

# Philosophical Foundations of Contract Law

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## 6

# Personal Autonomy and Change of Mind in Promise and in Contract

*Dori Kimel*

### Introduction: Promise and Personal Autonomy

For those who see value in personal autonomy, one of the supposed great mysteries of moral philosophy—the binding force of a promise—turns out to be far less mysterious. At least for those who also believe that the desirability of a state of affairs whereby people can bind themselves in a promise is the basis on which to explain promissory obligations, the value of personal autonomy has been key in solving that supposed mystery, as it constitutes the broadway to explaining the desirability of that very state of affairs. Personal autonomy concerns people exerting control, through the exercise of free choice, over a significant proportion of fundamental aspects of their lives. At its core, it is an ideal of self-authorship; what better manifestation of that ideal than a person acting, *inter alia*, as the author of her own moral obligations?

Autonomy-based accounts of the value, and hence the binding force of promises, have come to dominate the philosophical understanding of this domain, and that is perhaps not surprising in view of the depth of this idea's philosophical roots. Indeed, the capacity to self-impose an obligation—to self-legislate, to be the willing author of significant dimensions of one's own normative environment—has long been seen by many not just as *an* important freedom, but possibly as some sort of a paradigmatic, logically antecedent freedom—a freedom capable of providing an explanation and a foundation to all other freedoms, and a freedom such that, when present, its bearer is seen as “free” even when its exercise, actual or hypothetical, has seemingly rendered her, and in fairly obvious ways, far less free than she would have been otherwise. This idea has long gained perch in political thought, informing much of what has become known as social contract theory (if political obligations, no matter how onerous, can be construed as self-imposed, their legitimacy is all but guaranteed) and, somewhat less extravagantly, has gained much prominence in promissory theory, and in the theory of contract law. The modern canonical statement of the position I have in mind is probably Charles Fried's, for whom promise (and hence also contract) is explicable as a freedom-maximizing device in the most straightforward way:

In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in

which I may commit myself. It is necessary that I be able to make nonoptional a course of conduct that would otherwise be optional for me.<sup>1</sup>

Fried's treatment of the value, and ultimately the binding force of promise as *the* device which secures this crucial freedom subsequently places some emphasis on the reciprocal or bilateral potential that it holds: the motive for the kind of commitment it facilitates need not be altruistic, and it is just as valuable—just as “worth facilitating,” as he put it<sup>2</sup>—when deployed with the aim of receiving the promisee's own commitment in return, which is of course the norm in the domain of contract. Nevertheless for him, to recognize the binding force of a promise—even quite regardless of reciprocity or bilaterality—is to show respect for the promisor's standing as an autonomous moral agent, whereas a failure to so recognize—for instance, by allowing a promisor who regrets the promise to renege—amounts to doing the opposite:

If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor's prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person. We infantilize him, as we do quite properly when we release the very young from the consequences of their choices.<sup>3</sup>

This last quote may seem to apply with equal force to nonpromissory undertakings just the same; yet when it comes to promises, as a particular form of a voluntary assumption of obligations, the link to the ideal of personal autonomy can be shown to be particularly natural and particularly strong. By exploring the special bond-creating dimension of promises, Joseph Raz has shown that particularly well. Unlike, say, a vow, or other putative forms of personal undertakings, a promise is made to someone; it involves a promisee. When successful, a promise places the promisor under an obligation that is owed, at least primarily, specifically to the promisee; it creates a special relationship between two agents. It creates, as Raz put it, “a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having preemptory force.”<sup>4</sup> On this basis, Raz went on to explain that the moral principles which govern the binding force of promises “can only be justified if the creation of such special relationships between people is held to be valuable.”<sup>5</sup> And personal autonomy can indeed play a central role in explaining why it is valuable. Human relationships feature prominently in any plausible account of personal autonomy. The control over one's life that personal autonomy prizes concerns primarily the meaningful, the lasting, the profound—those choices that can truly be said to be the ones through which a person's life acquires the particular character and meaning that it has. These are choices that concern matters such as long-term projects, careers, and relationships. By promising, a person elevates some

<sup>1</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 13 (1981).

<sup>2</sup> FRIED, *CONTRACT AS PROMISE*, 13.

<sup>3</sup> FRIED, *CONTRACT AS PROMISE*, at 20–1.

<sup>4</sup> J. Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY* 210, 227–8 (P. M. S. Hacker & J. Raz eds., 1977).

<sup>5</sup> Raz, *Promises and Obligations*, at 228.

future conduct for which she might at best have an ordinary reason, into something which she bears an obligation to do, and an obligation owed specifically to another at that. Thus beyond the natural affinity of obligations (as opposed to ordinary reasons) to the stable, the long term, here we have (self-created) obligations that, by their very nature as obligations owed to another, establish special relationships. And interpersonal relationships are not only one of those central dimensions of life over which self-authorship is called for from the perspective of personal autonomy; rather, they are often the bedrock of other such central dimensions just the same: careers, long-term pursuits, serious hobbies, and the like are usually significantly constituted by the interpersonal relationships involved in their pursuit.

So the capacity to promise makes us freer, and freer in a sense which is particularly germane to the ideal of personal autonomy: through it we become part-authors of our own moral obligations, and, moreover, the obligations we author, bond creating as they are, are particularly conducive to autonomy-related interests. Might that be a bit too easy? Might personal autonomy-based accounts of the value—and hence also, by implication, the binding force—of promise have been too casual in assuming that the ability to create obligations for one's self in general, and create those so that they are owed to others in particular, is, overall, beneficial to one's propensity to be autonomous? Might there be another side to things?

We could envisage an attempt to reduce the reasoning by which self-imposed obligations are some sort of a pinnacle of self-authorship, and hence a requirement as well as a most natural extension of personal autonomy, to absurdity. Taken at face value, this reasoning may inform the view that the more one promises, thus exercising more authorship over one's own normative environment, the more autonomous one is. That may ring true particularly when it is noted that promissory obligations can not just add to, but sometimes displace nonpromissory, nonself-created moral obligations (let alone nonobligatory norms): the prolific promisor may not just bear more obligations, but a greater proportion of obligations which she herself has authored, and a smaller proportion, perhaps even a smaller number, of obligations over which she has exercised no control. Does that invariably make her more autonomous?

Of course not. When someone promises willy-nilly, makes promises that it is not in her interests to make, or makes promises to the wrong people or at the wrong time (etc.), she may be authoring more of her own obligations, but authoring them badly—and, most likely, “badly” precisely in the relevant sense: to the detriment of her personal autonomy. Yet this is by no means an embarrassment to the original contention. Personal autonomy in general depends for its value on the worthiness of its exercise,<sup>6</sup> and its exercise through promising may be more or less worthy. The capacity to self-author obligations to others may be of great value, autonomy-wise and otherwise; but like most other capacities, it can be used and it can be misused, and it can indeed be misused in a way that undermines the very goals that (when used prudently) it is particularly suitable for promoting. There is nothing unique about that.

<sup>6</sup> The benchmark argument for this position is Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 378–81 (1986).

But perhaps there is something unique, not in the mere fact that the capacity to self-author obligations can be misused, but in the magnitude of the risk inherent in such an occurrence? In this line of thought, I believe, lurks a more serious anxiety. In light of certain prominent features it has or may plausibly be thought to have, the capacity to self-create obligations owed to others may be thought of not only as a manifestation or an extension of personal autonomy, but also as something that can pose a particularly potent threat to it. Once its nature and magnitude are understood, it may be asked rather credibly: is it possible that the removal of that threat, albeit at the cost of removing the autonomy-enhancing potential inherent in promises, would leave us with no net detriment in terms of personal autonomy and the capacity to enjoy it, or even with a net gain? Is it possible that, in a world without promise, people would be just as likely, or perhaps even more likely, to be autonomous?

This is the main question to be addressed in this chapter. I will begin by animating it a little further, by reference to the autonomy-related value of a change of mind, and by reference to some (perceived) qualities of promises that may be thought to render the practice exceptionally hostile to a change of mind. Having done that, I will argue to the contrary, and aim to restore the notion that the autonomy-enhancing potential of promises outweighs the autonomy-curtailling risk they create. I will conclude with some observations concerning the difference between contract and promise, and the case for treating the former as a device for the legal enforcement of the latter.

## I. Personal Autonomy and a Change of Mind

The control over one's life that personal autonomy prizes concerns, in particular, not the trivial or the transient but the meaningful and lasting. It concerns those aspects of a life that endow it with the particular meaning and character that it has as a whole; it places particular value on free choice when it comes to significant decisions—those decisions that have the propensity to shape a life, make it into the kind of life that it is. Therefore it is not surprising that much of the emphasis, in discussions of personal autonomy, its exercise, and the conditions that must obtain in order for people to enjoy it, revolves around the long term, the stable, the unchanging. The range of options people must have so as to have the opportunity to live truly autonomous lives primarily concerns the big themes—careers, deep relationships, abiding passions; the background conditions must include, beyond a range of valuable options from which to choose, the normative transparency and stability required for long-term planning and enduring commitment.<sup>7</sup> Indeed, inasmuch as commitment and spontaneity are viewed as (potentially) contrasting dispositions, or the propensity to display them as contrasting virtues, the emphasis in discussions of personal autonomy, notwithstanding it being a *freedom*, tends to be on the former, and not the latter: the commitments in question ought to be of one's own making, but the freedom in question is the freedom to shape one's own life as a whole, not to do as one pleases at any given moment. This is why, when instantiations of both types of freedom come into conflict, curtailment of the latter kind of freedom, even when done against the present

<sup>7</sup> This theme is often explored in discussions of the rule of law as a condition for personal autonomy.

wishes of a person, can be viewed as manifestations of respect for her personal autonomy, whereas, as we have seen, the opposite can be described as her infantilization.<sup>8</sup>

Again we can see, now perhaps with greater clarity, how naturally promises may seem to fit within the general scheme of reverence for personal autonomy. By placing herself under a self-created obligation, the promisor may impose a weighty restriction upon the prospect of deviating from a course of future conduct, but that is precisely what personal autonomy routinely calls for; it is part and parcel of the idea of freely chosen commitments, so central to the very possibility of personal autonomy—and promises are a particularly useful means to just that end. Thus, as Fried put it, the supposed “mystery that surrounds increasing autonomy by providing means for restricting it” turns out to be “a pseudomystery:” “the restrictions involved in promising are restrictions undertaken just in order to increase one’s options in the long run, and thus are perfectly consistent with the principle of autonomy.”<sup>9</sup> Those restrictions, moreover, are conceived and undertaken by the promisor, who is in control over their timing, their content, and their context (when to promise, what to promise, to whom). All that is missing for the air of mystery to be dispelled altogether is an assumption of “the continuity of the self and the possibility of maintaining complex projects over time”—an assumption in the absence of which, as Fried has observed correctly, “not only the morality of promising but also any coherent picture of the person becomes impossible.”<sup>10</sup>

Does this picture leave any meaningful moral space for a change of mind? That is, can the freedom and the capacity to change one’s mind, at least in circumstances where the change in question is relative to a past commitment of the agent’s own making, ever have a distinct value, appreciable by those who see personal autonomy as key to the good life? I think so. One way to articulate what I have in mind here involves that underlying assumption we have just encountered. Yes, a certain conception of the continuity of the self invariably underpins any plausible account of personal autonomy. Yet the continuity of past commitments may exceed that of the relevant self. The continuing self, that is, may also continue to evolve. Particularly over extended periods of time, tastes develop, priorities change, temperaments mellow or intensify, new passions are ignited, old ones extinguished. Still without straying into the realm of conceiving the self as perpetually fragmented, we can sometimes observe that certain choices that a person has made at some point in the past are now, in quite a profound sense, “no longer hers;” or indeed, consider a person who remains unwaveringly true to past commitments which no longer meaningfully relate to her present vision of how she ought to live as anything but a model of personal autonomy in action.

Perhaps the quality at stake is authenticity. The example around which Fried has offered his observations concerning the right way to treat the regretting promisor is that of a person who concludes, shortly after the act, that the purchase of an expensive antique was an unnecessary extravagance. In a case such as this, it seems quite right to suggest, as Fried has done, that a refusal to release the promisor is entirely consistent with, and may indeed be required by, respect for his standing as an autonomous agent,

<sup>8</sup> See FRIED, *CONTRACT AS PROMISE*, at 20–1.

<sup>9</sup> FRIED, *CONTRACT AS PROMISE*, at 20–1.

<sup>10</sup> FRIED, *CONTRACT AS PROMISE*, at 20–1.

and thus as someone whose own commitments ought to be taken seriously; in any event, such a refusal would not represent much of a setback to the promisor's personal autonomy. But things are not always like that. Particularly when it is remembered that personal autonomy consists primarily in long-term endeavors and relationships, it becomes natural to think of it as involving not only *original* authorship of fundamental aspects of one's life, but also a continuing sense of authorship—a striving, if you like, towards authenticity in one's pursuits. Buyer's regret following the purchase of an expensive antique ought not render a person dissociated from the life she is living or from any significant dimension of that life, or make that life any less authentic, or less authentically *hers*. But other types of regret, other types of issue over which a change of mind may occur, can do just that.

Changes of mind of the latter sort, it should be noted, need not always be the product of some profound evolution of character, as I may have been taken to imply thus far. This kind of development only tends to take place over lengthy periods of time, and usually in a manner so piecemeal as to rarely manifest itself by way of a discrete change of mind over a particular matter (although sometimes it does). But frequently, limitations of self-knowledge, or knowledge other than of the self, or limitations of imagination (and the like) are at stake. Sometimes, it is only through immersion in a career, a relationship, a project (etc.), no matter how profoundly appealing or suitable it appeared to be or how earnestly a person chose to embark upon it in the first place, that the realization emerges as to its unsuitability or undesirability for that person. Once some idea of authenticity in one's pursuits and relationships is accepted as a vital quality of the truly autonomous life, not just the ability to choose, to commit, to persist. . . but also the occasion to stop, to reappraise, to break from the past, to veer into a new path—to change one's mind—emerges as crucial for personal autonomy.

Indeed, it may be thought that a considerable freedom to change one's mind is just as essential for the ongoing pursuit of personal autonomy as is the capacity and the willingness to make long-term commitments or to persevere with past choices. The notion that there is always tension between these two sets of conditions and (corresponding) personal attributes may itself emerge as highly exaggerated, perhaps altogether misleading: a change of mind is not always the antithesis of planning, controlling, self-authorship; sometimes it is part and parcel of those. Pathology, to put it differently, can be found on either ends of the spectrum: a person who cannot make long-term commitments cannot be autonomous, but nor can a person who never has the opportunity or the disposition to experience, and where appropriate to act on a change of mind.

Once this is taken into account, the capacity facilitated by promise to bind one's self to another may begin to appear in a slightly different light. There is clearly a danger here, not just a potential. There are, of course, numerous other ways in which people place themselves, voluntarily, under obligations which are owed to others. Most if not all types of personal relationships, to take one example, tend to generate their own norms, including mandatory ones; so by choosing to enter or to remain in a relationship, a person renders herself bound by norms which would not bind her otherwise. Yet there is something different about a promise: you say something, and you are bound—possibly in perpetuity; there is probably no easier way to incur a new



obligation, there is barely a limit on its possible content and scope, and it is an obligation which, once incurred, may prove particularly tricky to shake off. By stark contrast to that earlier caricature—the more you promise, the more autonomous you are—the carefree promisor can begin to look anything but truly autonomous; instead, it is a person shackled to past decisions, mired in other people's expectations—legitimate expectations, at that!—with her ability to respond to changes in outlook, temperament, desires, interests, or priorities, and to maintain a sense of authenticity and true engagement in her life, severely curtailed. That may seem true particularly when it is remembered that an obligation excludes counter-reasons for action by type,<sup>11</sup> and the type most trivially excluded is a simple change of mind: if that is not excluded, what is?

Of course, not all changes of mind are the same. A change of mind that is truly relevant to personal autonomy, or to the safeguarding of authenticity in one's pursuits, would be, for the most part at least, rational. It would be a response to reasons, which happen to be (among other things) reasons to break from a past commitment. Obligations may always exclude a random, capricious change of mind as ground for nonconforming action, but not necessarily exclude those proper, potentially weighty reasons for action informing what may be thought of as a *reasonable* change of mind; occasionally, acting on such reasons may be morally permissible after all. Still, it remains the case that existing moral obligations can pose a significant restriction on the latitude for changing course, and the capacity to create new ones by one's mere say-so increases the span of such a restriction to a potentially limitless extent.

It is time to focus on those characteristics of promises, as a particular (although not unique) device for the voluntary assumption of obligations, which may give the impression that they pose the risk in question in a particularly acute way. Some such characteristics have been touched upon already: promissory obligations are easy to assume, and their content (and timing, scope, etc.) is within the control of the promisor. I have also mentioned the notion that, once incurred, such obligations may prove particularly tricky to shake off—why is that? In what follows, I will focus on three sets of considerations which may contribute to this impression, or something like it. First, the issue of fault, and, in particular, the notion that promissory obligations *exclude* fault—that they are, by their very nature, strict liability. Second, the notion that a failure to discharge a promissory obligation typically triggers other obligations—obligations which often are just as onerous as the promissory obligation by the breach of which they are triggered. Finally, considerations relating to the role of the promisee, and, in particular, the notion that whilst the promisee is granted the unique prerogative and with it the discretion to release the promisor (or to alter the terms of the obligation, or the terms of the reparative obligation that a breach carries in its wake, etc.), the exercise of this discretion is ungoverned by any binding norms.

If sound, these considerations are mutually reinforcing: that a promise is strict liability means that a broader range of possible scenarios would involve a breach, thus triggering (potentially equally onerous) reparative obligations; that, in turn, shows the power the promisee has over the promisor to be even greater, and the apparent dearth

<sup>11</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW* 22 (1979).

of norms governing its exercise all the more troubling. I will, however, aim to show that the first and the third type of consideration, or the anxieties to which they give rise, are rather exaggerated if not altogether misplaced. If so, then their relationship may in fact prove to be mutually weakening, perhaps with the overall effect of restoring promises to their status as enhancers of personal autonomy more than they are a threat to it.

## II. Are Promissory Obligations Strict?

Contract law—thought of by many as, simply, the law of enforceable promises—is often distinguished from other branches of the law by reference to the strict liability nature of the obligations arising and enforced within it.<sup>12</sup> Promissory liability can similarly be thought of as strict. Indeed, it is usually thought of as such. Few have endorsed this view explicitly, but it seems to be at least implicitly implicated in many standard philosophical accounts of promising, if only through the sort of examples which are most commonly used to animate them. These are examples of promises as undertakings, sometimes conditional (on the future conduct of the promisee, or on some other future eventuality), to do something or to refrain from doing something, such that an eventual failure to do the thing promised—turn up someplace, render some service, pay—is a breach, no matter what the surrounding circumstances are, what reasons there may have been for the failure, or whether those reasons have been in any way within the control of the promisor. In such scenarios it may of course be acknowledged, where appropriate (e.g., when the frustrating circumstances are truly beyond the control of the promisor: an unforecast storm has blocked her path, or some emergency required her attention) that the breach “wasn’t her fault”; that “she is not to blame,” or even that “she did nothing wrong;”, but even so, the breach means that she has committed one distinct wrong—indeed, she wronged the promisee—she broke the promise. The breach, in other words, may happen to be unavoidable, or justified, or excusable, but such considerations would not affect the issue of its very occurrence, nor its status as a wrong.

Does that matter? Especially as I have just endorsed the view that conceptually dissociates the wrong from fault, or any other notion of blameworthiness, it may be thought not to matter one bit. If the wrong of a breach does not, in and of itself, entail the conclusion nor presupposes the premise that the promisor has been in any way blameworthy, life can simply go on, with no moral blemish attached to anyone and nothing more to be said or done. For that matter, even inasmuch as some sort of a moral blemish does happen to attach to the promisor, that in and of itself may seem to matter little: either way, the breach has terminated the promise, it has now been discharged. The moral blemish need not be too grave, and life can still go on.

Yet it does matter, since, being a wrong, a breach of promise always leaves something in its wake—a certain moral residue, if you like—and something which can be far more burdensome than moral blemish alone: it may give rise to reparative obligations.

<sup>12</sup> For an influential critique, see George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994). For a recent volume collecting diverse contributions on the topic see *FAULT IN AMERICAN CONTRACT LAW* (Omri Ben-Shahar & Ariel Porat eds., 2010).

So once a wrong has been committed, whether its commission was attended by fault may indeed matter little; but the fault dimension of the obligation itself is part of what determines whether the wrong—the breach of the obligation—has been committed in the first place, so that the moral residue in question, possibly in the shape of reparative obligations, comes into existence.

This is probably true of all wrongs, but when it comes to broken promises, the nature and scope of the so-called moral residue is particularly straightforward to establish. A promissory obligation is typically owed to a specified person—the promisee; its breach is therefore not just a wrong, but it wrongs someone—there is an aggrieved party, and its identity is readily ascertainable. The obligation's precise content is also readily ascertainable. So a reparative obligation arises in the wake of a broken promise, and *its* content as well as would-be beneficiary can be ascertained straightforwardly by reference to the content of the primary obligation, the promise.

Whereas lawyers and philosophers alike have always shown interest in promises (or, for that matter, agreements), lawyers, much more so than philosophers, have always paid particularly close attention to the normative aftermath of a breach. This is probably only natural, given that the law of contract primarily expresses itself, so to speak, in this very domain—that is, by responding to a breach, or anyway by responding to “things going wrong” with agreements: mistakes being made, parties coming under undue influence, etc. And in practically all jurisdictions, the norm, when it comes to the choice of remedy for a breach of contract, is to opt, other things being equal, for that remedy which would place the aggrieved party in as good a position, or as close as possible to the position in which it would have been absent the breach. Moreover, at common law, at least, considerations relating to fault in breach play an extremely limited role in the selection of the appropriate remedy to be awarded; even when truly without fault, the leading consideration in responding to a breach is the need to secure for the plaintiff, as much as possible, if not the very performance of the promise made to her then the benefits that performance would have brought.<sup>13</sup>

Is the morality of promise different, in this regard, from the law of contract? I do not think so. Neil MacCormick, and more recently John Gardner, have both argued that when a promise is broken, an obligation arises in its stead, the content of which is largely determined by the content of the promise. MacCormick's treatment of this particular issue was encapsulated in an example of a (justifiably) broken promise to take the children to the beach on a particular afternoon, and the judgment he offered that, in such a case, the promisor “now owes it to his children as soon as possible to make good their disappointment by taking them to the seaside.”<sup>14</sup> Gardner, for his part, has explicated that judgment by way of offering a thesis explaining the emergence, in the wake of a failure to perform an obligation, of an obligation to do the “next best,” which is rooted in the need to satisfy the same reasons that ground the original obligation:

Once the time for performance of a primary obligation is past, so that it can no longer be performed, one can often nevertheless still contribute to satisfaction of some or all

<sup>13</sup> For my own explanation, see Dori Kimel, *Fault and Harm in Breach of Contract*, in *FAULT IN AMERICAN CONTRACT LAW*, at 271.

<sup>14</sup> Neil MacCormick, *The Obligation of Reparation*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 212 (1982).

of the reasons that added up to make the action obligatory. Those reasons, not having been satisfied by performance of the primary obligation, are still with us awaiting satisfaction and since they cannot now be satisfied by performance of that obligation, they call for satisfaction in some other way. They call for next-best satisfaction, the closest to full satisfaction that is still available.<sup>15</sup>

Gardner's thesis concerns the foundations of corrective justice in general, and is not limited to promissory obligations; but in the promissory domain, as MacCormick's example (and Gardner's deployment of the same example) illustrates, its application appears to be particularly straightforward. The example also illustrates that it is by no means unusual for the reparative obligations that arise in the wake of a broken promise to be just as onerous as the promissory obligation was. And if promissory obligations are always strict—if fault has no necessary bearing not only on the nature of the reparative obligation that arises in the wake of a breach, but also no bearing on the question of whether a breach has taken place in the first place—then promissory obligations emerge as quite a burdensome affair indeed. A promisor may do all she can to keep the promise, and fail to do so for reasons that are entirely beyond her control, or that entirely justify the failure; nevertheless she now owes the promisee an "obligation of reparation" (to use MacCormick's language) the content of which may differ little from the content of the promise. This has little to do with a change of mind as such, of course, but it does show promissory obligations to be burdensome in a way which is clearly pertinent to the assessment of their likely impact on the (future) autonomy of those who undertake them: anything short of actual performance leaves the promisor still bound to the promisee, the magnitude of her debt to him (potentially) barely diminished.

As far as it goes, I think the upshot of this analysis is correct. Whether for the reasons captured in Gardner's continuity thesis, or for the reasons offered by MacCormick, the conclusions they both draw—when a promise is broken, the promisor incurs an obligation to do the "next best" for the promisee, and that need not depend on fault in breach—are sound.<sup>16</sup> The one qualification I would offer concerns the notion that promissory obligations themselves are necessarily strict; that is, that the fact of a breach (and hence, also, the emergence of those reparative obligations) is a matter in which fault can play no role.

My point is not that promissory obligations necessarily are *not* strict. They can be. But equally, promissory obligations can be fault based, and the fault element—so long as it "matches" the wrong in terms of its inherent logic<sup>17</sup>—can be any of the types of fault which may attend the commission of a wrong: intention, knowledge, inappropriate motive, recklessness, negligence, or as the case may be. My point, in other words, is that promissory obligations do not have a fixed fault element; that, like much else to do with the content of the promise, the fault element is essentially

<sup>15</sup> John Gardner, *What Is Tort Law for? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1, 33 (2011).

<sup>16</sup> Why "as far as it goes?" I return to this question in Section III, arguing that, for reasons that do not originate in the morality of promise itself, what the promisor ends up owing the promisee in the aftermath of a breach may depend on fault after all.

<sup>17</sup> For example, recklessness, or unreasonable risk taking, can only attend certain types of conduct but not others; some things can be done with or without knowledge, but knowledge or its absence is not a dimension of others; etc.

under the control of the promisor. And that, I believe, softens the picture painted up to this point a great deal.

Philosophical discussions of promises (and, similarly, contracts) tend to place considerable emphasis on the control the promisor has over the content of the promise—“content,” that is, in terms of the subject matter of the promise: can one promise to do that which is not morally permissible? Promise the impossible? Etc.—as well as over various aspects of its normative implications, yet tend to pay little attention to the promisor’s (or the contract parties’) control over the fault dimension of the undertaking. But the fault dimension is, in fact, a dimension of the content. That the promisor, as a matter of principle, has as much control over that dimension of the content as she does over others—still limited, of course, by the bounds of logic, moral permissibility, perhaps the wishes of the promisee,<sup>18</sup> but not otherwise—is, in fact, a proposition I would find difficult to defend in isolation from a comprehensive account of promise as a whole, as it strikes me as a rather obvious implication of any such plausible account: if there is a point to and a justification for the institution of promise as a whole, why would the promisor *not* have such control?

Indeed, I can only advance the proposition that the fault dimension of promissory obligations, rather than fixed (at strict liability, or otherwise) is something which can be freely determined by promisors, by way of defending it against possible objections, and the only objections I can anticipate would take the shape of denying either the possibility, or the desirability of such a proposition. So: can it plausibly be argued, first, that something about the nature or the method of promissory undertakings somehow makes it *impossible* for promisors to introduce a fault element into that which they undertake? I cannot see why. A famous British chain of department stores, for example, has been trading for decades under the motto “Never Knowingly Undersold.” This statement can be understood as a promise to customers, not to overcharge them with knowledge. This promise is not broken *whenever* customers are overcharged—it is not broken when, unbeknownst to the store, a rival store starts selling the same product for less, and, strictly speaking, it is not broken even if the pricing procedure deployed by the store involves the known risk of overcharging. Similarly, a person can promise to make an effort to bring (although not to succeed in bringing) about some state of affairs, or to refrain from doing something intentionally (although not accidentally or negligently or through risk taking) or for a certain motive (though not necessarily for others), and so on. To say “I promise I’ll try to be there” is not the same as to say “I don’t promise I’ll be there:” in the first instance, but not the second, a promise has been made, albeit one that does not create a strict liability for not being there, but merely an obligation to make some reasonable effort towards that end. If the effort has been made yet the being there has not been achieved, the promise has been performed, and no reparative obligations need kick in. Similarly if I borrow something and promise not to take unreasonable risks with it, so long as I refrain from taking unreasonable

<sup>18</sup> Whether the wishes of the promisee matter in this way is controversial. Compare JOHN R. SEARLE, *The Structure of Illocutionary Acts*, in *SPEECH ACTS* 54 (1969); G. J. WARNOCK, *THE OBJECT OF MORALITY* 99–101 (1971); Raz, *Promises and Obligations*, at 213; DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* 21, 24–5 (2003).

risks I will have kept my promise even if I break it through the materialization of some reasonable risk I take.

Can it be argued that making the promissory obligation fault based rather than strict liability, or that giving the power to make them so to promisors is morally (or otherwise) *undesirable*? Or, at least, that a state of affairs in which all promissory obligations are treated as strict liability is somehow preferable to one in which the fault element is left to be determined by the promisor? If something like this could be established, it would make it plausible to insist that promissory obligations are strict liability even when they do not look or sound like that: if making the obligation fault based is not within the control of the promisor, then attempts by promisors to make it that way would simply fail,<sup>19</sup> in much the same way that attempts to promise that which simply cannot be the subject of a moral obligation would fail. But again, I cannot see how any variation on the theme that the practice as a whole becomes more valuable or desirable if the promisor's control over the fault element is removed could possibly be established. If anything, by exploring the anxiety that the notion that promises *are* always strict liability may generate, we have already encountered a powerful reason to think otherwise. The ability to make promises fault based moderates the combined implications of the facts that broken promissory obligations carry reparative obligations in their wake, that those reparative obligations can be and often are just as onerous as the original obligation, and that their incidence once a promise has been broken need not depend on fault. By making their promises fault based, promisors can protect themselves, to a degree, from a certain kind of over-exposure to the future claims of promisees: inasmuch as the fact of the breach depends on fault, at least those promisors who have failed to secure the ends of the promise—a rival store charges less; I did not make it there; the borrowed object broke—but with no fault (or with fault below the specified type) are now free to move on. This is desirable, and desirable precisely on the basis of concern for personal autonomy: the ability to introduce a fault element into the structure of promissory obligations allows promisors to strike a better balance between present commitment and future freedom.

I can think of two possible objections to the conclusions thus far. The first is a technicality: promissory obligations, so the objection goes, are strict liability after all: if I promise not to knowingly overcharge, I am strictly liable for knowingly overcharging. Of course, in a particular sense, that is true—I have indeed endorsed the view by which, *once the wrong has been committed*, reparative obligations may arise irrespectively of fault. If that makes promises strict liability, then they are indeed, as are, probably, all moral obligations. Or criminal offences, for that matter: the offence of murder can be said to impose a strict liability for killing with intention, “gross-negligence manslaughter” imposes a strict liability on those who kill through gross negligence, and so on. I am not convinced that the distinction between strict liability and fault-based liability remains of much interest or analytical import if it is understood exhaustively in this manner, but be that as it may, my point could be put thus: promissory obligations

<sup>19</sup> Although if that were the case, it would also be open to argument that the result of the failure is not a strict-liability obligation but a failure to assume an obligation altogether. Either way, all promissory obligations would be strict liability.



are strict liability in terms of the incidence of reparative obligations, but not necessarily strict liability in terms of what constitutes the commission of the wrong. Moreover, they are probably unique amongst moral obligations in the sense that the fault element is under the control of the bearer of the obligation, who is also its author.

The second objection concerns the notion that when a fault-based promissory obligation has been kept only in the sense that the fault condition has not been satisfied—that is, the promisee did not receive the performance she hoped for, but the promisor acted without the requisite fault for that to constitute a breach—no moral residue remains, no secondary obligations kick in, and the promisor is free from the claims of the promisee. Reparative obligations, so the objection goes, may still kick in in such a scenario. The fault element, after all, is just a modifier of performance. Performance can be modified in other ways; it can be made conditional, for instance—and then, too, if the condition fails to materialize, something may still be owed to the promisee. Perhaps not when the condition concerns the conduct of the promisee; but take a modified version of MacCormick's example: if the father promises "I'll take you to the beach tomorrow unless something important comes up at work," and something important does come up at work, is it not plausible to think that he now owes his children something very similar to what he ended up owing them in the original example?

In a scenario such as this, he may indeed; even though he has not broken the promise, he probably does owe his children precisely the same debt MacCormick identified in his discussion of the original example, "as soon as possible to make good their disappointment by taking them to the seaside."<sup>20</sup> Yet in the modified example, I would argue, the new obligation to do the next-best thing for the promisee originates elsewhere. It would probably be an instantiation of some parental (or general) obligation not to disappoint small children, particularly having first raised their hopes. So the fact of the promise and its particular aftermath forms part of the scenario that triggers the new obligation (an obligation which could, of course, be triggered in any number of different ways), but it is not its source: by failing to take the children to the beach in the first place, the father committed no wrong; relative to the promise itself, there is nothing to remedy.<sup>21</sup> The same would be true in a case where the promisee is similarly disappointed, but the promise has not been broken since the promisor has not acted with the kind of fault specified in the promise as the standard by which her conduct is to be judged.

This last objection and its refutation bring to the fore an important prospect: that norms that originate elsewhere—that is, originate in the background relationship between promisor and promisee—can interact with and supplement promissory norms, and end up playing a significant role in governing what the promisor and the promisee owe each other in and around the promise. This theme will take central stage in Section III, with the focus shifting from the promisor to the promisee.

<sup>20</sup> MacCormick, *The Obligation of Reparation*, at 212.

<sup>21</sup> Does Gardner's "continuity thesis" support this conclusion? Does it discriminate between the original and the modified example? I think so, even though the earlier quote, text accompanying note 15, perhaps leaves it somewhat ambiguous. If it does not, however, this can only be a flaw in the thesis: a specific duty of corrective justice must be distinctly attached to an ascertainable wrong; if the wrong in question is the broken promise, yet the duty can emerge in the same way and for the same reasons even if it has not been committed, the distinctiveness of correcting a wrong has not been captured.

### III. The Morality of Being a Promisee

The rules of promise seem to constitute the role of the promisee in quite a limited way. What do we know? The promise places the promisee in a uniquely privileged position relative to the promisor. We know it is the promisee who is owed performance. We know it is the promisee who is owed reparation (or an apology, an explanation—whatever is owed) if the promise is broken. We know that the promisee, and the promisee alone, has the power to release the promisor—either from the promise altogether, or from parts of it, or, following a breach, from any or all of the reparative obligations. But promissory norms seem to tell us very little besides. They are unclear, for instance, on whether the promisee can refuse that power altogether. And, more significantly in the present context, they are silent on the manner in which this power is to be exercised. Thus, viewed in the abstract, the promisee appears to have *unlimited* power over the promisor—one that is not governed by any binding norms. The promisee may show compassion or generosity in exercising this power, but she may not. She may simply refuse to release the promisor from the promise, or refuse to forgo or discount her reparative entitlements; for all we know, she may behave this way even in the face of the weightiest reasons to release or discount and in the absence of any reason not to, or for the worst motives imaginable.

That the power of the promisee over the promisor may be unlimited in this way is probably the most potent consideration informing the view that promissory obligations, compared to all other types of voluntarily assumed obligations, are uniquely difficult to shake off. The obligations of friendship, for example, may not be the easiest to set aside; but setting them aside is just as hard as it is to exit a friendship—often a tricky feat, admittedly, but not one that usually involves one person in a position of unlimited normative power to stop another from accomplishing it.<sup>22</sup>

This picture, however, is somewhat simplistic, and for a reason I hinted at earlier. In fact, promisees hardly ever operate in such a normative vacuum. Usually they are bound by a multitude of norms that govern their power over the promisor, and are capable of comprehensively curtailing it. These are, however, for the most part not promissory norms as such, but norms that constitute, or originate in, the background relationship between promisee and promisor.

Such norms need not, in fact, obtain exclusively in the context of particularly rich or meaningful relationships. Even when the promisor and promisee are complete strangers, brought together by the bond of promise and not much else, certain norms—perhaps the general obligation to treat all others with decency, or some particular implication thereof—may come to curtail the promisee's power to refuse a complete or partial release, or to insist on (full or even partial) reparation; it may come into direct conflict, in other words, with the promisee's promissory rights, and may indeed

<sup>22</sup> There are some exceptions. I am told that under Jewish law, for example, each party to a marriage must assent to her or his counterpart's request for a divorce, and although the party who refuses to grant it may come under judicial pressure to do so, its power to continue to refuse cannot be taken away under any circumstances, no matter how unreasonable or badly motivated the refusal is deemed to be. Relationships that are constituted in such a way can perhaps be defended, but I suspect that their autonomy-enhancing potential would not be a central feature of any plausible defense.



erode them, possibly to a vanishing point. For this to happen, however, the circumstances must be quite exceptional indeed. And when we try to assess the overall effect of promises (or the capacity to make them) on personal autonomy, not just the logical possibility but the prevalence and scope of such norms should concern us. It then becomes crucial to note that complete strangerhood between the parties to the transaction is not the typical habitat for promises. Rather, promises are typically made or exchanged in the context of already existing, well-established, personal relationships<sup>23</sup>—friendships, collegiate relationships, family ties, etc.—indeed, precisely the sort of relationships that tend to generate a wealth of relationship-specific norms capable of supplementing, competing with, altering, or altogether defeating promissory norms, and by no means only in extreme or highly exceptional circumstances.

Let us persevere with the example of friendship. There are, of course, endless permutations on the theme of friendship; perhaps not two friendships are exactly alike. But I think it is true of all friendships (and, of course, many other types of interpersonal relationship) that the parties are—that they must be—to some extent attuned, and responsive, to each others' well-being, interests, desires, dreams, and aspirations in a way that transcends their preoccupation with or responsiveness to their own. The completely self-serving, or hermetically self-regarding friend is, in fact, not a friend at all. And many of those norms that govern true friendship are nothing short of mandatory. They can be binding on the parties in much the same way that promissory norms may bind them. And, of course, when friendship norms and promissory norms conflict, the upshot of the conflict is anything but a forgone conclusion; there is no telling in the abstract which are likely to triumph, or be modified or weakened or strengthened or outweighed.

The scope for conflict, or for some sort of coming-into-contact or interaction between friendship norms and promissory norms is wide indeed. Friendship norms can apply to all aspects of the promissory transaction, and apply to either of its parties. They may determine, or, at least, have a bearing on issues such as when it is right, and when it is wrong, to ask for a promise, to expect one, or to accept it; or when it is right to offer a promise and what linguistic conventions would be appropriate for the task, what needs saying and what goes without; how to interpret a promise when interpretation is called for, or how to debate the choice between rival interpretation; and of course, there are norms that govern the question as to when it is right to expect or ask for a release, when to grant it, when to discount, when to insist.

The list goes on, of course; and studying the particular implications of every item on it—the particular ways, that is, that all possible interactions between promissory and nonpromissory norms may turn out—would be a hefty and inevitably rather speculative undertaking indeed. But I think that the general observation suffices to show how the prospect and indeed the reality of such interactions ought to moderate, and quite significantly, the perception of promissory obligations as exceptionally hazardous to personal autonomy, particularly to the extent that such a perception is informed by anxiety over the seemingly unlimited power of the promisee over the promisor: in the real life of promises, this power is in fact limited in a plethora of ways.

<sup>23</sup> I have defended and elaborated on this proposition. See KIMEL, *FROM PROMISE TO CONTRACT*, ch. 1.

As the hazard in question has been animated by reference to the potential significance of a change of mind, let us return for a moment to that theme. The discussion thus far, it should be recognized, does not produce the conclusion that the promisee-friend must always see a change of mind, even a reasonable one, as reason to release or to forgo reparation, fully or even partially. Far from it. The balance of considerations applicable in every case may be complex and quite delicate. Certain actions which would usually be taken to exhibit exceptional generosity, thoughtfulness, or compassion when aimed at strangers, are nothing other than the norm between friends. That can push things one way when it comes to norms governing the role of the promisee. Yet even in the context of friendship, by releasing too easily the promisee may infantilize the promisor, in much the same way that may be the case in general;<sup>24</sup> and in the context of friendship, infantilization of this sort usually would be more egregious, not less—and that can sometimes push things the other way. Nevertheless, the requisite balancing of considerations, and the complex weighing up of norms of different origins and pedigree that the role of the promisee-friend calls for, would often discriminate, in terms of its overall conclusion, between different types of change of mind, different reasons for it, different types of circumstances in which it occurs and the likely ramifications of allowing or not allowing it, with the likely gains and the likely losses in terms of the personal autonomy of the promisor inevitably central to any such reasoning.

The main argument of this section, it may be noted, has a direct bearing on the question of the previous section—the role of fault—and in two different ways. First, it shows how fault can find its way back into the picture, and prove relevant after all for the identity of the reparative obligation arising in the wake of a breach. That is, some of the nonpromissory norms that govern the role of the promisee at this juncture—that govern, if you like, the exercise of her discretion to forgo reparation, or to settle for less (etc.), or that possibly remove that discretion altogether and make it mandatory for her to do so—may well be sensitive to fault. They may well *require* the promisee to take fault into account, and, in certain circumstances at least, to treat a justified breach one way, an excusable breach another, and so on. They may even require her to take repentance or the (additional) fault exhibited by its absence into account.

Second, when promises are given, received, or interpreted in the context of certain kinds of personal relationship—friendship would again be a sound example—a fault element may often be read into their content even when it is not explicitly articulated. In such contexts, that is, it may be particularly natural to resist an interpretation of a promissory undertaking as rendering the promisor strictly liable for a failure to secure the ends of the promise—her failure to *be there*, in the earlier example—irrespective of the presence of excusatory or justificatory factors. So in the abstract, it remains true that when a person says, “I promise to be there by three o’clock” and ends up being late, she broke the promise; by then explaining that the car broke down she is not arguing to the contrary. Yet if the promisee is her partner, things may be different: the norms governing that relationship may inform the very way in which the

<sup>24</sup> See text accompanying notes 3, 8.

original undertaking is understood by both parties, to the extent that “the car broke down” may be an account of how, despite appearances, the promise has not been broken after all.<sup>25</sup>

### Conclusions: Promise

Recall the earlier question: is it possible that, in a world without promise, people would be just as likely, or perhaps even more likely, to be autonomous? I would say that if this question, or anyway its second permutation, were to be answered in the affirmative, then morally-speaking the world we live in *is* a world without promise. The existence of promise, as a moral phenomenon, depends on its desirability; and its desirability depends on its effect on personal autonomy.

It turns out, however, that promises do not endanger personal autonomy to the extent that it might be thought. They allow those who make them to render the obligation they assume fault based. And they operate predominantly within relational contexts, in which parties relate to each other not just as promisor and promisee but also as actors within a relationship, and a relationship comprising of norms capable of having the effect of considerably softening, to put it loosely, the apparent firmness of promissory obligations: such norms may increase the incidence of fault-based (as opposed to strict liability) undertakings, and increase the significance of fault for the emergence and character of reparative obligations in the aftermath of a breach; and, more importantly, they govern, and significantly limit, the power of the promisee over the promisor.

I do not think, however, that those anxieties we have examined, concerning the autonomy-related risks inherent in the capacity to promise, have gone away altogether. Besides the great autonomy-enhancing potential encapsulated in the capacity to promise, there remains a particularly potent risk. There is an art to promising; when mastered, its autonomy-enhancing potential can be realized, and in an infinite number of ways. But mistakes can be costly: the autonomy of the carefree promisor can indeed be very severely curtailed. It is crucial to know when to promise, what to promise, and to whom; and just as crucial to know when to withhold a promise, resist pressure or even a temptation to promise, not be seduced by the immediate gratification to be had.

When contemplating this equilibrium, it is perhaps worth noting that the capacity to promise, when present, adds more to the available spectrum of modes of commitment than just the one option—to *promise*. That option itself, we have seen, encompasses a range—the obligations assumed may be conditional in numerous different ways, or unconditional; and they can span the entire menu of fault conditions, from strict liability to intention or motive. But beyond that, the capacity to promise makes the whole range of dispositions in between the two ends—no commitment whatsoever, and full-blown moral obligation—that bit finer grained. It allows people to articulate to themselves, and to communicate, intermediate levels of commitment by reference

<sup>25</sup> Of course it would be quite perverse, in the context of an intimate relationship, for this to matter, in terms of the normative aftermath of the event: no-breach and excusable breach would mean the same; the explanation would do the trick, no matter which of the two tricks it is.

to, but short of deploying that capacity. It allows people to say distinctly meaningful things such as “I can’t promise, but I’ll do my best.”

Finally, the promisee. Being a promisee, it turns out, is a serious business. There is an art to that, too. In exercising her unique power over the promisor, the promisee often has a wide range of options to choose from, and must attend to a delicate and complex balance of considerations before she can make the right choice. That, incidentally, informs my view that it is a role that cannot be thrust upon a person without her consent; that it is possible to refuse it, reject a promise, prevent it from coming into existence.<sup>26</sup> A full defense of this view must await another day; if I am right, however, then here we have yet another feature of promise that renders it attractive for those who value personal autonomy: not just the role of the promisor, but also that of the promisee involves self-authorship of significant dimensions of one’s normative environment.

### Conclusions: Contract

I have said little about contract thus far, other than mentioning, in passing, that the law of contract is commonly thought of as the law of enforceable promises—or, at any rate, as the legal iteration of the moral institution of promise;<sup>27</sup> and that philosophical theory of contract, just like that of promise, has come to be dominated by the view that the key to the desirability of the institution lies in its personal-autonomy-enhancing potential. Yet much the same anxieties over the likely effect of promise on personal autonomy may be felt in relation to contract; in light of the role of the state in enforcing contracts, perhaps even more strongly. Moreover, parties to contract are invited to relate to each other predominantly as parties to contract; the relational background, in this instance, is at best a contingency: much of the very point of the institution is the way in which it avails itself to those who are not already interlocked in meaningful personal relationships.<sup>28</sup>

Indeed, in contract, the risk of excessive restriction of the freedom to change one’s mind, and various other dimensions of the inherent, potentially excessive risk to personal autonomy this institution could pose, are addressed, inasmuch as they are, differently. It is true that in contract, too, parties can sometimes create a fault condition for an obligation they assume. Yet it is not surprising that creating such fault conditions is not a very pervasive practice in this domain, nor that, in the absence of an explicit contractual provision to such an effect, contracts are usually interpreted (and rightly so) as excluding it.<sup>29</sup> There are, however, various other ways in which the law of contract may be understood, or indeed *justified*, as setting out to moderate such risks. Focusing on the common law of contract, I will list three, in an ascending order of generality and scope.

<sup>26</sup> Although in cases such as this, some sort of an obligation (a vow?) may still come into existence.

<sup>27</sup> The moral institution of agreement is, in fact, the better analogy. I have argued along such lines in Dori Kimel, *The Morality of Contract and Moral Culpability in Breach*, 21 K.L.J. 213, 215 n. 2 (2010).

<sup>28</sup> See KIMEL, FROM PROMISE TO CONTRACT, at 57.

<sup>29</sup> Some very specific exceptions may be found in “vitiating” doctrines such as frustration and impossibility; these, by their nature, are limited in application to highly exceptional circumstances.

1. The common law of contract is generally averse to recognizing and enforcing unilateral undertakings. There are specific ways in which to create unilateral, legally binding obligations, but the norm in contract law is bilaterality. The formation requirement of consideration, while not coming close to ensuring that every contract represents an equally beneficial bargain to all parties, prevents entirely unreciprocated undertakings from acquiring legal force. It is plausible to think that entirely unreciprocated undertakings are particularly likely to become the object of a change of mind, or that the capacity to act on a change of mind of this sort merits particularly robust protection.

2. The common law of contract does not enforce promises, or indeed agreements, *per se*; rather, it protects the performance interest that agreements generate. To non-lawyers, this distinction may seem trivial; however, it has numerous, far-reaching doctrinal and practical implications. It manifests itself most palpably in the area of remedies for breach of contract: whereas the protection of the performance interest sometimes calls for the actual enforcement of contracts, very frequently it does not—for instance, in all cases where the award of a certain measure of monetary damages suffices to place the plaintiff in as good a position as that in which it would have been had the contract been performed.

This, of course, is a feature far greater in doctrinal scope, as well as theoretical significance. It is a feature of the law of contract that has always attracted a great deal of critical attention, particularly by those who, for a wide range of reasons, think that the enforcement of promises *is* in fact a proper role for the law of contract to fulfil. But the analysis I have offered gives us one more reason to be wary of all such views. It suggests that if contract law set out to systematically enforce promises (or even, for that matter, just agreements), what it would end up enforcing is something far less autonomy enhancing, far more autonomy endangering than the moral institution of promise: it would end up enforcing promissory norms in a relative normative vacuum, that is, absent the myriad relationship-derived norms which supplement and often supplant promissory norms in the normal, nonlegal habitat for promissory activity.

3. The freedom of contract appears to be significantly narrower than the freedom of promise. Numerous forms of restriction on the freedom of contract, that is, go far beyond excluding from the realm of contract that which it would be morally impermissible for parties to contract to undertake, and much further, often on straightforwardly paternalistic grounds, towards the removal of those options which are likely to cause particularly acute regret, or prevent parties from acting on such regret.<sup>30</sup> Curtailed as it is, the freedom of contract is not quite as limited as to ensure that every contract represents a net gain for the personal autonomy of its parties, or indeed that the very capacity to make contracts ends up representing a net gain for the personal autonomy of all those who may deploy it—far from it; yet the observable trend, in virtually all legal systems which are the product of a moral-political outlook that prizes personal autonomy, can be understood, and by and large justified, as one orientated towards some more modest iteration of such a goal.

<sup>30</sup> For a classic discussion, see Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763 (1983).

It remains the case that, just as with promises, there is an art to making contracts. With contracts, too, there is scope for making mistakes, and mistakes that can be costly, and can be costly in terms of the personal autonomy of those who make them. It cannot be assumed too casually that by facilitating the capacity to make legally binding agreements—by creating *a* law of contract—the state invariably enhances rather than endangers the personal autonomy of those who may deploy it. The historical as well as ongoing trajectory of the law of contract in autonomy-prizing cultures attests to that: tilting the overall balance away from the endangerment of personal autonomy and in favor of its enhancement has been the most enduring challenge, and the endeavor to meet it the most powerful engine of development and reform.