The Promise of Contract Pluralism

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Many contract theorists argue that contracts are promises. This view is appealing because it can justify the institution of contract law—contract law allows parties to vindicate their promissory rights. But contract-as-promise advocates have seriously misunderstood how promises work. They assume a cartoon version of promises, one that is overly abstract, individualistic, and is singularly fixated on the obligation to do what one promised. Such theorists have failed to adequately attend to other important dimensions of promises: How stringent is the promise? Under what conditions is a person obligated to perform? How is an agent entitled to respond to a breach? How should a promisee respond to a request for release? When should a promisee agree to renegotiate? These features of promissory morality vary radically across different kinds of human relationships—e.g., marriage, friendship, employment, parenting, and commercial bargains. This is an important result for contract theory. Courts routinely invoke the idea of a general, uniform set of contract principles applicable to all contracts. But if promissory morality doesn’t justify applying uniform contract principles across different contracting relationships, then likely nothing does. We should thus liberate ourselves from the idea of general contract principles and embrace a kind of contractual pluralism.
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INTRODUCTION

Courts routinely and increasingly invoke general contract principles to resolve disputes between diverse kinds of parties in diverse kinds of relationships.\(^1\) For much of the history of Anglo-American jurisprudence, however, such invocations would have been nonsensical.\(^2\) Indeed, for a long period prior to the late 1800s, there was not thought to be a unified law of contract at all. Instead, courts and people naturally understood that to adjudicate a dispute between parties, it was required to know who those parties were and, more importantly, what the parties’ relationship to each other was.\(^3\) Such details have become less important in how many courts conceive contract law. Instead, many courts imagine a common body of contract law, which can be applied simply and dispassionately to all kinds of human agreements, whether it be a complex merger of two multinational

\(^{\text{1}}\) Consider the Pennsylvania Supreme Court’s recent decision overturning Bill Cosby’s conviction. The Pennsylvania Supreme Court described itself as applying “general principles of contract law” in finding that there was a binding non-prosecution agreement between the state and Cosby. Pennsylvania v. Cosby, 252 A.3d 1092, 1133 (Pa. 2021). As shall become clear below, the court would have done better to resist the urge to couch its decision in general contract principles. Doing so simply invites confusion. Consider also M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 430 (2015). The United States Supreme Court rejected the Sixth Circuit’s longstanding set of context and relationship-specific principles for interpreting retirement benefits provisions in a collective bargaining agreement. It did so on grounds that the Sixth Circuit’s interpretive rules were “incompatible with ordinary principles of contract law.” Id. See also Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. (UAW) v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983) (setting forth the Sixth Circuit’s context specific interpretive principles that the Supreme Court rejected in Tackett).

\(^{\text{2}}\) See Roy Kreitner, Calculating Promises: The Emergence of Modern American Contract Doctrine 1–7 (2007) (recounting a shift in the late 19th century from a view of contract “dominated by an understanding that contracts were divided into pre-ordered types according to specified relationships, whose obligations were set as a matter of law” to a view in which there was a general contract law grounded in a view of promises on which “individuals create[ ] their own obligations”). This is also the view put forth by Grant Gilmore in his seminal work The Death of Contract. As Gilmore explains, for a long period of time prior to Langdell, the idea of a unified body of general contract law would have seemed strange. GRANT GILMORE, THE DEATH OF CONTRACT 6 (1974). Rather, even just focusing on the world of commerce, there were specialized areas of law, such as bailments, insurance, and suretyship. Id. at 10–11.

\(^{\text{3}}\) As Nathan Oman recounts, as recently as the 1830s, treatise writers organized their texts not around general contract principles, but around specific kinds of contracting relationships—e.g., bailment, real estate, marriage, and landlord tenant. Nathan B. Oman, A Pragmatic Defense of Contract Law, 98 GEO. L.J. 77, 81 (2009) [hereinafter Oman, A Pragmatic Defense of Contract Law].
corporations, a collective bargaining agreement, or an agreement to enter a plea. We might wonder whether the trend toward uniformity in contract law and the adoption of general rules that apply across different contracting relationships—marriage, employment, and commercial—is indeed such a welcome development or if, instead, we should reject the “aspiration to transcend contract types with ‘general’ law.”

Given the substantial diversity of human relationships, what motivates the idea that courts should adopt general principles of contract law that would displace a more situated look at the type of contracting relationship between the parties and the legitimate claims that arise therefrom? Why might we think that human phenomena as diverse as agreements within relationships between employers and employees and between commercial parties in a one-off exchange ought to be subject to a uniform set of legal standards? The most plausible answer is that these apparently diverse phenomena all involve agreements or promises.

But if promises ground uniformity in contract law, then promises themselves must have uniform normative relevance across different kinds of relationships. This sort of uniformity in promissory morality is something that many contract theorists simply presume. The idea seems to be that what is characteristic of promissory morality is that in promising, one voluntarily undertakes a moral obligation to do what is promised. Given that narrow conception of promises, it is hard to see how it matters whether the parties to the promise are individuals, corporations, married, or complete strangers. A promise is a promise. Hence, the thinking goes, a promissory grounding of contract invites a flattened understanding of contract law, that can be cashed out in terms of a set of non-context-specific legal principles. As a

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4 M&G Polymers USA, 574 U.S. at 438 (applying “ordinary contract principles” to the construction of a collective bargaining agreement).

5 United States v. Patterson, 576 F.3d 431, 438 (7th Cir. 2009) (stating that “plea agreements are governed by ordinary contract principles”).

6 HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 8 (2017) [hereinafter DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS]. This is a question that has recently occupied many contract theorists. See generally, e.g., Id. (arguing for multiplicity in contract law on autonomy grounds); Oman, A Pragmatic Defense of Contract Law, supra note 3 (defending uniformity); Peter Benson, Unity and Multiplicity in Contract Law: From General Principles to Transaction-Types, 20 THEORETICAL INQUIRIES L. 537, 538–39 (2019) (discussing the ways in which different foundational accounts of contract can justify multiplicity in contract law); Oren Bar-Gill & Clayton P. Gillette, On the Optimal Number of Contract Types, 20 THEORETICAL INQUIRIES L. 487, 490–91 (2019) (discussing informational constraints and transaction costs that might limit our ability to identify the optimal number of contract types); BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 147–62 (2012) (rejecting the idea that there is a single general theory of contract law).

7 See, e.g., Oman, A Pragmatic Defense of Contract Law, supra note 3, at 82–83 (discussing Charles Fried’s promissory account of contract as a basis for uniformity in contract law); Anat Rosenberg, Contract’s Meaning and the Histories of Classical Contract Law, 59 McGill L.J. 165, 181 (2013) (“Classical contract law took free choice, epitomized in the idea of promise, as the basis for its entire analytic structure, to the exclusion of other sources of obligations.”).
result, those who would reject that kind of flattened uniformity in contract law feel compelled to reject a promissory grounding of the law of contracts.\footnote{For instance, Prince Saprai rejects promissory accounts of contract on the grounds that they are incompatible with the “normative pluralism” that he defends. PRINCE SAPRAI, CONTRACT LAW WITHOUT FOUNDATIONS: TOWARD A REPUBLICAN THEORY OF CONTRACT LAW 17–18 (2019) [hereinafter SAPRAI, CONTRACT LAW WITHOUT FOUNDATIONS]. Dagan and Heller spend the first three chapters of their book arguing that promissory theories of contract are a non-starter. Their main aim is to defend a plurality of contract rules each governing different contracting relationships. See DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS, supra note 6, at 19–40.}

In this Article, I argue that promissory morality is not unified in the way that has been assumed in the last roughly forty years since the publication of Charles Fried’s seminal essay, Contract as Promise.\footnote{See generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 8–10 (2d ed. 2015) [hereinafter FRIED, CONTRACT AS PROMISE].} The approach used by theorists who would ground contract in promissory morality rests on an impoverished, indeed cartoonish, account of how promises actually work. To riff on a phrase from the philosopher Bernard Williams, the prevailing analyses of promissory morality evidence a gap between how we promise and how we \textit{think} we promise.\footnote{BERNARD WILLIAMS, SHAME AND NECESSITY 91 (2008) (discussing a gap between “what we think from what we think we think”).}

If we look at how promissory agreements work on the ground, we can see our way to a better understanding of promissory morality, one that has a surprising but welcome upshot for contract theory: promissory morality justifies different doctrines in different kinds of contracting relationships and hence grounds a rejection of the flattened understanding of contract law. Once we understand why promissory morality has this character, we are in a good position to revisit certain contract law doctrines which then can be seen as fully consonant with moral norms of promise, rather than as problems to be ignored or explained away.

There are two main problems with existing contract-as-promise theories. First is an overriding preoccupation with what we might call the primary promissory obligation—that is, the obligation to do what one has promised.\footnote{FRIED, CONTRACT AS PROMISE, supra note 9, at 17 (“If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance.”). See also SAPRAI, CONTRACT LAW WITHOUT FOUNDATIONS, supra note 8, at 16 (“In the case of contract law, the main form of foundationalism is the idea that contract is underlain by the principle that promises ought to be kept, or the promise principle for short.”).} This obsession obscures other equally important normative dimensions of promissory morality, such as: How stringent is the promise? Under what conditions is a person obligated to perform? How should either party respond to a breach? How should a promisee respond to a request for release? When should a promisee agree to renegotiate?

Second is an overly static view about the nature of promissory morality that fixates primarily, or even exclusively, on the intentions or will of the
promisor at the time of promising.\textsuperscript{12} Attending to the other features of promises shows that the full shape of promissory morality is dependent on the relationship between the promising parties. So, the force of a promise cannot be understood solely in terms of what happens at a single snapshot of time—at the moment of promising—but rather, we must look to the role of the promise in the ongoing relationships between the parties. In short, it matters whether the promise occurs in a friendship, a marriage, a parent/child relationship, an employer/employee relationship, or a commercial relationship between strangers. Details of the particular relationship affect the normative dimensions of promising in important ways. We should therefore be skeptical of any simplistic unified story about promissory obligation across different kinds of promissory relationships.

Coming to grips with the normative variability of promissory morality across different types of relationships has important implications for contract theory.\textsuperscript{13} If contract is to track promissory morality, we should expect (indeed we should want) variance in contract doctrine across different kinds of contracting relationships. But when looking to the law, we find something that is somewhat Janus-faced. On the one hand, there is some multiplicity. There is a law of employment relationships, a law of parenting agreements, a law regarding the effect of plea deals, and a law of prenuptial agreements. On the other hand, there is a tendency for actors in our legal system to insist on the application of uniform contract principles across diverse legal contexts unified only by the fact that they involve promissory agreements.\textsuperscript{14} That latter tendency runs the risk of flattening out normatively relevant differences.

If all that unifies things as diverse as prenuptial agreements, employment agreements, collective bargaining agreements, and commercial deals, is that they involve promises, then the arguments presented here should expose the insistence on legal uniformity across different kinds of

\textsuperscript{12} See, e.g., Jody P. Kraus & Robert E. Scott, The Case Against Equity in American Contract Law, 93 S. CAL. L. REV. 1323, 1333–34 (2020) (characterizing contract law as "devoted exclusively to enforcing executory agreements according to the parties’ ex ante intentions"). See also Jody S. Kraus, The Correspondence of Contract and Promise, 109 COLUM. L. REV. 1603, 1608 (2009) [hereinafter Kraus, The Correspondence of Contract and Promise] (defending a "[p]ersonal sovereignty" view of promissory morality, and thereby contract law, grounded in "respect for a person’s autonomy" conceived of as "respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him") (citation omitted).

\textsuperscript{13} I am not the first to have considered the possibility that the normative force of promises varies across different kinds of promissory relationships. See Aditi Bagchi, Unequal Promises, 72 U. PITT. L. REV. 467, 486 (2011) (“It is not necessarily the case that the relevant value of promise is constant across different domains in our lives.”). As far as I know, I am the first to provide an analysis of why promissory morality has this structure.

promissory relationships as seriously misguided. If promissory morality itself doesn’t justify the application of uniform contract principles across different contracting relationships, then likely nothing does. It would be better to embrace the idea that different legal norms should regulate agreements in different kinds of relationships. It is in this light that this Article stands as an important corrective: Promissory morality, properly understood, does not ground uniformity in promissory law. On the contrary, it invites multiplicity.

The argument proceeds in the following manner: In Part I, I situate the debate over whether we should embrace a general contract law. There are two competing strands in that debate. On the one side are theorists who have in various ways rejected the Willistonian dream of a general contract law. On the other side are courts and others who have invoked general contract law to justify a given result. In Part II, I articulate a view of private law that reflects the legitimate moral claims of the parties. This motivates looking to promissory morality as a grounding for contract law. I also argue that the primary issue in a contract suit is the legitimate complaints of the parties. That is important because looking to promissory complaints informs the relevance of things like the strength of the promise, defeating conditions, and the relevance of norms of release or renegotiation. In Part III, I provide a series of examples of promises that serves to dislodge the narrow conception of promissory morality assumed by most contract-as-promise theorists. Those examples support a view of promissory morality on which a successful promise represents a kind of joint decision. The morality of promise, I contend, is just the morality of having made a joint decision. In Part IV, I explore implications of a joint decision account of promissory morality for contract doctrines, including frustration of purpose, impossibility, and fraud, duress, and coercion. I also argue that contrary to the received view, consideration doesn’t pose an actual problem for theorists who would ground contract law in promissory morality, but rather is an important tool in identifying the kind of relationships that the core of contract doctrine covers—viz., bargained-for exchange, paradigmatically between strangers. In Part V, I turn to specific promissory relationships to illustrate how the view of promissory morality and contract law that I recommend might figure into an account of the law of certain kinds of promissory relationships. Specifically, I consider marital and parenting relationships, employment relationships, and consumer relationships. In Part VI, I offer some concluding thoughts.

I. THE PUSH FOR UNIFORMITY (AND FOR MULTIPLICITY) IN CONTRACT LAW

Should contract law use different legal rules for different contracting relationships? The most extensive case for an affirmative answer to this question comes from Hanoch Dagan and Michael Heller in their book *The Choice Theory of Contract*. There they argue that we should reject the “aspiration to transcend contract types with ‘general’ contract law.”

Instead, they argue that we should embrace the idea that there are different contract types suited for different kinds of contracting relationships, and that the state ought to provide different contract types that parties can select.

According to Dagan and Heller, the idea that there is a general, uniform contract law that applies universally across diverse contracting relationships can be partially traced to Christopher Langdell and Samuel Williston, who both aimed to provide a unified account of contract law. The effect of this effort was to shift “contract theory from concern with distinctive types to a trans-substantive, stylized, and seemingly universal approach.” As a result, “contract theory today is dominated by the notion of general contract law and is structured around the specific, not very representative, sphere of commercial contracting.”

While Dagan and Heller are the most explicit advocates of multiplicity in contract law, other contract theorists openly acknowledge that their preferred theoretical accounts make sense for some sorts of contracting relationships, but not others. For example, Daniel Markovits notes that his collaborative account of promissory morality, in which he would ground (some) contracts, makes sense when the contracting parties are individuals, but not when they are corporate entities. This is because corporate entities

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16 Dagan & Heller, The Choice Theory of Contracts, supra note 6, at 8. It is worth noting that their argument is explicitly instrumental in nature. Specifically, Dagan and Heller fix upon the instrumental role that different contract types might play in facilitating human autonomy. Id. at 40. As they put it, contract’s “value derives from its contribution to our autonomy.” Id. We need different contract types in order to increase the range of choices that contracting parties have available for determining how their relationships will be structured. Id. at 4 (“[A] state committed to human freedom must be proactive in shaping contract law, including ensuring availability of a diverse body of normatively attractive [contract] types.”). Indeed, Dagan and Heller go out of their way to reject non-instrumental promissory theories of contract, which, for them, ultimately rely on a “transfer” theory under which a promise transfers a right from the promisor to the promisee. Id. at 25–40. As will become clear shortly, I think that so-called transfer theories of promise are mistaken and do not fit our promissory practices.


18 Id.

19 Id.

20 Daniel Markovits, Contract and Collaboration, 113 Yale L.J. 1417, 1471 (2004) [hereinafter Markovits, Contract and Collaboration] (noting that “[t]he collaborative view does not immediately apply to obligations generated by contracts involving organizations, including in particular economic firms. But alternative accounts of contracts between organizations, even as they succeed at explaining the obligations involved, cast these obligations in a light that reveals them to be enormously different from the obligations that the collaborative view seeks to explain”).
cannot have relations of mutual recognition and respect on which Markovits wants to ground both promise and contract. Alan Schwartz and Robert Scott defend their preferred economic account of contract only with regard to what they call “Category 1” contracts—i.e., those between firms.\(^{21}\) This is because it is within those sorts of relationships that the norms they endorse—economic efficiency and the maximization of contractual surplus—have the most purchase.\(^{22}\) Thus, following these theories to their logical conclusions provides justification for multiplicity in contract doctrine, where contracts vary based on the kind of relationship in which the contract occurs.

Our legal practices partly reflect the judgment that there should be different contract rules for different kinds of contracting relationships. For example, the draft Restatement of the Law of Consumer Contracts aims to describe a separate body of law governing the consumer relationship.\(^{23}\) More than half of the states have adopted the Uniform Premarital Agreement Act (UPAA) which creates special rules for premarital contracts.\(^{24}\) Article 2 of the Uniform Commercial Code applies somewhat different rules to transactions between merchants.\(^{25}\) And as Dagan and Heller observe, for a lawyer “[t]o rely on any general view [of contract law] would often constitute malpractice,” say, in the context of family law, plea deals, or employment law.\(^{26}\)

Still the idea of a uniform contract law applicable across diverse contracting relationships maintains serious traction.\(^{27}\) Business groups have objected to the draft Restatement of the Law on Consumer Contracts because


\(^{23}\) The Restatement has come under fire for being insufficiently protective of consumers by partially eroding the requirement of mutual assent to contract terms. See Letter from Letitia James, N.Y. Attorney General, to Members of the American Law Institute, Re: Restatement of the Law of Consumer Contracts (May 14, 2019), available at https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf (writing on behalf of twenty-four attorneys general to express concerns with the new draft Restatement).


\(^{25}\) U.C.C. § 2-104 cmt. 1 (“This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer.”).

\(^{26}\) See also, e.g., U.C.C. § 2-201(2) (between merchants, written confirmation of a contract satisfies the code’s statute of frauds requirement unless the other party objects within ten days); U.C.C. § 2-207(2) (between merchants, additional terms sent with acceptance become part of the agreement if certain specified conditions are met).

\(^{27}\) DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS, supra note 6, at 8.

\(^{28}\) Nathan Oman argues that a general contract law can “serve[] as a check on the power of factions to manipulate the law” and “that the generality of contract law facilitates the decentralized and experimental search for solutions to collective problems.” Oman, *A Pragmatic Defense of Contract Law*, supra note 3, at 79.
it departs from general contract principles—that is, principles that would apply across all contracting relationships. Courts too have embraced the idea that there are uniform contract principles that ought to apply across all contractual relationships. Most notable, perhaps, is Federal Arbitration Act (FAA) case law. The FAA requires that arbitration agreements be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.” The Supreme Court has applied the FAA across a wide variety of contracting relationships, not just to the commercial relationships that the statutory text and history seem to contemplate, but also to consumer relationships and employment relationships. The net effect is that the FAA, as interpreted by the Court, means that the rules governing contractual enforcement cannot be tailored to specific kinds of contractual relationships.

In other contexts, courts have insisted on applying general contract rules across relationships as diverse as plea deals and collective bargaining agreements. For instance, in *M&G Polymers USA, LLC v. Tackett* the Supreme Court insisted on the application of “ordinary contract principles” and rejected the Sixth Circuit’s reliance on the “context of . . . labor-management negotiations” in overturning the circuit court’s determination that retirement benefits under a collective bargaining agreement vested for life. So, while there is some acknowledgment that different kinds of relationships might merit different treatment, there seems to be a competing force pushing for the application of uniform contract principles across quite diverse promissory relations.

Thus, the current situation is this: in some ways, our legal system recognizes the need for different rules for different kinds of contracting relationships. In other ways, our legal system finds the idea of uniform trans-substantive contract law irresistible. What might motivate this latter

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30 See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting) (determining that Congress did not intend the FAA to apply to “arbitration provisions in employment contracts”). See also Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 121, 127 (2001) (Stevens, J., dissenting) (noting that the FAA was never intended to apply to employment agreements); Imre Stephen Szalai, Exploring the Federal Arbitration Act Through the Lens of History, 2016 J. Disp. Resol. 115, 117 (2016) (“One fundamental lesson I learned from studying the history of the FAA’s enactment is that the Supreme Court has grossly erred in interpreting the statute. The history of the FAA’s enactment helps demonstrate that the FAA was originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes, not the expansive system that exists today involving both state and federal courts and covering virtually all types of non-criminal disputes.”).


35 Id. at 438, 442.
tendency? The most plausible hypothesis is that these diverse areas of law—e.g., plea agreements, employment agreements, consumer purchases, and commercial deals—share one thing in common: they all involve promises. This common promissory thread leads many legal actors to search for uniform principles of promissory law to ground and make sense of contract law. But there is an implicit assumption here: that promissory morality is itself monolithic and generalizable. As I argue below, however, this assumption is mistaken. Promissory morality, properly conceived, grounds multiplicity in contract law, not uniformity.

II. THE RELEVANCE OF PROMISSORY MORALITY FOR UNDERSTANDING CONTRACT LAW

A. Private Law as a Reflection of Moral Relationships

A natural question to ask about any area of law is why its subject matter is the proper object of state involvement. We can ask that question of contracts. Why, we might ask, should the state interest itself in voluntary undertakings any more than it interests itself, say, in a person’s interior design choices. One attractive story is that private law institutions legitimately, albeit defeasibly, interest themselves in moral claims that parties have over one another. As Jody Kraus comments, “[i]t is natural to suppose that the justification of any particular area of law turns, at least in part, on whether the legal rights and duties it recognizes correspond to individual moral rights and responsibilities.”36 In this vein, promissory theories of contract are attractive because promises can explain why one party might have a legitimate claim over another, either for performance of a promissory duty, or performance of a duty of repair upon breach of the promise.37 Promises, the thought goes, explain the rights and obligations, the violations of which form the subject matter of a contractual complaint. And promises also make sense of why contract law would be a sensible category

36 Kraus, The Correspondence of Contract and Promise, supra note 12, at 1611.
37 See Seana Valentine Shiffrin, Is a Contract a Promise?, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 241 (Andrei Marmor ed., 2012) (“The thought is that if contracts have, at their foundations, the same moral relations that we describe as promises in our everyday social relations, that fact might provide the seedlings both of a justification for contract law and of a guide to the principles it should follow.”). Of course, one might doubt the legitimacy of state enforcement of non-harmful breaches of promises. One might wonder why we should not, in such a case, simply leave the parties as they are, with whatever they had before the agreement. For discussion of the relevance of the harm principle to remedies, see Dori Kimel, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 104–105 (2003) [hereinafter Kimel, FROM PROMISE TO CONTRACT. See also Dagan & Heller, The Choice Theory of Contracts, supra note 6, at 19–24; L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages:1, 46 YALE L.J. 52, 57–60 (1936) (voicing some skepticism about the enforcement of damages based on the parties’ expectancy, but ultimately arguing that it is a proxy for a kind of reliance based in foregone alternatives). The legitimacy of legal enforcement of promises where there is no harm to one of the parties is an important issue for contract theorists to grapple with, but I won’t do so here.
to use in describing our legal practices—all contracts involve promises, after all.

So, the prima facie appeal of a promissory account of contract is that it provides some hook that can intuitively justify the institution of contract law and provides some unified subject matter that is the object of contract law. Further, an account based on the promissory claims of the parties can explain some core features of a contract lawsuit in the right sort of way. For instance, an essential feature of a contract suit is that the promisee seeks relief from the breaching promisor. If successful, damages will be paid to the promisee, and not, for example, to the state. Finally, grounding private lawsuits in the moral claims of parties, including promissory claims, has the advantage of making the law intuitively consonant with moral life, instead of an alien and artificial imposition on it. There are, therefore, prima facie reasons to prefer accounts of private law as reflecting the moral claims that parties have over one another, which might run parallel to, but are different from, the public interests that the state might also wish to endorse. At a minimum, the attractive explanatory and justificatory features of modeling contract on promise make it worth assessing what contract would look like if it accurately reflected promissory morality.

B. If Contract Reflects Promise, it Reflects the Morality of Promissory Complaints

What would it mean for contract law to accurately reflect promissory morality? One approach would treat contract law as imposing duties that are the same as what we might call promissory performance duties. On that sort of view, if promissory morality imposes a duty to do what one promised, then contract law should also impose a duty to do what one promised, perhaps subject to defeating conditions based on institutional limits of the legal system. Seana Shiffrin adopts this sort of approach, arguing that

38 Other accounts—the economic analysis of private law comes to mind—have a harder time explaining this structure. For discussion of this point, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 46–48 (1995) (highlighting the failure of economic analysis to capture important features of private law). The economic analysis of law is concerned with efficient incentive structures, and from the standpoint of efficiency, there is no obvious reason why the promisee rather than some random third party, or the state, ought to be bringing a claim, or why the promisee ought to collect (all of) the damages. Of course, it’s possible that the economic analysis might justify preserving the structure of a private lawsuit—perhaps that structure is efficient after all. But if economic efficiency happened to coincide with that structure, it would be a mere fortuity. In contrast, an analysis in terms of the moral claims of one party against another explains the structure of a private lawsuit in a way that doesn’t make that structure a mere accident of human psychology and social practices.

39 See Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 HARV. L. REV. 708, 718 (2007) [hereinafter Shiffrin, The Divergence of Contract and Promise] (“[T]he law and its rationale should be transparent and accessible to the moral agent . . . because the agent is subject to the law and that to which she is subject should be justifiable to her.”).

40 The state might endorse the view that it’s bad to act fraudulently in one’s dealings. But a private suit plaintiff isn’t seeking redress for the general badness of fraud—the subject matter of the state’s interests—but for their own claim against the fraudster for wrongdoing them.
“[c]ontract law would run parallel to morality if contract law rendered the same assessments of permissibility and impermissibility as the moral perspective, except that it would replace moral permissibility with legal permissibility.”

Shiffrin’s approach, however, assumes that the law would need to reflect the first-order obligations of the parties if it is to converge with promissory morality. This assumption would leave out important details of what is happening in a contract lawsuit (as well as important features of promissory morality). A contract-suit plaintiff is asking the state both to intervene in a private dispute and to provide a remedy for an alleged promissory breach. Because of this, some theorists have suggested that if contract reflects promissory morality, it is better construed as the morality of promissory remedies and not performance duties. And, it might be fruitful to add, remedies imposed by third parties.

So, if we are to see the law as reflecting morality, then we must be careful to properly identify the moral posture of the parties within a contract lawsuit. Properly understood, a plaintiff to a contract lawsuit is bringing a complaint that asks for a remedy provided by the court for an alleged promissory breach. They are not seeking performance of primary promissory duties. Thus, as Nico Cornell has argued, for the law to reflect promissory morality would require that it reflect the conditions under which

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41 Shiffrin, The Divergence of Contract and Promise, supra note 39, at 722. Based on this approach, Shiffrin identifies several ways in which contract doctrine diverges from promissory morality. For instance, she claims that “moral rules of promise typically require that one keep a unilateral promise, even if nothing is received in exchange.” Id. at 710. That is, promissory morality has no consideration requirement. Contract law places a duty on the promisee to mitigate damages, while promissory morality does not. Id. Promissory breaches might license punitive responses, but contract law doesn’t allow punitive damages. Id. And expectation damages represent a divergence between promise and contract, because “[a]bsent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised.” Id. at 722.

42 Shiffrin is well-aware that divergence between primary promissory duties and contract remedies could sometimes be justified. For instance, she allows that some divergence between contract and promise might be justified by the “normatively salient properties of law and its appropriate content and shape.” Shiffrin, The Divergence of Contract and Promise, supra note 39, at 733. And in other work she argues that the unconscionability doctrine shouldn’t be seen as paternalistic because the court, understood as a third party, could legitimately refuse to intervene to enforce an unconscionable contract, not for the sake of the promisor, but for the sake of the state’s independent interests in not facilitating an exploitative relationship. Seana Valentine Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 PHIL. & PUB. AFFS. 205, 221–30 (2000). But she appears to see these additional limits on state enforcement as external to promissory morality itself.

43 Kraus, The Correspondence of Contract and Promise, supra note 12, at 1628–29. Kraus argues that participants in the debate over the convergence of contract and promise should be careful not to confuse first-order moral obligations to keep a promise with remedial duties after breach. It’s possible that the remedial duty after breach is not performance, even if performance is still possible.

44 See generally Stephen A. Smith, Rights and Remedies: A Complex Relationship, in TAKING REMEDIES SERIOUSLY 31, 51–53 (Kent Roach & Robert J. Sharpe eds., 2010). Smith notes that remedies imposed by third parties might diverge from primary promissory obligations, and from remedies that would be appropriate for the promisor to perform absent third-party encouragement.
the plaintiff can legitimately be seen to complain to a court about an alleged promissory breach.45 As Cornell puts it,

[i]he question whether contract law is based on the morality of promising should be focused on whether the rules of contract law can be understood in terms of the moral practices surrounding promissory wrongs and complaints. To compare as sources of norms contract law, in its ex post and remedial form, with the morality of promises is to compare apples with oranges.46

For contract to reflect promissory morality requires that “the rules of contract law . . . be understood in terms of the moral practices surrounding promissory wrongs and complaints.”47 Understanding the morality of promissory complaints is important for the arguments that follow. Contract-as-promise theorists’ focus on the primary promissory obligation has led them to ignore other important features of promissory morality—e.g., the strength of the promise, how an agent is entitled to respond to a breach, what counts as a fitting remedy, how a promisee must respond to a request for release, and when a promisee ought to agree to renegotiate. Those features all bear on the propriety of bringing a promissory complaint, even if they may not bear on the primary performance obligation. The aim of the next section is to argue that these features of promissory morality vary based on the relationship between the parties. Thus, a contract law that reflects the morality of promissory complaining will also vary based on the relationships between the parties.

III. HOW PROMISSORY MORALITY WORKS

In the previous Part, I argued that for contract to reflect promissory morality, we must look to promissory complaining and not just to the primary promissory duty. In this Part, I want to draw attention to several under-explored features of promissory morality that can help us get a better grip on when a complaint might be fitting and in what ways. Along the way,

45 See generally Cornell, A Complainant-Oriented Approach to Unconscionability and Contract Law, supra note 15.

46 Id. at 1165.

47 Id. I would offer one (possibly friendly) modification to Cornell’s view. The modification is to distinguish the conditions under which a person has a complaint from the conditions under which it would be fitting for them to complain. Cornell argues that the conditions under which A has a complaint against B might diverge from the conditions under which B breached a duty owed to A. In support, he asks us to imagine a scene where A punches B, and B returns the favor. Id. at 1149. As he imagines it, the morally correct thing for B to do is to turn the other cheek. And so, B acts wrongly by returning the punch. The worry with this analysis is that we might agree that B acts wrongly in the sense of acting in a manner that is not virtuous. But from that alone it does not follow that B wrongs A in the sense of doing something B owed it to A not to do. A had it coming, after all. Thus, the example arguably falls short in showing that there can be conditions where one party breaches a duty owed to another, but where the other lacks a complaint for the breach. What is easier to establish is that sometimes it would be unseemly for the harmed party to complain, whether or not they have a complaint.
I dislodge an impoverished view of how promissory morality works that arises from a misguided fixation on the primary promissory duty to do what one has promised. That fixation leads contract-as-promise theorists to adopt an overly static picture of promissory morality which underestimates the ways in which the moral shape of a promise is affected by ongoing relations between the parties. Once we have a more accurate picture of how promissory morality works, we can see our way to a grounding for multiplicity in contract law that varies based on the different relationships between the parties.

The core of my argument in this Part proceeds by way of analysis of a series of examples. Because they are likely to be familiar to readers, most of the examples are drawn from friendship and familial life. I contend that the best explanation of the examples is that promissory morality is properly understood in terms of a kind of joint decision-making.

On this account, we can see promises as proposals in a form of joint practical deliberation—i.e., deliberation about a joint decision.

A. A Joint Decision-Making Account of Promissory Morality

Before we turn to the examples, it is worth saying a bit about how a joint decision account of promises works. In outline, the idea is this: when A promises B that A will φ, that is a proposal that they (A and B) make a joint decision that A will φ. For that proposal to become a joint decision that A will φ, the promise must be accepted. The force of the promise, thus, can be

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48 This fixation is arguably what grounds Richard Craswell’s critique of promissory theories of contract. He argues that theories such as Fried’s have nothing to say about any of contract law’s “background rules” by which he means things like “those parts of contract law that govern the proper remedies for breach, the conditions under which the promisor is excused from her duty to perform, or the additional obligations (such as implied warranties) imputed to the promisor as an implicit part of her promise.” Richard Craswell, Contract Law, Default Rules, and the Philosophy of Promising, 88 MICH. L. REV. 489, 489–90 (1989). If we give up the fixation and instead see promissory morality as involving more than just the primary performance obligation, Craswell’s criticism loses some of its force.

49 This view of promises was first proposed by Margaret Gilbert. See MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 81, 98 (2014) [hereinafter GILBERT, JOINT COMMITMENT] (explaining the idea of a shared intention among individuals when they make plans). The joint decision-making account has benefits over a view like Daniel Markovits’s that attempts to ground promises and contracts in Kantian ideas of mutual respect and treating others as ends-in-themselves. Markovits’s account requires that promisors “share ends.” That strikes me as an odd way of characterizing my relationship with my plumber. His account also struggles to explain how promises between individuals and corporate entities can be effective. Markovits, Contract and Collaboration, supra note 20, at 1436. As he puts it, “The collaborative account of contract therefore seems not to apply, either directly or indirectly, to contracts that involve organizations. Organizations cannot engage the values of respect and community that underwrite the collaborative ideal, and an organization’s contracts draw neither its agents nor its stakeholders into collaboration.” Id. at 1467. I agree that it is awfully odd to think of ourselves as in community with corporate entities. Of course, I also think it’s a bit much to think of myself as in community with my plumber. But what I can do with both a corporation and my plumber is make joint decisions. We can decide that my plumber will fix my water heater, and that I will pay him, and the same goes if my plumber is a company and not an individual.

50 Brendan de Kenessey has recently defended this view of promissory morality. Brendan de Kenessey, Promises as Proposals in Joint Practical Deliberation, 54 NOûS 204 (2020) [hereinafter de Kenessey, Promises as Proposals in Joint Practical Deliberation].
understood in terms of the fact that the parties *jointly intend* that the promisor do something, and have decided that he or she will so act. While it is true that sometimes only the promisor has a performance obligation—an obligation to do what she promised—both parties come to have the obligations that are required to realize the joint decision. This is why, for instance, when $A$ promises $B$ that $A$ will call and $B$ accepts, $B$ should not then refuse to answer the phone. Such action would thwart the joint decision.

We can further understand the normative structure of joint decisions by reflecting on some general features of decision-making. Decisions to do something—whether joint or individual—have a point. That is, there are reasons for having made the decision. For instance, if I commit myself to exercising more, the point, presumably, is that it will improve my health. That point explains what role the commitment to get more exercise plays in accounting for when it is rational for me to exercise, and when it is not. The decision to exercise more has to rule out some kinds of reconsideration; if any whim was a sufficient basis to reconsider, it wouldn’t make sense to say that I had made a decision. But if I learn that I have a heart condition, and my health is served by exercising less, then my commitment to exercise more can no longer rationalize my doing so. Relatedly, the decision to exercise more figures into further practical deliberation with the weight of the reason for it. This explains why certain moral obligations might justify some departure from my exercise plan, but a desire to laze about on the sofa does not. In the same way, joint decisions, and so, promises, are subject to reconsideration when there are sufficiently weighty competing considerations that count in favor of doing something other than what was promised. It is this feature of joint decisions that will explain why a

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52 As both Dori Kimel and Abraham Roth have observed, accepting a promise doesn’t come without strings attached, and that is plausibly why acceptance is required for the promissory relationship to come into being. See *Kimel, FROM PROMISE TO CONTRACT, supra* note 37, at 25 (“[T]he power to release . . . can also be a responsibility, and it seems strange that a (would-be) promisee should not be able to avoid assuming it in the first place, or that a person should be able to thrust such a responsibility upon another, regardless of whether or not the latter is at all interested in finding herself in this position, and regardless of whether or not the promisor even believes this to be the case.”); Roth, *Intention, Expectation, and Promissory Obligation, supra* note 51, at 90 (commenting that the requirement that for a promise to be effective, it must be accepted, can be explained by the fact that an effective promise “imposes some responsibility upon the promisee to exercise [the] power of release when appropriate, and sometimes the promisee might not want to take up this task”).

53 See Gilbert, *JOINT COMMITMENT, supra* note 49, at 99. In the law, this idea is reflected in the implied covenant of good faith and fair dealing that similarly prevents the promisee from impeding the promisor’s performance. See *Lowell v. Twin Disc, Inc.*, 527 F.2d 767, 770 (2d Cir. 1975) (“[E]ach contract contains an implicit understanding that neither party will intentionally do anything to prevent the other party from carrying out his part of the agreement.”).

54 Determining what counts as a sufficiently weighty competing consideration can be rather complicated and is itself affected by the relationship between the parties. Between strangers, mere personal inconvenience is usually insufficient to warrant deviation from the promise, since there is no personal relationship between the parties that makes that inconvenience a salient reason for the promisee.
promise is not strictly binding, and when changed circumstances warrant renegotiation or reconsideration.

What we can add to existing accounts of promises as joint decisions is that the normative relevance of joint decisions is shaped in important ways by the other joint projects of the promising agents—e.g., friendship, marriage, or parenthood. It is in this way that the normative force of a promise is shaped by the relationship between the parties. Again, we might see this by reflecting on individual decisions. The projects we engage in as individuals have a kind of interwoven structure. I might engage in the project of writing a paper as part of a host of other projects—e.g., getting tenure, making myself more knowledgeable about some topic, and doing something that I enjoy. These related projects make sense of the specific normative force of the project to write a paper—they contribute to the rationality of decisions about how much to prioritize it, when to give it up, what form the paper should take, and so forth. Similarly, individuals engaged in a joint project of being friends, or parents, say, cannot avoid having that project affect the normative structure of other joint projects that they engage in—such as the agreement or promise to cook dinner. This interwoven structure helps to explain why the simplistic view that is assumed by contract-as-promise theorists—one that reduces promissory morality to the moral requirement that one does what one promises—misses the rather rich texture of how promissory morality actually works across different human relationships. It is this interwoven structure that explains why a contract law that tracks promissory morality will require different doctrines for different kinds of human relationships.

The interwoven structure of promising is most evident when we look beyond the primary promissory obligation to the broader contours of promissory morality that include a complicated and context-dependent set of norms. Those other features of promissory morality include norms for: (1) sorting out what counts as performance, or a sufficient alternative to performance, (2) determining when release is appropriate or required, (3) understanding renegotiation or accommodation of the interests of both parties in light of changed circumstances, (4) navigating a miscommunication between promisor and promisee, (5) determining when a person has a complaint about breach, and when they can fittingly voice that complaint (these are importantly different things), and (6) determining

But between friends, substantial inconvenience might be sufficient. When one friend offers another a ride, and performance becomes substantially more difficult than making alternative travel arrangements would be, the promisee friend typically ought to make other arrangements. Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 717–19 (2011) [hereinafter Bagchi, *Separating Contract and Promise*].

Aditi Bagchi has made a similar point to what I am offering here. *Id.* at 733 (emphasizing that “regulatory norms”—norms about the conditions under which a promise must be kept, what counts as performance, and what happens when a promise is breached—are as essential to understanding promissory morality, as are the norms for identifying what counts as a promise).

See supra notes 45–47 for discussion of this point.
what a promisor’s duty of repair comes to after a breach, in light of, for instance, prior attempts to renegotiate or accommodate the promisee’s interests. As I explain, these features of promissory morality cannot be derived from the overly simple principle that promises must be kept—the principle assumed by most contract-as-promise theorists.

Attending to the additional components of promissory morality highlighted above exposes the impoverishment of a family of what we might call “individualistic” views in promissory and contract theory that treat promises as expressions of an individual power to create moral obligations. Such views treat a promise as the manifestation of an individual’s normative power to take on a duty via an exercise of will, which determines the content of the promise. By exercising her will in this way, the promisor transfers an entitlement to the promisee, and the promisee, as the holder of the transferred entitlement, has discretion in deciding whether to release

57 Prince Saprai argues that these other features of promissory morality exhibit a kind of interpretive pluralism, by which he means that “there is an irreducible plurality of ways in which to interpret values” and a kind of value pluralism—an “irreducible plurality of moral values and no single correct way of resolving conflict between them.” Prince Saprai, Balfour v. Balfour and the Separation of Contract and Promise, 37 LEGAL STUD. 468, 488 (2017). Because of this pluralism, “it is far less clear what the promise principle requires when a promise is broken.” Id. I’m not opposed to the thought that there can be value conflicts and no single right answer regarding how to resolve them. But I suspect that these kinds of conflicts are rarer than Saprai imagines. This is for two reasons. First, in many contexts there is a correct answer about what ought to be done, but figuring it out requires the exercise of a contextualized practical judgment. Good moral agents will sometimes come to see that some act is exactly the right thing to do to make something up to another, say. But its being exactly the right thing to do is a matter of properly assessing a concrete situation, and not something that interestingly generalizes. Second, and relatedly, I suspect that what pluralism there is, is more bounded than Saprai imagines. Saprai notes that the set of possibilities for resolving supposed conflicts in value is not totally open, and that promissory morality “might rule out some obviously inappropriate responses to my breach.” Id. That’s right. Offering to pay money damages to one’s spouse for a broken promise is almost always off the table as a remedy. But he also suggests that our attitudes towards a mitigation requirement, say, might be optional. Id. at 489. That latter claim seems far too broad. The idea that mitigation might be wholly optional across diverse human interactions strikes me as simply wrong. Contrary to what Saprai says, if I break a promise to drive a friend to the airport and my friend doesn’t bother to make alternative arrangements when he easily could, he can’t complain that I caused him to miss his flight (though he might complain that I inconvenienced him). And that conclusion isn’t a discretionary one. Refusal to make alternative transportation arrangements would simply be unreasonable under the circumstances. That said, Saprai’s observations may make more sense as an account of political morality that would limit state enforcement in some cases of value conflict where we have less confidence about how competing values shake out.

58 See, e.g., Kraus, The Correspondence of Contract and Promise, supra note 12, at 1609 (“The moral power to make—and thus the moral obligation to keep—a promise is therefore an axiom of personal sovereignty.”); FRIED, CONTRACT AS PROMISE, supra note 9, at 1 (“The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.”).

59 See, e.g., FRIED, CONTRACT AS PROMISE, supra note 9, at 2 (defending a “will theory of contract, which sees contractual obligations as essentially self-imposed”).

60 See, e.g., Seana Valentine Shiffrin, Promising, Intimate Relationships, and Conventionalism, 117 PHIL. REV. 481, 517 (2008) [hereinafter Shiffrin, Promising, Intimate Relationships, and Conventionalism] (“The conception of the ability to promise for which I have been arguing is one on which a promisor has the ability to transfer a right to make a decision and to act on certain reasons to another party.”). See also DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS, supra note 6, at 33–40 (arguing that the most promising way to justify “legal coercion of the promisor” is through the idea that a promise transfers a right to the promisee). Dagan and Heller ultimately reject transfer theory, and indeed, promissory theories of contract.
promisor. On this conception, promises primarily serve the function of moving around entitlements that are themselves held by individuals. The picture is that of separate individuals whose responsibilities to each other are the by-product of individual acts of volition. However, as the examples below show, this is a misleading conception of how promissory morality actually works. It’s misleading because it seriously underestimates the extent to which promising parties do not live their lives as isolated individuals: they are embedded in various forms of joint activity—e.g., marriage, family, friendship, clubs, committees, and faculty. Those who adopt the individualistic conception, one that is single-mindedly focused on what happens at the moment of successfully making a promise, fail to situate promises within other normatively salient dimensions of the ongoing relationship between the parties. As Barbara Fried rightly comments,

Lawyers and philosophers put a lot of weight on promissory language. But the layperson, I think, is much more likely to view promises as continuous with other forms of conduct (conscious coordination, representations about one’s own expectations, and likely future events) that have the effect of leading others to expect you will do X even if you never explicitly promised you would.

Now to the examples.

B. The Scope of the Promissory Obligation is Limited by the Relationship Between the Parties

Let’s start with a thought that might initially seem controversial: in a large number of promissory contexts, one does not have a duty to do what one promised. Other theorists have observed that promises are conditional in ways that cannot be gleaned by looking only at the promissory utterance. As Joseph Raz puts it, “[p]romises are made by acts of communication, but

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61 See, e.g., Markovits, Contract and Collaboration, supra note 20, at 1432 (“[T]he promisor, through her promise, intends to entrench her pursuit of the ends announced by the promise and to refuse to defect from these ends unless the promisee releases her.”).

62 Even Ian Macneil, who has long argued for the importance of relational norms in contract, conceives of promissory morality as essentially individualistic in nature. See Ian R. Macneil, Values in Contract: Internal and External, 78 NW. U. L. REV. 340, 388–93 (1983) (noting how “contract-as-promise sacrifices a great many relational values”). Macneil sees a promissory grounding of contract as compromising relational values, and as an account that makes sense of “discrete” contracts, but not the long-term relational contracts and associated norms that are his primary focus. Id. at 391–93. This strikes me as the by-product of contract-as-promise theorists single-minded focus on the primary promissory obligation.


64 But framing this in terms of implicit conditions is potentially misleading if it invites the thought that the promissory utterance had conditions that were unstated but there all along. I think it is better to see the conditional nature of the force of a promise not as premised on conditions that might have been antecedently specified were the promisor and promisee to have thought of it, but rather, as a byproduct of the reasons that the promissory utterance creates, and how those reasons might bear on the post-promising circumstances that the promisor finds herself in.
the content of the promise is not the same as what is said in making the promise.  

The most obvious examples that support this conclusion involve promises to do something immoral. But there are other cases that do not involve immoral promises that illustrate the importance of the parties’ relationships in understanding the normative shape of a promise. Indeed, there are cases where those relationships can explain not only why the promisor does not have an obligation to do what they said they would, but also where the promisee might reasonably complain were they to do so. Consider a promise to take another person to see the musical Hamilton. Suppose someone makes such a promise unaware of the fact that tickets are outrageously expensive and hard to come by. What is the proper response upon recognizing the price? There isn’t a single answer here. It matters whether the promise was made within a marriage, or to a friend, or as part of a bargain with a stranger. In the case of a marriage, the promisee-spouse might reasonably complain about performance, insisting that the promisor-spouse should have checked in regarding the purchase. If the ticket cost means incurring financial hardship, then the promisor might err in performing, and in such a case the promisee has grounds to complain about the performance. Why? The most straightforward answer is that the ticket promise is embedded in another joint project—one involving shared finances and mutual decision-making regarding important (financial or otherwise) decisions. This other joint project alters the normative force of the promise. Thus, understanding the relevance of the promise to procure the tickets also requires understanding the prior relationship between the parties.

Were the promisee a friend and not a spouse, then the promisee-friend likely does not have an objection based on a joint project involving shared finances and joint decision-making. But a true friend will prefer to look out for the promisor’s financial interests. A friend who learns of the exorbitant price of Hamilton tickets would likely have a strong reason to refuse performance and suggest another plan. In return, the promisor-friend, out of concern for the friendship, would reasonably join along in formulating a new plan. In fact, where the promisor doesn’t ask to be released, the promisee-friend might reasonably object to the purchase on grounds that she has been prevented by the promisor from acting as a good friend should. There is

65 Joseph Raz, Is There a Reason to Keep a Promise?, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 58 (Gregory Klass, George Lestas & Prince Saprai eds., 2014).
66 Not everyone agrees that immoral promises don’t create obligations. Margaret Gilbert, for instance, invites us to reject what she calls the “immoral promises dogma.” GILBERT, JOINT COMMITMENT, supra note 49, at 301. According to that “dogma” immoral promises don’t obligate the promisor to follow through. Gilbert’s view might strike one as counter intuitive, but she also rejects the idea that a promise creates a moral obligation. Id. at 301–02. And if a promise doesn’t create a moral obligation, but rather a comparatively thin obligation that serves only to explain the special status of the promisee in relation to the promisor, then the resistance to the idea that an immoral promise binds loses some of its bite.
67 I owe this example to a conversation with Daniel Fryer.
something shameful about having a friend suffer at your expense, even if they promised to do so. And if the promisor bought the *Hamilton* tickets, the promisee-friend might reasonably insist that they be resold or criticize the promisor for not bringing up the unexpected cost.

Further, gift promises between friends create a debt of gratitude that neither party has the power to eliminate by fiat. In addition to not wanting one’s promisor-friend to incur a financial hardship, the promisee-friend may not want to be beholden to the promisor in that way. As Jed Lewinsohn observes, “friends calibrate the degree of favors they are comfortable receiving to the strength of their bond.”

Again, all of this makes sense when we situate the promise within another kind of joint project—here, friendship. The moral force of the promise is shaped by the way it fits into a separate joint project of friendship that, let’s hope, takes priority over the joint project of going to see the play on the promisor’s dime.

Things would be different if the promise was made as part of a bargained-for exchange between strangers; “I’ll get you two Hamilton tickets if you give me your bicycle.” There, it’s not clear that the surprisingly high price alters the obligations between the parties, or the conditions of renegotiation. If the promisee performs, the promisor doesn’t have grounds to complain. This is because there are rarely other joint projects between strangers that can alter the force of the promise.

There are a few lessons that we might draw from the *Hamilton* examples. First, we can correctly understand the moral force of the promise to procure tickets only by situating it within other joint projects of the parties, such as friendship or marriage. Second, the moral force of the promise cannot be derived exclusively from the content of what the promisor willed at the time of making the promise. What the promisor willed at the time of making the promise was that they would procure *Hamilton* tickets for a spouse/friend/stranger, but procuring *Hamilton* tickets is precisely what one should not do in some contexts. Third, the promise to procure tickets isn’t simply defeated by the cost. The promise still figures in an explanation of why, for instance, making alternative (less expensive) plans is something that the promisor has reason to contribute to doing. Fourth, the promise to procure *Hamilton* tickets doesn’t create a discretionary power in the

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69 Even some commercial bargains may take on different normative dimensions when the parties have a long-term contracting relationship. For instance, in *Market Street Associates Limited Partnership v. Frey*,Judge Posner held that a lessee would have acted in bad faith by intentionally failing to bring up a contract clause allowing purchase of the leased property if negotiations for funding for improvements broke down, and then attempting to use the lessor’s refusal to provide funds to get the property at a bargain price. *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 594, 596–97 (7th Cir. 1991). As Posner put it, such a contract “set in motion a cooperative enterprise, which may to some extent place one party at the other’s mercy.” *Id.* at 595. *Market Street* illustrates the potential for the duty of good faith and fair dealing to impose contractual requirements that to some degree are tailored to the specific relationships between the parties, even within the sphere of commercial exchange.
promisee to release the promisor. That’s the relevance of saying that a good friend *ought* to suggest a different plan, or otherwise object to the purchase.

C. *The Relationship Between the Parties Alters the Conditions under Which Renegotiation is Fitting and How Renegotiation Ought to Proceed*

Joint projects of the parties, such as friendship or marriage, also affect how the parties ought to respond to changed circumstances, via, for instance, renegotiation of the agreement. Suppose two coworker-friends, Bob and Sue, promise to meet each other at a restaurant they both like at 7:00 PM the following Thursday. Wednesday night Sue works late and has trouble falling asleep. The next morning, she calls Bob and says, “Bob, I barely slept last night, do you mind if we reschedule?” Polite people usually frame such inquiries in terms of a question. If Bob understands Sue’s inquiry as giving him a wholly discretionary power to release her from the dinner plans, Bob would be confused. Bob has to give a good reason for not releasing Sue from her promise. Sue’s question is the beginning of a negotiation where each tries to sort out the weight of reasons for performing, as compared to other options such as canceling, rescheduling, or altering the plan.70

How might that negotiation go? Bob might note that he’s going to be busy with a project at work for the next several weeks, and he’s not sure whether he can otherwise get together before it’s completed. Or he might note that he could really use some advice about something at work, and he might suggest that instead of dinner they get together for a quick drink. But one thing he can’t do is say “I do not release you from the promise, and I expect you to be at dinner at 7:00.” That’s both rude and obtuse. Further, how he responds alters the normative situation that Sue faces. If they can’t meet any other time in the next few weeks, Sue ought to be awfully tired to back out, though maybe that’s a course of action that’s still open to her. If Bob voices a desperate need for advice, she probably ought to go, although she would be permitted to accept Bob’s alternative proposal of getting together for a quick drink, or perhaps even suggest it herself if Bob doesn’t.

What does Bob and Sue’s case show us? First, the example illustrates why we should reject the idea that promises create a discretionary power in the hands of the promisee to release the promisor.71 Again, if Bob were to insist on performance without providing a good reason for it, he’s being

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70 The promise isn’t inert in this negotiation, as the promisor still must prioritize the promisee’s interest in performance over similarly weighty ones of her own. As Aditi Bagchi rightly notes, “[t]he obligation created by a private promise is not simply to perform a specified action, but to regard the decision whether to perform that act, in the future, in a particular manner. A private promisor is normally obligated to give greater weight to her promisee’s interests than her own—how much greater weight will depend on the nature of the promise and the relationships within which it takes place.” Bagchi, *Separating Contract and Promise*, supra note 54, at 719.

71 This is contrary to the sorts of things that some theorists claim. See, e.g., Markovits, *Contract and Collaboration*, supra note 20, at 1432.
obtuse. Indeed, were Bob to do so Sue would have grounds to complain that he is being unreasonable. Still, the promise gives Bob some kind of moral privilege. Because of the promise, Sue owes it to Bob to call him and ask to reschedule, and she has the burden of justifying that result. If she were to simply not show up or insist that they not meet, Bob would have reasonable grounds to complain. The joint project—meeting for dinner—that the promise facilitates means that Sue has certain obligations to Bob regarding how to renegotiate those plans. Of course, Bob also has obligations rooted in the joint projects of the parties to reconsider the plans in good faith. And on occasion, the promisee either ought to release the promisor or renegotiate the promise to accommodate changed circumstances. Just as keeping with an individual decision despite changed circumstances can be unreasonable, so too can be keeping to a joint decision. Some promissory relationships require greater accommodation in renegotiation, and that limits what counts as a complaint-worthy breach. Accordingly, theories that aim to capture the normative force of a promise in terms of an exercise of will at the moment of making the promise will miss much of how promissory morality works in practice.

Second, we can see how the reasons for the promise, in conjunction with the broader features of the parties’ relationship, including other joint projects in which the promisor and promisee are engaged, affect its normative structure. Most of the time, dinner plans with a friend have the point of maintaining a relationship and providing each friend with a pleasant kind of entertainment. But they can also take on another point—perhaps of allowing one friend to provide the other needed support. The conditions for renegotiating performance—either by rescheduling or canceling—hinge on what point performance would serve. The point of the promise both shapes the conditions under which it is reasonable for a promisor to ask to back out, and what counts as a reasonable proposal for an alternative performance. If Sue knows that Bob could use some help right now, she ought not ask to back out in the first place, unless she has a very weighty reason to do so. The point of a promise also alters what counts as a reason for rejecting a promisor’s request to be released. If dinner plans are primarily a way of maintaining a friendship, then “I won’t be able to get together again for several weeks” is a pretty good reason to suggest getting together despite Sue’s tiredness, though Sue’s tiredness counts in favor of drinks rather than dinner. The point of a promise is understood against the background relationship of the parties—and it is rarely made explicit. It matters that Sue and Bob are friends. The story we would tell about a promise to go to dinner

72 Bob also has obligations to Sue arising out of that project. The idea that the promisee has obligations to the promisor is something that many theorists haven’t adequately attended to, but they should. As Margaret Gilbert observes, if I promise to call you later tonight, and you accept, you owe it to me not to take the phone off the hook. GILBERT, JOINT COMMITMENT, supra note 49, at 318. That’s hard to explain if one thinks of promises as exercises of a normative power that creates a right in the promisee, but it makes perfect sense if promises are a mechanism of joint agency.
among strangers might be quite different even if the explicit linguistic content of the promise were the same.

D. Wrongfully Failing to Release and Rightfully Backing Out

There are also conditions under which a promisee has an obligation to release the promisor from the promise and the promisor can legitimately insist on backing out. Suppose that John owns a vacation home and asks his friend, Evelyn, if she might help him to remodel the kitchen. As a friendly gesture (i.e., without pay), Evelyn promises that she will help remodel the kitchen in a couple weekends. In the interim, John decides that he is going to sell the house but doesn’t tell Evelyn. When she arrives, John happily allows her to proceed with the remodel. In such a case, John acts wrongly in allowing Evelyn to do him this favor because his intentions regarding the house have changed. Evelyn has a reasonable complaint upon learning that John has sold the house. She might reasonably complain that John took advantage of her friendship. One might be tempted to say that in such a case, Evelyn has a promissory duty to remodel until John releases her, even though he has a concomitant duty to release. I’m not so sure. If, at a cocktail party during the week, Evelyn hears John mention that he has decided to sell the house, Evelyn would be within her rights to back out. If John were to complain that Evelyn promised, he’s being unreasonable. The point of the promise was to do something nice for a friend, not to help that friend gain an economic advantage through the sale of a home.

Again, notice how different things are if John and Evelyn aren’t friends, and John has hired Evelyn to remodel the kitchen. In that case, Evelyn plausibly ought to remodel the kitchen, regardless of what John’s intentions for the house are. Indeed, one might reasonably conclude that his (morally defensible) intentions are none of Evelyn’s business, and hence, cannot alter the scope of her obligations to him.

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73 This is along the lines of Aristotle’s point in the Nicomachean Ethics when he notes that “one might complain of another if, when he loved us for our usefulness or pleasantness, he pretended to love us for our character.” Aristotle, Nicomachean Ethics, 1165b5, (W.D. Ross trans.). The problem with John’s behavior is that he is using something that was ostensibly a friendly favor for his merely financial gain.

74 One might be tempted to argue that the promissory duty had an implied condition—Evelyn promised to help remodel on the condition that John intends to use the kitchen, and not sell the house. But that sort of move has an ad hoc quality to it. After all, one could identify any condition in which it turns out that one lacks a duty to do what one ostensibly promised to do and insist that this was always an implied condition of the promise. Better is to just admit that promissory duties are defeasible, instead of insisting that the defeating conditions are ex ante components of what was promised. I don’t mean to deny that there could be implied conditions. I just don’t think that we should recharacterize every defeating condition in that way.
E. The Normative Dimensions of a Promise Are Shaped by the Promise’s Point

Let’s dig in a bit more to the importance of the aim or point of a promise and the relationship in which it occurs for purposes of understanding other normative dimensions of the promise, such as what (short of doing what one said one would do) counts as performance, or what counts as a fitting act of repair in the face of a breach. John Gardner gives an example of promising to pick up his stepdaughter from her theater rehearsal. In some cases, that promise could be satisfied through delegation—by arranging to have another person pick her up. But not always. Gardner writes, “if the reason for me to collect her is that she is worried about her father’s level of commitment to her theatrical activities, then woe betide me if I am not the one who is waiting for her afterwards.” Again, this example illustrates that what counts as performance of the promise depends on the relationship between the promising parties—here, a parental one—and on the relevant interests of the parties in the promise, which are themselves shaped by that particular relationship.

Something similar can be said about reparative duties in the face of a breach. Gardner asks us to consider what would happen were he to get a flat tire on the way to picking his daughter up. He notes that if the promise was a response to his daughter’s concern that he wasn’t supporting her activities, then woe betide him if he isn’t the one who is waiting for her afterwards.

Query whether Markovits’s sensible observation here is not totally out of step with what he says in his attempt to provide a more monolithic account of contract and promise. In Contract and Collaboration, Markovits states “[t]he breaching promisor does not just unmake but instead actively betrays the community established by the promise. She pursues ends, through her breach, that do not just depart from but instead contradict her promisee’s ends. The breaching promisor therefore becomes, within the sphere of the promise, an enemy of her promisee.” Markovits, Contract and Collaboration, supra note 20, at 1433. That’s rather dramatic. And it’s not at all plausible as an account of breaching a promise to his daughter, or of a homely decision to cancel dinner plans. One suspects that something has gone awry if Markovits’s comments about “betrayal” are supposed to identify a general truth about promissory morality. Indeed, this is a good example of a disconnect between promissory theorists’ abstract ideas about promises and their more grounded intuitive understanding of how they actually work in practice.

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73 JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 111–13 (2018) [hereinafter GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW].
74 Id. at 111.
75 Or consider Daniel Markovits’s observations about promises to his eight-year-old daughter regarding which restaurant they will go to. He notes that she desires his promise even though “she also knows that, should [he] determine to break the promise, she will be unable even to insist on her promissory rights: [he is] sufficiently more experienced than she is, and she trusts me sufficiently to have the family’s best interests at heart, so that my conclusion that we should abandon the plan to go out notwithstanding the promise will always persuade her either that the promise does not cover the present case or that she should release me from its obligations.” Daniel Markovits, Authority, Recognition, and the Grounds of Promise, in Reviews of David Owens, Shaping the Normative Landscape, with a Response from David Owens, 6 JURIS. 349, 353 (2015). He goes on to note that the promise “is, for her, a matter of status” and reflects a desire on her part to be self-governing—something that small children often feel is missing from their lives—and to have her father recognize her as self-governing. Id. This strikes me as a perfectly sensible thing to say, both in terms of identifying the point of the promise, and the ways in which the relationship that it occurs in shapes its normative force. But query whether Markovits’s sensible observation here is not totally out of step with what he says in his attempt to provide a more monolithic account of contract and promise. In Contract and Collaboration, Markovits states “[t]he breaching promisor does not just unmake but instead actively betrays the community established by the promise. She pursues ends, through her breach, that do not just depart from but instead contradict her promisee’s ends. The breaching promisor therefore becomes, within the sphere of the promise, an enemy of her promisee.” Markovits, Contract and Collaboration, supra note 20, at 1433. That’s rather dramatic. And it’s not at all plausible as an account of breaching a promise to his daughter, or of a homely decision to cancel dinner plans. One suspects that something has gone awry if Markovits’s comments about “betrayal” are supposed to identify a general truth about promissory morality. Id. Indeed, this is a good example of a disconnect between promissory theorists’ abstract ideas about promises and their more grounded intuitive understanding of how they actually work in practice.
76 GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW, supra note 75, at 113.
he might be able to repair the breach by asking a playwright friend to chat
with his daughter after a performance, or by taking her to see a professional
performance of the same play in which she is acting.\textsuperscript{80}

There are some further things we might add to Gardner’s example and
analysis. First, what counts as adequate repair isn’t always whatever most
closely resembles performing what was promised.\textsuperscript{81} It might involve doing
something else to make up for failure to perform. That something else might
involve going more out of one’s way than performance would have required.
We can understand his taking his daughter to see a professional performance
in this way. The point of the promise was to demonstrate support for her
activities, and to repair a perceived deficiency in that regard. Taking her to
see a professional performance is plausibly a fitting way of rectifying the
breach, precisely because it shows support—a repair that would not be
achieved by arranging a taxi while awaiting the tire repair. Properly showing
support must be understood in terms of characteristic features of a parent-
child relationship, and things like dependence within that relationship, the
dimensions of justified authority within that relationship, and the typical
desire of children to seek approval from their parents.

Second, Gardner’s daughter may have a complaint that he didn’t pick
her up, but it’s not entirely clear that she ought to demand anything of him
by way of repair. Indeed, were she to demand that her father make it up to
her, that would have partially stripped the extra reparative step—taking her
to a professional performance, say—of its ability to realize the reparative
function that it might otherwise serve. When repair is demanded, it often
counts for less. This is why demanding repair is very often misguided within
intimate relationships where the point of the promise is to show a kind of
support for the relationship or care for the promisee.

Third, it would be unfitting for almost any third party to get involved in
an interpersonal promissory relationship like that of Gardner and his
daughter. Most relevant for contract law, this includes the state. One reason
why intervention by third parties, including the state, would be inappropriate
is that such parties cannot intervene in a way that serves the point of the
promise within the relationship in which it occurs.

Fourth, none of the aforementioned observations can be gleaned from
what was said (or even what was thought) in making the promise alone.

\textsuperscript{80} \textit{Id.} at 114–115.

\textsuperscript{81} I take my suggestion here to be consistent with Gardner’s “continuity thesis.” \textit{Id.} at 102.
According to that thesis “when a contract was breached or any other wrong was done to another person,
various reasons went unconformed to, and those reasons are still awaiting conformity. The question is
always, what is the best conformity with those reasons that is still available?” \textit{Id.} One might be tempted
to think that my suggestion is at odds with the continuity thesis if one thinks that the reasons created by
a promise are just reasons to perform the promise. But I take it that an upshot of Gardner’s example and
some of the other examples in this paper is that the reasons to perform a promise may be better explained
by the point of the promise and the relationship in which the promise occurs. In the case of the theatrical
daughter, the point is to show support, not to pick the daughter up, even though it is the latter, and not
the former, that was, strictly speaking, promised.
Indeed, understanding the moral dimensions of the promise requires understanding the history between the parties and the nature of their relationship. It matters for the story, for instance, that the daughter had earlier voiced concerns that her stepfather wasn’t adequately supportive of her endeavors. It certainly matters that the relationship is a parental one.

All of this shows that if we are to understand contract law as tracking the morality of promissory complaints made to the state, then the relationship between the parties will be essential to getting the morality, and hence the law, right. We also now have a ready explanation for why legal enforcement of certain promissory breaches between intimates would be misplaced. It would be misplaced because seeking state intervention in the face of a breach wouldn’t plausibly accomplish what repair for breaches of intimate promises is supposed to do. Asking the state to make someone do something by way of repair would be out of step with the point of a great many promises between intimates.

Finally, we can drive home the relevance of the parties’ relationship and the aim or point of a promise to understanding its normative force by considering a case where we strip away any relationship or obvious point. Thomas Pink asks us to imagine approaching a complete stranger who appears to be well-to-do and in no need of money, and gratuitously promising to give them twenty dollars within the half hour.82 Pink remarks, “it is at least arguable that no binding obligation exists at all.”83 I share the intuition that it would be strange to insist that the promisor has an obligation. But we might wonder why that is. Why might such a promise not have any binding force at all?84 I suspect that reservations about any promissory obligation hinge on not having any clear view about what the point of such a promise is, or what sort of relationship this kind of promissory exchange creates. There is no reliance or dependence. Bonds of friendship—either actual or potential—are not at stake. For his part, Pink suggests that the promise doesn’t invoke a relationship of trust, where the trustworthiness of the promisor matters to the promisee.85 Whatever the right analysis, the general lesson is that we find ourselves dumfounded when we strip away from the putative promise anything that allows it to make sense as a form of intentional action aimed at some point or purpose or in service of some other ongoing relationship between the parties. That’s a strong reason for thinking that the moral shape of a promise is bound up with those sorts of features. And that poses a serious problem for predominant theories of promise that would analyze promissory morality in terms of a “power to obligate

82 Thomas Pink, Promising and Obligation, 23 PHIL. PERSPS. 389, 408 (2009) [hereinafter Pink, Promising and Obligation].
83 Id.
84 Contrast a case of promising to watch a stranger’s shopping bags for a moment. In that case, there is an obvious interest served by the promise, and it seems binding on the promisor.
85 Pink, Promising and Obligation, supra note 82, at 411.
If this were the correct account of promissory morality, then the example wouldn’t invite ambivalence. After all, that feature—intending through an act of will to obligate oneself—is just as present in Pink’s example as it is in other cases where the promise is intuitively binding.

F. Promises Between Intimates and Promises Between Strangers

Other theorists writing about the relationship between contract and promise have drawn a distinction between promises between intimates and those between strangers. But they don’t do enough to explain why this is a salient distinction, apart from pointing out that we treat promises in intimate relationships differently, and that legal enforcement might be at odds with the values those relationships support. The account developed here does more on this score. Promises within an intimate relationship are shaped in part by the joint projects that are characteristic of that kind of relationship. It is those other joint projects that explain why, for instance, there can be cases where the promisor ought to release the promisee, or why strictly hewing to the letter of the agreement would be out of place. It is this interwoven structure of joint agency, where specific joint commitments of promises are understood within the broader framework of the joint commitment of the intimate relationship that explains why these relationships are normatively distinct. This contrasts with the arms-length commercial exchange that is the primary business of contract law where the other joint projects, if they exist at all, are normatively much thinner.

An account that sees promises as joint decisions interwoven within other joint projects also goes a long way toward explaining some other features of promises in intimate relationships. And it does so better than an analysis that treats the promise as something that an individual does rather than something that promisor and promisee do together. To see the pitfalls of treating a promise as an individual exercise of a normative power, consider Seana Shiffrin’s analysis of the importance of promises in intimate relationships.

[one]self at will through promising.” If this were the correct account of promissory morality, then the example wouldn’t invite ambivalence. After all, that feature—intending through an act of will to obligate oneself—is just as present in Pink’s example as it is in other cases where the promise is intuitively binding.

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86 Id. at 408.
87 See, e.g., KIMEL, FROM PROMISE TO CONTRACT, supra note 37, at 29–31 (discussing promises to strangers); Bagchi, Separating Contract and Promise, supra note 54, at 730. And some theorists have disagreed about whether promissory morality is paradigmatically a relationship between strangers, or a relationship between intimates. See generally Daniel Markovits, Promise as an Arm’s-length Relation, in PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295–326 (Hanoch Sheinman ed., 2011) [Markovits, Promise as an Arm’s-length Relation] (arguing that promises are prototypically at odds with intimate relationships) and Shiffrin, Promising, Intimate Relationships, and Conventionalism, supra note 60 (arguing that promises are essential to maintaining intimate relationships).
88 Shiffrin and Markovits are an exception, since they go into great detail explaining why promising is especially salient to intimate relationships (Shiffrin) or especially salient to relationships between strangers (Markovits). See Shiffrin, Promising, Intimate Relationships, and Conventionalism, supra note 60; Markovits, Promise as an Arm’s-length Relation, supra note 87. As should be clear by now, promising figures into each of those kinds of relationships, but works differently in each. I can see little point in insisting that one or the other of those kinds of relationships is more central for understanding promissory morality.
Shiffrin asks us to consider a couple deciding whether to move to a different city. As she explains, if one person can only announce a present intention to move, but cannot commit themselves to moving, this can leave the other vulnerable. True. But Shiffrin uses this observation to underwrite an individual power to bind one-self to another via an exercise of the will. If we are to assume that the couple have some sort of deep interpersonal relationship, as I suspect Shiffrin imagines, then we can more fruitfully see the decision to move to a new city in light of the joint project of intimacy. The commitment to move will itself be shaped by the joint commitment to look out for each other’s happiness and to forge a life together. That other joint commitment—the one that strikes me as morally weightier—makes no appearance in Shiffrin’s normative story about the force of the promise. This, I suspect, is a by-product of thinking about promises in terms of an exercise of the will—something that an individual, in theory, can do on their own—rather than as a component of a kind of joint activity.

Shiffrin’s failure to treat the commitment to move to another city as interwoven within the commitment to an intimate relationship leads her to say things about the normative effect of the former commitment that strike me as misguided. For instance, she wants to characterize the promise to move to another city as “transferring” the power to decide about the perceived merits of moving to the promisee. And she characterizes the promise as creating the power in the promisee to insist on or release the promisor. As she puts it, “[b]y promising to φ, the promisor transfers his or her right to act otherwise to the promisee.” But that can’t be right. If Sam and Chris are married and Sam promises to move with Chris to New York City, but upon arriving there Sam has a hard time finding a job or friends and becomes miserable and proposes that they move back to Ann Arbor, it would be morally obtuse for Chris to insist that Sam had transferred the power to decide where to live to Chris. That way of characterizing the power relationship between the two is wholly at odds with the norms of the other joint project—marriage—that they are engaged in. Deciding where to live is one of those ongoing joint decisions that married couples have to make. If the relationship is one of equals, one spouse cannot ever wholly transfer the power to make that decision to the other, by promise, or otherwise. A transfer of that sort is at odds with the idea that a married couple is engaged in a joint project of sharing a life together and taking each other’s well-being as a constant and ongoing constraint on what each spouse should do individually. The problem with Shiffrin’s analysis is that it treats the promise as something that an individual does, rather than as a component of

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89 Shiffrin, Promising, Intimate Relationships, and Conventionalism, supra note 60, at 503.
90 Id. at 504.
91 Id. at 506.
92 Id. at 507.
93 Id. at 517.
something that the promisor and promisee do together. We better capture the normativity of a commitment to move to another city in terms of a kind of joint agency, including a joint project of being married, or otherwise intimate, and not in terms of some act of will that has a separable normative foundation and transfers a moral entitlement.

G. Other Joint Projects Impose Substantive Limits on What One Can Promise

I want to close this Part with an observation that will be important when I turn to the law of specific kinds of relationships: the sorts of other joint projects between the parties substantially limit the kinds of promises that the parties can make. If one friend tries to specify all the terms of her friendship with another, by, for instance, dictating her maximum number of weekly hours of interaction, she shows that she does not understand friendship. The idea that we might voluntarily shape the terms of all of our relationships with others is simply confused, and indeed pernicious. To try to specify ex ante the rights and obligations within a marriage or within a friendship is to try to opt out of friendship, or of the relationship of mutual support that is characteristic of good marriages. Those sorts of relationships have an ongoing life that requires flexibility and adaptability by the participants.

Thus, there are limits on what one can voluntarily agree to while still maintaining a friendship or marriage, say. One might be able to choose a role—friendship, marriage, employer—but one cannot exert voluntary control over many of the details of the relationship within that role. As a general rule, the normatively thinner the relationship is, the more power one has to set its terms. One might be able to choose a role, but one cannot exert voluntary control over many of the details of the relationship within that role.

94 It is for this reason that I am deeply skeptical of Kraus’s “personal sovereignty” account of promises. Kraus argues that his “personal sovereignty” account supports the view that remedial duties should also be subject to the will of the parties to the promise. If they wish to specify expectation damages, then so be it. Kraus, The Correspondence of Contract and Promise, supra note 12, at 1629–30. And indeed, he justifies expectation damages as a default rule for contract on grounds that it is the remedial rule that most promisors would choose. Id. at 1632–33. If they wish to specify apology as the only remedy, then they can. But one cannot plausibly choose remedial duties in the way Kraus imagines. What it takes to make things up to someone we’ve wronged isn’t something over which we can ex ante exert voluntary control. In a great many promissory contexts, saying to the promisee “I promise to X, but if I don’t X, only expect a half-hearted apology from me” is morally perverse. Imagine saying that to one’s spouse when one had just promised to be more supportive of their career efforts. This is a good reason to think that whatever Kraus has argued for with his “personal sovereignty” account, it’s not a general account of promises. And there is even better reason to think that “personal sovereignty” as a framework for human interactions is something we would have good moral reason to reject.

95 A closely related idea makes an appearance in the Second Restatement of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 190(1) (AM. L. INST. 1979) (“A promise by a person contemplating marriage or by a married person, other than as part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.”).
governing all kinds of human relationships. That sort of approach would simply destroy a great many valuable ways of relating to one another.

IV. PROMISES, JOINT DECISIONS, AND CONTRACT DOCTRINE

In a moment, I want to highlight some implications of the view developed here for contract doctrine. But it’s worth pausing to take stock of where we are. So far, I’ve argued that our promissory practices indicate that the normative force of a promise is shaped by the relationship in which it arises and by the point of the promise. More specifically, it is structured by the interwoven joint projects of the parties constituted by those relationships. This fact has been obscured, I’ve claimed, because of the unfortunate focus of many contract-as-promise theorists on the primary promissory obligation, with little to no attention to other normative features of promissory morality. That narrow focus has led to an impoverished view of how promissory morality works. It has also led to a mistaken conception of when a person can be seen to legitimately complain about a supposed promissory breach. Whether a person can legitimately complain to a court for a remedy depends on the relationship between the promisor and promisee, and the normative conditions related to requirements of release, accommodation, or renegotiation that are fitting for that sort of relationship. Those relationships shape the strength of a promise by determining the force and scope of the primary performance obligation, when release or backing out is appropriate, or when and how the parties ought to renegotiate the agreement. If something comes up, and the promisor has a good reason to back out, the promisee—friend must take the promisor’s interests into account in figuring out alternative ways to satisfy the point of the performance (and is obligated to do so in a different way than a promisee inventory-supplier).

As I mentioned earlier, the law already partly reflects the idea that there should be different bodies of law for different kinds of contracting relationships. For instance, the American Law Institute recently released a draft restatement specific to consumer contracts. There is a Uniform Premarital Agreement Act. There are specific statutes and case-law rules governing things like parenting agreements. The Uniform Commercial Code differentiates between exchanges that involve merchants and those that don’t. If one thinks of promissory morality as working the same way across all kinds of promissory relationships, then any divergence in the law across different kinds of relationships must be based in non-promissory concerns.

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99. See, e.g., U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM’N 2023) (between merchants, additional terms become part of a contract absent specified conditions).
An attractive upshot of the view of promissory morality that I have defended here is that contract-as-promise theorists need not see these other areas of law in that way. On the view of promissory morality that I recommend, we should expect different bodies of law governing different kinds of promissory relationships, not in spite of promissory morality, but because of promissory morality, which varies substantially across different kinds of relationships.

So far, my examples have been largely based in what we might call thick interpersonal relationships, and one might wonder about the implications of the view on offer here for the standard case in contract law—the arm’s length bargain. In the remainder of this Part, I explore the implications of a joint decision account of promissory morality for certain contract doctrines operating within the commercial sphere. Many doctrines that have been thought to be a problem for the contract-as-promise thesis can be accommodated on the joint-decision model offered here. Indeed, these doctrines only seem to be a problem because of the cramped view of promissory morality that most contract-as-promise theorists assume.

To be sure, it is not my aim here to argue that all contract doctrine tracks the morality of promise on the joint decision model. Indeed, it would be an astonishing fortuity if a body of common law that has evolved stepwise over centuries, in the hands of diverse judges with substantially different moral outlooks and concerns, happened to exactly track any specific account of promissory morality. But the joint-decision model better allows us to retain the attractive notion that promissory morality is of central justificatory force, and allows us to bring into the fold many doctrines that have heretofore been seen as aberrations for those who would ground contract in promissory morality. In the remainder of this Part, I first show how a joint-decision account of promises can shed new light on impossibility, frustration of purpose, and fraud, duress, and coercion doctrines. I then turn to the

100 That said, the best account of many relationship-specific rules might be non-promissory in character.
101 Perhaps Prince Saprai is right in thinking that we should be skeptical of attempts to ground all of contract in a promissory foundation. See generally PRINCE SAPPRAI, CONTRACT LAW WITHOUT FOUNDATIONS, supra note 8. That said, it is worth considering how much promissory morality, properly understood, deviates from what Saprai ultimately defends. Saprai’s main thesis is that contract is ultimately grounded in a plurality of values, of which the promise principle is only one. Id. at 3–5. Those values include “preventing exploitation, security of transactions, reliance, [and] fairness.” Id. at 17–18. But once we have a more capacious account of promissory morality that gives up the misguided fixation on the supposed obligation to do what one promised, and instead looks to other features of promissory morality such as obligations to release or renegotiate, and conditions under which complaints about breach are appropriate, it isn’t at all clear that promissory morality itself doesn’t already accommodate everything Saprai points to. Indeed, it is plausible that things like preventing exploitation, reliance, and fairness will partially explain why release or renegotiation makes sense as the thing to do under the circumstances, or why a promisee lacks a legitimate complaint about a breach. See Cornell, A Complainant-Oriented Approach to Unconscionability and Contract Law, supra note 15, at 1144–53.
102 Even if every common-law judge attempted to have contract doctrine track promissory morality, there has been enough disagreement about how promissory morality works that we might expect the law to fail to track any one single account of promise.
consideration doctrine and explain how the joint-decision account can inform a new understanding of that doctrine’s function.

A. A Joint Decision Account of Promissory Morality and Frustration of Purpose, Impossibility, and Fraud, Duress, and Coercion Doctrines

In Contract as Promise, Fried struggles with the doctrines of frustration and impossibility. He concludes that the defining feature of frustration and impossibility cases is that there was no agreement about what to do in the event that a specific risk comes to pass.103 He considers two coronation cases—Griffith v. Brymer104 and Krell v. Henry.105 In those cases, owners of rooms along Edward VII’s planned coronation route rented the rooms to would-be viewers of the proceedings at elevated prices.106 Edward became ill, and the coronation was canceled.107 Fried observes that the parties had no agreement about what to do in the case that Edward’s coronation was canceled.108 Because he sees promissory morality as consisting solely of the obligations that the parties willed into existence, he is thus forced to look outside of promissory morality, and hence outside the core of contract law to decide how those cases ought to be resolved.109

But thinking of promises, and so contract, in terms of joint decisions provides a compelling account of these doctrines from within promissory morality. In the case of frustration, the end that is the agreed purpose of the joint action—watching the coronation—is no longer attainable given the agreed upon means—renting some rooms. Properly understood, the parties have jointly decided that one will rent out a room for the sake of allowing the other to watch the coronation. The court in Krell, for instance, noted that the owner of the room had advertised that they were available “for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27.” Once the coronation was canceled, carrying through on that joint decision became irrational—one cannot rationally continue to pursue a means that is no longer conducive to its end. This is why the contract ceased to bind.

Thus conceived, there is no need to treat the frustration of purpose doctrine as a default rule that apportions risk.111 One could enter into a risk-apportionment agreement. But assuming that risk-apportionment is a hidden salient feature of every promise, and hence contract, is a mistake. If I

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103 Fried, Contract as Promise, supra note 9, at 58–65.
104 Griffith v. Brymer (1903) 19 TLR 434 (UK). Technically, Brymer can be construed as a mistake case since the parties entered into the contract after the king had already fallen ill.
105 Krell v. Henry (1903) 2 KB 740 (UK).
106 Id. at 740.
107 Id.
108 Fried, Contract as Promise, supra note 9, at 60.
109 Id.
110 Krell, 2 KB at 750.
111 Fried, Contract as Promise, supra note 9, at 63–64 (framing frustration and impossibility cases as establishing a default rule that apportions risk that the unforeseen event comes to pass).
promise my wife that I’ll pick up black beans on my way home from work and all the beans in the city have been contaminated, it’s enough to say that our joint decision has been thwarted, and that given the point of the promise (to enable us to cook bean burritos for dinner), it would be unreasonable to drive to another city to procure the beans. There is no need to inflict an apportionment-of-risk framing on the agreement because apportionment of risk just wasn’t a salient feature of the interaction. Similarly, it is a mistake to insist that apportionment of risk was a salient feature in the coronation cases. Rather, it is enough to say that the parties had formed a joint intention to engage in a specific course of action for a specific purpose. When that purpose could no longer be achieved, continuing would be irrational.

Of course, one might wonder why we should characterize the joint intention as renting the room for a specific purpose, rather than renting the room simpliciter. Which characterization is appropriate depends on what the parties had actually decided—had they decided to X simpliciter, or had they decided to X for the purpose of Y? The Restatement captures this distinction by noting that the frustration doctrine applies only when the principal purpose of the agreement is frustrated.112 This is also a distinction identified in Krell. There the court was keen to emphasize that both parties took viewing the procession to be the point of the contract.113 Nothing prohibits the parties from reaching an agreement that requires payment regardless of whether the coronation takes place. But that’s simply a different joint decision—one that rents rooms simpliciter rather than for a specific purpose. If that’s the joint decision, then there is nothing irrational about continuing to perform, even if one of the parties might be disappointed by the cancelation of the coronation.

Impossibility cases—those where performance is no longer practicable—can similarly be captured on a joint decision account of promises.114 A joint decision account allows us to see how the role of the impossibility doctrine is not, as Fried would have it, a gap-filling device that apportions risk for the parties when they fail to do so.115 Rather, it is a device capturing the rational dimensions of the joint agreement that the parties actually made. Just as in an individual case where it would be irrational to carry through with a decision to X when X is no longer possible or practicable, it is unreasonable for joint agents to carry through with a decision that is no longer possible or practicable. Again, the impossibility doctrine is something we should expect based on the rationality of joint decision-making. Insisting that the law imposes a default rule apportioning risk in the event that performance is impracticable is unnecessary. Of course,

112 Restatement (Second) of Contracts § 265 cmt. a (Am. L. Inst. 1979).
113 Krell, 2 KB at 750.
114 See Restatement (Second) of Contracts § 261 (Am. L. Inst. 1979) (stating that a duty to render performance is discharged when performance is made impracticable by circumstances outside of the would-be performer’s control).
115 Fried, Contract as Promise, supra note 9, at 60.
parties can adopt hell or high-water clauses. But again, that is just a different joint decision—one that specifically apportions risk. While it is irrational to expect someone to perform the impossible, it isn’t irrational to apportion financial risk associated with unforeseen events. The apportionment of risk creates a different kind of joint agreement rendering it no longer irrational for one party to expect payment by the other.

Similarly, fraud, duress, and coercion doctrines can also be explained from within a joint decision account of promissory morality. When a person is engaged in fraud or coercion or exercises undue influence, she isn’t engaged in making a joint decision with the promisor in good faith. That’s why they can no longer insist on performance. Importantly, the joint decision account explains why the promisee loses the right to insist on performance without recourse to a lack of consent.

The conditions of consent are complicated, in part because criteria for ideal consent come in degrees—I can be more or less informed, have more or less of a chance to reflect, or be under more or less pressure. But where one party exerts coercive pressure, or defrauds another, the coercing party cannot be said to be engaged in joint decision-making in good faith, regardless of what we want to say about the promisor’s consent. It is the failure to engage in good faith joint decision-making that explains why the promisor loses the ability to complain about non-performance.

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117 See deKenessey, Promises as Proposals in Joint Practical Deliberation, supra note 50, at 217 (“When I deliberate in bad faith, I am not jointly deliberating at all: I am just pretending to do so. This failure to participate robs our interaction of the mutuality that is essential to joint decision-making. We are not deciding together, and so we cannot decide anything together.”). If bad faith deliberation prevents a joint decision from being made, then it might seem to follow that a joint decision view of contract entails that there is no contract. But contract doctrine distinguishes between fraud in the factum which voids the contract, and fraud in the inducement which merely makes the contract voidable. See RESTATEMENT (SECOND) OF CONTRACTS § 163 (AM. L. INST. 1979) (fraud in the factum); RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. L. INST. 1979) (fraud in the inducement). Where there is fraud in the factum, there is no joint decision at all, and so we get the expected result on the joint decision model. But why, on a joint decision model, should the contract be voidable, and not void where there is merely fraud in the inducement? As I see it there are two possible ways to go. One view could embrace the idea that the defrauding party’s bad faith does undermine the mutuality necessary for a bona fide joint decision but claim that a separate equitable principle protects the defrauded party if they still find the transaction beneficial. Another view could say that where there is fraud in the inducement, the parties have made a joint decision under some description—e.g., to sell a house. But when the seller hides a termite infestation, the seller’s deception means they can’t legitimately complain about the buyer backing out. Thanks to Nico Cornell for encouraging me to address this doctrinal issue.

118 Note that this is in keeping with the structure of the fraud/misrepresentation doctrines as described in the Second Restatement. For instance, the Restatement focuses on the mental states of the misrepresenting party, rather than on facts about the misled party. RESTATEMENT (SECOND) OF CONTRACTS § 162 cmt. b (AM. L. INST. 1979). And it is not necessary to show that absent the misrepresentation the misled party would not have agreed to the contract. RESTATEMENT (SECOND) OF CONTRACTS § 167 cmt. a. (AM. L. INST. 1979). Thus, even if the misled party’s agreement was overdetermined, the contract can still be voidable.
B. Shedding Light on the Consideration Doctrine

Contract law’s consideration requirement has long been thought to be an embarrassment to the contract as promise thesis. After all, promissory morality has no consideration requirement. Indeed, the consideration doctrine has been described as “[t]he largest quarrel Contract as Promise has with standard doctrine.” The apparent tension is pretty straightforward: one can engage in unilateral promises without any reciprocal promise or exchange. If this is so, the thought goes, contract law diverges markedly from promissory morality. In promises, unilateral promissory duties are possible, in contract, barring some exceptions such as promissory estoppel, unilateral contract duties are not. From this perspective, consideration doctrine looks like a limit artificially imposed by contract law.

But in light of the foregoing discussion, we now can see our way to a solution to this supposed problem. The function of consideration is to pick out a type of promissory relationship—one involving bargained-for exchange, paradigmatically between strangers—that has its own moral dimensions which are different from, for instance, gratuitous promises between friends. Thus conceived, the consideration doctrine functionally limits the force of contract law to relationships where it is safe to assume (1) that the point of the agreement is economic (as opposed to relationship-building, or trust-inducing, or care-demonstrating), and (2) where the state’s intervention is unlikely to be at odds with the point of the promissory relationship (as it would be with promises between a parent and child that have the point of demonstrating care and concern, for instance). Thus conceived, contract law—understood as the subject that takes up the bulk of 1L contract classes—isn’t the law of all promises or promissory morality writ large. Indeed, in light of the foregoing, it should be apparent that seeking to provide a uniform law of promises is as unmotivated as seeking to provide a uniform law of relationships—we need different law for different promises, and different law for different kinds of relationships. Contract law is the law of the bargain (perhaps with an appendix covering detrimental reliance that could easily be folded into tort). And if promises work

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119 See FRIED, CONTRACT AS PROMISE, supra note 9, at 28–39 (discussing the tension between consideration and the idea of “contract as promise”).

120 See id. at 29 (noting that “[i]t is the doctrine of consideration that leads some to see contract as distinct from promise”).


123 Lewinsohn, Paid on Both Sides, supra note 68, at 757–58.

124 Admittedly, even the Second Restatement adopts rules limiting the enforcement of agreements within familial relationships. RESTATEMENT (SECOND) OF CONTRACTS §§ 189–191 (AM. L. INST. 1979). It treats these limits as “public policy” constraints on promises. In contrast, the view developed here can see something like them as a natural by-product of promissory morality itself.

125 Thanks to Sherman Clark for suggesting this framing of the point.
differently in different kinds of relationships, then the consideration doctrine need not be an embarrassment for contract as promise. Rather, it is a necessary mechanism for narrowing the scope of the relationships covered by contract law so that the law might have a chance of correctly tracking at least one narrow corner of promissory morality.

In this vein, it is worth asking what the moral dimensions of the bargain relationship are. I’ve already identified a few features of bargain: the consideration doctrine limits contract law to promises, the point of which is primarily economic and not trust-inducing, or care-demonstrating, say. While it is not my aim to fully flesh out the details of promissory morality between strangers here, in a recent paper, Jed Lewinsohn has gotten us off to a good start in identifying some other moral dimensions of the bargain.  

Lewinsohn argues that bargain-exchanges have two normative characteristics. First, a party’s performance satisfies a debt incurred by the other party’s performance. Second, performance by both parties means that neither party has any lingering obligation grounded in the other’s performance. This includes obligations of gratitude, for instance. In short, the characteristic feature of a bargain is the mutual understanding by both parties that reciprocal performance will leave both parties “all paid up.” Lewinsohn’s characterization of the normative features of the bargain should be familiar. Typical transactions in the sphere of commerce have the quality of leaving the parties in the same normative relation to each other after performance as before the agreement. That is, neither owes the other anything. In contrast, as Lewinsohn explains, in the typical case where one friend agrees to help the other and the other to help the one, “the parties will not typically walk away from this sequence with no debts of gratitude; rather, at least in many cases, they will walk away with two.” And what differentiates a bona fide quid pro quo exchange—the primary subject of a contract class—from the friendly exchange of aid, Lewinsohn rightly

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126 See generally Lewinsohn, Paid on Both Sides, supra note 68 (discussing the morality of the consideration doctrine).  
127 Id. at 700–01. To be sure, Lewinsohn is arguing for a clarification of consideration doctrine, that in some ways deviates from the way it is sometimes formulated. His aim is to reject accounts of consideration based on the motives of the parties, where something is consideration if it is offered to induce a return promise. Instead, he characterizes consideration in what is, to my mind, a much more natural account of bargains—the performance by each party is taken to be full payment for the performance of the other. His account has the advantage of eliminating from the scope of the consideration cases of joint planning within a family, say, for instance, a couple might agree that one will pick up some new furniture, and the other will buy groceries. It would be a rather peculiar relationship if getting groceries was seen as resolving a debt incurred by the other getting the furniture. See id. at 732 (discussing that “[w]hen friends or members of preexisting cooperative units commit to plans involving the coordination of their activities, the ensuing obligations are not typically regarded as debts”).  
128 Lewinsohn, Paid on Both Sides, supra note 68, at 700–01.  
129 Id.  
130 Id. at 734 (emphasis omitted).
claims, is the “instrumental, non-altruistic” motives of the parties to the exchange.133 Consideration doctrine, thus, functions to preclude the legal enforcement of agreements in intimate relationships where quid pro quo exchange rarely occurs.134

While Lewinsohn is basically right in identifying some of the normatively distinct features of bargain-promises, he further argues that consideration doctrine is merely a proxy “to keep contract in its place.”135 This is effectuated by “invalidat[ing] promises and commitments made in personal, intimate contexts when the parties to such agreements have not expressly manifested an intention to establish legal relations.”136 Consideration doctrine thus succeeds in keeping contract out of intimate relationships because the sort of quid pro quo exchange picked out by consideration doctrine is rare between intimates.137 But I don’t think that we need to treat consideration as a mere proxy. Instead, the rule functions to pick out a normatively distinct kind of promissory relationship. Thus, on offer in this Article is the sort of account that Lewinsohn considers but doesn’t endorse. As Lewinsohn puts it, “[p]erhaps the reciprocal payment relation that I have identified possesses just the kind of significance that could justify the [consideration] requirement without appeal to other factors. I am open to that possibility but have not yet seen how the case can be made.”138 While a bargain-promise may not obviously diverge from a promise between friends with regard to the primary performance obligation, it varies substantially with regard to the additional normative features of promissory relationships that I have identified—dealing with renegotiation, the obligation to release, et cetera. Strangers engaged in an arms-length bargain don’t have interwoven joint projects that ground those other duties. Relatedly, relationships between strangers lack the resources to ground a substantive basis for reconsideration and renegotiation. This is reflected in the law which imposes no requirement to renegotiate based on changed circumstances, and only releases a promisor from an obligation in conditions that are narrower than would be appropriate in promises between friends, say.139

Recognizing that there are different kinds of promises and that bargained-for exchange is a distinct type that is picked out by contract law also provides a ready response to Shiffrin’s worry that “the divergent treatment of agreements in contract would exert a subtle influence over time

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133 Id. at 734–35.
134 Lewinsohn, Paid on Both Sides, supra note 68, at 758–59.
135 Id. at 756.
136 Id.
137 Id. at 757–58.
138 Id. at 770.
139 See, e.g., Kel Kim Corp. v. Cent. Mkt., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (noting that impossibility doctrine is “applied narrowly” and that the defense is available only in “extreme circumstances.”).
on how seriously the moral agent regarded unilateral promises and how casually she regarded promissory breach.”

If promissory morality varies based on the relationships in which the promise occurs, then two results follow. First, it would be a mistake to think that the normative force of the promises involved in contracts had to be the same as the normative force of promises involved in friendship. Second, the effect on how we conceive unilateral promises that Shiffrin imagines is not likely to occur. Minimally morally astute individuals can distinguish the normative force of a marital promise, or a gift promise from that of a bargain. There is little reason to worry that the norms of one of these things might creep into the norms of the other.

V. THE LAW OF RELATIONSHIPS

In this Part, I illustrate some further practical upshots of the main theoretical idea developed here—that if the law is to track promissory morality, the relationship between the parties should alter their legal claims. I start with a couple of examples from family law—marital agreements and parenting agreements—where courts already adopt different rules that, I shall argue, are well-suited to the interwoven-joint-project structure that I have described above. I then turn to employment and consumer agreements to consider how the law in these areas might be structured so as to respect the sort of relationship-based norms that I have defended in this Article.

A. Marital Agreements

Marital agreements present one area where courts explicitly recognize a form of relationship with its own normative structure and constitutive values. Courts evaluate the force of agreements within the marital relationship in ways that do not reflect merely what the parties willed. As Hanoch Dagan has observed about marriage, it involves a “plural subject that generates the potential for intimacy, caring and commitment, and meaningful self-identification. The projects of marriage, including the common management of resources, facilitate these virtues by providing opportunities for an intensive, long-term fusion of the couple.”

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140 Shiffrin, The Divergence of Contract and Promise, supra note 39, at 741–42.
141 The discussion here will necessarily be suggestive. Excavating the normative structure of any one of these relationships and the effect that structure has on determining the normative force of a promise could be a full article in itself. I aim here to provide the basic skeleton of how such an analysis might proceed to serve as the basis of such further projects.
142 Gregg Strauss has argued that marital status norms are an ineliminable component of how the state ought to deal with marital agreements. Gregg P. Strauss, Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage, 90 Ind. L.J. 1261, 1262 (2015).
Massachusetts Supreme Court put it, “[m]arriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise.”\(^\text{144}\) In part, because of the normative structure of marriage—it is a joint project of a certain kind—the court embraced a “fair and reasonable” test for assessing the degree to which a prenuptial agreement would be enforced.\(^\text{145}\) It was keen to emphasize that this test differed from the unconscionability test used “for testing the validity of a business agreement” that would be “inappropriate in [the marital] context.”\(^\text{146}\) Thus the court recognized one theme of this paper—the norms that make sense in one sort of promissory relationship—e.g., a business relationship—don’t make sense in another—e.g., a marriage. In a similar mode, the New Jersey Supreme Court has proclaimed that “contract principles have little place in the law of domestic relations.”\(^\text{147}\) The court emphasized that “[t]he equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted.”\(^\text{148}\)

The idea that marital agreements may be altered based on changed circumstances is hard to situate within the austere view of promissory morality that focuses on the primary promissory obligation and fails to properly situate promises within the normative structure of other joint projects. Defenders of that view of promissory morality are forced to look to other non-promissory justifications for the equitable rule, such as instrumental public policy concerns related to protecting a spouse from poverty.\(^\text{149}\) But the richer conception of promissory morality defended in this Article provides the resources to understand the relevance of changed circumstances to the enforceability of marital agreements from within promissory morality. The normative force of a promise includes the conditions under which one can reasonably expect deviation from the terms of the promise based on changed circumstances. And those conditions are determined, in part, by the sort of relationship in which the promise occurred.

\(^{144}\) Dematteo v. Dematteo, 762 N.E.2d 797, 809 (Mass. 2002).
\(^{145}\) Id. at 805.
\(^{146}\) Id. at 810.
\(^{147}\) Lepis v. Lepis, 416 A.2d 45, 50 (N.J. 1980).
\(^{148}\) Id.; see also Gross v. Gross, 464 N.E.2d 500, 509 (Ohio 1984) (“Although we have held herein that such provisions in an antenuptial agreement generally may be considered valid, and even though it is found in a given case upon review that the agreement had met all of the good faith tests, the provisions relating to maintenance or sustenance may lose their validity by reason of changed circumstances which render the provisions unconscionable as to one or the other at the time of the divorce of the parties.”).
\(^{149}\) Or they may decry the rule.
B. Parenting and Custody Agreements

Parenting agreements are another area where courts often refuse to enforce the facial terms of an agreement. As Sarah Abramowicz has observed, courts are reluctant to enforce both pre-marital and post-marital (where there is still an intact marriage) custody agreements.\(^{150}\) Courts reason that “parents cannot bind the courts by their private contracts when it comes to custody, because a court making a custody decision must be given the discretion to protect children’s interests.”\(^{151}\) In the context of pre-marital custody agreements courts are also hesitant to treat parents as having bound themselves with respect to a child who is not yet born, or with whom a relationship has not yet been established.\(^{152}\) In addition, most courts will not enforce custody agreements where enforcement is at odds with the best interests of the child.\(^{153}\) Also, courts are open to reconfiguring the terms of such agreements, even when they are initially accepted by the court, for example, “where parents have agreed to share decision-making authority but have not been able to do so without generating conflict.”\(^{154}\)

We can think of the enforcement of a custody agreement in terms of whether the party seeking enforcement has a legitimate complaint given the kind of relationship that is (or at least ought to be) at stake. Whether there is a legitimate complaint for a violation of the agreement is in part shaped by the other shared projects that the court is justified in attributing to the relationship—to try to do what is in the interests of the child or to try to further the joint project of raising a child. Parents, even divorced ones, are (or at least ought to be) engaged in a joint project of raising their children well. Notice here that the joint project shapes the moral contours of the promise, and it thereby shapes what sorts of complaints one could reasonably bring given changed circumstances. Changed circumstances are a fact of life, and in a parenting relationship they ought to figure into each party’s decision regarding renegotiation of an agreement. There are

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\(^{150}\) Sarah Abramowicz, Contractualizing Custody, 83 FORDHAM L. REV. 67, 76 (2014) [hereinafter Abramowicz, Contractualizing Custody].

\(^{151}\) Id. (citation omitted).

\(^{152}\) Id. (citing Spires v. Spires, 743 A.2d 186, 187 (D.C. 1999)). In Spires one judge was so taken aback by the terms of the agreement that he described its “legitimiz[ation] [of] absolute male domination and female subordination within the marital relationship” as “against the public policy of this jurisdiction.” Spires, 743 A.2d at 192 (Schwelb, J., concurring). And he found it “remarkable that a husband who has contrived to secure his wife’s formal written assent to the husband’s assertion of supremacy would then have the temerity to ask a court to enforce such an oppressive document according to its terms.” Id. I take this to be in keeping with the basic framework I’ve defended here.

\(^{153}\) Abramowicz, Contractualizing Custody, supra note 150, at 79–80. For her part, Abramowicz wants custody agreements to be more readily enforced. I stress that I in no way aim to stamp an all-encompassing uniform and perhaps parochial form on all parenting arrangements or marriages. My point, rather, is that it is unreasonable to treat all marital agreements or parenting agreements in the same way that one would treat a commercial agreement, since normatively they are likely to differ regarding things like when renegotiation is required, and when a person has a legitimate complaint about deviation from the agreement.

\(^{154}\) Id. at 82, 84–88 (discussing rules governing the modification of custody agreements).
constraints on the sorts of demands that parties to the agreement might reasonably make. In the midst of a custody disagreement a person who demands state intervention to enforce an agreement (or refuses to renegotiate the agreement) without serious consideration of the interests of the child is making an unreasonable demand. The law reflects this idea that any parenting or custody agreement’s normative force is shaped by the more fundamental joint project—raising a child—that both parties are presumed to be engaged in.

C. Employment

A joint-decision view of promise can also provide a framework for thinking about employment law in a way that doesn’t simply resolve into debates over consent and coercion. In thinking about employment we could instead focus on the features of that distinct kind of relationship. We could ask what the force of putative agreements within that kind of relationship would be, and how this limits legitimate complaints by the employer. What is distinctive about the employment relationship? Many employees are reliant on their employer for their subsistence and health care, and face walk-away costs that are often crippling. Most employees also have a kind of relationship with their employer that differs in important ways from that of the prototypical commercial bargain. Employment relationships are (and are usually presumed to be) ongoing and there aren’t clear boundaries as to what is being exchanged for what, such that there is a definitive end-point constituting the completion of the promised act. The character of the workplace is often one of an extended joint project, not one where individuals seek out only their own subjective benefit. Many people feel some sense of ongoing obligation to the joint projects of the workplace—and hence feel the need to provide notice before leaving, for instance. And they might reasonably expect that sense of loyalty to be

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155 For an example of a paper focused on the rather theoretically fraught concepts of consent and coercion, see Samuel R. Bagenstos, Consent, Coercion, and Employment Law, 55 Harv. C.R.–C.L. L. Rev. 409 (2020) [hereinafter Bagenstos, Consent, Coercion, and Employment Law] To be sure, I do not mean to deny that consent and coercion might plausibly figure into an assessment of employment law, or in moves for law reform.

156 See ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 56 (2017) (noting the serious burdens employees would face in quitting).

157 See DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS, supra note 6, at 117 (discussing how “[e]mpirical studies have shown that most employees incorrectly believe that their employment can be terminated only for cause”) (citing Jesse Rudy, What They Don’t Know Won’t Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection, 23 Berkeley J. Emp. & Lab. L. 307, 309–10 (2002)).

reciprocated by their employer. These features plausibly alter the responsibilities and legitimate claims of the parties and would justify legal limits on the force of putative employment agreements.\footnote{159}

Employment law is one area where the nature of the relationship is a central factor, because the identification of a worker as an employee rather than an independent contractor has substantial effects on the rights and responsibilities of the parties.\footnote{160} It is natural to think that those rights and responsibilities are different when a company hires an outside plumber, than when a delivery company hires a delivery driver. In many states, courts resist treating the parties’ characterization of their relationship as determinative. Instead, they identify employees based on their social role in relation to the employer.\footnote{161} On the view that I defend here, this is as we’d expect, as one can no more autonomously opt out of role-relevant responsibilities associated with employment than one can opt out of the requirements of friendship by stipulating to one’s friends the limits of one’s commitment. Such stipulation is opting out of friendship, not of the requirements thereof.

This is a key point. To treat contract (and promises) as a mechanism for autonomously shaping one’s relationships with others will be morally obtuse when one attempts to use that mechanism in an unconstrained manner. Different roles—marriage, friendship, and employment—establish a kind of status relationship that substantially limits and shapes the normative force of agreements within those relationships. Some agreements are ruled out within those relationships. For example, an attempt to establish a vast number of rules specifying in great detail the rights and obligations of parties to a marriage would simply fail to accord with reasonable norms of marriage. Other agreements have limited force in the face of changed circumstances. By embracing the idea that certain status relationships limit the freedom of

\footnote{159} It is worth noting that the features that I’ve identified here are socially contingent features of the employment relationship. I do not mean to suggest that there is an ideal form of the employment relationship that dictates the moral force of agreements within it. One can fruitfully understand lots of employment legislation and case law dealing with employee classification as working out what the salient features of our contingent cultural practices are, and how we ought to conceptualize them. Moreover, that same legislation and case law also partially shape our understanding of these kinds of relationships. Employment relationships, more so than marriages, are constructed by the law in important ways. Our cultural sense of what employers and employees owe each other is affected substantially by what various statutes and court decisions say they owe each other.

\footnote{160} Consider, for instance, the California Supreme Court’s discussion in \textit{Dynamex Operations West v. Superior Court of Los Angeles County}, recounting the various tests the court has used over the years to distinguish employees from independent contractors. \textit{Dynamex Operations W. v. Superior Ct.}, 416 P.3d 1 (Cal. 2018).

\footnote{161} See \textit{id.} at 35 (adopting the “ABC” test to determine whether a worker is an independent contractor or an employee. Under that test, a worker is an employee unless all three criteria are satisfied: “(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; \textit{and} (B) that the worker performs work that is outside the usual course of the hiring entity’s business; \textit{and} (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.” \textit{Id.}) See also \textit{Bagenstos, Consent, Coercion, and Employment Law, supra} note 155, at 443–50 (discussing different tests courts have used to distinguish employers from independent contractors).
parties to reach agreements within those relationships, we can avoid the quagmire of a consent and coercion-based discourse. That discourse struggles to provide sensible guiding principles for establishing the conditions that ensure the viability of consent and the absence of coercion. On the view I defend here, limits on the force of agreements can be grounded in constitutive features of promissory morality within certain relationship types.

The analysis provided here can help to reframe discussions about the enforceability of certain provisions in employment agreements. Recently, non-compete clauses have garnered greater scrutiny, and President Biden has issued an executive order attempting to limit their enforceability. Often such agreements are criticized because of their anti-competitive effects or because of concerns about their harmful effects on lower-wage workers. Those are certainly important considerations. But the arguments provided here show another way of thinking about limits on non-competes, indeed one that is partly reflected in the common-law rules regarding their enforceability. The common-law rule requires that a non-compete be reasonable in light of legitimate business interests and not unduly burden the employee or the public. One might criticize the “reasonableness” standard for insufficiently protecting lower-wage workers. Perhaps that’s right in practice. But note that it’s a standard that limits the ability of parties in a certain kind of relationship—employment—to enter into agreements within that relationship. It grounds those limits in the kind of relationship that the parties have; non-competes have to be reasonable in light of the business

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162 See, e.g., Bagenstos, Consent, Coercion, and Employment Law, supra note 155, at 415–21 (discussing the Supreme Court’s rather incoherent holdings regarding consent in employment cases).
164 See generally Eric A. Posner, The Antitrust Challenge to Covenants Not to Compete in Employment Contracts, 83 ANTITRUST L.J. 165, 167 (2020) (arguing that legal regulation of non-compete clauses in employment contracts should be strengthened due to their harmful effect on competition).
165 See, e.g., Alan B. Krueger & Eric A. Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion, 2018 HAMILTON PROJECT 1, 10 (discussing the burdens that non-competes impose on low-wage workers).
166 For instance, in Ohio, a non-compete is “reasonable” and hence enforceable “if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.” Chicago Title Ins. Corp. v. Magnuson, 487 F.3d 985, 991 (6th Cir. 2007).
167 Many jurisdictions include hardship to the employee as a component of assessing reasonableness, and the harm of enforcement to low-wage workers will depend on how broadly that element is construed. See, e.g., id. (quoting Ohio law concerning employment contracts); Woodward v. Cadillac Overall Supply Co., 240 N.W.2d 710, 720 (Mich. 1976). Of course, there is also the worry that even an unenforceable non-compete might still harshly burden workers by subjecting them to the apparent risk of legal liability. See Evan Starr, J.J. Prescott & Norman Bishara, The Behavioral Effects of (Unenforceable) Contracts, 36 J.L. & ECON. & ORG. 633, 635–37 (2020) (concluding that even unenforceable non-competes affect employee behavior).
practice that the employer and employee jointly engage in.\textsuperscript{168} Thus, an employer can’t opportunistically try to get employees to agree to non-compete agreements that aren’t sufficiently related to that joint endeavor. The upshot here is that instead of seeing limits on non-compete agreements as merely instrumental to certain policy goals—protecting lower-wage workers, say—we can see the limits as part and parcel to how promissory morality works within a certain kind of relationship. And in assessing the proper scope of the elements of the common law rule—what’s a legitimate business interest and what’s unduly harsh to employees—we might fruitfully reflect on characteristics of the employment relationship identified above.

D. Consumer Agreements

Consumer agreements present a somewhat different kind of case. Indeed, it is plausible to think that the prototypical consumer agreement doesn’t involve anything like a promise at all. Most consumer “contracts”\textsuperscript{169} involve terms of adhesion using copious amounts of technical boilerplate content that almost no one reads.\textsuperscript{170} Moreover, the vast majority of consumers would be unlikely to understand the effect of the terms, even if they did read the “contract.”\textsuperscript{171} As a result, almost all consumer “contract terms” lack the hallmarks of bona fide joint decision-making that is characteristic of promising.\textsuperscript{172} Because of the typical features of consumer “contracts,” it can thus be appealing to think that we should adopt a

\textsuperscript{168} Assurance Data, Inc. v. Malyevac, 747 S.E.2d 804, 808 (Va. 2013) (noting that non-compete agreements must be “narrowly drawn to protect the employer’s legitimate business interest” and “not unduly burdensome on the employee’s ability to earn a living”) (citation omitted).

\textsuperscript{169} I’m using scare quotes here to indicate that the status of consumer agreements as bona fide contracts is, at best, tenuous.

\textsuperscript{170} See MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2013) [hereinafter RADIN, BOILERPLATE] (explaining some of the reasons why consumers tend not to read boilerplate provisions). The reporter’s notes to Section two of the draft Restatement of the Law of Consumer Contracts also notes that “credible empirical evidence, as well as common sense and experience, suggests that consumers rarely read standard contract terms no matter how those terms are disclosed” and thus “[i]nformed consent to the standard contract terms is, by and large, absent in the typical consumer contract.” RESTATEMENT OF CONSUMER CONTRACTS § 2, reporter’s notes (AM. L. INST., Tentative Draft 2019).

\textsuperscript{171} RADIN, BOILERPLATE, supra note 170, at 20–29.

\textsuperscript{172} Robin Bradley Kar and Margaret Jane Radin argue that contract “terms” should be enforceable only to the extent to which they could plausibly contribute to the cooperative endeavor of reaching an agreement, and hence, that many boilerplate terms in consumer “contracts” should not be treated as part of the agreement. Robin Bradley Kar & Margaret Jane Radin, Pseudo-Contract and Shared Meaning Analysis, 132 HARV. L. REV. 1135, 1166–68 (2019). This is so, because throwing massive amounts of technical text at a consumer at the point of sale is not plausibly consistent with “cooperative norms that govern language use to form a contract.” Id. at 1167. However, they present this constraint as a feature of “meaning.” Id. at 1144–50. Better, I think, is to frame their account as capturing a normative condition on joint decision-making that should limit when contract terms are enforceable. To throw massive amounts of boilerplate at someone, knowing that they won’t (and can’t) read it, is to fail to respect the conditions of joint decision-making, and hence is a failure to create anything that the law could justifiably enforce.
regulatory attitude towards them, rather than try to shoe-horn them into contract law and its promissory grounding.173

The draft Restatement of the Law, Consumer Contracts acknowledges that consumer contracts lack some of the hallmarks of the traditional model of contracting.174 The draft restatement thus adopts what might be thought of as a pseudo-regulatory approach, based on Karl Lewellyn’s blanket assent theory.175 That approach deviates from traditional contract doctrine by, for instance, enforcing oral representations to the consumer, even if they are contrary to what is in the contractual text,176 and providing somewhat more robust protections against the enforcement of unconscionable terms.177 The point I’d stress is that even if we say that consumer contracts represent a promise of a sort, it would be a promise associated with a particular kind of relationship. It would be worth attempting to specify what sort of relationship that is—a task that seems natural, appropriate, and useful here and is predicted by my view. As a result of this sort of inquiry, we might find ourselves endorsing something like Dagan and Heller’s “errands” model of consumer contracts that aims to “minimize[]” the “friction” associated with procuring basic consumer goods, and recognizes the thinness of the kind of relationship a consumer interaction creates.178 Framed in that way, the attempt of a business to foist lots of terms, some of which might be detrimental to the consumer, onto the transaction should seem totally unreasonable.179 Such a business would have little to complain about if the consumer, ignoring the arbitration clause embedded in the text, brought suit in court to vindicate her reasonable expectations.

CONCLUDING THOUGHTS—RESISTING ATOMISTIC INDIVIDUALISM IN CONTRACT

In this Article, I have argued that the search for a general contract law that applies across all different kinds of relationships is unmotivated. Such a view would require that there be some sort of normative uniformity across all such relationships. The only thing that plausibly unites such diverse contracting relationships is that they all involve promises. But for general

173 See RADIN, BOILERPLATE, supra 170, at 217–39 (describing different kinds of regulatory schemes that might be applied to consumer transactions).
174 See RESTATEMENT OF CONSUMER CONTRACTS, supra note 170 (discussing the differences between the consumer contracts and notions of traditional contract law).
175 See id.
176 Id. §§ 6–8.
177 Id. § 5.
178 DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS, supra note 6, at 80–82.
179 Indeed, I think that this point strengthens Kar and Radin’s basic picture. See supra note 172 and accompanying text (explaining Radin and Kar’s argument that boilerplate language should not be treated as part of consumer “contract” agreements). What we find in consumer contracts isn’t a good faith attempt to reach a joint decision. But it’s especially not a plausible way to reach a joint decision on an “errands” model of the promissory relationship, the whole point of which is to substantially limit the need for interaction between the parties. Thus, the very idea that in such a relationship one might come bearing pages of terms should strike us as being especially misguided.
contract law to be grounded in promissory morality would require that promissory morality itself be unified.

Promissory morality is not unified in the way that many contract-as-promise theorists seem to have assumed. Such theorists operate with an abstract idea of a promise that is detached from commonplace intuitions about how promises actually work on the ground. Looking at promissory morality in practice shows how promises are best understood in terms of a kind of joint decision-making between the parties. That conception of promises provides a theoretical grounding for multiplicity in contract law, as the normative force of joint decisions by the parties to a promise is shaped by other projects that the parties are engaged in—e.g., friendship, marriage, or employment. Conceiving of promissory morality in terms of joint decisions also provides a new framework for understanding certain contract doctrines—frustration, impossibility, duress, coercion, fraud, and undue influence. It also allows us to treat the consideration doctrine as a useful tool for identifying a specific kind of promissory relationship—the arms-length bargain—rather than as an embarrassment to the contract as promise thesis.

But there is another important implication of the arguments I’ve offered here. Along the way, I have hoped to dislodge a misguided individualistic view of promissory morality, which grounds the normativity of promises in an individual’s exercise of will at the moment of promising. That view of promissory morality provides an illegitimately abstract and distorted idea of promises premised on an illegitimately abstract and distorted view of human life. It’s a vision of promises that fits a conception of humans as separate, isolated, and autonomous individuals, who though they might come together, always do so alone. Thankfully, that’s not all that we are. We do things together. We engage in forms of joint agency, and joint decision-making. And the relationships we have are not merely composites of individual wills, but valuable forms of life. It is this background of joint agency that will theories of promise miss. And it is the structure of joint agency that explains why a view of contract grounded in promissory morality is a basis for multiplicity in contract doctrine that respects the different normative force of promises across different kinds of human relationships.