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THE IMPORTANCE OF FAULT IN CONTRACT LAW

Robert A. Hillman*

According to judicial opinions, the Restatement (Second) of Contracts, and some analysts, the reasons for failing to perform a contract, whether willful, negligent, or unavoidable, have little or no bearing in determining contract liability.¹ Contract liability is said to be “strict,” meaning that the reasons for nonperformance are irrelevant in determining the injured party’s rights.² In this Article, I argue that the reasons for failing to perform, which focus on whether non-performance is the promisor’s fault, are crucially important in the resolution of many, perhaps most disputes under contract law.³

* Edwin H. Woodruff Professor of Law, Cornell Law School. The interesting and important Symposium, *Fault in American Contract Law*, 107 Mich. L. Rev. 1341 (2009) inspired me to write this article.

¹ See George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 Mich. L. Rev. 1445, 1455 (2009) [hereinafter Cohen, *Fault Within Contract Law*] (“The myth that contract law is a system of strict liability stubbornly persists.”).

² E. Allan Farnsworth, *Contracts* 737, 761 (4th ed. 2004); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 Mich. L. Rev. 1341, 1341 (2009); (“The basic rule of liability in contract law is no fault.”); Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 Mich. 1381 (2009) (case law reflects the lack of relevance of fault); Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Mich. L. Rev. 1349, 1351 (2009) (explaining that contract liability is strict in that “the victim of the breach need not prove fault by the contract breaker”); *Id.* at 1361-62 (moving to a fault analysis would “change the law”).

³ For additional commentary consistent with this point, see Cohen, *Fault Within Contract Law*, *supra* note 1, at 1455 (“Contract doctrine contains numerous direct expressions of fault. The Restatement and UCC include the following terms, all of which naturally invite a fault inquiry: best efforts, diligence, fault, fraudulent, good (and bad) faith, injustice (and justice and unjust), justified, know and reason to know, mitigate, negligent, precaution, reasonable, unconscionable, and willful.”); Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 Mich. L. Rev. 1413, 1414 (2009) (“[I]t should not be surprising that fault *is* a pervasive element in contract law. Some areas of contract law, such as unconscionability, are almost entirely fault based. Other areas, including interpretation, include sectors that are fault based in significant part. Still other areas, such as liability for nonperformance, might superficially appear to be based on strict liability, but can best be understood as resting in significant part on fault.”). See generally Robert A. Hillman, *Contract Lore*, 27 J. Corp. L. 505 (2002).

Before proceeding, it is important to define two terms used throughout this Article. First, what do I mean when I say the promisor was at fault?⁴ There are many reasons for failing to perform a contract. A party may want to take advantage of better opportunities elsewhere with the belief that the gain from breaching will exceed contract damages liability. Or a party may have entered a losing contract and refuse to perform for that reason. Or a party may decline to perform unless the other party, who has relied on the contract, agrees to provide additional compensation to the promisor. Each of these failures to perform constitutes a breach and is willful in the sense that the promisor deliberately decides not to perform.⁵ A party may also fail to take appropriate action to ensure performance and become unable to perform. Such conduct constitutes negligent or reckless behavior and is a breach.⁶ However, a promisor who has done all that is reasonably possible to avoid breach, but changed circumstances make performance impossible or impracticable, has neither willfully nor negligently breached. The same conclusion applies to a party who fails to perform because the contract terms are unenforceable on grounds such as unconscionability, duress, or the like. As used here, fault encompasses willful, reckless, and negligent breaches.⁷ It does not include failures to perform if the party has taken adequate precautions and simply cannot perform because of changed circumstances or if the terms are

⁴ For a discussion of the fogginess of willful breach, see Richard Craswell, When Is a Willful Breach “Willful”? The Link Between Definitions and Damages, 107 Mich. L. Rev. 1501, 1502-04 (2009) [hereinafter Craswell, Willful Breach].

⁵ Craswell sees an ambiguity in the concept of willfulness based on the failure to determine “which event in the sequence leading up to the breach should be assessed for deliberateness or intentionality.” Craswell, Willful Breach, supra note 4, at 1515. He points out, for example, that the breach in *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921), using the wrong kind of pipe in the construction of a house, which the court determined was accidental, could be “characterized as a willful breach” if the court focused on the builder’s failure to tear down the house after discovering the error. But it is hard to see why the builder’s first failure to abide by the contract should not be the focal point for determining willfulness, just as (using Craswell’s own analogy) the criminal law assesses the liability of a drunk driver by the initial act of driving the car while drunk, not based on what happens next.

Some analysts define willfulness based on efficiency criteria. For example, one analyst asserts that a willful breach is an inefficient one: “[A] breach is willful when the promisor fails to take cost-effective precautions in performing a contract that is ex ante efficient and then breaches the contract to avoid incurring substantial losses.” Scott supra note 2, at 1384.

⁶ See Eric A. Posner, Fault in Contract Law, 107 Mich. L. Rev. 1431, 1438 (2009) (a breacher is at fault when the breacher fails to take reasonable precautions).

⁷ Judge Richard Posner argues that courts should treat only negligent breaches as fault-based. See Posner, supra note 2, at 1353-54. According to Posner, negligent breaches diminish society’s resources but deliberate breaches are efficient. *Id.*

unconscionable or the like. In fact, in the latter situation, we shall see that the promisee is the one at fault.⁸

This leads to the second definitional issue. “Contract liability” encompasses two separate issues.⁹ Contract liability may refer to whether a promisor who has failed to perform has breached the contract. Despite my observation above that not all failures to perform are breaches and that a promisor who fails to perform may have a valid defense, some authorities insist that the reasons for failing to perform have little or no place in the analysis of whether a party has breached a contract.¹⁰ Contract liability also may refer to the measure of money damages or other relief. Some legal scholars that maintain that contract liability is strict focus on remedies.¹¹ They argue that the reasons for breach have no effect on contract remedies.¹² Some analysts also stake out a normative position that courts *should not* consider fault in determining breach or remedies (although theorists are not always clear on whether they are describing contract law or explaining what it should be).¹³ This Article argues that both the breach and remedy visions of strict liability are incorrect in that in many if not most contracts cases fault figures in both the determination of breach and the measurement of damages or other relief.

As we shall see, several reasons underlie contract law’s heavy use of fault concepts in assessing failure to perform and remedies. For example, a court may view as immoral and worthy of condemnation a promisor who willfully or negligently breaks a promise and import those perceptions into legal decisions and rules.¹⁴ Or a court may measure the reasonableness of

⁸ See *infra* notes 77-88, and accompanying text.

⁹ Cohen, *Fault Within Contract Law*, *supra* note 1, at 1446.

¹⁰ See e.g., Posner, *supra* note 2, at 1351 (“The option theory of contract . . . implies that liability for the breach of a contract is strict”); Ben-Shahar & Porat, *supra* note 2, at 1344 (“The primary ambition of this Symposium . . . is to inquire into the reasons why fault plays no more than a limited role”); Scott, *supra* note 2, at 1382 (“The core of contract law as applied in the courts is a no-fault regime.”); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal. L. Rev. 1, 32 (1985) (“Even though the fundamental rule governing breach of contract is a strict liability rule, ancillary contract rules based upon fault do exist.”).

¹¹ See e.g., Cohen, *Fault Within Contract Law*, *supra* note 1, at 1446 (discussing and refuting the “strict liability paradigm”); see also 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.”).

¹² See Part IIB *infra*.

¹³ Judge Posner, for one, appears to advocate on efficiency grounds that liability *should be* strict, regardless of the actual judicial approach. Posner, *supra* note 2, at 1351.

¹⁴ Eisenberg, *supra* note 3, at 1414; see also Seana Shiffrin, *Could Breach of Contract Be Immoral*, 107 Mich. L. Rev. 1551 (2009) (a promise is a moral commitment to perform).

a party's conduct with the goal of administering a fair and equitable system of exchange.¹⁵ Or a court may focus on creating incentives to facilitate efficient outcomes, which strategy necessarily encompasses the reasons for breach and the assessment of remedies.¹⁶ Of course, such reasons are not mutually exclusive, although analysts who recognize fault's role in contract law sometimes dispute whether moral reasons or incentives predominate.¹⁷ In light of undisputable evidence of and strong reasons for assessing fault in contract law, the mystery is why the no-fault perception persists.

The discussion proceeds as follows. Part I discusses the view that maintains that contract liability is strict. Part II reveals that fault in contract law is important, first with respect to contract breach and then concerning remedies. Part III, the conclusion, surmises why many people still maintain that contract liability is strict when the truth is so obviously otherwise.

I. The Perception That the Reasons for Failing to Perform Do Not Matter

Much judicial language and the Restatement (Second) lend support to the idea that fault is irrelevant in assessing contract breach and remedies. Some courts posit that the reasons for breach do not matter because a contract obligation is nothing more than an option to perform or pay damages. Judge Richard Posner is a champion of this position both in his judicial opinions and, as we shortly shall see, in his influential writings on contract law. For example, Judge Posner reasons:

What is true and worth noting is that the civil law—the law of Continental Europe, as distinct from Anglo-American law—of contracts places an emphasis on fault that is not found in the common law. As Holmes remarked, the common law conceives of contracts as options—when you sign a contract in which you promise a specified performance you buy an option to either perform as promised or pay damages, unless damages are not an adequate remedy in the particular case. Whether you were at fault in deciding not to perform—you could have done so but preferred to pay damages because someone offered you a higher price for the goods that you'd promised to the other party—is therefore

¹⁵ For example, a court a court may assess fault in determining which party should bear the risk of a misunderstanding concerning the meaning of their agreement or whether a breaching party is likely to cure a default.

¹⁶ For example, if a party cannot perform because of an unanticipated catastrophic event through no fault of her own, holding the party to performance will not create incentives for greater care.

¹⁷ See, e.g., Ben-Shahar & Porat, *supra* note 2, at 1344 (“Damage booster[s] . . . have nothing to do with the mens reas of the promisor, the volition of his act, or its morality. . . . Instead, the willful-breach cases have to do with incentives.”).

irrelevant.¹⁸

A related claim focuses on the goal of contract remedies, which is to award damages sufficient to compensate the injured party for the loss of the expected performance.¹⁹ This Article later reveals that in actuality the injured party rarely recovers its full loss. But a corollary to the full-compensation idea is that, assuming parties are made whole by expectancy damages, this approach demonstrates that courts ignore fault issues in assigning remedies.²⁰ By awarding only expectancy damages and denying punitive damages and specific performance, courts refrain from punishing the breacher or compelling performance. By granting expectancy damages and no less, courts refrain from penalizing the injured party. As such, fault plays no role in assessing damages. The Restatement (Second) of Contracts reinforces this perspective:

The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. “Willful” breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party.²¹

Many courts appear to follow the Restatement position. The following language is typical: “The law does not condone breach of contract, but it does not consider it tortious or wrongful. If a party desires to breach a contract, he may do so purposely as long as he is willing

¹⁸ *Bodum USA, Inc., v. La Cafetiere, Inc.*, 621 F.3d 624, 634 (7th Cir. 2010). Many courts follow this reasoning. See, e.g., *Kase v. Salomon Smith Barney, Inc.*, 218 F.R.D. 149, 156 n.9 (S.D. Tex. 2003) (“Because [plaintiff’s] only remaining cause of action is for breach of contract, not fraud or negligence, issues such as intent and lack of accident or mistake are irrelevant to this lawsuit.”).

¹⁹ Robert A. Hillman, *Principles of Contract Law* 138-170 (2d ed. 2009) [hereinafter *Hillman, Principles*].

²⁰ See, e.g., Farnsworth, *supra* note 2, at 761 (noting that “contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.”).

²¹ Restatement (Second) of Contracts ch. 16, introductory note, 100 (1981). The law and economics movement likely influenced the Restatement position. For example, Allan Farnsworth, the Reporter of the Restatement (Second) wrote a description in his treatise of the legal-economists’ position that parrots the Restatement: “‘Willful’ breaches should not be distinguished from other breaches.” Farnsworth, *supra* note 2, at 737; see also Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 *Ariz. L. Rev.* 733, 736 (1982).

to put the other party in the position he would have been had the contract been fully performed. Fault is irrelevant to breach of contract.”²² Similarly, another court has stated that “a promisor’s motive for breaching his contract is generally regarded as irrelevant because the promisee will be compensated for all damages proximately resulting from the promisor’s breach.”²³ Some courts are not even tested by the degree of nastiness of the breach: “[M]otive, regardless of how malevolent, remains irrelevant to a breach of contract claim and does not convert a contract action into a tort claim exposing the breaching party to liability for punitive damages.”²⁴

Prominent legal scholars (including Judge Posner in his scholarly writings) also maintain that fault is irrelevant to both issues of breach and remedies²⁵ or that fault plays a limited role.²⁶ Some of these writers follow the courts that adopt a narrow view of the nature of a contract promise.²⁷ These scholars also rely on Holmes adage that a contract means no more than a promise to perform or to pay damages, and argue that a promisor who fails to perform but who fully compensates the promisee for her loss has not broken a promise and therefore is not at fault.²⁸ In fact, we will see that the logical conclusion from this observation, adherents believe,

²² *Eichmann v. National Hosp. and Health Care Services, Inc.*, 308 Ill. App. 3d 337 (1999) (quoting *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338 (1980)).

²³ *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 68 (2009) (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599 (1976)); see also *Koufakis v. Carvel*, 425 F.2d 892, 906 (2d Cir. 1970) (“A breach is a breach; it is of marginal relevance what motivations led to it.”).

²⁴ *JRS Products, Inc. v. Matsushita Electronic Corp. of America*, 115 Cal. App. 4th 168 (2004).

²⁵ See Posner, *supra* note 2, at 1350 (discussing Holmes) (“[W]hen you sign a contract in which you promise a specified performance . . . you buy an option to perform or pay damages.”).

²⁶ See *supra* note 2 ; see also E. Posner, *supra* note 6, at 1431 (“[A]lthough Anglo-American contract law is usually called a strict-liability system, it does contain pockets of fault.”) ; Saul Levmore, *Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law*, 107 Mich. L. Rev. 1365, 1366 (2009) (“Contract law has been understood as deploying strict liability, but it is strict only to a point—because once the ‘duty to mitigate’ is at issue, fault comes into play as courts consider the reasonableness of the post- and even the pre-breach mitigation efforts.”); Richard Speidel, *The Borderland of Contract*, 10 N. Ky. L. Rev. 164, 168 (1983) (“A must make and break a promise, but B is not required to prove that the breach was negligent or intentional or otherwise ‘wrongful.’”).

²⁷ Cohen, *Fault Within Contract Law*, *supra* note 2, at 1447 (describing the position).

²⁸ Posner, *supra* note 2, at 1350; Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 Mich. L. Rev. 1569 (2009). Posner adds that in the civil law system contract liability is not strict because a party is in breach “only if he ‘could reasonably have been expected to behave in a different way,’ that is, only if he was at fault in failing to perform.” *Id.* at 1351 (quoting Jurgen Basedow, *Towards a Universal Doctrine of Breach of contract: The Impact of the CISG*, 25 Int’l Rev. L. & Econ. 487, 496 (2005)).

is that contract law should and does encourage breach if the promisor is better off by breaching after compensating the promisee with expectancy damages.²⁹

Beyond conceptualizing the content of a contract promise as narrow, some analysts argue that strict liability is good policy, sometimes intimating that the enumerated policy is so persuasive that contract law must be following it. For example, Posner claims that no-fault “minimize[s] the expense and uncertainty of litigation” because it requires only a “comparison . . . of the language of the contract with the fact of nonperformance.”³⁰ He argues that fault, on the other hand, is an unruly concept that increases the cost of dispute resolution or litigation.³¹ Contract law opts for strict liability, the argument goes, to minimize such costs.

Posner also asserts that strict liability “reduces transaction costs by optimizing risk bearing.”³² By this he apparently mean that promisors are generally the superior risk bearer—the party best able to prevent the risk or insure against it³³—and strict liability creates incentives for the promisor to take the most efficient level of precautions against those risks.³⁴ Precautions “range from quality control to backup supplies to purchasing insurance to not promising in the first place.”³⁵

Some analysts who describe contract law as largely strict attempt to explain away doctrines that seemingly focus on fault, arguing that economic explanations that do not entail

²⁹ See *infra* notes 149-161, and accompanying text.

³⁰ Posner, *supra* note 2, at 1353; see also Scott, *supra* note 2, at 1392.

³¹ See Posner, *supra* note 2, at 1353, 1359; see also Craswell, *Willful Breach*, *supra* note 4, at 1502 (indeterminacy of the term “willful”); E. Posner, *supra* note 6, at 1431 (“the disadvantage of [a fault-based system] is that courts would need to make difficult inquiries and could make more errors.”).

³² Posner, *supra* note 2, at 1351.

³³ See Posner and Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Leg. Stud.* 83, 89-91 (1977); see also Cohen, *Fault Within Contract Law*, *supra* note 1, at 1457. The parties would have agreed to allocate the risk to the superior risk bearer in their effort to maximize the fruits of the contract. With this default rule in place, so the argument goes, future parties do not have to expend resources contracting with respect to the risk of supervening events. Posner and Rosenfield, at 89-91.

³⁴ Cohen, *Fault Within Contract Law*, *supra* note 1, at 1448 (explaining the approach); see also Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 *Mich. L. Rev.* 1479, 1480 (2009) (“[I]n general the expectation remedy is sufficient to provide optimal deterrence.”). But Scott points out that strict liability may fail to deter promisor inefficiencies such as failing to take precautions to ensure performance and promisee inefficiencies such as failing to mitigate before the promisor’s repudiation. Scott, *supra* note 2, at 1393-94.

³⁵ Cohen, *Fault Within Contract Law*, *supra* note 2, at 1453.

fault are more clear and persuasive.³⁶ Others more boldly assert that case law does not bear out the claim that courts generally rely on fault concepts.³⁷ Further, they claim that commercially sophisticated business parties generally prefer strict liability.³⁸ I respond to the above descriptive and normative arguments supporting strict liability in the next section on contract law.

II. The Reasons for Failing to Perform Matter a Lot

The following discussion sets forth a selection of the leading contract principles and doctrines in which fault plays a role. The discussion also evaluates, where relevant, the leading alternative claims of strict-liability adherents set forth in Part I of this Article.

Part A discusses contract law's use of fault in assessing whether a party has broken the contract. Part B analyzes fault in the context of determining remedies.

A. Contract Breach

The nature of a promise. We saw that some advocates of strict liability rely on Holmes's pronouncement that a contract promise is to perform or to compensate the promisee for non-performance.³⁹ A promisor who chooses the latter therefore cannot be at fault. But this is a very narrow view of the nature of a contract promise. At minimum, it ignores the many contracts that explicitly or implicitly import standards of care, such as best efforts, due care, and good faith (I address the latter shortly).⁴⁰ Even in the absence of a judicial invocation of such standards, Holmes' view ignores the reasonable expectations of most commercial parties who understand that the costs of contract breakdown, whether in the form of settlement negotiations, dispute resolution, or lawsuits, are generally a poor substitute for performance and the creation of a good working relationship.⁴¹ In fact, non-legal "business cultures" govern the day-to-day relations of

³⁶ See, e.g., Posner, *supra* note 2, at 1357 ("[T]he fact that the law uses moral language doesn't mean that legal duties are moral duties.").

³⁷ See, e.g., Scott, *supra* note 2, at 1382 ("The core of contract law as applied in the courts is a no-fault regime.").

³⁸ See, e.g., *id.* at 1383 ("both autonomy and efficiency values support the claim that commercial parties will prefer strict liability rules to fault-based rules for assessing performance and the response to nonperformance.").

³⁹ See *supra* notes 27-29, and accompanying text; see also Posner, *supra* note 2, at 1350; Shavell, *supra* note 28.

⁴⁰ See Cohen, *Fault Within Contract Law*, *supra* note 2, at 1450-51. Cohen also points out that "parties often draft terms designed to discourage certain conduct" such as "satisfaction clauses[.]" *Id.* at 1451.

⁴¹ See, e.g., Ian Macneil, *The New Social Contract* 66-67 (1980); Stewart Macaulay, *An Empirical View of Contract*, 1985 *Wis. L. Rev.* 465, 467; Cohen, *Fault Within Contract Law*,

many parties, who believe that they should honor agreements and avoid “legalese.”⁴² Such parties reasonably believe that a contract promise is to perform the contract.⁴³

A contract promise requires performance for moral reasons as well.⁴⁴ As a general matter, morality requires people to look out for the personal and property interests of others.⁴⁵ In particular, contract promisors have a “moral obligation to honor [their] promises” to avoid harming the interests of their promisees.⁴⁶ According to Charles Fried, the author of the still most comprehensive moral theory of contract law,

a promise creates a moral obligation because the promisor purposefully invokes the “convention of promising.” A convention is a “system of rules” governing the making of commitments that others can “count on.” In fact the very purpose of the convention of promising is to confer on the promisee “moral grounds . . . to expect the promised performance.”⁴⁷

Professor Mel Eisenberg observes that “[i]n the area of nonperformance, law and morality, although not identical, tend to converge rather than diverge.”⁴⁸ This is not surprising. The goal of contract law may not be to enforce moral norms directly, but it also does not want to

supra note 1, at 1450 (“[W]e should be wary of theoretical justifications for strict liability that depend on overly confident assertions of mutual intent.”); see also *Demasse v. ITT Corp.*, 984 P.2d 1138, 1148 (Ariz. 1999) (“The contract rule is and has always been that one should keep one’s promises.”).

⁴² See Macaulay, supra note 41, at 467; Stewart Macaulay, *The Reliance Interest and World Outside the Law Schools’ doors*, 1991 Wis. L. Rev. 247, 260.

⁴³ *Id.*, see also Shiffrin, supra note 14, at 1564-66; Barry Nicholas, *Fault and Breach of Contract*, in *Good Faith and Fault in Contract Law* 337, 345 (Jack Beatson & Daniel Friedmann eds., 1995), quoted in Eisenberg, supra note 3, at 1429 (“Fault is . . . absent from the conventional common law conception of liability for breach of contract only because it is in substance incorporated in the meaning of ‘contract’.”)

⁴⁴ Eisenberg, supra note 3, at 1428.

⁴⁵ Robert A. Hillman, *The Richness of Contract Law* 12-13 (1997) (describing Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981)); see also Shiffrin, supra note 14, at 1551 n. 2 (“By morality, I mean those nonlegal, objectively grounded normative principles that regulate our motives, reasons, and conduct . . .”).

⁴⁶ Farnsworth, supra note 2, at 737 (citing Fried, supra note 45).

⁴⁷ Hillman, supra note 45, at 12-13 (describing Fried, supra note 45, at 12-13; 16); see also Charles Fried, *The Convergence of Contract and Promise*, 120 Harv. L. Rev. 1 (2007).

⁴⁸ Eisenberg, supra note 3, at 1428.

promote immoral behavior.⁴⁹ This is not the place nor is it necessary to delve deeply into the complex relationship of law and morality, however. Suffice it to say that if contracting parties reasonably expect performance and if promisors have a moral obligation to look out for the interests of their promisees, countenancing breach through a narrow view of legal promising may undermine society's faith in the contract institution, which obviously would have significant instrumental implications.⁵⁰ As Lon Fuller commented, the "regime of exchange would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another."⁵¹ Under such conditions, people may choose not to contract even if it would benefit both of them.⁵² Or they may look to non-legal mechanisms for enforcement of their arrangements, such as requiring security deposits or premature performance that may be costly and inefficient.⁵³ Through the development of doctrine in which fault plays an important role, contract law has absorbed these important instrumental reasons for rejecting contract damages as an alternative to performance.

It should not be surprising, therefore, that courts look askance at purposeful, reckless, and negligent breaches. The rest of this subsection enumerates numerous instances in which courts do so.

The objective test of contract formation and interpretation. Despite judicial language requiring a "meeting of the minds" for contract formation and for ascertaining the "intent of the parties" in contract interpretation,⁵⁴ contract law actually asks whether a reasonable person would believe the parties made a contract and decides the meaning of contract terms objectively as well. Judge Learned Hand's famous dicta in *Hotchkiss v. National City Bank of New York* makes this point:

⁴⁹ Shiffrin, *supra* note 14, at 1552. Courts in the U.S. as early as 1825 worried about this issue in contracts cases. See, e.g., *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 ("there are great interests of society which justify withholding the coercive arm of the law from" moral duties).

⁵⁰ Cf. Bar-Gill & Ben-Shahar, *supra* note 34, at 1484 ("The sanctity of contract is infringed not by the willful breach per se, but by the propensity to disregard the full scope of the contractual obligation and to chisel away at it.) .

⁵¹ Lon L. Fuller, *The Morality of Law* 28 (rev. ed. 1969).

⁵² Marschall, *supra* note 21, at 734, 740.

⁵³ Von Mehren, *Contract in General*, 7 Int'l Ency. Of Comp. L. 20 (ch. 1) 1982) (quoting R. Posner, *Economic Analysis of Law* §4.1 at 66 (1977)).

⁵⁴ See, e.g., *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 702 (2d Cir. 1998) ("[I]t is the intent of the parties which controls the interpretation of contracts."); *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948, 953 (10th Cir. 1993) ("In construing the meaning of a written contract, the intent of the parties controls."); *Holbrook v. United States*, 194 F.Supp. 252, 255 (D. Or. 1961) ("[T]he intention of the parties ... controls the contract's interpretation and when that is ascertained, it is conclusive.").

A contract has, strictly speaking nothing to do with the personal, or individual, intent of the parties. * * * If * * * it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.⁵⁵

Under this objective test of contract formation and interpretation, a promisor is therefore liable for misleading use of language, whether purposeful, reckless, or careless.

There are countless examples of the use of the objective standard to police purposeful, reckless, and negligent use of language. One example suffices here. Under the misunderstanding doctrine, if a material term in a contract is objectively ambiguous and the parties are thinking of different meanings of the term, the contract is unenforceable.⁵⁶ However, courts enforce one party's understanding of the meaning of a term if that party did not know or have reason to know the meaning attached by the other party and the other party knew or had reason to know the meaning attached by the first party.⁵⁷ In other words, courts determine the meaning of language and the enforcement of terms in misunderstanding situations by evaluating whether a party is at fault for purposefully, recklessly, or negligently failing to clarify that party's view of the meaning of terms.⁵⁸ For example, in the venerable *Dickey v. Hurd*,⁵⁹ an offeror was bound to the offeree's understanding of the offer's ambiguous requirement for acceptance because the offeree had written to the offeror expressing his understanding of the requirement (to give notice of acceptance, not actually to perform), which the offeror did not contest.

The objective approach to contract formation and interpretation strikes at the heart of the no-fault claim. Contract law channels behavior toward making enforceable agreements, but it also governs how to avoid them. A useful way of thinking about the objective approach is that it measures a party's language and conduct against the test of reasonableness and sanctions careless, reckless, or purposeful misleading language by finding an obligation even if the promisor did not intend one. This form of "punishment" for fault-based conduct underscores its

⁵⁵ *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

⁵⁶ *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. Ch. 1864); Restatement (Second) of Contracts § 20(1) (1981).

⁵⁷ Restatement (Second) of Contracts § 20(2) (1981).

⁵⁸ See Cohen, *Fault Within Contract Law*, *supra* note 1, at 1455-56; Eisenberg, *supra* note 3, at 1423-24.

⁵⁹ 33 F.2d 414 (1st Cir. 1929).

importance in contract law.

Material breach. A promisor materially breaches if the promisee fails to receive substantially what it bargained for. A finding of material breach means that the promisee can suspend performance and ultimately cancel the contract.⁶⁰ Factors for determining material breach include those focusing on the reasonable expectations of the promisee, but other factors also encompass the promisor's actions, including the promisor's fault. For example, section 275 of the Restatement (First) of Contracts states that "the wilful, negligent or innocent behavior of the party failing to perform" is influential in determining the materiality of a breach.⁶¹ The second Restatement substitutes a test of the promisor's "good faith and fair dealing" in determining the materiality of a breach, but the result is essentially the same.⁶² Another factor for determining materiality in the Restatement (Second) is the likelihood that the breacher will cure its failure, thereby measuring at least in part the reliability and sincerity of that party.⁶³ In addition, according to the second Restatement, upon a finding of material breach, the promisor's good faith and fair dealing are also factors for determining if a promisee may cease its own performance.⁶⁴

As with the objective approach to formation and interpretation, the material breach doctrine goes a long way toward proving the importance of fault in contract law. If fault plays a role in determining the rights of the injured party to cease performance and cancel the contract, there may be few litigated cases of breach that do not involve an investigation of fault.

Good faith and unconscionability. Not only is good faith a factor for determining the materiality of a breach, but it also constitutes an implied term filling out the performance obligations of a promisor.⁶⁵ As a general matter, courts find bad faith if the promisor's performance belies the promisee's reasonable expectations. Contract language cannot always capture many of the intricacies of the parties' understandings. In addition, contract drafters rarely allocate the risk of all of the contingencies because of their limited imagination, experience, and time. In such situations, the source of reasonable expectations is the terms

⁶⁰ Restatement (Second) of Contracts §§ 241, 242 (1981).

⁶¹ Restatement (First) of Contracts § 275(e).

⁶² Restatement (Second) of Contracts d. § 241 cmt. f ("The extent to which the behavior of the party failing to perform . . . comports with standards of good faith and fair dealing is . . . a significant circumstance in determining whether the failure is material In giving weight to this factor courts have often used such less precise terms as "wilful.").

⁶³ *Id.* 241(d); see also Bar-Gill & Ben-Shahar, *supra* note 34 (breacher more likely to breach again and to be dishonest).

⁶⁴ Restatement (Second) of Contracts § 241(e).

⁶⁵ See generally Hillman, *Principles*, *supra* note 19, at 267-71.

society would deem fair and reasonable: “Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable.”⁶⁶ Good faith performance therefore rules out conduct that “violate[s] community standards of decency, fairness, or reasonableness.”⁶⁷

A good example of the good faith approach is *Tymshare, Inc. v. Covell*, where a contract term authorized an employer to raise the requirement for its sales representatives’ commissions retroactively in the employer’s discretion. Then Judge Scalia observed that the employer would be in bad faith if it raised the requirement solely to deprive an employee of earned commissions:⁶⁸

[A]greeing to [the retroactive] provision would require a degree of folly on the part of these sales representatives we are not inclined to posit where another plausible interpretation of the language is available. It seems to us that the 'sole discretion' intended was discretion to determine the existence or nonexistence of the various factors that would reasonably justify alteration of the sales quota. Those factors would include ... an unanticipated volume of business from a particular customer unconnected with the extra sales efforts of the employee assigned to that account; and ... a poor overall sales year for the company, leaving less gross income to be expended on commissions.... But the language need not (and therefore can not reasonably) be read to confer discretion to [increase] the quota for any reason whatever—including ... a simple desire to deprive an employee of the fairly agreed benefit of his labors.⁶⁹

Judge Scalia saw that a reasonable sales representative would understand that the employer’s right to alter the requirements for commissions could not be exercised to deprive the employee of commissions because “[r]easonable parties . . . intend to incorporate the meaning of terms society would find fair and just.”⁷⁰

⁶⁶ *Jacob & Youngs Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

⁶⁷ Restatement (Second) of Contracts § 205, cmt. a.

⁶⁸ See *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984); see also *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (holding that an at-will employment contract contained an implied covenant of good faith and fair dealing and that a bad-faith termination constituted a breach of contract).

⁶⁹ *Tymshare*, at 1154.

⁷⁰ Hillman, *Principles*, supra note 19, at 270; see also Corbin on Contracts § 85.18: “A party may contract to limit liability in damages for nonperformance of promises. . . . Such a provision is not effective, however, if that party acts fraudulently or in bad faith.”); *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983) (the employer’s “failure to act in good faith in terminating [the employee’s] employment precludes the application of the restrictive covenant.”).

Writer-advocates of strict liability prefer an economic explanation for the good-faith duty. Judge Posner argues that fault principles obfuscate issues and introduce litigation costs. He therefore maintains that good faith is an unnecessary diversion.⁷¹ For example, in the context of a seller who refused to perform without a price increase where the buyer had no choice but to accede to the seller's demand, Posner comments:

Courts might describe the seller's conduct . . . as coercive, extortionate, or in bad faith, but all they would mean by these highly charged words . . . would be that an implicit term of every contract (unless disclaimed) is that neither party shall take advantage of a temporary monopoly, conferred by the contract One can if one wants denounce the temporary monopolists's conduct as wrongful, but the adjective adds nothing to the analysis."⁷²

Of course, the phrase "tak[ing] advantage" in Posner's definition is also "highly charged" and requires an investigation of the fault-based motives of the seller and the circumstances of the buyer. For example, a seller who believes that changed circumstances entitle the seller to more consideration would not necessarily be "taking advantage" of a promisee who has no market alternatives.⁷³ And a buyer with ample substitute opportunities would not be the victim of advantage-taking even if the seller's motive was to extract extra-contractual gains.⁷⁴ "Temporary monopoly" is also a technical term meaning roughly that the buyer has no reasonable alternatives. Determining what constitutes reasonable alternatives in various contexts will also tax the courts. Posner simply may want to substitute one set of abstract concepts for another, which may not clarify issues or reduce litigation costs at all.

Good faith also serves an independent function. As with other legal categories (for example, larceny, fraud, duress, duty), good faith helps clarify the law by linking or grouping common kinds of conduct and the manner in which the law relates to this conduct.⁷⁵ By denominating the issue one of "good faith modification," for example, a court entertaining the buyer's claim signals that the issue involves whether the seller seeks to extract additional gains

⁷¹ See Posner, *supra* note 2, at 1359 ("There is a legally enforceable contract duty of 'good faith,' but it is just a duty to avoid exploiting the temporary monopoly position that a contracting party will sometimes obtain during the course of performance.").

⁷² *Id.* at 1359.

⁷³ E.g., *Angel v. Murray*, 113 R.I. 482 (1974) (Trash collector granted augmentation of contract price for unexpected additional costs.).

⁷⁴ See Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 *Iowa L. Rev.* 849, 852 n.14 (1979).

⁷⁵ See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 *Va. L. Rev.* 195 (1968).

because of the buyer's exigent position.⁷⁶ Further, by denominating conduct as good or bad faith, contract law increases the incentive of contracting parties such as the seller to abide by the spirit of the contract in order to create or maintain a good reputation and good will.

The same kinds of considerations that advise the doctrine of good faith apply to contract law's unconscionability doctrine, although the two principles differ in that good faith deals with implied terms and unconscionability with express ones.⁷⁷ Unconscionability applies "the moral standards that are rooted in aspirations for the community"⁷⁸ to police the manner in which contracts are formed and the fairness of the resulting terms.⁷⁹ The history and modern-day applications of the doctrine are well rehearsed.⁸⁰ Here I only want to make the rather obvious point that unconscionability (and related doctrines) plays an important role in introducing fault into contract law.

Although the term unconscionability provides little guidance for determining if contracts or terms are unenforceable, case law and scholarly treatment have delineated important criteria.⁸¹ Generally, courts evaluate the bargaining process to determine if contract formation was "procedurally unconscionable," meaning that the promisee was a victim of fault-based conduct approaching or consisting of duress, fraud or the like.⁸² Despite contract law's admonition that courts do not look at the adequacy of consideration,⁸³ courts also evaluate the resulting terms to see whether they are "oppressive" ("substantive unconscionability").⁸⁴ Courts find terms

⁷⁶ Hillman, Policing, supra note 74.

⁷⁷ See Eisenberg, supra note 3, at 1415-1418.

⁷⁸ Id. at 1418.

⁷⁹ UCC Section 2-302 provides in part: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

⁸⁰ See Article 5. See also Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 Cornell L. Rev. 1 (1981).

⁸¹ The classic article collecting cases is Arthur Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

⁸² Id. "Cases in which a party takes advantage of the age, lack of sophistication or education, or emotional state of the other party may call out for relief, but still not quite constitute [duress or fraud]." Hillman, Principles, supra note 19, at 223; see also Ryan v. Weiner, 610 A.2d 1377 (Del. Ch. 1992).

⁸³ See Restatement (Second) of Contracts § 79.

⁸⁴ See, e.g., Fensterstock v. Educ. Fin. Partners, 2009 WL 812046 (S.D.N.Y. 2009) at *3-4 ("For a contractual provision to be held unconscionable under California law, it must be both

oppressive, for example, if a party must pay two or three times the fair market value for an item or is subject to duties the court finds reprehensible.⁸⁵ For an example of the latter, in *Weaver v. American Oil Co.*,⁸⁶ Weaver's gas station lease required Weaver to indemnify American Oil for its own negligence. After Weaver was burned because of an American Oil employee's negligence, American Oil sought to enforce the indemnity clause through a declaratory judgment action to determine *Weaver's* liability.⁸⁷ Of course, the court refused to enforce the provision. Such oppressive terms are often the work of the drafter of a standard form or of a party with superior bargaining power, who may earn the condemnation of society for their efforts.

Good faith and unconscionability do not exhaust the judicial policing doctrines that measure the conduct of contracting parties. As Professor Eisenberg points out "fraud, duress, [and] undue influence" also play a major role in determining whether an agreement that is *prima facie* enforceable ultimately is judicially enforceable.⁸⁸

Torts arising in the contract setting. Some analysts have found it a mystery why tort law is fault centered and, in their view, contract law is not.⁸⁹ Of course, this Article argues that the dichotomy is not very compelling. But one likely reason for any divergence is that courts show little hesitancy in finding a tort in contract settings.⁹⁰ This may relieve the pressure to inject fault into contract law itself. But, of course, tort and contract are themselves artificial legal categories and the significance of the role of fault, whether called a component of tort or contract, shows the importance of fault in exchange transactions.

For example, courts have recognized an "independent tort" in the contract context including where a party misrepresents facts during negotiations or recklessly performs a contract.⁹¹ Although most courts stress that the wrongdoer's duty arises apart from the contract

procedurally and substantively unconscionable. However, 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable.'" (citation omitted).

⁸⁵ Hillman, *Principles*, supra note 19, at 223-225.

⁸⁶ 276 N.E.2d 144 (Ind. 1971).

⁸⁷ *Id.*

⁸⁸ Eisenberg, supra note 3, at 1428.

⁸⁹ See, e.g., Ben-Shahar & Porat, *Foreword*, supra note 2, at 1341.

⁹⁰ See, e.g., W. Prosser & W. Keeton on Torts 660-661 (5th Ed. 1984) ("[T]he American courts have extended the tort liability for misfeasance to virtually every type of contract where defective performance may injure the promisee.").

⁹¹ See John A. Seibert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 *UCLA L. Rev.* 1565, 1600-03, (1986); *Allapattah Services, Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1328-33 (S.D. Fla.

and in tort, the bottom line is that the law establishes behavioral guidelines based on the conduct of the parties in negotiating and performing their contract. Labels aside, if contractual performance is bad enough, such as an engineer using plans from another construction project that have no relation to his current contract obligations, courts can punish the wrongdoer by granting punitive damages.⁹² In fact, some states also allow punitive damages under a contract theory if the breacher's conduct was "malicious, fraudulent, oppressive or reckless."⁹³

In short, tort is a safety valve that relieves the pressure on contract to punish bad behavior. As such, the absence in most jurisdictions of punitive damages for contract breach should be no mystery.

Impracticability and related excuse doctrines. Contract doctrines such as impracticability, impossibility, and frustration of purpose excuse a promisor from performance if unanticipated circumstances make performance extremely costly and the promisor did not assume the risk of the circumstances. One iteration excuses a promisor "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption in which the contract was made"⁹⁴ Performance is "impracticable" if it would result in a severe loss to the promisor.⁹⁵ The "non-occurrence of a contingency . . . was a basic assumption" language means that the parties made their agreement on the assumption that the disrupting event would not occur.⁹⁶ The *Mishara* court nicely summarizes the doctrine: "It is implicit . . . that certain risks are so unusual and have such severe consequences that they must have been beyond the score of the assignment of risks inherent in the contract that is beyond the agreement made by the parties."⁹⁷

On the other hand, courts will not excuse performance if the promisor reasonably should have foreseen the risk and, through its own neglect, failed to contract around the risk or to take reasonable precautions against it.⁹⁸ In this way, fault enters the equation in excuse cases.⁹⁹

1999).

⁹² Mauldin v. Sheffer, 150 S.E.2d 150 (Ga. Ct. App. 1966).

⁹³ See, e.g., Romero v. Mervyn's, 784 P.2d 992, 998 (N.M. 1989).

⁹⁴ U.C.C. § 2-615(a) (2007); see also Restatement (Second) of Contracts § 261 (1981).

⁹⁵ See, e.g., Lawrance v. Elmore Bean Warehouse, Inc., 702 P.2d 930, 933 (Idaho Ct. App. 1985).

⁹⁶ Hillman, Principles, supra note 19, at 323.

⁹⁷ Mishara Contr. Co. v. Transit-Mixed Concrete Corp., 310 N.E. 2d 363, 367 (Mass. 1974).

⁹⁸ See, e.g., Roy v. Stephen Pontiac-Cadillac, Inc., 543 A.2d 775, 778 (Conn. App. Ct. 1988); see also Eisenberg, supra note 3, at 1419-1422.

⁹⁹ See, e.g., Farnsworth, supra note 2, at 630 ("The third requirement for excuse is that

Focusing on court dicta such as in *Mishara*, however, some analysts insist that successful excuse cases are no exception to strict liability because the promisor did not promise to perform under the circumstances.¹⁰⁰ This ignores the reality that in most excuse cases the allocation of risk of the supervening disruption (whether the promisor promised to perform under the circumstances) is uncertain and involves analyzing the circumstances to determine what the parties probably intended or would have intended had they bargained over the matter. The often foginess of this investigation invites courts to consider matters such as the fault of the promisor. In many impracticability cases, in fact, fault and the degree of harm caused by performance probably are the most influential factors.¹⁰¹

Writers also defend strict liability in excuse cases as good policy on efficiency grounds. For example, Judge Posner asserts that courts fill risk-allocation gaps based not on whether the promisor was at fault in failing to perform or other factors, but on what “the parties could be expected to have done had they negotiated over the issue.”¹⁰² Further, Posner maintains that parties would have allocated the risk to the promisor, who is the “cheaper insurer against the risk of nonperformance.”¹⁰³ According to Judge Posner, the promisor must be the cheapest insurer because otherwise the promisor would not have made the promise.¹⁰⁴ Strict liability thereby “reduces transaction costs by optimizing risk bearing”¹⁰⁵ By definition in impracticability

the impracticability must have resulted without the fault of the party seeking to be excused.”).

¹⁰⁰ See, e.g., Scott, *supra* note 2, at 1383 (“the promisor [cannot] escape liability by showing that the breach was caused by exogenous factors beyond her control.”). Professor Scott “qualifies” his statement “to the extent that the promisor can establish an excuse owing to the fact that the risk in question was not allocated in the contract.” Scott, *supra* note 2, at 1383. See also Posner, *supra* note 2, 1351 (“The promise is to perform or pay damages, and so if you choose not to perform—even if you are prevented from performing by circumstances beyond your control—you *must* pay damages.”) (emphasis in original); Cohen, *Fault Within Contract Law*, *supra* note 1, at 1457.

¹⁰¹ See, e.g., Farnsworth, *supra* note 2, at 630 (citing cases); Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 *Cornell L. Rev.* 617, 652 (1983) (“A helpful generalization in predicting a court’s finding on the parties’ risk allocation or in predicting how a court will allocate the risk in gap situations is that when losses to the promisor would be moderate courts will not excuse performance, but when losses would be extreme and the promisor has acted reasonably courts will excuse performance.”) (citing cases and authorities).

¹⁰² See, e.g., Posner, *supra* note 2, at 1353.

¹⁰³ *Id.* at 1351.

¹⁰⁴ *Id.* (a promisor will make a promise to perform or pay damages if the promisor “is the cheaper insurer against the risk of nonperformance”).

¹⁰⁵ *Id.*

cases, however, the promisor cannot calculate the cost of the disabling risk at the time she makes the promise because the risk is unforeseeable or at least unforeseen. So it is difficult to see how the decision to make the promise depends on whether the promisor is the cheapest insurer. And as Professor Porat points out, in many instances the promisee may be the superior risk bearer, such as where a promisor's performance depends on the cooperation of the promisee or where the promisor relies on information about the prospect of performance by the promisee.¹⁰⁶

Further, even if courts seek to assign the risk of an event based on what the parties would have done had they contracted with respect to the matter, in many situations, the parties likely would have taken into account fault issues in assigning the risk contractually. Suppose a supplier contractually agrees to supply molasses from "the usual run from the National Sugar Refinery."¹⁰⁷ If they had contracted with respect to the issue of excuse, reasonable parties likely would have wanted to elucidate the kinds of events beyond the control of the supplier that would excuse performance. Willful, reckless, and negligent failures to perform surely would be absent from the list, perhaps in part because assigning liability to the supplier in these instances is efficient, but also because parties expect reasonable conduct from their counterpart.¹⁰⁸ Why else would they contract in the first place?

Strict-liability theorists add that strict liability is good policy because it diminishes the cost of litigation by replacing fuzzy fault principles with the relative certainty of economic analysis.¹⁰⁹ But despite these claims that fault issues are costly and uncertain,¹¹⁰ willfulness or negligence is often indisputable in the context of excuse doctrines. For example, courts do not excuse a seller who sells goods to a third party that were earmarked for the buyer based on an inability to perform. And a supplier that is contractually obligated to supply molasses from "the usual run from the National Sugar Refinery" who fails contractually to assure a sufficient supply from the refinery cannot claim reasonable care.¹¹¹

In fact, as a general matter, sorting out which party is the superior risk bearer in any given case may be more costly, time consuming, and indeterminate than filling gaps based on the

¹⁰⁶ Ariel Porat, A Comparative Fault Defense in Contract Law, 107 Mich. L. Rev. 1397, 1398-1403 (2009).

¹⁰⁷ Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 179 N.E. 383 (N.Y. 1932) .

¹⁰⁸ Id.

¹⁰⁹ Posner, *supra* note 2, at 1353, 1359.

¹¹⁰ See *id.*; see also Craswell, Willful Breach, *supra* note 4.

¹¹¹ Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 179 N.E. 383, 384 (N.Y. 1932) ("The defendant does not even show that it tried to get a contract from the refinery It has wholly failed to relieve itself of the imputation of contributory fault.").

promisor's fault and the severity of the unanticipated event.¹¹² Consider *Transatlantic Financing Corp. v. United States*, a case relied on by superior-risk-bearer advocates as a good example of their theory.¹¹³ Instead of the usual route for transporting the U.S.'s wheat from Texas to Iran through the Suez Canal, the shipowner-plaintiff had to take a longer route around the Cape of Good Hope because, after embarking, Egypt closed the canal during an international crisis. The shipowner claimed the excess costs of the longer route. The court implied that the shipowner was the superior risk bearer because it could have insured against the risk of the canal closure more cheaply.¹¹⁴ The shipowner, the court claimed, was in the best position to estimate the probability of the closure and the likely damages. But this conclusion is not self-evident. After all, the U.S. government was in an excellent position to assess the probability of Egypt's actions, and thus arguably was in the best position to protect itself against the risk.¹¹⁵

Although in a recent discussion of strict liability Professor Robert Scott did not focus on excuse doctrines, his analysis of the problem of gaps relates to the issue.¹¹⁶ He maintains that, as a normative matter, strict liability is the appropriate approach and that parties prefer it. Scott associates strict liability with rule-based jurisprudence and fault concerns with broad standards. He then reasons that parties must choose between writing rule-based contracts (strict liability contracts) that determine outcomes "regardless of the eventual state of the world" and contracts that are more flexible and include standards (fault-based contracts) such as good faith and the like.¹¹⁷ Scott concludes that "courts should refrain from filling contractual gaps with broad standards" if the contract is silent because parties can best determine "the optimal mix of precise and vague terms" and can draft standards cheaply if they want them. If they fail to do so, the argument goes, party autonomy demands strict liability.¹¹⁸ Scott points to some available evidence that indicates that some businesses and trades prefer certainty.¹¹⁹ Strict liability also better supports non-legal norms such as trust and reciprocity, Scott maintains, because "an effort to superimpose legal enforcement on a regime of self-enforcement can displace or 'crowd out' informal mechanisms."¹²⁰ Scott reasons that "extending legal enforcement to the difficult-to-verify questions . . . may well impair the efficacy of informal means of enforcement that rely

¹¹² Cohen, *Fault Within Contract Law*, supra note 1, at 1452-53.

¹¹³ 363 F.2d 313 (D.C. Cir. 1966). See, e.g., John Eloffson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 *Colum. J.L. & Soc. Probs.* 1 (1996).

¹¹⁴ Shipowners "are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required)" *Transatlantic Financing Corp. v. United States* 363 F.2d 313, (D.C. Cir. 1966).

¹¹⁵ Eloffson, supra note 113, at 14-15.

¹¹⁶ Scott, supra note 2.

¹¹⁷ *Id.* at 1390-91,

¹¹⁸ *Id.* at 1391.

¹¹⁹ *Id.* at 1394-95.

¹²⁰ *Id.* at 1393.

instead on reciprocity norms.”¹²¹ Under Scott’s reasoning, the bottom line in an excuse case must be to enforce a promise to perform strictly unless the parties expressly included a “vague” term to deal with a supervening event.

There are, of course, counter arguments. Most important, I wonder whether contracting parties at the drafting stage can determine the best mix of rules and standards to govern unforeseeable or unforeseen risks. By definition, these risks involve issues that the parties have not considered at all. In the face of such uncertainty, a promisee may be wary of agreeing to a broad standard, fearing that the promisor may invoke the standard to try to escape risks allocated to it in the contract. Nevertheless, the promisee may understand that the promisor should be excused if a catastrophe occurs. The parties may have difficulty drafting a term that satisfies both inclinations. If they fail to do so that does not mean that they intended the promisor to be strictly liable. In addition, although Scott points to some evidence of the “crowding out” phenomenon, the issue is far from settled. For example, as Stuart Macaulay has pointed out “business people often fail to plan and draft their agreements carefully, to consult lawyers, to consider their legal rights, and to utilize courts when something goes awry.”¹²² Macaulay’s work suggests little relationship between contract law and business cooperation and flexibility.¹²³

B. Contract Remedies

We now revisit and evaluate the observation of some writers that contract law’s principal remedy, expectancy damages, reveals that contract liability is strict. The goal of contract damages, the argument goes, is compensation not compulsion and courts do not distinguish breaches in assessing damages nor do they grant punitive damages or, ordinarily, specific performance. The following discussion, however, illustrates the many applications of fault in contract remedial law and sets forth alternative explanations for the dearth of specific performance and punitive damages cases.¹²⁴

¹²¹ *Id.* at 1394.

¹²² Hillman, Richness, *supra* note 49, at 242 (discussing Macaulay’s work).

¹²³ Unilateral mistake is another excuse that depends in part on the fault of the promisor. See, e.g., *Cargill Commission Co. v. Mowery*, 161 P. 634 (Kan. 1916) (“Had the mistake been discovered and made known to the plaintiff before acting on the contract the error could have been corrected, but it was not the plaintiff’s mistake nor was it the plaintiff’s fault that the defendant used th wrong work in the contract, and did not make this known until the plaintiff had obligated itself . . .”).

¹²⁴ See Cohen, *The Fault Lines in Contract Damages*, 80 Va. L. Rev. 1225 (1994) (different measures of damages depending in part on fault); Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 Mich. L. Rev. 1517, 1518 (2009) (“[I]n reality courts frequently award promisees more than their expectation when they find that a breach is willful, and thus act to deprive willful breachers of any gains from breach.”).

Measurement of expectancy damages. The issue of fault often arises when courts determine how to measure expectancy damages. For example, often courts must decide whether to measure these damages based on the cost of completing work promised by the breaching party or based on the projected increase in the value of the promisee's property if the breacher had performed. All other things being equal, courts are likely to choose the higher measure if a promisor's breach was willful because courts disapprove of this behavior and want to encourage promisors to perform their contracts. For example, in *Groves v. John Wunder Co.*,¹²⁵ the court determined, among other things, that Wunder willfully ignored a term in a lease to excavate gravel from Groves' land that required Wunder to restore the land at the end of the lease. The court held that landowner Groves should be awarded cost-of-restoration damages,¹²⁶ although the cost was five times greater than the diminution in value of the property.¹²⁷ Apparently, Wunder's conduct was an important justification for its decision: "Defendant's breach of contract was wilful. There was nothing of good faith about it. Hence, that the decision below handsomely rewards bad faith and deliberate breach of contract is obvious. That is not allowable."¹²⁸

¹²⁵ 205 Minn. 163, 286 N.W. 235 (1939).

¹²⁶ Actually, the court remanded the case for the trial court to determine if the contract required restoration under the circumstances. If so, the court would award the cost of restoration.

¹²⁷ The dissent disagreed over the willfulness of the contractor's breach, suggesting fault's importance to both the majority and dissent. According to the majority, the [d]efendant breached the contract deliberately," but the dissent volunteered that there was no "finding that the contractor 'wilfully and fraudulently' violated the terms of its contract." 286 N.W. at 239.

¹²⁸ *Id.* at 236.

Many courts reflect the same instinct as Groves,¹²⁹ although other factors may heavily weigh on courts as well. For example, in cases like Grove, courts seek to determine the importance of land restoration to the landowner or whether state public policy requires or urges such restoration. This investigation leads to a series of questions: Did the landowner intend to sell the land?¹³⁰ Did the landowner insist on restoration at the bargaining stage? Did the landowner pay for restoration by discounting the rent? Does state public policy require restoration?¹³¹ How large is the difference between the diminution in value and the cost of restoration? As for the latter issue, courts often refer to cost of completion damages as “economic waste” if the damages are many times greater than the diminution of value.¹³²

¹²⁹ See, e.g., *Kangas v. Trust*, 110 Ill. App. 3d 876, 441 N.E.2d 1271 (Ill. App. Ct. 1982):

If the builder does not perform in the manner called for in the contract, but in good faith, although intentionally, does something equally as good he should not be required to pay for substantial repairs. Otherwise, the penalty and the forfeiture, with no real damage to the owner, may be grossly disproportionate to the nature of the breach. . . . [T]he willful violation of the contract by a builder is a factor which may be considered by the trier of fact in determining whether the breach requires application of cost of repair or diminution in value as the measure of damages.

Id. at 1276–77; see also *Meyer v. Woods*, 374 Ill. App. 3d. 440 (2007) (“Diminution in value is not the proper measure of damages in cases where there has been willful violation of the contract.”) (citing *Kangas*); *City Sch. Dist. of City of Elmira v. McLane Const. Co.*, 445 N.Y.S.2d 258 (App. Div. 1981) (“Where the contractor’s performance has been incomplete or defective, the usual measure of damages is the reasonable cost of replacement or completion. That rule does not apply if the contractor performs in good faith but defects nevertheless exist and remedying them could entail economic waste. Then, diminution in value becomes the proper measure of damages.”); *Lyon v. Belosky Const. Inc.*, 669 N.Y.S.2d 400 (3d Dept.1998) (“As a general rule, the proper measure of damages in cases involving breach of a construction contract is ‘the difference between the amount due on a contract and the amount necessary to properly complete the job or to replace the defective construction, whichever is appropriate.’ Where, however, ‘the contractor’s breach was unintentional and constituted substantial performance in good faith’ remedying the defective performance would result in unreasonable economic waste, damages should be based upon ‘the difference between the value of the property as constructed and the value if performance had been properly completed.’”).

¹³⁰ The dissent thought that Groves was going to sell the land and therefore was damaged only by its diminution in value due to the failure of Wunder to restore the land. 286 N.W. at 241.

¹³¹ See *Rock Island Improvement Co. v. Helmerich & Payne, Inc.*, 698 F.2d 1075 (10th Cir. 1983).

¹³² Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 Colum. L. Rev. 1610, 1624-29 (2008).

Despite an assortment of reasons for measurement decisions, judging by what courts say in this context, willful breach is clearly an important one.

Ultimately, many courts do not award cost-of-completion damages in Groves-type situations despite the possible efficiency of the rule in creating incentives for promisors to take efficient precautions. Professor Scott attributes this reluctance to judicial adherence to strict liability over efficiency,¹³³ but another explanation is that some or all of the factors enumerated above may play a greater role in judicial decisions than either. For example, in a state that expresses restoration of land as a public policy it is no surprise that a court would grant damages based on the cost of restoration, but absent such a policy courts may be reluctant on fairness grounds to charge a promisor with cost of completion damages if they greatly exceed the diminution in value.¹³⁴

Another example of fault's influence on expectancy damages is the certainty hurdle of consequential damages. Injured promisees must prove such damages with sufficient certainty so that courts have ample guidance on the promisee's actual loss.¹³⁵ However, comment a to Restatement (Second) section 352, as well as case law, reveal that courts relax the degree of certainty required for the promisee to recover if the breach is willful.¹³⁶

Finally, it is now well accepted that the strength of the theory for enforcing a contract may directly affect the measure of damages. For example, in doctor-patient relations some courts have enforced a contract claim against a doctor for a failed operation. However, such courts may show a reluctance to grant full expectancy damages if the doctor has not been negligent: "Where . . . in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be too harsh."¹³⁷ On the other hand, if the botched operation is the doctor's fault, one would expect the court to be much less merciful.

Mitigation of Damages. The focus of mitigation is on the conduct of the injured promisee.¹³⁸ An injured promisee must act reasonably after breach to minimize the loss.¹³⁹

¹³³ Scott, *supra* note 2, at 1387.

¹³⁴ See, e.g., *Rock Island Improvement Co. v. Helmerich & Payne, Inc.*, 698 F.2d 1075 (1983).

¹³⁵ See, e.g., *Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, 139 F. Supp. 2d 869 (N.D. Ill. 2001).

¹³⁶ See, e.g., *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, (8th Cir. 1975) ("The wrongdoer should bear the risk of uncertainty that his own conduct has created.") (citing cases); 5 *Corbin on Contracts* 1022 (1964) ("doubts will generally be resolved in favor of the party who has certainly been injured and against the party committing the breach.").

¹³⁷ *Sullivan v. O'Connor*, 296 N.E.2d 183, 188 (Mass. 1973).

¹³⁸ But not always. Levmore suggests that the mitigation inquiry is one of "comparative

Accordingly, the promisee must take affirmative steps, such as agreeing to reasonable substitute opportunities that diminish the loss from breach, and must refrain from conduct that increases damages.¹⁴⁰ Courts may even require an injured promisee to deal further with the breacher in order to minimize damages, depending in part on the breacher's motive for the breach.¹⁴¹ For example, if a contract party breaches deliberately and thereby exhibits its unreliability, a court will not require the promisee to accept a new offer from the breacher.¹⁴² On the other hand, courts also consider the breaching promisor's conduct in mitigation cases if it is the "superior mitigator," such as when the breacher can reasonably cure its default.¹⁴³

Some analysts prefer to examine the mitigation doctrine through an economic lens. For example, Judge Posner argues that "the duty to mitigate damages prevents [a party] from exploiting his temporary, contract-conferred monopoly in order to obtain a more generous settlement of his claim of breach of contract."¹⁴⁴ Posner's principal justification for analyzing the problem in economic terms is again clarity,¹⁴⁵ but it is not self-evident why language such as "exploiting" and "contract-conferred monopoly" is any clearer than language that describes as wrongful promisee conduct that builds up damages, such as failing to take advantage of market substitute opportunities.

Professor Levmore suggests that enforcement of liquidated damages provisions constitutes a "super strict" liability rule that trumps the duty to mitigate damages.¹⁴⁶ However, enforcement of liquidated damages requires that the parties have made a reasonable estimate of

fault." Levmore, *supra* note 26, at 1370. Scott points out that the mitigation principle applies to both parties, but it is limited by the rule that allows the promisee to await the time for performance before mitigating. Scott, *supra* note 2, at 1388-89.

¹³⁹ If the promisee fails to act reasonably to mitigate, the court will require her to absorb her own avoidable loss.

¹⁴⁰ See e.g., *Clark v. Marsiglia*, 1 Denio 317, 318 (N.Y. 1845) ("[T]he plaintiff [has] no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been."); *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, (Me. 1983) (Dealer failed to mitigate damages by not accepting a substitute offer for mobile home.).

¹⁴¹ See Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. Colo. L. Rev. 553, 598 (1976) [hereinafter Hillman, *Keeping the Deal Together*](observing that courts often consider whether a breach was willful or unavoidable in determining if the avoidable consequences rule requires an injured party to accept a new offer from the breaching party).

¹⁴² See *id.* at 560.

¹⁴³ See Cohen, *Fault Within Contract Law*, *supra* note 1, at 1453.

¹⁴⁴ See Posner, *supra* note 2, at 1359.

¹⁴⁵ *Id.* ("One can if one wants denounce the temporary monopolist's conduct as wrongful, but the adjective adds nothing to the analysis.").

¹⁴⁶ Levmore, *supra* note 26, at 1378.

damages that are difficult to determine.¹⁴⁷ Such requirements serve as a filter for excluding penalty terms intended to coerce performance.¹⁴⁸ In the eyes of courts, promisees who insist on penalty clauses are overreaching and in bad faith.

The efficient breach fallacy. Strict-liability analysts not only assert that expectancy damages are based on strict liability, they also argue that the policy of granting expectancy damages *promotes* breach under certain circumstances. I have described the “efficient breach” theory elsewhere:

According to the "theory of efficient breach," expectancy damages correctly *encourage* a party to breach when the breach is *efficient*, in that the breach makes some parties better off without making anyone worse off. On the other hand, expectancy damages dissuade a party from breaching when a breach would cause more losses than gains. Suppose, for example, you agree to sell your piano to [your neighbor] Alice for \$1200. . . . [T]he piano is worth \$1400. . . . Another neighbor, Bob, offers to buy the piano from you for \$1800. According to the lawyer-economists, expectancy damages allow, even encourage, you to break your contract with Alice, to pay her \$200 (her expectancy damages measured by the market price-contract differential), and to deliver the piano to Bob, who outbid Alice for the piano. You gain enough from selling to Bob instead of Alice (\$600) so that you can pay Alice her expectancy damages and still come out \$400 ahead. Bob, who bid the highest for the piano is also better off because he valued the piano more than the \$1800 he paid (otherwise he would not have made the deal). Alice is no worse off because she recovers her \$200 expectancy. . . .

Lawyer-economists point out that awarding damages greater than an injured party's lost expectancy would be undesirable because it would discourage breach when breach would be efficient. Suppose, for example, that Alice could recover \$200 lost expectancy damages and \$600 punitive damages. You would not breach because it would not be profitable for you, even though we have just demonstrated that, without the punitive damages liability, breaching would make you and Bob better off and no one worse off (hence a breach would be efficient). Awarding damages any lower than expectancy also would be undesirable because you would have the incentive to breach even when your gain from doing so would be less than Alice's real loss.¹⁴⁹

As noted in the excerpt above, analysts look to the absence of punitive damages as

¹⁴⁷ See, e.g., *McQueen, Rains & Tresch, LLP v. Citgo Petrol. Corp.*, 195 P.3d 35, 46 (Okla. 2008).

¹⁴⁸ See, e.g., Farnsworth, *supra* note 2, at 811-812.

¹⁴⁹ Hillman, *Principles*, *supra* note 19, at 140-141; see also William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 *Duke L.J.* 629, 664 (1999) ("If the breaching party is not responsible for the non-breaching party's full losses, then there is an incentive to breach even when the breach would not be efficient.").

evidence of contract remedies' efficient-breach, strict-liability approach.¹⁵⁰ They reason that awarding punitive damages would discourage breach even if efficient.¹⁵¹ Efficient breach advocates also argue that courts' reluctance to grant specific performance arises because the breacher would have to bargain with the injured party for a release from the contract, thereby increasing transaction costs.¹⁵² In sum, according to lawyer-economists, society benefits from efficient breaches because they move resources to their highest valued uses. Contracting parties themselves also benefit because efficient breach is what the parties would have wanted had they drafted a provision dealing with breach.¹⁵³ The key to the measurement of damages is therefore efficiency, not fault. There is no reason to condemn a contract breaker who is trying to "increase the overall contractual pie" by finding a better opportunity and making the promisee whole.¹⁵⁴

The efficient breach hypothesis is interesting and fun to discuss, but it has little basis in reality. For one thing, its basic premise, that expectancy damages make the injured party whole, is not accurate. Consider the various limitations on expectancy awards, including the requirements that damages are foreseeable, certain, and caused by the breach, the limitations on prejudgment interest, and the lack of compensation for most attorneys' fees. Add the additional expenses and time commitment of possible negotiation and litigation and it will be rare indeed for contract law to fully compensate a promisee by awarding expectancy damages. And the prospect for injured parties of incurring these uncompensated damages and expenses means that breaching parties have leverage to extract favorable settlements below their expectancy liability. If injured parties are not fully compensated, of course, the foundation of the efficient-breach theory collapses.

The efficient breach strategy is also beset with problems for the promisor, who must predict the promisee's damages if the promisor breaches, including difficult to forecast consequential damages that must be foreseeable, certain, and unavoidable. Accurate prediction would require access to the promisee's business records and a determination of how these hurdles would play out if the case went to trial. Further, the promisor must account for the potential damage to its reputation and good will. These too will often be incalculable, which itself may be sufficient to deter a breach.¹⁵⁵

Further, a rule that encourages breach may ultimately be inefficient for a host of reasons.

¹⁵⁰ See Posner, *supra* note 2, at 1354.

¹⁵¹ See Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. Cal. L. Rev. 629, 637 (1988).

¹⁵² See Dodge, *supra* note 149, at 665.

¹⁵³ See Shavell, *supra* note 28.

¹⁵⁴ Bar-Gill & Ben-Shahar, *supra* note 34, at 1482.

¹⁵⁵ Hillman, *Principles*, *supra* note 19, at 179-180.

For example, a party who bids more for a performance may not always move the resources to a higher-valued use. In the example above, if contract law measures “higher-valued use” by who will pay more, itself a highly debatable assertion, Bob is the higher-valued user, but Alice may have outbid him if not for exigent circumstances unrelated to the piano deal that made paying more impossible.¹⁵⁶ In addition, encouraging the promisor to breach may lead to costly negotiations or litigation over how much the promisor must pay the promisee to purchase the right to breach. Ian Macneil pointed out that the efficient breach theory has

a bias in favor of individual, uncooperative behavior as opposed to behavior requiring the cooperation of the parties. . . . The whole thrust . . . is breach first, talk afterwards . . . [however] talking after a breach may be one of the more expensive forms of conversation to be found, involving, as it so often does, engaging high-priced lawyers, and gambits like starting litigation, engaging in discovery, and even trying and appealing cases.¹⁵⁷

In addition, although contracts principles such as expectancy damages, the lack of specific performance, and punitive damages seem consistent with efficient breach, these rules are better explained on other grounds:

For example, the rules confining recovery to lost expectancy, barring punitive damages, and barring the enforcement of penalty clauses make contracting less hazardous, and thus encourage parties to enter into contracts in the first place. The parties know that if they are unable to perform, and their non-performance is not legally excused, they will still be responsible only for making the other party whole.

Further, specific performance may be limited for reasons other than facilitating efficient breach. For example, as a matter of history, specific performance was rarely available because of the view that such an “equitable remedy” should only be awarded when the “legal remedy” of damages was inadequate. In this way, conflicts between the court of equity and the common law courts were minimized. The efficient breach theory ignores this history.¹⁵⁸ Recall, also, that the absence of punitive damages in contract cases may be explained by the availability of tort punitive damages in contract settings. Whether called a contract breach or a tort, the reality is that a promisor may be liable for punitive damages for breaking a promise.¹⁵⁹

¹⁵⁶ Robert S. Summers and Robert A. Hillman, *Contract and Related Obligation* 404 (6th ed. 2011).

¹⁵⁷ Ian Macneil, “Efficient Breach of Contract: Circles in the Sky,” 68 *Virginia L.Rev.* 947, 968 (1982).

¹⁵⁸ Summers and Hillman, *supra* note 156, at 402.

¹⁵⁹ See *supra* notes 89-93, and accompanying text.

Finally, and perhaps most important, countenancing or even favoring efficient breach may undermine society's faith in the contract institution.¹⁶⁰ It is worth reemphasizing Lon Fuller's point that the "regime of exchange would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another."¹⁶¹ A policy of encouraging or even condoning efficient breach might discourage contract making in situations where an exchange would benefit both parties. Contracting parties understand that circumstances may change, so they seek transactional security. Without this security, it would make little sense to contract in the first place.¹⁶²

In sum, if efficient breach is a fallacy and contract law does not encourage breach in some circumstances through expectancy damages awards, strict liability advocates have to look elsewhere for support.

Restitution. The new Restatement of Restitution (Third) provides that a breaching party must disgorge gains from a breach if it is "both material and opportunistic."¹⁶³ The injured party may elect this remedy if contract damages are inadequate.¹⁶⁴ An opportunistic breach, according to the Restatement is "deliberate," and damages are inadequate "if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction."¹⁶⁵ As comment i to section 39 acknowledges, "[t]he rationale of the disgorgement liability in restitution, in a contractual context or any other, is inherently at odds with the idea of efficient breach." Specifically, the rationale is that [t]o take without asking, having calculated that one's anticipated liability in damages is less than the price one would have to pay to purchase the rights in question is precisely the conduct that the law of restitution condemns."¹⁶⁶ Of course, the

¹⁶⁰ Hillman, Principles, supra note 19, at 180; but see Bar-Gill & Ben-Shahar, supra note 34, at 1482-1483.

¹⁶¹ Lon L. Fuller, The Morality of Law 28 (rev. ed. 1969).

¹⁶² Marschall, supra note 21, at 734, 740.

¹⁶³ Restatement (Third) of Restitution §§ 39(1), 39(2) (2010).

¹⁶⁴ Id.

¹⁶⁵ Id. § 39(2)(ii).

¹⁶⁶ Restatement (Third) of Restitution §39, cmt. i; see also Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 S. Cal. L. Rev. 1465, 1482-83 (1994) ("[C]ourts in some circumstances favor a punitive remedy for breach of contract, and that stripping a defendant of the benefits secured by a contract he has failed to perform . . . [is] no more than poetic justice. If promise-breakers are wrongdoers we can . . . choose to punish them any way we see fit."); Watts v. Watts, 405 N.W.2d 303, (Wis. 1987) ("[A]n action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust."); but see Posner, supra note 2, at

premise of the Restatement that the promisor is “tak[ing] without asking” is subject to the counter-argument of legal economists that the promise in the agreement implicitly granted the promisor the right to choose between performance and payment of damages.¹⁶⁷ But the Restatement follows substantial case law and, as previously noted, few adhere to such a narrow view of contract promises.¹⁶⁸

Further on the restitution front, it is no secret that “there is some evidence that courts are influenced in their choice of measurement (of restitution) by how well or badly the breaching party behaved.”¹⁶⁹ As we have seen, such a strategy coincides with the approach of courts to the issue of measurement of expectancy damages, and should be no surprise here.¹⁷⁰ For example, the Restatement (Second) of Contracts sets forth a series of possible measurements of benefit conferred and suggests granting the least generous measure to parties seeking a restitutionary recovery who are themselves in default.¹⁷¹

III. Conclusion

Were it not for the prevalence of the perception that contract liability is and should be strict, nothing in this Article’s discussion of the role of fault would be very surprising or controversial. Party conduct influences court decisions concerning whether a failure to perform constitutes a breach and concerning the appropriate remedy. Perhaps the most obvious reason for the prevalence of fault is that judges and juries are human beings who cannot help but be influenced by the degree of nastiness and inconsiderateness of a breach.¹⁷² Decisions are full of

1354.

¹⁶⁷ See supra notes 27-29, and accompanying text.

¹⁶⁸ See cases cited in Rptrs. Notes to Restatement (Third) of Restitution § 39.

¹⁶⁹ Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99, 142 (2000); see also Summers and Hillman, supra note 156, at 366.

¹⁷⁰ See *U.S. Steel v. M. Dematteo Const. Co.*, 315 F.3d 43, 48 (2002) (“ ‘It is . . . well established that “an intentional departure from the terms of the contract without justification or excuse in matters other than those so trifling as to be properly regarded as falling within the rule of de minimis will bar all recovery for materials supplied and work performed.” ’ ”) (quoting *Hayeck Bldg. & Realty Co. v. Turcotte*, 361 Mass. 785 (1972)) (further quoting citation omitted).

¹⁷¹ See Restatement (Second) of Contracts § 374, cmt. b. See also *S.P. Dunham & Co. V. Kudra*, 131 A.2d 306 (N. J. App. Div. 1957) (“why should the law have such a tender regard for a wrongdoer? Relief by way of restitution puts no undue burden upon him . . .”).

¹⁷² See Eisenberg, supra note 3, at 1414 (“As a normative matter, fault *should* be a building block of contract law. One part of the human condition is that we hold many moral values concerning right and wrong. Contract law cannot escape this condition.”); Cohen, *Fault*

language and inferences that people should keep their promises and that unintentional breaches deserve less approbation than intentional ones.¹⁷³ Although many have noted that legal rules and moral norms are distinct,¹⁷⁴ the latter inevitably influence the law. This is not to say that courts are uninterested in instrumental reasons for contract rules, but these necessarily encompass fault principles too. For example, in order to encourage contract making and the movement of resources to their highest valued uses, courts must deter “opportunistic breaches.”¹⁷⁵ In order to avoid the costs of repeated breakdowns in performance, courts must consider the reliability of the breacher.¹⁷⁶

So it should be no mystery why courts account for fault in contract law. Many theorists, if pressed, understand and would admit that the true “rule” is that the breacher’s conduct matters a lot in assessing contract performance and the remedies available for breach. In fact, some of the strongest advocates of strict liability ultimately hedge a bit themselves.¹⁷⁷ The enigma is not why judges pay attention to a promisor’s conduct, but why more contracts people cannot bring themselves thoroughly to repudiate the lore that the reasons for a breach do not matter.

Within Contract Law, *supra* note 1, at 1459 (“Judges are not automatons; they exercise judgment, which includes making normative assessments, like fault.”); *S.P. Dunham & Co. V. Kudra*, 131 A.2d 306 (N. J. App. Div. 1957) (defendant’s conduct “is one of the things I prefer not to . . . have to live with in the community. I couldn’t justify it.”); see also Chris Guthrie et al., *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777, 778-84 (2001) (judicial decision making is influenced by a variety of cognitive illusions).

¹⁷³ See, e.g., *Jacob Youngs, Inc.* 129 N.E. at 244 (“The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.”); *Roudis v. Hubbard*, 574 N.Y.S.2d 95, 96 (3d Dept. 1991) (“[W]hen an unintentional deviation from a nonessential contract requirement is made, the measure of damages is the value of the house with and without the specified material or contract deviation.”); *North Star Alaska Housing Crop v. U.S.*, 76 Fed.Cl. 158, 189-90 (2007) (“The dispositive issue here then is whether defendant’s representatives acted, with animus in a fashion calculated to hinder plaintiff’s performance. If they did, this would be the type of opportunistic behavior in an ongoing contractual relationship that would violate the duty of good faith performance.”); see also *Shiffrin*, *supra* note 14, at 1566-77 (2009).

¹⁷⁴ See, e.g., *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

¹⁷⁵ Opportunism occurs when a promisor “wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies.” *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 751 (7th Cir. 1988) (Posner, J.). “By definition, opportunistic behavior does not create wealth but simply redistributes wealth from one party to another.” *Dodge*, *supra* note 149, at 654.

¹⁷⁶ See, e.g., *Ben Shahar & Bar-Gill*, *supra* note 34.

¹⁷⁷ See *supra* note 10, and accompanying text.

In this Article, we have seen that the no-fault model assumes incorrectly a world of economically rational actors in which injured parties are content with nonperformance and compensation if the promisor does not perform. In this context, punishing contract breakers produces no benefit, but might deter them from making economically rational decisions. Further, advocates of no-fault believe erroneously that strict liability systematically creates appropriate incentives for promisors to take the optimal level of precautions to avoid breach. Proponents of strict liability also yearn for clarity in contract law and believe that a fault-free model contributes to that clarity, even though a no-fault regime raises many issues of its own. In sum, advocates of strict liability give too little weight to the counter-principles and policies discussed in this article that undermine their perception.