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The Future of Fault in Contract Law

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The Future of Fault in Contract Law

Robert A. Hillman*

I.	THE PERCEPTION THAT THE REASONS FOR FAILING TO PERFORM DO NOT MATTER	278
II.	THE REASONS FOR FAILING TO PERFORM CURRENTLY PLAY AN IMPORTANT ROLE	282
	A. <i>Contract Breach</i>	283
	B. <i>Contract Remedies</i>	292
III.	THE ROLE OF FAULT IN 2025.....	297
IV.	CONCLUSION	302

Currently, courts, Restatement drafters, and analysts debate the role, if any, that fault plays in contract law.¹ According to many judicial opinions, the *Restatement (Second) of Contracts*, and various analysts, the reasons for failing to perform a contract, whether willful, negligent, or unavoidable, have little or no bearing in determining contract liability.² These authorities claim that contract liability is “strict,” meaning that the reasons for non-performance are irrelevant in determining the injured party’s rights.³ But other sources believe 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.⁴ The topic of this symposium is

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1. See, e.g., Symposium, *Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009).

2. See George M. Cohen, *The Fault That Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1446 (2009) [hereinafter Cohen, *Fault Within Contract Law*] (“The myth that contract law is a system of strict liability stubbornly persists.”).

3. 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. L. REV. 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, 1361-62 (2009) (explaining that contract liability is strict in that “the victim of the breach need not prove fault by the contract breaker” and that moving to a fault analysis would “change the law”).

4. For additional commentary consistent with this point, see Cohen, *Fault Within Contract Law*, *supra* note 2, at 1455 (“Contract doctrine contains numerous direct expres-

“Contract Law in 2025.” So the question I address here is: what will become of the dispute about fault in contract law in the next twelve or so years? In Part I of this essay, I summarize the argument that fault does not matter. In Part II, I argue that fault plays an important role in contract law today. In Part III, I make the prediction that by 2025 the controversy likely will disappear.

Before proceeding, it is important to define two terms used throughout this article. First, what do I mean when I say that the promisor was at fault?⁵ 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 into 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.⁶ 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.⁷ However, if a promisor has done all that is reasonably possible to avoid breach, but changed circumstances make performance impossible or impracticable, the promisor 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.

sions 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.”) (emphasis added). See generally Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505 (2002).

5. 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).

6. 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.” *Id.* at 1515.

7. 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).

As used here, “fault” encompasses willful, reckless, and negligent breaches.⁸ It does not include failures to perform if the party has taken adequate precautions but simply cannot perform because of changed circumstances or if the terms are unconscionable or the like. In fact, in the latter situation, we shall see that the promisee is the one at fault.⁹

This leads to the second definitional issue. “Contract liability” encompasses two separate issues.¹⁰ “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.¹¹ “Contract liability” also may refer to the measure of money damages or other relief. Some legal scholars who maintain that contract liability is strict focus on remedies.¹² They argue that the reasons for breach have no effect on contract remedies.¹³ 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 the current state of contract law or explaining what it should be).¹⁴ I argue in Part II 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.

8. Judge Richard Posner argues that courts should treat only negligent breaches as fault-based. See Posner, *supra* note 3, at 1353-54. According to Posner, negligent breaches diminish society’s resources, but deliberate breaches are efficient. *Id.*

9. See *infra* notes 73-76 and accompanying text.

10. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1446.

11. See, e.g., Ben-Shahar & Porat, *supra* note 3, at 1344 (“The primary ambition of this Symposium . . . is to inquire into the reasons why fault plays no more than a limited role.”); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. 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.”); Posner, *supra* note 3, at 1351 (“The option theory of contract . . . implies that liability for the breach of a contract is strict.”); Scott, *supra* note 3, at 1382 (“The core of contract law as applied in the courts is a no-fault regime.”).

12. See, e.g., Cohen, *Fault Within Contract Law*, *supra* note 2, 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.”).

13. See *infra* Part I.

14. Judge Posner, for one, appears to advocate on efficiency grounds that liability should be strict, regardless of the actual judicial approach. Posner, *supra* note 3, at 1351.

As we shall see, several reasons underlie contract law's heavy use of fault concepts in assessing failure to perform and appropriate 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.¹⁵ Or a court may measure the reasonableness of a party's conduct with the goal of administering a fair and equitable system of exchange.¹⁶ Or a court may focus on creating incentives to facilitate efficient outcomes, a strategy that necessarily encompasses the reasons for breach and the assessment of remedies.¹⁷ 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.¹⁸ In light of undisputable evidence of, and strong reasons for, assessing fault in contract law, the mystery is why the no-fault perception persists.

In Part III of this essay, I predict that this perception cannot last. Part of the reason should be obvious already after reading this introduction. If I am right that fault already plays a huge role in contract law, perceptions to the contrary should wither away (although they have lasted for a long time). And we will see that sources already are wavering.¹⁹ In addition, I show why technological advances that have changed the manner in which many contracting parties do business and that have increased the opportunities for advantage-taking and information gathering suggest an even larger role in the future for fault in contract law.

I. THE PERCEPTION THAT THE REASONS FOR FAILING TO PERFORM DO NOT MATTER

Much judicial language and the *Restatement (Second) of Contracts* lend support to the idea that fault is irrelevant in assessing

15. Eisenberg, *supra* note 4, 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).

16. For example, 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.

17. 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.

18. *See, e.g.*, Ben-Shahar & Porat, *supra* note 3, at 1344 ("Damage booster[s] . . . have nothing to do with the mens rea of the promisor, the volition of his act, or its morality Instead, the willful-breach cases have to do with incentives.").

19. *See infra* note 28 and accompanying text.

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 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 irrelevant.²⁰

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.²¹ Assuming full compensation (itself a dubious proposition in light of compensation hurdles such as foreseeability, certainty, and attorney's fees rules), this approach demonstrates that courts ignore fault issues in assigning remedies.²² 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 nothing 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:

20. *Bodum USA, Inc., v. La Cafetiere, Inc.*, 621 F.3d 624, 634 (7th Cir. 2010) (citation omitted). 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.”).

21. ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 163-88 (3d ed. 2014) [hereinafter HILLMAN, *PRINCIPLES*].

22. *See, e.g.*, FARNSWORTH, *supra* note 3, 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.”).

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.²³

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 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.²⁴

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.”²⁵ Some courts are not even tested by the degree of nastiness of the breach: “motive, 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.”²⁶

Prominent legal scholars (including Judge Posner in his scholarly writings) also maintain that fault is either irrelevant to issues

23. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1981). The law and economics movement likely influenced the *Restatement (Second)* 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 (Second)*: “Willful’ breaches should not be distinguished from other breaches.” FARNSWORTH, *supra* note 3, 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).

24. *Eichmann v. Nat’l Hosp. and Health Care Servs., Inc.*, 719 N.E.2d 1141, 1145 (Ill. App. Ct. 1999) (quoting *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1050 (Ill. App. Ct. 1980)).

25. *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 68 (Ind. Ct. App. 2009) (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 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.”).

26. *JRS Prod., Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 852 (Cal. Ct. App. 2004).

of both breach and remedies²⁷ or that fault plays a limited role.²⁸ Some of these writers follow the courts that adopt a narrow view of the nature of a contract promise.²⁹ These scholars often rely on Holmes's adage that a contract means no more than a promise to perform or to pay damages. They 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.³⁰ In fact, we will see that the logical conclusion from this observation, adherents believe, is that contract law should and does encourage breach if the promisor is better off by breaching after compensating the promisee with expectancy damages.³¹

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, Judge 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."³² He argues that fault, on the other hand, is an unruly concept that increases the cost of dispute resolution or litigation.³³ Contract law opts for strict liability, as the argument goes, to minimize such costs.

Judge Posner also asserts that strict liability "reduces transaction costs by optimizing risk bearing."³⁴ By this he apparently

27. See Posner, *supra* note 3, 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.").

28. See, e.g., E. Posner, *supra* note 7, 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 prebreach 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.'").

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

30. Posner, *supra* note 3, at 1350; Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1569 (2009).

31. See *infra* notes 112-119 and accompanying text.

32. Posner, *supra* note 3, at 1353; see also Scott, *supra* note 3, at 1392.

33. See Posner, *supra* note 3, at 1353, 1359; see also Craswell, *supra* note 5, at 1502 (indeterminacy of the term "willful"); E. Posner, *supra* note 7, at 1431 ("[T]he disadvantage of [a fault-based system] is that courts would need to make difficult inquiries and could make more errors.").

34. Posner, *supra* note 3, at 1351.

means that the promisor is generally the superior risk bearer—the party best able to prevent the risk or insure against it³⁵—and strict liability creates incentives for the promisor to take the most efficient level of precautions against those risks.³⁶ Precautions “range from quality control to backup supplies to purchasing insurance to not promising in the first place.”³⁷

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 fault are clearer and more persuasive.³⁸ Others more boldly assert that case law does not bear out the claim that courts generally rely on fault concepts.³⁹ Further, they claim that commercially sophisticated business parties generally prefer strict liability.⁴⁰ I respond to Part I’s descriptive and normative arguments supporting strict liability in the next section.

II. THE REASONS FOR FAILING TO PERFORM CURRENTLY PLAY AN IMPORTANT ROLE

The following discussion sets forth a selection of the leading contract principles and doctrines of today in which fault plays a role. The discussion also evaluates, where relevant, the leading alternative claims of strict liability adherents set forth above. Subsection A discusses contract law’s use of fault in assessing whether a party has broken the contract. Subsection B analyzes fault in the context of determining remedies.

35. See Posner and Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89-91 (1977); see also Cohen, *Fault Within Contract Law*, *supra* note 2, at 1457.

36. Cohen, *Fault Within Contract Law*, *supra* note 2, 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 3, at 1393-94.

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

38. See, e.g., Posner, *supra* note 3, at 1357 (“[T]he fact that the law uses moral language doesn’t mean that legal duties are moral duties.”).

39. See, e.g., Scott, *supra* note 3, at 1382 (“The core of contract law as applied in the courts is a no-fault regime.”).

40. See, e.g., *id.* at 1383 (“[B]oth 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.”).

A. Contract Breach

The nature of a promise. We saw that some advocates of strict liability rely on Holmes's pronouncement that a contract is a promise to perform or to compensate the promisee for non-performance.⁴¹ 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, this view 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).⁴² Even in the absence of a judicial invocation of such standards, Holmes's 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.⁴³ In fact, non-legal "business cultures" govern the day-to-day relations of many parties who believe that they should honor agreements and avoid "legalese."⁴⁴ These parties reasonably believe that a contract promise is to perform the contract.⁴⁵

A contract promise requires performance for moral reasons as well.⁴⁶ As a general matter, morality requires people to look out for the personal and property interests of others.⁴⁷ In particular,

41. See *supra* notes 27-31 and accompanying text; see also Posner, *supra* note 3, at 1350; Shavell, *supra* note 30, at 1569.

42. 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.

43. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT* 66-67 (1980); Cohen, *Fault within Contract Law*, *supra* note 2, at 1450 ("[W]e should be wary of theoretical justifications for strict liability that depend on overly confident assertions of mutual intent."); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467 (1985); see also *Demasse v. ITT Corp.*, 984 P.2d 1138, 1148 (Ariz. 1999) ("[T]he contract rule is and has always been that one should keep one's promises.").

44. See Macaulay, *supra* note 43, at 467; Stewart Macaulay, *The Reliance Interest and World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 260 (1991).

45. *Id.*, see also 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 4, 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.'"); Shiffrin, *supra* note 15, at 1564-66.

46. Eisenberg, *supra* note 4, at 1428.

47. ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 12-13 (1997) (describing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981)); see also Shiffrin, *supra* note 15, at 1568 n.2 ("By morality, I mean those nonlegal, objectively grounded normative principles that regulate our motives, reasons, and conduct . . .").

contract promisors have a “moral obligation to honor [their] promises” in order to avoid harming the interests of their promisees.⁴⁸ According to Charles Fried, the author of the 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.”⁴⁹

Professor Mel Eisenberg observes that “[i]n the area of nonperformance, law and morality, although not identical, tend to converge rather than diverge.”⁵⁰ This is not surprising. The goal of contract law may not be to enforce moral norms directly, but it also does not want to promote immoral behavior.⁵¹ 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.⁵² 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.”⁵³ Under such conditions, people may choose not to contract even if it would benefit both of them.⁵⁴ Or they may look to non-legal mechanisms for enforcement of their arrangements, such as requiring security deposits or premature

48. FARNSWORTH, *supra* note 3, at 737 (citing FRIED, *supra* note 47, at 17).

49. HILLMAN, *supra* note 47, at 12-13 (quoting and describing FRIED, *supra* note 47, at 12-13; 16); *see also* Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. 1, 1 (2007).

50. Eisenberg, *supra* note 4, at 1428.

51. Shiffrin, *supra* note 15, at 1552. As early as 1825, courts in the U.S. worried about this issue in contracts cases. *See, e.g.*, *Mills v. Wyman*, 20 Mass. 207, 210 (“[T]here are great interests of society which justify withholding the coercive arm of the law from” moral duties.).

52. *Cf.* Bar-Gill & Ben-Shahar, *supra* note 36, 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.”).

53. LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

54. Marschall, *supra* note 23, at 734, 740.

performance that may be costly and inefficient.⁵⁵ Through the development of a 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,⁵⁶ 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 dictum in *Hotchkiss v. National City Bank of New York* makes this point:

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.⁵⁷

Under this objective test of contract formation and interpretation, a promisor is 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 con-

55. *Contract in General*, 7 INT’L ENCY. OF COMP. L. 20 (Arthur T. Von Mehren ed., 1982) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1, at 67 (1977)).

56. *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.”).

57. *Hotchkiss v. Nat’l 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).

tract is unenforceable.⁵⁸ 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.⁵⁹ 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.⁶⁰

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. Under the objective approach, careless, reckless, or purposefully misleading language can bind a promisor notwithstanding the promisor's actual intentions, thereby "punishing" the promisor for her fault-based conduct.

Material breach. A promisor materially breaches if the promisee fails to receive substantially what the promisee bargained for. A finding of material breach means that the promisee can suspend performance and ultimately cancel the contract.⁶¹ 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.⁶² 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.⁶³ Another factor for determining materiality in the *Restatement (Second)* is the likelihood that the breacher will cure its failure, thereby measur-

58. *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. Ch. 1864); RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981).

59. RESTATEMENT (SECOND) OF CONTRACTS § 20(2) (1981).

60. See Cohen, *Fault Within Contract Law*, *supra* note 2, at 1455-56; Eisenberg, *supra* note 4, at 1423-24.

61. RESTATEMENT (SECOND) OF CONTRACTS §§ 241, 242 (1981).

62. RESTATEMENT OF THE LAW OF CONTRACTS § 275(e) (1932).

63. RESTATEMENT (SECOND) OF CONTRACTS d. § 241 cmt. f (1981) ("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.").

ing at least in part the reliability and sincerity of that party.⁶⁴ 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 her own performance.⁶⁵

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, it also constitutes an implied term filling out the performance obligations of a promisor.⁶⁶ 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 term society would deem fair and reasonable: "Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable."⁶⁷ Good faith performance therefore rules out conduct that "violate[s] community standards of decency, fairness, or reasonableness."⁶⁸

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.⁶⁹ For ex-

64. *Id.* § 241(d); see also Bar-Gill & Ben-Shahar, *supra* note 36 (breacher more likely to breach again and to be dishonest).

65. RESTATEMENT (SECOND) OF CONTRACTS § 241(e) (1981).

66. See generally HILLMAN, PRINCIPLES, *supra* note 21, at 297-303.

67. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

68. RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981); see Robert A. Hillman, "Instinct with an Obligation" and the "Normative Ambiguity of Rhetorical Power", 56 Ohio St. L.J. 775, 792 (1995) (citing *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984)) ("[r]easonable parties . . . intend to incorporate the meaning of terms society would find fair and just."); see also *Fortune v. Nat'l 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. See Posner, *supra* note 3, at 1358 ("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.").

ample, where a buyer has no choice but to accede to the seller's demand for a price increase, 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 monopolist's conduct as wrongful, but the adjective adds nothing to the analysis.⁷⁰

I have commented elsewhere on Judge Posner's position:⁷¹

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. 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. "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.⁷²

The same kinds of considerations that inform 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.⁷³ Unconscionability applies the "moral standards that are rooted in aspirations for the community"⁷⁴ to police the manner in which con-

70. *Id.* at 1358-59.

71. HILLMAN, PRINCIPLES, *supra* note 21, at 302.

72. For the traditional view, 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).

73. See Eisenberg, *supra* note 4, at 1415-18.

74. *Id.* at 1418.

tracts are formed and the fairness of the resulting terms.⁷⁵ The history and modern-day applications of the doctrine are well rehearsed.⁷⁶ Here, I only want to make the rather obvious point that unconscionability and related doctrines such as fraud and duress play an important role in introducing fault into contract law. When these principles apply, contract law focuses on the overreaching of the promisee and excuses the promisor.

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.⁷⁷ 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.⁷⁸ 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.⁷⁹ This may relieve the pressure to inject fault into contract law itself.⁸⁰ 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.⁸¹

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. Under impracticability, for example, courts excuse a promisor “if performance as agreed has been made impracticable by the occurrence of a contin-

75. U.C.C. § 2-302 (2002).

76. See U.C.C. Art. 5 (2002); 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).

77. See, e.g., Ben-Shahar & Porat, *supra* note 3, at 1341.

78. See, e.g., W. PROSSER & W. KEETON ON TORTS 660-61 (William L. Prosser et al. eds., 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.”).

79. See *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1328-33 (S.D. Fla. 1999); 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).

80. See HILLMAN, PRINCIPLES, *supra* note 21, at 205-07.

81. See, e.g., *Mauldin v. Sheffer*, 150 S.E.2d 150 (Ga. Ct. App. 1966) (holding engineer liable for punitive damages for using plans for one construction project on another unrelated project); see also *Romero v. Mervyn's*, 784 P.2d 992, 998 (N.M. 1989) (awarding punitive damages under a contract theory for “malicious, fraudulent, oppressive, or . . . reckless[]” behavior).

gency the non-occurrence of which was a basic assumption on which the contract was made”⁸² Performance is “impracticable” if it would result in a severe loss to the promisor.⁸³ 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.⁸⁴ The *Mishara* court nicely summarized the doctrine: “It is implicit . . . that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties.”⁸⁵

On the other hand, courts will not excuse performance if the promisor should reasonably have foreseen the risk and, through its own neglect, failed to contract around the risk or to take reasonable precautions against it.⁸⁶ In this way, fault enters the equation in excuse cases.⁸⁷ 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.⁸⁸ 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 fogginess of this investigation invites courts to consider matters such as the fault of the promisor. In many impracticabil-

82. U.C.C. § 2-615(a) (2007); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

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

84. HILLMAN, PRINCIPLES, *supra* note 21, at 361-62.

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

86. *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 1419-22.

87. *See, e.g.*, FARNSWORTH, *supra* note 3, at 630 (“The third requirement for excuse is that the impracticability must have resulted without the fault of the party seeking to be excused.”).

88. *See* Cohen, *Fault Within Contract Law*, *supra* note 2, at 1457; Posner, *supra* note 3, 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.”).

ity cases, in fact, fault and the degree of harm caused by performance are probably the most influential factors.⁸⁹

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.”⁹⁰ Further, Posner maintains that parties would have allocated the risk to the promisor, who is the “cheaper insurer against the risk of nonperformance.”⁹¹ According to Judge Posner, the promisor must be the cheapest insurer because otherwise the promisor would not have made the promise.⁹² Strict liability thereby “reduces transaction costs by optimizing risk bearing.”⁹³ By definition in impracticability 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.⁹⁴

Strict-liability theorists add that strict liability is good policy because it diminishes the cost of litigation by replacing fuzzy fault principles with the claimed relative certainty of economic analysis.⁹⁵ But despite these claims that fault issues are costly and uncertain,⁹⁶ willfulness or negligence is often indisputable in the context of excuse doctrines. For example, courts do not excuse a sell-

89. See, e.g., FARNSWORTH, *supra* note 3, 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).

90. See, e.g., Posner, *supra* note 3, at 1353.

91. *Id.* at 1351.

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

93. *Id.*

94. Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397, 1398-1403 (2009).

95. Posner, *supra* note 3, at 1353, 1359.

96. See *id.*; see also Craswell, *supra* note 5.

er 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.⁹⁷ 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 promisor’s fault and the severity of the unanticipated event.⁹⁸

B. *Contract Remedies*

I 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.⁹⁹

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

97. *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.”).

98. Cohen, *Fault Within Contract Law*, *supra* note 2, at 1452-53; *see, e.g.*, *Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 313 (D.C. Cir. 1966) (concluding that ship owner could insure against risk of deviation, but U.S. government charterer could assess the probability of closing of Suez Canal); *see also* 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).

99. *See* George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994) (analyzing 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.”).

this behavior and want to encourage promisors to perform their contracts.¹⁰⁰

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.¹⁰¹ 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.¹⁰²

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 contract claims against doctors for failed operations. However, such courts may be reluctant 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 thought harsh."¹⁰³ 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.¹⁰⁴ An injured promisee must act reasonably after breach to minimize the loss.¹⁰⁵ Accordingly, the promisee must take affirmative steps, such as agreeing to reasonable substitute opportunities that diminish the loss from breach,

100. See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235, 236 (Minn. 1939) (majority willing to award much larger cost of restoration damages because "[d]efendant's breach of contract was willful. 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."); see also *Kangas v. Trust*, 441 N.E.2d 1271, 1276-77 (Ill. App. Ct. 1982) ("[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 of diminution in value as the measure of damages."). Other factors, of course, play a role in these and similar cases.

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

102. See, e.g., *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 643 (8th Cir. 1975) ("The wrongdoer should bear the risk of uncertainty that his own conduct has created.") (citing *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 565 (2d Cir. 1970)); 5 CORBIN ON CONTRACTS 1022 (1964) ("[D]oubts will generally be resolved in favor of the party who has certainly been injured and against the party committing the breach.").

103. *Sullivan v. O'Connor*, 296 N.E.2d 183, 187-88 (Mass. 1973).

104. But not always. Levmore suggests that the mitigation inquiry is one of "comparative fault." Levmore, *supra* note 28, 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 3, at 1388-89.

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

and must refrain from conduct that increases damages.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

Judge Posner explains the mitigation principle's purpose as preventing a party "from exploiting his temporary, contract-conferred monopoly in order to obtain a more generous settlement of his claim of breach of contract."¹¹⁰ Applying economic analysis to the mitigation question in this way, Posner argues, leads to greater clarity.¹¹¹ But I wonder whether employing language such as "exploiting" and "contract-conferred monopoly" produces greater clarity than language that declares that the injured promisee cannot recover for conduct that would unnecessarily increase the damages liability of the breaching promisor, such as declining to avail herself of advantageous market substitutes.

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, expect-

106. See, e.g., *Schiavi Mobile Homes, Inc. v. Girona*, 463 A.2d 722, (Me. 1983) (dealer failed to mitigate damages by not accepting a substitute offer for mobile home); *Clark v. Marsiglia*, 1 Denio 317, 318 (N.Y. Sup. Ct. 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.").

107. 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) (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).

108. See *id.* at 560.

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

110. See Posner, *supra* note 3, at 1359.

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

tancy 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.¹¹²

As noted in the excerpt above, analysts look to the absence of punitive damages as evidence of contract remedies' efficient-breach, strict liability approach.¹¹³ The key to the measurement of damages, they believe, is, therefore, efficiency, not fault. There is little reason to condemn a contract breaker who is trying to "increase

112. HILLMAN, PRINCIPLES, *supra* note 21, at 157; *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.")

113. *See* Posner, *supra* note 3, at 1354.

the overall contractual pie” by finding a better opportunity and making the promisee whole.¹¹⁴

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 must be 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.¹¹⁵

Furthermore, a rule that encourages breach may ultimately be inefficient for a host of reasons. For example, 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:

[B]ias . . . 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

114. Bar-Gill & Ben-Shahar, *supra* note 36, at 1482.

115. HILLMAN, *PRINCIPLES*, *supra* note 21, at 200.

often does, engaging high-priced lawyers, and gambits like starting litigation, engaging in discovery, and even trying and appealing cases.¹¹⁶

Finally, and perhaps most important, countenancing or even favoring efficient breach may undermine society's faith in the contract institution.¹¹⁷ 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."¹¹⁸ 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.¹¹⁹

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.

III. THE ROLE OF FAULT IN 2025

Were it not for the prevalence of today's perception that contract liability is and should be strict, nothing I have said so far 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.¹²⁰ Decisions

116. Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 968 (1982). 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. See ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 402 (6th ed. 2011).

117. HILLMAN, *PRINCIPLES*, *supra* note 21, at 200-01; *but see* Bar-Gill & Ben-Shahar, *supra* note 36, at 1482-83.

118. LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

119. Marschall, *supra* note 23, at 734, 740. The new *Restatement (Third) of Restitution* repudiates the theory of efficient breach. See RESTATEMENT (THIRD) OF RESTITUTION § 39 and cmt. h (2010) ("The rationale of the disgorgement liability in restitution, in a contractual context or any other, is inherently at odds with the idea of efficient breach . . .").

120. See Eisenberg, *supra* note 4, 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 mor-

are full of language and inferences that people should keep their promises and that unintentional breaches deserve less approbation than intentional ones.¹²¹ Although many have noted that legal rules and moral norms are distinct,¹²² 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.”¹²³ In order to avoid the costs of repeated breakdowns in performance, courts must consider the reliability of the breacher.¹²⁴ So it should be no mystery why courts account for fault in contract law. Of course, none of these deeply embedded norms and principles is going to change or disappear in the near or, for that matter, distant future.

For now, a series of incorrect assumptions fuels the no-fault perspective. We have seen that the no-fault model incorrectly assumes 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

al values concerning right and wrong. Contract law cannot escape this condition.”) (emphasis added); Cohen, *Fault Within Contract Law*, *supra* note 2, 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, 312 (N. J. Super. Ct. App. Div. 1957) (referencing trial court’s statement that defendant’s conduct “is one of the things I prefer not to . . . have to live with in the community. I couldn’t justify it.”) (alteration in original).

121. See, e.g., North Star Alaska Housing Corp. v. United States, 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.”); Jacob & Youngs, Inc., v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (“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 (N.Y. App. Div. 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.”); see also Shiffrin, *supra* note 15, at 1566-77 (2009).

122. See, e.g., Mills v. Wyman, 20 Mass. 207 (1825); see also *supra* notes 46-55 and accompanying text.

123. 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 Sys. Inc., 841 F.2d 742, 751 (7th Cir. 1988). “By definition, opportunistic behavior does not create wealth but simply redistributes wealth from one party to another.” Dodge, *supra* note 112, at 654.

124. See, e.g., Bar-Gill & Ben-Shahar, *supra* note 36.

erroneously believe 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, today's advocates of strict liability give too little weight to the counter-principles and policies that undermine their perception.

In the future, therefore, no-fault adherents may simply lay down their arms. Evidence of this trend already exists: many of today's theorists, if pressed, likely understand and would admit that the true "rule" is that the parties' conduct is important in assessing contract performance and the remedies available for breach. In fact, some of the strongest advocates of strict liability already hedge a bit themselves.¹²⁵ I predict that in the future, more contracts scholars will bring themselves to repudiate the lore that the reasons for breach do not matter.

Furthermore, technological advances that have changed the manner in which many contracting parties do business only portend a greater role for fault in the future. For example, vendors increasingly do business with consumers and small businesses over the Internet using electronic standard forms. Jeff Rachlinski and I have already written about the use of such standard forms in the "electronic age."¹²⁶ We identified various forms of opportunism occasioned by this new form of doing business. For example, we wrote that "e-businesses probably have more avenues for tinkering with the presentation format of their electronic boilerplate."¹²⁷ Some nefarious vendors may use this strategy to confuse readers and diminish their comprehension of the rights they forfeit.¹²⁸ In addition, these vendors can collect data on the kinds of presentations that lead potential customers to link to the terms and conditions in order to deter customers from doing so.¹²⁹ At a minimum, vendors who include nasty terms can count on the impatience of their customers, who likely will not read the boiler-

125. See *supra* note 28 and accompanying text.

126. Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

127. *Id.* at 479.

128. *Id.*

129. *Id.*

plate at all.¹³⁰ Notwithstanding these new strategies by vendors, traditional fault-based concepts such as unconscionability and good faith are suited for, and will likely play a greater role in, policing against these various new forms of opportunism.

Technological advances such as smartphones may also lead to a greater focus on what constitutes appropriate consumer shopping behavior.¹³¹ Professor Peppet, for example, points out that smartphones “saturate our daily experiences with previously unavailable information.”¹³² Consumers can readily access information such as the reputation of firms, the quality of goods, and the nature of standard forms even while shopping in brick-and-mortar stores, and Peppet asks whether contract law should consider what he calls this “augmented reality” of readily accessible information in assessing the enforceability of standard form contracts. For example, Peppet wonders whether the application of doctrines such as unconscionability might be “less and less justified” in the new “augmented reality.”¹³³ Failure to research and read, leading to the enforcement of a marginal contract or term, may be the consumer’s own fault.

Rachlinski and I have responded to Peppet’s thoughtful piece:

We are nervous about [Peppet’s conclusions], although [he] deserves lots of credit for raising the issues and for anticipating our concerns. Perhaps most important, everyone knows that consumers do not read their standard forms. There are a host of reasons for this in both the paper and digital worlds, including impatience and information overload. Similarly, we doubt that consumers will pause very long to use their smartphones to gather information, especially about the quality of the offered standard form. In addition, to the extent that consumers use their smartphones while shopping, they may not know how to access some of the pertinent information that may be available. Consumers also may have good reason to distrust some of the information they do ac-

130. Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE “INFORMATION ECONOMY” 283 (Jane K. Winn ed., 2006). Examples of unfair terms surfacing in e-standard forms due in part to the lack of reading include automatic renewal and modification without notice clauses.

131. Scott Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676 (2012).

132. *Id.* at 679.

133. *Id.* at 715.

cess, such as reports by consumers on product reliability and ratings of products or terms that are often very unreliable. If anything, smartphones are likely to further reduce consumers' perusal of their standard forms (not to mention cause eyestrain trying to read them). In such an environment, an argument can be made that judicial policing of standard terms should increase, not decrease.

Furthermore, as Professor Peppet observes, smartphones are becoming ubiquitous among the well-to-do and educated segments of our population, but not among the poor and uneducated. Although contract law delves into the background of its actors in many respects, we wonder if it is advisable here. At minimum, deciding enforcement on the basis of smartphone ownership raises lots of additional questions. For example, would ownership of a smartphone be sufficient to heighten the duty of consumers to gather information or should the duty arise only if the consumer brings the device with her at the time of contracting? If consumers with smartphones are to be held to a higher standard, would such a rule deter people from purchasing such a device or, if the narrower rule applies, deter them from bringing the device with them during shopping? Should people be penalized for failing to bring them? As a general matter, should wealth which inevitably increases access to information, heighten the duty to investigate through digital information?

....

[D]o smartphones change the people who use them? Smartphones facilitate access to information about quality of products, vendors, and even contract terms. Smartphones do not, however, alter the cognitive factors that lead consumers to avoid scrutinizing the boilerplate. If consumers are uninformed because information is costly and difficult to obtain, then Professor Peppet's observations help put courts on the right path. But if consumers decline to read or investigate because they believe that doing so is of little use to them, then it is hard to see how smartphones can make much difference.¹³⁴

134. Robert A. Hillman & Jeffrey J. Rachlinski, *Contract Law in the Age of Smartphones: Do Smartphones Make for Smarter Consumers?*, J.L. & PUB. POL'Y BLOG

I do not rule out the possibility that some changes brought about by new technology will diminish the need for fault-based concepts in contract law. For example, improvements in methods for predicting acts of nature may narrow the circumstances for applying excuses such as impossibility and impracticability. In addition, new technology allows for the rapid dissemination of bad publicity that may rein in opportunism. For example, watchdog groups on the Internet can search for and discover unfair terms in vendors' standard forms and rapidly publicize these terms.¹³⁵ The outcry when Facebook attempted to change their terms in order to appropriate its members' information evidences this phenomenon.¹³⁶ Thinking imaginatively, perhaps new methods of determining expectancy damages that utilize future computer programs may narrow the discretion of courts to employ fault in assessing damages. Notwithstanding these ideas, this symposium asks about contract law in 2025. I don't believe any of these ideas, or others that diminish the need for fault in contract law, will have made their mark by then.

IV. CONCLUSION

The conclusion can be very brief: fault is an important concept in today's contract law and will continue to be so, maybe even more so, in 2025.

(Oct. 4, 2011), <http://www.jlpp.org/2011/10/04/contract-law-in-the-age-of-smartphones-do-smartphones-make-for-smarter-consumers/> (footnotes omitted).

135. Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 106-107 (2011). The ALI's *Principles of the Law of Software Contracts* facilitates the discovery of unfair terms by watchdog groups by creating incentives for the disclosure of terms prior to any particular transaction. See ALI, PRINCIPLES OF THE LAW: SOFTWARE CONTRACTS § 2.02 (2010).

136. Hillman & O'Rourke, *supra* note 135, at 107.