

They Don't Really Care About Us: The Virtuous Agent and Efficient Breach

Daniel Choi

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The relationship between law and morality is a rich and complicated topic. Seana Shiffrin¹ argues that contract law and promissory morality diverge in some significant ways. Given the divergence, there is a question of how an agent ought to navigate areas of tension between the norms of contract law and the norms of promissory morality. Shiffrin argues that when tensions are problematic for an agent to cultivate moral virtues, contract law should at least carve out a space for the virtuous agent's flourishing. This is the foundation that this paper builds on.

The boundaries of this paper are fixed by the current state of contract law and common-sense notions of morality; as such, we will put aside justificatory questions of private law and metaethics. To further clarify, this paper does not take a stance on which mode of analysis of law is the most convincing for tackling these issues in contract law. While I focus on the "moral" approach outlined by Shiffrin, the aim of my paper here (contrary to Shiffrin) is not to undermine, for one, an economic analysis of contract law. Further, I should stipulate that I am not trying to expound any particular substantive normative theory, and I do my best to stay neutral of these discussions and focus just on the structures of normativity.

In this paper, I will first contextualize the discussion by offering a brief background of the debate and laying out the issues Shiffrin begins to address. To narrow this further, I focus on Shiffrin's views on efficient breach and on how conceptions of promissory morality relate to the norms of contract law. Next, I turn to an objection put

¹ S Shiffrin, "The Divergence of Contract and Promise" (2007) 120 Harvard L Rev.

forth by Barbara Fried² and subsequently try to understand Shiffrin's argument in a more charitable light. I then turn to Steven Shavell³ and his attempt at vindicating efficient breach. I argue that Shiffrin's argument against efficient breach, with some slight modifications, can survive the critiques of Fried and Shavell. Both Fried and Shavell offer rigorous challenges which push Shiffrin's general argument forward. More specifically, insofar as contract law, the cogency of Shiffrin's view of promissory morality requires a further elaboration of the nature and structure of promises.

The Context of the Efficient Breach Debate

The stage of this discussion occurs within the debate between two extremes: "reflectivists," who think the law ought to reflect moral norms; and "separatists," who think law and morality can be divorced without much problem. Shiffrin purports to have an intermediate, "accommodationist" view, which generally claims that contract law ought to track morality at some points. The accommodationist view can be carved out in a number of ways. Specific to Shiffrin is the view that contract law ought to minimally "accommodate the needs of moral agency even if it need not or should not enforce morality directly."⁴ Morality is needed as far as it promotes the virtuous agent's flourishing.

Shiffrin argues that a virtuous agent cannot consistently hold the belief that a promise can be binding and the belief that breaching the promise can be morally justified on the grounds of mere economic welfare.⁵ The "virtuous agent" is not fully defined by Shiffrin, and the use of the term relies on common sense notions of morality. The term is a placeholder for an agent who cares about morality and strives to conform their actions

² B Fried, "What's Morality Got To Do With It?" (2009) 120 Harvard L Rev.

³ S Shavell, "Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts" (2009)

⁴ S Shiffrin, "Could Breach of Contract Be Immoral?" (2009) 107 Michigan L Rev.

⁵ *Supra* note 1, at 731.

to what morality requires. Reminiscent of Aristotelian ethics, the virtuous agent's wellbeing and general flourishing in life is inextricably tethered to morality, so any constraints on their capacity to adhere to moral requirements is also a constraint on their ability to live a good life. How Shiffrin defines the content of the moral requirements and whether there can be good justifications for such constraints are points I will return to later.

The best example in contract law in illuminating this problematic tension between law and morality is efficient breach. The basic idea of efficient breach is that it is sometimes cheaper to pay expectation damages than performing under a contract. Shiffrin parses out two definitions. The "strong" view of efficient breach takes something like a consequentialist approach in that efficient breach is morally justified because it promotes social welfare through economic welfare.⁶ The "weak" view of efficient breach drops the moral claim and opens the possibility of efficient breach being morally wrong. However, efficient breach might be justified within contract law—generating completely distinct reasons from moral reasons⁷—because it "facilitates efficient economic transactions."⁸ In support of efficient breach, agents should be encouraged to breach when yielding net economic gain, so "punitive damages must be foregone in order to make breach, and thereby a more efficient system of exchange, more likely."⁹ If the moral agent believes that (all things considered) breach is morally wrong, the economic reasons are not "a sufficient, or even a partial, contributory justification for the law's content."¹⁰

At times, Shiffrin seems to be responding to the separatists' views. One famous formulation is that a promise to perform (under promissory morality) becomes a promise to perform or pay expectation damages (under contract law). Although we might think

⁶ *Ibid* at 730.

⁷ *Ibid* at 732.

⁸ *Ibid* at 730.

⁹ *Ibid* at 732.

¹⁰ *Ibid* at 731.

that in the world of promissory morality that the breaking of promises is obviously immoral, the norms of contract law are of a different species. In entering into a contractual relationship, parties leave their promissory norms at the door and enter into the world of contractual norms. Contractual norms signal to parties that performance is fungible (unlike promissory norms) and can be substituted for economic value. Contractual norms are not promissory norms, and breaches of contract are not the breaking of promises. Since contractual norms are divorced from promissory norms, it would be a category error to bring moral intuitions from the moral realm into the legal realm.

Shiffrin challenges the assumption that contract law can be divorced from the actual practices we engage in. As some economic analyses of contract law purport, the divorce between contract law and morality assumes that the parties involved are rational maximizers who only seek economic incentives. It is possible to think that in the context of contract law, the norms of promises are transformed into economic norms. In the same way a token of gratitude is representative of something more than its market price, perhaps the way to respect people is through money. The costs of breach, some economists argue, is already included in the price. Is there truly no moral duty to perform “because the contract did not explicitly specify that performance should proceed even were A to receive a significantly superior offer for A's goods?”¹¹ Shiffrin notes the asymmetry of allowing the seller can unilaterally shift the burden of finding a substitute while the buyer cannot compel the seller to do anything. This is too far removed from how we operate, especially when we pursue moral ends over economics ends. Expectation damages fall short of what morality requires. Shiffrin argues the internal inconsistency of this separatist approach by taking a Kantian approach: she writes, “if this were the universalized response, then agreements would never be made. The same is not true if performance were the universalized response to a promise to perform.”¹²

¹¹ *Supra* note 4, at 1562.

¹² *Ibid* at 1565.

Agreements on this view because an institution that is insensitive to our morality is fundamentally unstable and “could not flourish or perform its function.”¹³

It is important to take note of exactly what Shiffrin is arguing. Shiffrin does not argue that the justification of efficient breach is wrong because it is morally wrong, or that it does not line up with our promissory norms—this would be some version of the reflectivists’ view. Rather, what Shiffrin argues is that the good moral agent cannot consistently endorse efficient breach in their moral lives in a way to promote “the flourishing of just institutions and cultures.”¹⁴ Shiffrin is supposedly neutral towards the moral substance of efficient breach but finds problems with the moral scope insofar as it leaves no space to “accommodate” the good moral agent living their good moral lives.

Fried’s Deflationary Challenge

Fried’s challenge to Shiffrin’s argument is that efficient breach is not a moral wrong or contrary to morality, so there is no real problem for the virtuous agent in contract law permitting efficient breach. A look at Fried’s critique, regardless of its success, has the upshot of clarifying the problem Shiffrin outlines. It would be pointless to move onto the premise that efficient breach undercuts the virtuous agent’s wellbeing if we cannot first establish that efficient breach is morally problematic. If efficient breach has nothing to do with morality, then there is no **issue** (issue,) and the argument collapses.

The target of Fried’s objection is a *reductio* type illustration by Shiffrin of what formation looks like on a permissive view of efficient breach:¹⁵

¹³ *Ibid* at 1566.

¹⁴ *Supra* note 1, at 733.

¹⁵ Another interesting point that Fried highlights is the knowledge of the parties and the specifics of what they are agreeing to when they form the contract. Fried gives the example of a carpenter hired and a contract lacking specifications of performance standards and remedies. Does the individual understand that failure of the carpenter to meet her specifications gives her only expectation damages, which are further limited by Hadley rule (i.e. the

*"I solemnly promise to X but I may fail to do so if something better comes along; moreover, if it does, you can only expect X's market value from me, although you may need to enlist the help of others to pry it out of my clenched fist. Further, let us now declare that should I fail, it will not be the sort of thing deserving of moral reprobation so long as eventually you are made whole monetarily. Moreover, it is not the sort of thing you may be upset with me over or view as showing my bad character."*¹⁶ Fried thinks that this illustration is supposed to show the absurdity of efficient breach when it is translated into the language of promissory morality. To Fried, Shiffrin's issue with efficient breach is that the promise underlying the contract is not really a promise at all because it diverges too much from promissory morality. In other words, whatever threshold there is for something to count as a promise, this vague and ambiguous forecasting of one's actions has not met it. Yet we are supposed to call this an enforceable contract? Fried responds sympathetically in acknowledging that this does not fit with promissory morality, but adds that this does not fit with contract law either. In contract law, illusory promises are not considered enforceable contracts for much of the same reasons as promissory morality—that is, there is no promise to suffice as good consideration, so no enforceable contract has been formed. To Fried, this illustration is misleading at best.

By and large, Fried has problems with the rhetoric employed by Shiffrin. The illustration can be reformulated in a way which is acceptable in both contract law and promissory morality: "I'm thinking I'll probably do X, but I have to see what all my options are."¹⁷ Fried suggests that the discomforts would disappear if Shiffrin phrased things differently. For instance, "breaching for a price" says more to a separate moral judgment about the character of the promisor than anything about the morality of the promise; that is, what is morally wrong about the illustration is the "jerkiness" of the

inability to collect for hard-to-quantify losses)? This is a procedural problem about "when should apparent consent to stated and implied terms be treated as binding?" See *supra* note 2, at 56.

¹⁶ *Supra* note 1, at 728-9.

¹⁷ *Supra* note 2, at 58.

promisor and “that for no good reason he feels impelled to taunt the promisee with the limited nature of his commitment.”¹⁸ To Fried, there is no divergence between promissory morality and contract law, as Shiffrin suggests, and whatever problems are left are really just run-of-the-mill procedural problems (*viz.* formation and interpretation). These procedural difficulties are morally neutral, so, concludes Fried, there is no real tension with contract law and promissory morality.

Framed as a problem of contract formation, it is natural to think that this has little or nothing to do with morality. However, I think Fried’s objections relies on a very narrow understanding of the illustration. The illustration should not be understood in relation to sophisticated parties drawing up sophisticated contracts, as Fried’s counterexamples suggest.¹⁹ There is indeed nothing or morally wrong (barring conflicts with public policy issues) with contracts planning for some contingencies of possible breach and building them into the terms.²⁰ It is a mistake to that Shiffrin’s argument is directed towards breaching *per se* being morally objectionable; rather, what Shiffrin argues is that only a small subset of breach is morally objectionable.

The more charitable way to understand Shiffrin’s illustration is that it points out the absurdity of how efficient breach is supposed to be understood when parties making promises fail to specify or foresee breach. This is a subtle point and it is not clear cut, so I should note that this may not be Shiffrin’s actual views. In any case, a stronger argument emerges if we think of the small subset of cases where a party deliberately shirks the moral responsibility of the promise and hides behind the veil of contract law justifications for efficient breach. For example, if I promise to sell you my poodle and instead sell it to somebody else, I have broken my promise to you, even if I pay you expectation damages. I could provide you with a justification of my actions to the tune of efficient transactions,

¹⁸ *Supra* note 2, at 60.

¹⁹ *Supra* note 2, at 58.

²⁰ It is unclear what kinds of promissory norms are generated in these kinds of contracts. One explanation might be that promissory norms are quite thin and only require that we do not deviate from our agreements.

the fungibility of poodles, and the egoistic rational maximizer; however, I have still broken a promise. I did not say that, to echo Fried, "I'm thinking I'll probably sell you the poodle, but I have to see what all my options are." Maybe if I did, you might accept my contract law justification. But Shiffrin's illustration is directed towards the small number of scenarios where parties have failed to plan for breach. Shiffrin's hyperbolic language tries to show that contract law justifications for efficient breach are absurd justifications when operationalized in promissory morality.

It is not difficult to see how employing contract law justifications for breaking promises invokes reactions of moral indignation. As Fried suggests, we might condemn such smarmy characters for their "jerkiness," but this is not to say that we accept their contract law justification of "breaching for a price," as if they have a legitimate justification, and they are being sore winners. Rather, we do not accept their justification and the source of the condemnation is their inappropriate use of contract law justification where a promissory morality justification is appropriate.

A question arises at this point: Why are we so worried about the subset of cases of breach that are morally problematic? If they are so few and infrequent, does it really matter for the virtuous agent? These are the kinds of questions addressed in the next section. In brief, the small set of problematic cases infect the legitimacy of contract law because it puts unfair barriers on the virtuous moral agent. If the virtuous agent must not break promises, then parts of contract law are practically inaccessible for the virtuous agent. As we will see, Shavell suggests that we might reinterpret the problematic cases in a way that it is not morally objectionable.

Shavell's Reformulation of Efficient Breach

The previous section showed that Shiffrin's argument is not (as Fried suggests) merely rhetorical or an issue with formation. Fried helped clarify that most cases of efficient breach are not problematic, yet there are a small number of problematic efficient breach scenarios. Put this way, a plausible way to accommodate the moral agent is by

arguing that contract law transforms promissory norms in a way that is morally acceptable.

Perhaps contract law is not entirely divorced from promissory morality; rather it reshapes (as we have already seen in the separatists' argument) promissory morality and expresses them in a different way. This is the thread that Shavell picks up on. To summarize Shavell, contract law can accommodate the virtuous agent by filling in terms so that they are no longer morally objectionable. The way to go about filling in terms is by looking closely at the counterfactual of what parties would have agreed to if they foresaw the breach. For Shavell, when contractual terms do not explicitly address the breach, the way to interpret the promise is that parties would have permitted the breach if they had considered it. The fact that both parties did not foresee breach and remained silent does not imply that the parties believed breach was immoral. Shiffrin is not so convinced by Shavell's approach. Shiffrin questions whether there "is a moral duty to perform only if the parties would have explicitly agreed to perform had they squarely faced the contingency that is the occasion for the breach."²¹ Promissory norms are not mapped onto contracts in the way Shavell describes. There needs to be more explanation as to why absent explicit agreement "we should invoke the apparatus of hypothetical contractarianism."²² There are certainly some implied rules in the norms of promise keeping, too. If I miss a promise to meet you because of an emergency, you excuse me. It is possible that this contingency is built into the promise, but it would be odd to include the *deliberate* breaking of a promise. Silence might not imply that the parties believe breached to be immoral but using this silence towards an inference that parties permit breach is to take a mile from a given inch. Consider the example of shoplifting policies:

"[A] vendor may adjust her prices given the predicted rate of shoplifting at her store and the expected payout of insurance. As theft rises her prices may rise. However reasonable, that does

²¹ *Supra* note 3, at 1560.

²² *Supra* note 3, at 1561.

*not mean that she consents to the theft or its possibility. Nor does it mean that consumers who buy the goods at those prices consent to the thievery or to pay on behalf of the thieves. They may understand that everyone must shoulder the burden imposed by thieves and, in effect, pay the thieves' way, but finding that remedy reasonable does not amount to (and should not amount to) consenting to the activity giving rise to the remedial reaction."*²³

It is certainly *possible* to imagine that a vendor is indifferent to shoplifting because there are mechanisms in place to level out the expected economic loss. But this seems to imagine the vendor as cold, calculating, and amoral. The point becomes clearer if we imagine that, say, the payout of insurance netted slightly more than the loss of the theft. Would the vendor encourage theft? Would the non-shoplifting consumer shouldering some of these costs be insouciant towards the vendor encouraging theft to make a profit? Certainly not. Perhaps contracts ought to be responsive to the belief that there is a "special premium on performance."²⁴

As Shavell correctly identifies, much of this discussion turns on individual moral beliefs and what is deemed to be an acceptable practice. However, Shavell makes the unique move of approaching this as an empirical question. Rather than pumping intuitions or engaging in conceptual analysis, Shavell opts for a "limited survey" and appeals to "a recent study by psychologists" to validate his claims about individuals' moral beliefs on breach.²⁵ The problem with this move, I think, is that the question about what beliefs are acceptable for parties for counterfactual contract agreements are not apt for the experimental approach. This is not to say that this methodology is completely irrelevant or that his survey is a complete disaster—it is indeed important to assess the norms of the public for justifying coercive law. Rather, the question here is what reasons contract law *ought to* endorse, and this separates from the question of what reasons

²³ S Shiffrin, "Must I Mean What You Think I Should Have Said?" (2012) 98:1 Virginia L Rev 175.

²⁴ *Supra* note 4, at 1566-7.

²⁵ *Supra* note 3, at 1579.

individuals *in fact* endorse.²⁶ Should contract law prioritize promissory morality over economic efficiency? If so, where does it derive its normative force? Shavell seems to suggest that the normative grounds are the practical reasons held by everyone (*e.g.* it is in everybody's interest to reasonably accommodate economic efficiencies), and supports this claim with empirical data to show that people in fact hold these practical reasons. But questions of justification cannot be answered by looking at what individuals already believe.

The issue of conflating the justificatory question with a descriptive one becomes clear if we imagine a dissenter. If a dissenter claims that the counterfactual agreement is not what they agree to and that the breach is still unfair, then it is difficult on Shavell's view to see what justification can be given to the dissenter. Even if the majority of people believed that breaching was in fact what they would have agreed to if they had foreseen it, it does not lend any support for the dissenter. It seems Shavell would be forced to call this dissenter unreasonable, and their irrationality can be coercively overridden. This is problematic because the methodology leads to self-defeating result. The law does not function to impose the will of the majority and trump individual rights as soon as they do not fit with the majority's beliefs. The question of justifying coercive law must be answered in the abstract. Let us now take stock of the argument brewing behind the scenes.

1. Contract law ought to reasonably accommodate the flourishing of virtuous agents.
2. There are a (small) number of efficient breach scenarios which promote morally objectionable actions.
3. Virtuous agents cannot flourish under laws which promote any morally objectionable actions.

Therefore, contract law cannot permit efficient breach.

²⁶ This is a familiar problem made famous by David Hume and is often called the "is-ought" problem.

I take the first premise for granted given the limits of this paper. This paper thus far has focused mostly on the second premise. We learned from Fried that the number of efficient breach scenarios that are morally objectionable is a lot smaller than we might have initially thought. The small number of problematic scenarios cannot be easily excised or transformed in the way Shavell has suggested. At this point, one might question the first premise, especially as it relates to the second premise: in what sense is the permission of a small number of problematic scenarios an unreasonable accommodation?²⁷ The answer is that I take it that, in morally objectionable efficient breach scenarios, the virtuous agent has a disadvantage to somebody who is willing to act contrary to morality; in effect, the virtuous agent is being punished for acting in accordance with morality.²⁸ If this disadvantage cannot be justified (which is what I think), then it does not matter if it is a small or large number of scenarios. A similar issue might be raised with the third premise—namely, is it true that the virtuous agent cannot flourish because of a small number of scenarios? This depends on one's ethical views.²⁹

In the last stretch, I will try to sketch the ethical structure needed to support the argument above. My aim is to tease out some of the ethical positions that have been in the background of this paper. I want to suggest that a consequentialist ethics is not suited for this particular argument, but I raise some challenges that other normative ethical views might face.

²⁷ Shiffrin's answer is that the virtuous agent cannot consistently hold the belief that a promise can be binding and the belief that breaching the promise can be morally justified on the grounds of economic welfare. It is not spelled out exactly how she comes to the view that these are inconsistent beliefs, but I take it that this is connected to her view of morality. See *supra* note 1, at 731.

²⁸ Note that the law does not command agents to contravene morality, but merely permits efficient breach. But the suggestion that the law "promotes" breaching behavior is a subtler move. If breaking promises is understood as contravening morally objectionable, then laws which promote breaking promises also promotes something morally objectionable. The virtuous agent presumably cannot engage in breaching behavior whereas others can and narrows the options when engaging in contractual practices. They are faced with the dilemma of facing a market disadvantage in contracts or engaging in immoral behavior. It seems in either case, their wellbeing is undermined.

²⁹ The combined contentiousness of the second and third premises admittedly lead to worries about the cogency of the argument as a whole.

The Ingredients for the Morality of Promises

In defining a morality of promises, it is useful to look at what kind of normative force of morality is supposed to have in our practical deliberation. Put differently, we have a plurality of reasons for actions at any given moment (legal reasons, moral reasons, prudential reasons, etc.) and some reasons are weightier than others. For instance, reasons to keep my promise of meeting you at the café might outweigh competing reasons to indulge in a nap at home. In these terms, for Shiffrin, moral reasons seem to have a special overriding status in that it overrides other competing reasons—their “overridingness” quality is what defines the reasons as “moral”. I understand Shiffrin to be taking a view that moral reasons override all other reasons; so a part of what makes moral reasons “moral” is their elevated normative status. In contrast, Shavell might be thought of as more aligned with a consequentialist decision procedure whereby what is “moral” is the result of weighing competing practical reasons; on this view, whatever is the most pressing reason is “moral,” because it best satisfies some particular set of ends.

Some economic theorists have presented accounts of contract law that are amoral. Shiffrin is correct to think that such views of law are impoverished, but it having morality regulate laws can also lead to deficiencies. Shiffrin may go a bit too far with the idea of a virtuous agent.³⁰ Contract law does not need to make room for the moral saint; rather, it needs to make room for the morally decent person. Contract law certainly needs to capture dimensions of moral responsibility and blame.³¹ As Fried suggests, there might be a more attenuated approach to incorporating morality into contract law which shows deference to other policy concerns.³²

³⁰ Shiffrin argues elsewhere that the traditional doctrine of expectation damages needs to be replaced for specific performance and punitive damages. This also is supposed to flow from what morality requires of us.

³¹ As some philosophers suggest, the locus of responsibility is tethered to the idea that one has the power of choice and ability to do otherwise.

³² And Fried would argue that the current state of contract law already does this, for instance, through its conscionability doctrine.

We therefore need an account of how to understand contract law within an ethical system. Some legal theorists have defended a rights-based account of contracts. They usually start with the idea that everybody deserves respect as free and equal persons simply in virtue of being human. This involves equal respect for autonomy and people can recruit others to help pursue their goals. On the rights-based view, promises are understood as an exchange of rights. Coercively taking a right by breach is unacceptable, and they can appeal to enforce the promise through coercive means to reinstate the right. This is certainly very convincing, but to imply some revisionist takes on current doctrines in contract law.

Another (I think) plausible starting point could be to take a closer look at the normative structure of intimate relationships and special obligations. The starting point would be the relation instead of the individual (and individual rights). Underscoring the relational aspect of promises can arrive at the reciprocal respect between parties while maintaining the flexibility of negotiating the norms of the relationship. For example, Aristotle's view of friendship can be a useful model for understanding contracts—specifically, the wellbeing of parties becomes conjoined, and there emerges a resultant mutual flourishing. Friendships, like contracts, generate special obligations that are often idiosyncratic to the parties.

Conclusion

This paper has argued in line with Shiffrin against efficient breach. It is still possible to argue against any one of the premises or challenge the argument's jurisprudential assumptions. Nothing has been said about the nature of contracts within a polity or the nature of promises within morality. In saying this I do not mean to imply that progress is impossible without first addressing these fundamental questions. Shiffrin provides a strong argument for the role morality plays in the normative underpinnings of contract law. By way of modest suggestion, a fruitful direction for further investigation is a comparison between promissory norms between strangers and promissory norms between intimates. This may shed light on why we take performance to be so special.

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