicitly—that real dangers lurk when consequentialism begins to infect our deontological reasoning. She begins with two anecdotal examples. First, she describes a woman who is ridiculed as a “moral fetishist” for feeling bound to honor her lease despite significant personal inconvenience. Or,

5. Ibid. at 725.
6. Ibid. at 727.
she recounts the story of a friend who is chided for feeling angry with a contractor who fails to appear in spite of repeated promises: “It isn’t a big deal. It’s business.” Shiffrin sees these examples as illustrative of a general decay in the normative culture that nourishes and maintains responsible moral agency, and she argues that it is, in part, the problematic divergence of “moral” and “legal” norms that brings this decay about. While the law does not ask an individual to directly contradict or reject her deontological duties, it does produce incentives that reinforce (and possibly reward) behavior that fails to honor the obligations that a promise creates. She argues that this problematic legal culture asks us to catalog and divide our moral and social intuitions and estranges us from our better selves. In the end, she concludes that, “A system that leans heavily on such alienation and compartmentalization is dispiriting to defend, to put it mildly.”

David Owens: A Simple Theory of Promising

As I suggested above, Shiffrin builds her argument on two problematic assumptions. The first is that, for relevant purposes, a contract is roughly equivalent to a promise, which is an assertion I ultimately reject, though I certainly believe a promise may accompany a contract. Before I can give much further explanation, however, I must overcome the second important shortcoming of Shiffrin’s account: I need a working account of what a promise is and how it brings about a change in deontological obligations. As Shiffrin offers no such theory, I turn to David Owens, whose work provides an excellent non-instrumental account of the normative significance of promising. With Owens’s account as a theoretical foundation, I can begin to disentangle promises from contracts and better differentiate the purposes each institution serves.

Owens’s “A Simple Theory of Promising” aims to explain why the institution of promising exists, and concludes that it has arisen as a tool that “serves our authority-interests.” By this Owens means that promising allows us to transfer a little bit of authority over our actions to another person. For example, if I promise you that I will pick you up at the train station at seven o’clock, you now have the authority to require my presence there at that time—and you alone have the authority to release me from my obligation. Owens theorizes that we are willing to cede bits of our authority in this way, in part, because doing so allows us to participate in a useful practice of “give-and-take.” That is, we can trade instances of authority over each other in mutually beneficial ways. But in the end, it is the transfer of the authority-interest itself—and not some instrumental benefit—that justifies and explains the institution of promising.

The train station is a fairly trivial example, however, and so perhaps does not capture the personal and important interests a promise can serve as effectively as a more complex illustration might. Think of a graduate student preparing to enter

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7. Ibid. at 741.
8. Ibid. at 749.
the academic job market who goes to his famous and well-regarded mentor and elicits the promise of a sterling professional recommendation. Upon Owens’s account, the elder professor has given—willingly, perhaps even gladly—the student authority to demand from her a glowing reference at some future date. That the professor is willing to do this certainly serves the student’s instrumental interests; among other things it allows him to devise more precise job-hunting strategies and to hold himself out to the market in a particular light. But, perhaps even more importantly, the promise also speaks to the student’s relationship with his mentor, and to the professor’s confidence and regard for her student. Thus, the act has meaning and value to both parties regardless of whether it can or will produce any beneficial consequences—it is in some sense a symbolic sacrifice appropriate to the particular relationship and context from which it arises.

It is, I think, with these kinds of considerations in mind that Owens posits his authority-interest account as a better explanation of promising than so-called “information-interest theories,” such as David Hume’s or Thomas Scanlon’s. Such consequentialist accounts explain promising as a practice that allows us to get reliable information about another’s future actions. Owens does not deny that promises can serve this purpose, but he suggests that other practices—such as predicting our behavior or stating our future intentions—can serve this information-interest nearly as effectively as promising. Again, it may be useful to think of the student and his professor. A simple testimonial from the mentor saying that she plans to write a great letter and make several calls on his behalf might serve the student’s information interests quite well; but it does not have the same interpersonal meaning or value as would the promise. We need something more to explain this very real difference between testimonials and promises, and thus Owens contends that promising initially arose to serve another purpose: our desire to transfer—or perhaps again “sacrifice” is a more apt word here—authority-interests to particular people in particular circumstances.

Indeed, Owens explicitly argues that “a promise [is] a moral power granted to the promissee,” and I think that the authority-interest theory has the resources to justify this claim. Owens comes closest to explaining the deontological significance of promising when he says “this authority-interest is not an interest in self-control … [r]ather it is an interest in having a certain moral power, the moral freedom to act in accordance with one’s own judgment about what one ought to do rather than in accordance with someone else’s.” Here Owens’ thoughts recall Joseph Raz’s explanation of the nature of authority in his “exclusive” account of legal positivism. Raz contends that to submit to an authority is to surrender one’s right to balance for oneself the “dependent” reasons for and against taking a particular action. We

10. Ibid. at 73. As I have said throughout this essay, consequentialists claim that efficiency and consequences give rise to “moral” obligations that are just as important as—indeed more important than—deontological duties. Thus, I realize that some confusion may arise from Owens’ use of the word “moral” as indicative of deontological reasoning. I believe, though, that this is the sense in which Owens intends the word here, and, likewise, the sense in which Mill and Kant intend it in the discussion below.
11. Ibid. at 70.
might contrast this with consulting an advisor, who can give us his thoughts on some matter, but whose advice we are under no obligation to follow. On the contrary, when we submit to an authority we are substituting another's judgments—including her moral judgments—for our own. This seems to be the kind of transfer of "moral power" that Owens envisions; and it helps to explain the significant change in normative circumstances that a promise can bring about.

According to Owens, then, a promisor transfers a "moral power"—an authority-interest—to the promisee when he makes a promise. The promisee, likewise, now wields a small piece of "moral power" over the promisor: he has authority over the promisor's actions at some point in the future. Note, however, that this is a socio-normative, not a legal, power, and that it relies for its effect upon the promisor's response to the moral duty he has undertaken. In the event of breach, then, the promisee's appropriate response is indignation, not a lawsuit; and the promisor has a personal, but not a legal, duty to make up for his wrong. If this is not enough for the promisee—if he wants some legally enforceable insurance against the potential consequences of a breach—he can ask the promisor to submit to the threat of state coercion by entering into a contract. It is then the contract, not the promise, which entitles the promisee to damages in the event of breach.

Thus a contract is not a promise in the univocal sense that Shiffrin suggests. In fact, in some circumstances a contract may be compelling evidence that a promise alone is not enough. People generally enter into contracts—thus bringing state power to bear—only when they have some reason to wonder whether the other party will respond adequately to the socio-normative duties that the promise creates. Perhaps the particular relationship or context in question does not give rise to sufficiently vital kinds of deontological reasons to inspire faith in performance, and so it may seem wise and appropriate to seek the comfort of a state-enforced remedy for breach. It is this difference in the purposes that contracts and promises serve, I contend, that ultimately justifies the divergence in norms that Shiffrin finds problematic.

A Theory of Divergence: The Harm Principle and Authentic Moral Agency

My own account of the divergence between promise and contract is founded on the belief that the paradigmatic cases of each institution embody and reflect different kinds of justifications or reasons: contracts serve consequentialist concerns, while promises create deontological duties. It is perhaps no surprise, therefore, that my description of contract law begins with the thoughts of one of our most noted utilitarians—John Stuart Mill's so-called "harm principle." Mill famously argued that the only just exercise of the state's coercive power "is to prevent harm to others." The liberal state should not intervene to enforce interpersonal norms or prevent moral wrongs, nor should it attempt to save individuals from the spiritual

13. It may be that a contract is a promise to be liable for the foreseeable damages of breach; but it is not a promise to perform in the "authority-interest" sense that Owens describes.
consequences of their moral failings. What is problematic is harm to others. As inexactness as this principle translates into our modern law, I suggest that there is something substantial left of Mill in the legal institution of contract.

As I have argued above, when two parties enter into a contract they are self-consciously stepping outside the world of purely social norms and appealing to the state's coercive power. The state, in turn, agrees to enforce the terms of the contract, but—in keeping with Mill's principle—only insofar as a breach of contract results in actual harm to the parties. The state is not concerned with any wrongs to which the broken promise may give rise; it is not sensitive to hurt feelings or moral indignations, only with actual harm. Thus the parties are left to resolve or account for any residual interpersonal wrongs between themselves. It is instructive, I think, to apply this "harm theory" of contract remedy to the examples of divergence Shiffrin finds problematic.

First, let us consider the divergence between specific performance and expectation damages. Recall that Shiffrin believes that to rightly reflect promissory norms the appropriate remedy for breach of contract is, whenever possible, specific performance. When we understand, however, that contract and promise actually serve different purposes—that the former exists to address harms, not wrongs—this divergence in remedy makes perfect sense. The parties have appealed to the state only to protect them from the harms they may incur as a result of breach, they have not asked the state to enforce the norms of promising. Thus the payment of expectation damages is entirely adequate if it compensates them for the harm suffered.

This account even makes sense of the special circumstances in which the state will enforce specific performance. These circumstances include the promised sale of unique goods, or similarly, when the buyer cannot find adequate "cover" (replacement goods). In these two circumstances, it is evident that a monetary payment cannot adequately compensate for the harm the non-breaching party has suffered. Put in my terms, in the case of unique goods it is a harm, not merely a wrong, to be denied sale of the one of a kind item. Likewise when a buyer cannot find replacement goods, the contracted-for goods have now become unique. In both of these situations, expectation damages fail to remedy the actual harm that the breach has caused, and thus—given the harm theory of contract—it is appropriate to order specific performance.

Shiffrin is also concerned about the rule limiting damages to those that were foreseeable at the time of contract formation. Again, the harm theory makes perfect sense of this doctrine. When the parties turn to the state by forming a contract, they are asking for protection against the harms that may arise in the event of breach. Each party subjects herself to the coercive power of the state regarding the harms she might reasonably anticipate the other party to suffer in the event of breach. As these are the terms upon which the state's "insurance policy" is invoked, it makes sense that these are the terms the state will enforce upon breach. Again, the state is not concerned with whatever deontological obligations or duties the promisor may have for the unforeseeable consequences of a broken promise.

15. Ibid. On the use of the term "moral" here, see supra note 10.
Second, Shiffrin is concerned about the mitigation doctrine, which requires the non-breaching party to do what he can to alleviate the harms that a breach has caused. Again, the harm theory can explain this divergence from the norms of promising. If parties enter into a contract as protection only against the harms of breach, it makes sense that the state will only enforce compensation for those harms that were not reasonably avoidable. When the non-breaching party refuses to take reasonable steps to stop the bleeding (so to speak), the harms that occur thereafter are no longer attributable to the breach: they are, in a sense, self-inflicted. While a promisee may have no obligation to lessen the wrong a promisor has committed, a non-breaching party can—and must—do what is reasonable to prevent bringing more harm into the world.

Finally, Shiffrin points to the divergence brought about by the law’s refusal to enforce punitive or liquidated damages clauses. These clauses attempt to stipulate an excessive amount of damages up front, presumably with the intent of compelling performance. This divergence, then, is really just a subset of the specific performance problem. The function of a contract—unlike a promise—is not to get the other party to perform; it is to provide state-enforced insurance against the foreseeable harms that breach may occasion. Thus the state will require payment of damages sufficient to compensate for the actual harm of a breach, but will not get involved in contractual efforts to compel actual performance. Again, any wrongs that this practice leaves unremedied are the parties’, not the state’s, responsibility.

Thus the harm theory of contract can at least explain the divergences between promise and contract, but I have not yet offered any justification for this state of affairs. That is, it may be that the different underlying justifications for promises and contracts can explain the divergence in norms, but this circumstance may still perpetuate the destruction or decay of a the culture of moral agency that Shiffrin decries. What is it, then, that justifies the harm theory of contract in terms of encouraging virtuous moral agency? Given my assertion that promises give rise to deontological duties, it might again be unsurprising that in exploring the conditions that may strengthen or weaken that institution, I turn to the great theorist of obligation and moral agency: Immanuel Kant.

In *The Metaphysics of Morals*, Kant discusses the relationship between morality and law.16 Both, he contends, impose mandatory duties upon us, and both originate from an external source (unlike self-imposed rules). The overlap between moral and legal duties is, of course, imperfect—though we could well imagine all moral duties being reissued as positive law. The essential (at least for my purposes) distinction between a legal duty and a moral duty is a matter of intent. The law obligates us to conform to its norms, but we can do this for any number of reasons—fear, love, profit—without breaking the law. We can only fulfill a moral duty, however, when we do so specifically because it is a duty. As an example, Kant claims

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that the suicidal person who refuses to kill himself only deserves moral credit if the refusal is based on duty, not on fear or some other motive.\textsuperscript{17} While Kant contends that we do have a moral duty to obey the law, he also contends that there are moral duties that both precede and survive politics and positive law. And, again, we only deserve moral approbation—either from ourselves or from others—when we fulfill these moral duties because they are duties. Put another way, a virtuous act is only virtuous if it is done for its own sake.

We can usefully apply Kant's ideas to understand how the divergence between promise and contract actually facilitates and encourages a culture of moral agency rooted in the concept of moral duty. Succinctly put, by leaving us free to fulfill or reject the moral obligations we incur in making a promise, the law gives us the opportunity to engage in authentic moral agency: that is, we are left to fulfill our moral duties simply because they are duties. This, I contend, allows us to engage in genuine moral flourishing—virtue for virtue's sake.

Again, if we consider the particular divergences between promise and contract that Shiffrin identifies, I think they are justified by this account of authentic moral duty and agency. Regarding specific performance versus expectation damages, let us take Shiffrin's example of the woman who was ridiculed for wanting to fulfill the obligations of her lease despite personal inconvenience. It is true, for the reasons discussed above, that the terms of the contract allow her to break the lease if she is willing to pay expectation damages. Under the terms of her promise, however, she is obligated to perform: that is, to stay in the apartment for the full term.\textsuperscript{18} The law does not impede her from fulfilling this deontological duty; it simply leaves her to do so of her own accord. If she chooses to stay, it is more likely that her decision will be based on a sense of duty, as the law no longer imposes other kinds of reasons upon her.

Likewise, in the case of the mitigation rule, the promisor is left to his own devices in deciding how to right the wrongs his failure has caused the promisee. The law requires the promisee to prevent more harm from accruing in the world, but the promisor is still duty bound to make up for all the wrongs his breach has brought about—including the inconvenience of mitigation—but, again, he must do so for purely deontological reasons. Seen this way, the law actually gives more to the moral agent; it leaves open a wider space for authentic moral behavior, which has its own very profound rewards. Conversely, a complete convergence of moral and legal norms would stunt authentic moral agency with the trappings of legal paternalism. Thus, I contend that the divergent functions of promise and contract actually facilitate, rather than corrode, a culture of authentic moral agency.

\textsuperscript{17} Immanuel Kant, \textit{The Grounding of the Metaphysics of Morals}, trans. by James Ellington (Indianapolis, IN: Hackett, 1993) at 10.

\textsuperscript{18} I have suggested above, I think, that the vitality or strength of the woman's deontological duty to perform may depend upon the particular relationship and/or context involved. While I believe this is true, I am not prepared at this time to give an account of exactly how these factors are deontologically significant.
Conclusion

Seana Shiffrin identifies what she believes are problematic divergences between the “moral” norms of promising and the “legal” norms of contract. She contends that these divergences are destructive of the broader culture of moral agency because they ask individuals to choose between their moral and legal duties. I agree that promise and contract diverge, but argue that this divergence reflects the fundamentally different purposes that contracts and promises serve in our lives. In short, Shiffrin fails adequately to differentiate between consequentialist and deontological justifications, and the role these reasons play in shaping the norms of contract and promise. While both kinds of justification may give rise to “moral” reasons, those reasons are not one and the same, as Shiffrin seems at times to suggest. Utility, that is, may require one remedy, while deontology requires quite another. For roughly Millsian kinds of reasons, the liberal state is rightly concerned only with the harms of a breached contract, not the wrongs occasioned by a broken promise. Indeed, by leaving us to fulfill our moral duties for their own sake, I contend that these divergences actually facilitate—rather than corrode—a culture of authentic moral agency.
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