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CONTRACT AND THE PROBLEM OF FICKLE PEOPLE

Aditi Bagchi[*]

Most theories of promise and contract hold that these practices enhance our autonomy. This Article argues that such theories are excessively optimistic about the relationship between autonomy and long-term commitment. Because we continuously revise our values and plans, voluntary obligations enable earlier plans and express older values at the expense of updated plans and values. The challenge of individual moral discontinuity plays out differently for the morality of promise and contract, respectively.

This Article first recasts moral discontinuity, or fickleness, as a valuable moral feature of persons, albeit one that is in tension with other moral interests. Agents with active moral faculties under conditions of incomplete information should continually revise the commitments that motivate particular promises. In fact, even commitments simultaneously held by a single agent may be inconsistent with each other. These limitations of consistency and continuity reflect persistent agency.

Individuals differently prioritize stability and consistency, on the one hand, and revision and growth, on the other. Each of us can navigate the practice of promise to strike a personal balance between these values. Similar calibration is not possible within contract, however. The legal regime of contracting in a liberal state should not undertake to enforce a promise for its own sake, lest it underwrite a thick conception of personhood that favors moral stability over moral evolution. Contract law must locate its justification elsewhere. Indeed, American contract law avoids embracing any dogmatic theory of the relationship between autonomy and contract.

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TABLE OF CONTENTS

I. INTRODUCTION

We often understand promise and contract as practices that promote autonomy.[1] By making a promise or entering into a contract, we are able to alter our moral and legal position, respectively, merely by expressing an intention to do so. You are not obligated to pick up your friend from the airport on a given occasion until you promise to do so. You are not obligated to refrain from disparaging a company's products until you agree not to as its employee. Most of what we owe each other does not depend on our communicated intentions in this way. Similarly, most of our legal duties to others do not depend on a communicated intent to assume them. Obligations of our own deliberate making are unique.

Why recognize the power to bind ourselves in this way? The promise to help your friend advances your friendship and the promise not to disparage your employer makes it possible to access employment. More generally, David Owens has argued persuasively that "normative powers"[2] like promise allow us to author our normative world, rendering it more of our making.[3] When we actively shape our normative position, we exercise a distinctive dimension of our moral agency. The resulting responsibility for our moral position is important to our self-conception as agents. Whether we are responsible for what we owe others is not a metaphysical fact; it depends on whether we take each other to be responsible. By treating

1. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 14 (1981) (arguing that when one promises it increases one's future "options," which in turn promotes autonomy); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1617 (2009) ("On the personal sovereignty conception of autonomy, promisors are held morally accountable for their promises out of respect for their right to choose to undertake moral commitments as they see fit."); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 502 (2008) ("An autonomous life requires . . . meaningful, moral relations with others. Meaningful, moral relations depend on agents having the ability to make binding promises.").

2. Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 PROC. ARISTOTELIAN SOC'Y 79, 93–94 (1972).

3. *See* DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE 25 (2012).

promises and other exercises of normative power as binding, we construct our own agency.

But the binding character of promise and contract is constrictive too. In fact, on their face, promise and contract reduce the choices available to us in the future.[4] Because you promised to pick up your friend, you can no longer spend the afternoon reading, running, or staring at the wall, even if you later decide that one of those is a better way to spend the afternoon. Because you agreed not to disparage your employer, you may not share views that you come to hold deeply about the place where you spend most of your time. Scholars of promise and contract have tended to conclude that because *we* bind *ourselves* through those practices, the constrictive effect of promise and contract does not pose a threat to autonomy. Pursuant to the prevailing view, the power to put ourselves in a new moral position enhances our autonomy even if we find ourselves newly encumbered.[5]

Such optimism about promise and contract is excessive. This Article does not set out to deny that the normative power to make promises and contracts enhances our moral agency. But that benefit comes at a cost. The same ideal of moral agency that makes promise valuable makes the power to revise and reject commitments that we have made valuable too. In fact, the power to revise and reject recognizes an important feature of our agency: it is *persistent*. That is, because we are persistent agents, we continuously revisit our values and ends. We can and should act in a manner that reflects our new assessments.

Of course, the human tendency to break promises and breach contracts reflects a variety of weaknesses, including the bare temptation of self-interest. We might fail to follow through on a promise because we have already obtained the advantage we sought in making the promise and see nothing to gain from performance. Or we might regret an agreement because we learn new facts that reveal it to have been a bad deal for us. Arguably, the assignment of risk in contract is intended precisely to deal with this sort of painful resolution to factual uncertainty. However, we also break promises

4. Self-imposed obligations are only one of the ways in which we may be burdened by our former selves. *See, e.g.*, RICHARD WOLLHEIM, THE THREAD OF LIFE 130–32 (Yale Univ. Press 1999) (1984) (describing the potential psychological tyranny of memory). But they are unusual because the practice of recognizing self-imposed obligations as binding depends on the positive contribution of the practice to our autonomy, all things considered. By contrast, the tyranny of memory is a psychological fact that does not depend on our conclusion that memory serves us well (though we might agree that our personhood would be even more compromised without memory). *See infra* Part III (comparing the self-imposed obligation with involuntary duties).

5. *See* FRIED, *supra* note 1, at 16–17.

and breach contracts because we have changed our minds in a morally significant way.[6]

We often change our minds about the commitments we have made because we reject some value on which the commitment was based—a life plan, a relationship—or because we reassess the balance of the same reasons we had previously considered.[7] Even a decision to breach that appears at first blush to be a momentary failure of will likely reflects some underlying ambivalence in our reasoning about the agreement. At a critical moment, we might revive reasons that we earlier rejected or had previously judged to be outweighed by other reasons.[8] Our tendency to change our minds is easily dismissed as fickleness because the internal processes that result in a change of mind are often opaque to others.[9] All that others see is the same person doing something different.[10] A change in behavior will appear sudden, even though the reasons for the change have been accumulating for an agent for some time before the reasons reached tipping weight. Of course, some people are more sympathetic to change in others and will project reasonable uncertainty that they cannot directly observe. Similarly, some cultures are more tolerant than others of such "multiplicity" within a single person and her life.[11]

Regardless of our particular dispositions, we all know from subjective experience that we change our minds because we are still thinking. And, as agents, we aim to translate our new thoughts into

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6. Throughout this Article, I will refer to (changes in our) values, ends, and identity as "normative" or "moral" matters. It can be useful to distinguish questions about what we owe each other from questions about what we care about. *See* HARRY G. FRANKFURT, *The Importance of What We Care About*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 80, 80–81 (1998). Nevertheless, although self-regarding questions of value, virtue, and identity may not be strictly moral in the sense of defining our duties to others, they are normative and even moral in the more general sense that they entail "strong evaluation." *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 4 (1989). Moreover, ultimately, the way we construct our own identities has too many implications for how we treat others to draw a sharp boundary between these matters; questions of identity have a critical moral dimension. *Id.* at 28–29.

7. *Cf.* Monika Betzler, *Sources of Practical Conflicts and Reasons for Regret*, *in* PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS 197, 198 (Peter Baumann & Monika Betzler eds., 2004) (distinguishing regret over right decisions from regret over wrong decisions).

8. *Cf.* ALFRED R. MELE, IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL 3–6 (1987) (discussing varieties of akratic action).

9. *See* Simon Blackburn, *Has Kant Refuted Parfit?*, *in* READING PARFIT 180, 180–81 (Jonathan Dancy ed., 1997) (noting that the problem of personal identity is a first-person problem); *see also* Gottlob Frege, *The Thought: A Logical Inquiry*, 65 MIND 289, 310–11 (1956) (explaining that one can grasp thoughts about oneself that one cannot communicate and that others cannot grasp).

10. For a discussion of whether actions can be true, false, or inconsistent and how irrationality might figure in practical reasoning, see DAVID PEARS, MOTIVATED IRRATIONALITY 121–26 (1984).

11. *See* ROM HARRE, THE SINGULAR SELF: AN INTRODUCTION TO THE PSYCHOLOGY OF PERSONHOOD 148–49 (1998).

new action. The reasoning behind a change can be careless or careful, just as our initial commitments are sometimes careless and sometimes careful. Either case is an exercise of practical reason, the capacity for which defines us as moral agents.[12] Persistent agency is thus a morally valuable capacity, and it deserves accommodation. I will argue below that the practice of promise cannot accommodate persistent agency within itself, but the institution of contract can. It should, and it does.

To be sure, contract law does not entitle us to impose losses on others so that we might indulge our fickleness. But in several respects, contract law is more lenient than its private counterpart—the morality of promise.[13] Promise-making befits individuals who are committed to moral stability and prepared to undertake its weighty obligations. Many of us choose to exercise normative power over time at the expense of constricting our persistent agency—at least in some areas of our lives. Others might self-consciously take steps to avoid moral encumbrances. Because we are all equally entitled to the support that contract law provides in our daily lives, it is a more liberal institution than promise. Contract law facilitates commitment without endorsing any one conception of personal virtue over others.

Many scholarly discussions of promise and contract elaborate their relationships with the principle of autonomy. By contrast, this Article's focus is on the broader concept of agency. I should therefore specify how I use each concept. I take a moral agent to generate reasons for herself and others. She is an agent in that she is not merely responsive to external facts but processes facts in a way that makes her decision to act in one way rather than another her own.[14] Because she is a moral agent, her choices reflect moral deliberation, or they should.[15] And just as she ought to take into account the moral claims of others, her interests are of the sort that should be given special weight (as compared to other beings) by other moral agents.

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12. *See* RICHARD MORAN, AUTHORITY AND ESTRANGEMENT: AN ESSAY ON SELF-KNOWLEDGE 114–18 (2001).

13. *See infra* Part IV.

14. My use of the concept of agency is consistent with standard theories of agency. *See* G.E.M. ANSCOMBE, INTENTION 9 (Cornell Univ. Press 1969) (1957) (explaining that intentional actions are those for which the agent answers "Why?" with a reason for acting); DONALD DAVIDSON, *Agency*, *in* ESSAYS ON ACTIONS AND EVENTS 43, 46 (2d ed. 2001) ("[A] man is the agent of an act if what he does can be described under an aspect that makes it intentional."); *see also* MYLES BRAND, INTENDING AND ACTING: TOWARD A NATURALIZED ACTION THEORY 3–5 (1984) ("Whenever an action includes the casual consequences of the agent's bodily movements, observation is necessary for him to know what he is doing."); MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 128–29 (1987) (contemplating the relation between acting with an intention and intending); ALVIN I. GOLDMAN, A THEORY OF HUMAN ACTION 103–04 (hardcover ed. 2016).

15. *See* Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 PHIL. & PUB. AFF. 101, 101 (1989) (noting that the moral agent asks, "What *should* I do?" (emphasis added)).

I take autonomy to be a more robust principle: an autonomous person governs herself by reference to the *right* reasons.[16] That is, a person can fail to act autonomously where she does not act on the moral reasons that apply to her. Although autonomy is often used more broadly to encompass what is here either agency or the capacity for autonomy, I am using a more restrictive conception of autonomy in order to be able to distinguish systematically between our moral interest in exercising agency and our interest in exercising it well. Nevertheless, both agency and autonomy drive at the idea of self-authorship, and such self-authorship is facilitated by promising. Only if we share a conception of the person that is well-served by the power to promise does the law of contract have noninstrumental reasons for helping to construct the normative power of promise in the context of legally binding exchange.

A few years ago, Dori Kimel wrote a book chapter wondering whether the autonomy-enhancing effects of promise have caused us to overlook or downplay (in theory, at least) the obvious downsides of commitment for autonomy.[17] People can bind themselves until they are too bound up. Does autonomy not require that we retain the right to change our minds?

Kimel considers a number of problems that promise might pose for autonomy, but I will argue that he does not do the challenge justice. His account is thrown off by adopting the starting point of the literature on promise: only a morally continuous and unitary person can be autonomous.[18] Starting there, Kimel misjudges the value of changing one's mind and its relation to a fragmented and discontinuous identity.[19]

The idea of autonomy that Kimel employs presupposes a more basic moral agency. Because persistent agency is in basic tension with commitments across time, the implications of promising for autonomy are more ambiguous than Kimel allows. The power to promise is valuable, but normative powers outside promise have value too; the power to make a promise sits tightly against the power to revise that promise. The same ambition of agency that motivates the basic normative power of promise motivates us to revise our commitments in light of evolving values that may coexist in tension

16. The relationship between agency and autonomy is variously conceived but agency is treated here as the prior notion, a prerequisite for autonomy. The idea of autonomy employed is Kantian; it is more demanding than some popular uses. *See* IMMAUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 40–44 (James W. Ellington trans., Hackett Publ'g Co. 3d. ed. 1993) (1785) (identifying autonomy with self-governance by universalizable maxims, i.e., with a substantive moral principle, the categorical imperative).

17. *See* Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 96, 96–99 (Gregory Klass et al. eds., 2014).

18. *See id.* at 99–103 (discussing personal autonomy and a change of mind).

19. *Id.*

with each other. Revision and internal conflict are what we call fickleness. We may conceive ourselves as continuous persons, but we rightly accommodate our fickleness too.

Part II summarizes and suggests limitations in Kimel's arguments "in defense" of promise and contract in the face of the value of changing one's mind. In doing so, my aim is to show the scope of the challenge here, which applies not only to bad promises but also promises per se. Part III argues that agency under nonideal conditions, including limited cognitive faculties and limited knowledge, requires continuous revision of our basic moral commitments. *Some* degree of indecision is morally compulsory. Part IV suggests that people reasonably disagree about the value of stability and unity and makes sense of why promise and contract should diverge in their treatment of regret and reversal. Promise is properly associated with continuity of a singular identity and contract appropriately declines to presuppose such a conception of the person. This divergence is good, especially in a liberal state. Part V discusses several doctrines that accommodate fickleness.

II. DORI KIMEL'S DISCUSSION OF CHANGING ONE'S MIND

Surprisingly, Kimel's inquiry is the only extended philosophical discussion of this intuitive challenge to modern contract theory. Kimel begins by setting out the worry that the implications of promise for autonomy are more mixed than the literature on promise has allowed.[20] If it turns out that promises are bad for autonomy, then on his nonconventional view of promise, the idea of promise is just illusory—the moral practice exists only if it is endorsable from a moral standpoint. If promise undermines autonomy, there is no such thing as promise.

Kimel sets out to redeem promise and quell fears about contract.[21] Although making commitments and changing your mind are both valuable exercises of autonomy, he does not regard them as equally important. The value of autonomy, he claims, lies in the persistent and significant, not the fleeting and trivial.[22] He associates our interest in changing our mind with spontaneity and associates spontaneity with the fleeting and trivial. Autonomy dictates a moral interest in controlling weighty matters that affect the arc of one's life. Promise enhances that capacity at the expense of frivolous indecision.

Kimel himself is not wholly satisfied with that defense of promise. It rests, after all, on a dubious empirical view of what kinds of decisions people are likely to revise.[23] More problematically, it discounts the value of changing one's mind per se as distinct from the

20. *See id.* at 96–99.
21. *Id.* at 99.
22. *See id.*
23. *See id.* at 100.

value of changing one's mind about this or that matter.[24] Kimel offers two additional arguments for why promise might not unduly burden the moral interest in changing one's mind: promisors have the power to make promises fault based, and they operate in relationships where promisees are obligated to release promisors where a promise turns out to be regrettable.[25]

Kimel argues that a promisor's power to moderate her commitment attenuates the burden of promise.[26] A promisor that does not wish to commit herself wholly can promise only "to try" or she can promise that she will perform only under specified conditions.[27] Unfortunately, though this possibility does make promise less burdensome, it also seems to make it less valuable. And, in any event, it does not release the later self from the power of the former self since it is up to the former self to hedge the promise. A promisor who suspects that the promise she is about to make may turn out to be a bad idea can indeed avoid implicating herself too much, but a promisor with no such doubts will not take advantage of the opportunity to condition her own promise or limit its scope. Even where she does, she necessarily limits her promissory obligation by reference to some external constraint ("I promise I will pick you up unless I have a work conflict"); the contingency could not be within her own control ("I promise I will pick you up unless I come to decide that you are not worth the trouble."). The latter type of promise is illusory, in the language of contract. Even hedging by reference to external constraint may undermine the relational value of the promise substantially. A promise hedged by retaining the bare right to change one's mind is an affirmatively negative signal. Kimel may be right that promisors have wide-ranging formal powers with respect to their promises, but they are more constrained if they wish to avail themselves of the relational value associated with promise in the first place.

The last mitigating consideration Kimel identifies in defense of promise is the duty of promisees to release promisors from promises.[28] That duty is not one that attaches by virtue of their status as promisees (though that status gives them the power of release) but in light of the relationships in which promising usually takes place.[29] Kimel suggests that in most cases where a promise turns out to be especially burdensome, the promisor has a right of release by the promisee.[30] Presumably, in the context of contractual promises, the duty to release is manifested in doctrines of excuse.

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24. *Id.* at 100–01.
25. *Id.* at 109–11.
26. *Id.* at 106.
27. *Id.*
28. *Id.* at 109–11.
29. *Id.* at 109.
30. *Id.* at 109–10.

This argument too assumes certain kinds of reasons for wanting release from a promise. In particular, those reasons have to be ones that objectively justify breaching the promise, such that the promisee has objective reason to release the promisor from it. Kimel's argument does not contemplate the possibility of changing one's mind where that change of mind is triggered not by a change in the world (or information about it) but by a change in oneself. It might sometimes be the case that a promisee will respond to even the latter kind of change, but she is unlikely to be *bound* to release for that reason (morally or legally). This is especially true where the relevant change in oneself is precisely a desire to rupture relations with the promisee or at least a devaluation of her consideration in an exchange.

Kimel's defense of contract, or its implications for autonomy, is more persuasive than his defense of promise. He again identifies three ways in which contract takes into account the value of changing one's mind.[31] First, "[i]t 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."[32] Because contract law, by virtue of the consideration requirement, enforces primarily exchange agreements, most contractual promises are reciprocal.[33] It is not clear why one would be less likely to regret a commitment made for exchange, but Kimel seems right; there is less reason to allow one to change one's mind in that context. Although a promisee might rely on a unilateral promise, the state's interest in facilitating exchange because of the material benefits of a regime that allows for cheap, credible commitments justifies its enforcing commitments on which one might wish to backtrack. I expand on this point in Part IV.

Second, Kimel observes that contract does not enforce the promise but only the performance interest.[34] This is because in most cases, courts do not award specific performance.[35] Seana Shiffrin has critiqued this divergence between the rules of contract and the ostensible moral rule that promisors must actually perform.[36] Kimel seems to imply that the obligation to make the other party whole is less burdensome to a contracting party than an obligation to perform.[37] That is presumably true since, if a party finds damages more burdensome, they could just go ahead and perform (assuming

31. *Id.* at 114.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007).
37. Kimel, *supra* note 17, at 114.

the period for performance has not passed). But the rule that contract usually only gives rise to damages is important also for doing just what Shiffrin claims: sending a message that a party is not really required to perform.[38] Contrary to Shiffrin, that message is valuable as a *legal* norm precisely because it allows that the attitude of contract law toward a commitment is not so dogmatic as promissory norms alone would suggest. In particular, as I argue further below, contract can be regarded as accommodating other values derived from autonomy, including an interest being able to reverse course.

Finally, Kimel points to the fact that freedom of contract is less wide ranging than freedom of promise.[39] We are not permitted to bind ourselves in the most profound ways. We cannot sell ourselves into slavery or indentured servitude.[40] We cannot even agree not to work for a competitor of an employer on overly broad terms.[41] Contract is restricted in myriad other ways. Sometimes it is restricted to protect third parties[42] and sometimes restrictions appear motivated by cultural reasons,[43] but sometimes courts and policymakers are engaged in straightforward paternalism.[44] It is paternalistic, however, only if we assume continuity of the person. My discussion below might provide us with a better response to the charge of paternalism than does Kimel. Paternalism involves restricting a person for her own benefit. Relaxing the assumption of continuity, we can more easily justify protecting a later self from a former self.

The basic limitation in Kimel's defense of promise and contract from the standpoint of autonomy is that the value he acknowledges in changing one's mind is really just the value in changing one's mind about what turn out to be bad promises.[45] In this respect, his view is consistent with that of Stephen Smith, who defended rules limiting contracts that impair future freedom on the perfectionist grounds that such contracts interfere with promisors' future well-being.[46] Kimel and Smith justify excusing nonperformance and refusing to enforce agreements, respectively, when there is something objectively wrong with the initial promise.[47]

In fact, Kimel starts his defense of promise by discounting the value of changing one's mind per se, suggesting that spontaneity itself does not rival the autonomy interest in the serious and long term, the

38. Shiffrin, *supra* note 36, at 722.
39. Kimel, *supra* note 17, at 114.
40. Stephen A. Smith, *Future Freedom and Freedom of Contract*, 59 MOD. L. REV. 167, 175 (1996).
41. *Id.* at 169.
42. *Id.* at 170.
43. Kimel, *supra* note 17, at 114.
44. *Id.*
45. *Id.* at 98.
46. Smith, *supra* note 40.
47. Kimel, *supra* note 17, at 114; Smith, *supra* note 40, at 173.

latter being well served by promise.[48] The limitations on the burden of promising that he identifies all apply where there is continuity between the values of the person who made the promise and values of the person bound to perform it.[49] That is, the performing person is not severely burdened if her values were in complete alignment with those of the promising person because the promisor could hedge her promise in the appropriate ways. To the extent the performing person wishes to retain the relationships constructed by her former self, she can take comfort in the duties those relationships impose on promisees to release her from the promise where external circumstances warrant such excuse. But none of the considerations highlighted by Kimel mitigate the burden of promise on a promisor who has truly changed her mind.

The challenge posed by the phenomenon of regret to the practice of promise does not lie in the imperative to be responsive to objective reasons for changing one's mind about a particular promise. Just as the value of making promises does not lie in conformity with the reasons one might have for making a promise, the value of changing one's mind does not lie in the value of conforming with new reasons not to keep it. Keeping one's promise is valuable because it is empowering, but we can shape our normative situation over time only if we regard ourselves as continuous persons. As developed further below, changing one's mind is valuable because we also have reasons to render ourselves discontinuous by revising our beliefs and values over time. The presumption of continuity is not straightforwardly good for autonomy. Moral agency is a sufficiently sweeping interest that it is in some respects advanced by personal continuity even while other aspects lead us to harbor multiple values and commitments in an unstable hierarchy and sometimes in outright conflict with one another.

While our usual notion of a moral agent presupposes that she operates in the singular, an agent need not be unitary (in the sense of cohesive or consistent) either in her beliefs or in the values she endorses. We speak intelligibly of collective agents, whose goals and preferences are in flux over time.[50] In the political context, we recognize a tension between the need for stable political institutions and the accountability of democracies to their present populations.[51] On the one hand, a stable constitution makes it possible to undertake more elaborate national projects, including the institution building

48. Kimel, *supra* note 17, at 99.

49. *Id.* at 99–100.

50. *See* MICHAEL E. BRATMAN, *Shared Intention*, *in* FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 109, 110 (1999) (describing intentions of structured social groups); MARGARET GILBERT, ON SOCIAL FACTS 18 (Princeton Univ. Press 1992) (1989) (discussing plural subjects).

51. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 55 (2001).

necessary to comply with the demands of justice.[52] On the other hand, democracy seems to require that institutions and policies be responsive to people's changing values on even constitutional questions.[53] On the one hand, we desire some national unity in order that political processes function and with the legitimacy of proximate consensus on deep issues.[54] On the other hand, we celebrate divergent views and call ourselves liberal for not wishing difference away.[55] These are tensions we live with. We differ among ourselves on the relative priority of the two competing values. Some people advocate constitutional interpretation by reference to original intent,[56] while others call for "systematic instability" by way of periodic constitutional convention and sunset provisions[57] or other means of updating the constitutional canon over time.[58] Some people are nostalgic for greater cultural homogeneity, while others call for the most liberal definition of the demos.[59] But few would deny, in principle, either the values of stability and cohesion, on the one hand, or change and diversity, on the other.

The same tension in our normative commitments applies to the person. The natural person is more cohesive and stable than a collective agent only by degree.[60] Any given person has a complex

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52. *Id.* at 37.
53. *Id.* at 174.
54. *Id.* at 70.
55. *Id.* at 68–69.
56. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 243–59 (1988); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015).
57. *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 620 (2008) (describing various institutional proposals for promoting constitutional change); *see also* John Dinan, *"The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures*, 62 REV. POL. 645, 646 (2000); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 355 (1994); Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421, 422 (1970).
58. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 105–17 (2014); DAVID A. STRAUSS, THE LIVING CONSTITUTION 80 (2010).
59. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 120–22 (1989) (describing this tension and defining demos inclusively).
60. Although this Article does not concern itself with the problem of personal identity as such—because I assume that the person who makes a promise is the same as the one called upon to perform it—Derek Parfit's exploration of the complexities of psychological continuity were critical to establishing my starting point, i.e., fragmentation and instability in individual thinking. Derek Parfit, *Personal Identity*, *in* PERSONAL IDENTITY 199, 203 (John Perry ed., 2d ed. 2008) ("A person's mental history need not be like a canal, with only one channel. It could be like a river, with islands, and with separate streams."); *see* DEREK PARFIT, REASONS AND PERSONS 326–29 (1984) (discussing changing commitments).

conception of the good that is under constant revision.[61] Because our value set never arrives at a stable equilibrium, at any given moment in time there are internal tensions, if not outright contradictions, among our commitments.[62] Some conflicts are between concrete judgments and abstract principles. Some are among our theoretic commitments (e.g., in our aspiration to rival virtues), and others are among our judgments across contexts (we may be more relaxed in our fidelity to a moral principle in one setting than in another). No one has fully reconciled all her normative beliefs, though some are less comfortable with eclecticism (or inconsistency) and others are more insistent on consistency (or dogmatism). Importantly, these internal conflicts are genuine internal moral conflicts (i.e., "practical conflicts").[63] They are not merely conflicts between reason and emotion; emotional responses are only relevant here if they are endorsed or consciously adopted based on reasons.[64] While the possibility of "true" practical conflicts is an open philosophical question, the inconsistency in our normative commitments that I describe does not depend on the objective reality of the conflict. That is, it might be the case that in every case where our normative commitments conflict, one of those commitments is improper or reflects false moral reasoning. If that were true (which I do not believe), then any apparent conflict among our normative commitments is illusory.[65] But as elaborated in Part III below, we do not engage in practical reasoning under ideal conditions. Even if it were the case that there are no true practical conflicts, the human condition subjects us to such conflict because we cannot resolve all moral questions rightly or definitively as would be necessary to avoid them.

The moral capacities we ascribe to persons in the Rawlsian framework, i.e., a sense of justice and a capacity to have a conception

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61. A person's "conception of the good" is her life plan, rooted in philosophical and religious belief as well as political and social doctrines. *See* JOHN RAWLS, A THEORY OF JUSTICE 127 (rev. ed. 1999). It is roughly her worldview, especially her ideas about what is valuable.

62. I refer to inconsistency among our normative judgments and commitments and not "self-inconsistency" in the psychological sense, whereby one personal trait interferes with actualization of another, and it is the latter that the person endorses. *See* Augusto Blasi & Robert J. Oresick, *Self-Inconsistency and the Development of the Self*, *in* THE BOOK OF THE SELF: PERSON, PRETEXT, AND PROCESS 69, 73 (Polly Young-Eisendrath & James A. Hall eds., 1987).

63. THOMAS NAGEL, MORTAL QUESTIONS 128–29 (Canto ed. 1991).

64. I am following Joseph Raz here. *See* Joseph Raz, *Personal Practical Conflicts*, *in* PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS, *supra* note 7, at 172, 177 ("The so-called conflict between reason and the passions is no such thing . . . . [T]alk of such conflict refers to the degree to which one is inclined to response to emotion-related reasons and to the degree to which one relies on one's reason in deciding what to do.").

65. *See* Earl Conee, *Against Moral Dilemmas*, 91 PHIL. REV. 87, 87–97 (1982).

of the good,[66] are best understood as active capacities. Moral agency does not consist of passive possession of a static set of beliefs about either justice or the good. Having these capacities means exercising them, and this implies in the ordinary life that the work-products of these moral capacities are in perpetual flux. Because the exercise of these moral capacities is central to our self-conception as autonomous moral agents, we might even look askance at a person who seems disinclined to subject her ends to scrutiny, unresponsive to the new data on the human condition that each day supplies or wedded to a value set whose simplicity belies the complexity of the world through which those values should guide her.

Kimel is the first person since Farnsworth[67] to give sustained attention to the problem of changing's one mind.[68] It is surprising that the philosophical literature on promise has rallied so completely around the value to one's autonomy of being bound. The aim here is not to displace that general proposition but to put into focus a countervailing story. It is also about autonomy, or values related to autonomy. But my account will go farther back than Kimel in questioning the presumption that autonomy presupposes a continuous and stable self, such that normative powers that operate on that presumption come at no cost from the standpoint of autonomy. I will suggest instead that we do not have a single, stable identity and, as agents subject to cognitive and experiential constraints, we should not aspire to have one. The practice of promise may insist on it, but contract law does not expect it of us.

III. AGENCY UNDER NONIDEAL CONDITIONS

Nothing in this Article should be taken to deny the importance of a continuous self. The pragmatic ambitions of contract law, to facilitate planning and coordination,[69] assume that people have an interest in their future states.[70] Likewise, the foundational premise of contract law, that people know what is good for them and are

66. JOHN RAWLS, POLITICAL LIBERALISM 19 (expanded ed. 2011).

67. *See generally* E. ALLEN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS (1998) (discussing the general principles and legal rules that permit a person to change their mind).

68. *See generally* Kimel, *supra* note 17 (discussing changing one's mind in promise and in contract).

69. *See* Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 2003 (2011) (explaining that contract's moral and economic purpose is to "enable coordination on neutral terms in an open and pluralist economic and political order"); *see also* STANLEY I. BENN & RICHARD S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 279 (1959); E. ALLEN FARNSWORTH, CONTRACTS 7–9 (3d ed. 1999); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 27 (2d ed. 1989).

70. For a discussion of the implications of a reductionist account of personal identity for self-interest theory, see generally Sydney Shoemaker, *Parfit on Identity*, *in* READING PARFIT, *supra* note 9, at 135.

usually the best guardians of their own (future) interests, assumes continuity of contracting parties.[71]

Less parochially, the kind of life to which human beings ordinarily aspire has direction and purpose, whether by design or retrospective narrative. Our sense of agency is enhanced by seeing things that happen to us as connected with choices we made. We accept responsibility for what follows from those choices.[72] Direction, purpose, choice, and responsibility are all concepts that apply across time: One directs her life over many series of actions.[73] One has a purpose with respect to actions not yet accomplished.[74] One chooses what to do going forward.[75] And one is responsible for things that happened already.[76] If these concepts are central to our moral agency, as their ubiquity in any discussion of autonomy and agency implies, then we cannot do without some self that persists over time.

But that self cannot be too settled, or else it ceases to be an agent in other respects. After all, at issue here is not personal identity in the metaphysical sense.[77] I am not addressing the metaphysical questions of whether a human being is the same *person* over time and by virtue of what.[78] I refer to the identity of an agent in the sense of a self-conception, the set of beliefs and values that motivate one's choice to do this and not that or to commit to one thing rather than another.

Moral agents can have moral claims addressed to them and they can make claims on others. In either case, the agent helps generate reasons. As the addressee of other's moral claims, she recognizes their claims as reasons for herself. As a claimant on others, she presents her reasons for recognition by others. The capacity to

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71. Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 143–44 (2009).

72. *See* ZENO VENDLER, THE MATTER OF MINDS 118 (L. Jonathan Cohen ed., 1984).

73. *See* George Wilson & Samuel Shpall, *Action*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/action/ (explaining that actions are caused by an agent's "desires, intentions, and means-end beliefs") (last updated Apr. 4, 2012).

74. *See id.* ("It is also important to the concept of 'goal directed action' that agents normally implement a kind of *direct* control or guidance over their own behavior.").

75. *See id.* (explaining that agents act with "intentions for the future").

76. *See* Andrew Eshleman, *Moral Responsibility*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/moral-responsibility/ (last updated Mar. 26, 2014) (discussing Aristotle's theory of moral responsibility and the notion that agents are responsible for their voluntary actions).

77. Mark Johnston, *Human Concerns Without Superlative Selves*, *in* READING PARFIT, *supra* note 9, at 149, 174–75 (noting that metaphysical claims about personhood bear a contingent relationship with practical commitments).

78. For discussion of those questions, in addition to Parfit, *supra* note 60, see generally Stephen Clark, *How Many Selves Make Me?*, *in* HUMAN BEINGS 213 (David Cockburn ed., 1991); and Kathleen Wilkes, *How Many Selves Make Me?*, *in* HUMAN BEINGS, *supra*, at 235.

generate reasons, or to be a self-generating source of value, depends on our being recognized as capable of generating new value and on recognizing reasons based on who we are now.[79] Otherwise, we would be mere vessels for a conception of the good authored by a former self. Generating guiding values, or choosing a conception of the good, must always be unfinished business or we would not properly be characterized as having a capacity to generate value; we would be better described as possessing values. And because recognition as a moral agent requires that others recognize our generative capacity, these new, revised commitments must have some moral significance for where we stand in relation to others. Others must see us as capable of moving around in and reshaping the normative landscape (to use Owens's phrase).[80] This means they will expect some discontinuity.[81]

Inconsistency is not just temporal. The process of moral change does not involve wholesale substitution of one complete conception of the good with another at neat intervals. We are in ongoing deliberation; we do not actually *achieve* reflective equilibrium.[82] Because we experience the world in fragments, at any given moment, we too should be fragmented with commitments rising and falling in priority, each competing for space in a value set thus deprived of either constancy or cohesion. There is nothing tragic about this responsiveness. It is an ideal of agency, or at least it follows from its proper exercise. We might regard the diversity of views held by an individual over time as characteristic of a free mind in the way that a "reasonable plurality of conflicting and incommensurable [conceptions of good in a society] is seen as the characteristic work of practical reason over time under enduring free institutions."[83]

Of course, not everything is properly subject to revision. We are subject to myriad involuntary duties irrespective of what we think

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79. *See* Lynne McFall, *Integrity*, *in* ETHICS AND PERSONALITY: ESSAYS IN MORAL PSYCHOLOGY 79, 80 (John Deigh ed., 1992) (explaining that the virtue of integrity demands as an ideal not only that we espouse the right principles but "make our principles, conventional or otherwise, one's own"); *cf.* Thomas M. Scanlon, *Reasons and Passions*, *in* THE CONTOURS OF AGENCY: ESSAYS ON THEMES FROM HARRY FRANKFURT 165, 180 (Sarah Buss & Lee Overton eds., 2002) ("What we and others regard as particularly significant about us is the considerations we regard as reasons and how we respond to them.").

80. *See* OWENS, *supra* note 3, at 11.

81. *See id.* at 4–5 (explaining that when an agent communicates an intention to impose an obligation on another, the agent is intentionally changing the normative situation and must believe that the other party is capable of changing his obligations).

82. "Reflective equilibrium" is the process by which we attempt to reconcile our general beliefs and principles with our judgments about specific situations or facts. RAWLS, *supra* note 61, at 20. Rawls suggests that we go back and forth among these until the process "yields principles which match our considered judgments duly pruned and adjusted." *Id.*

83. RAWLS, *supra* note 66, at 135.

about them—just as state powers are limited by universal human rights irrespective of the policy agenda of a given government.[84] Moreover, we may not renounce commitments we have undertaken to others if doing so would harm them.[85] None of these propositions is troubled by the arguments here because the imperative to accommodate fickleness is a challenge (ultimately withstood) to the independent moral force of promises, not to the idea of obligation in general. We do not recognize a duty to not harm others because it is good for our own moral agency.[86] But we do regard ourselves as bound by promises just because we think that recognizing the power to bind ourselves in that way is good for our moral agency. Normative powers are uniquely susceptible to the challenge of fickleness because they exist only inasmuch as they promote agency, and the phenomenon of human fickleness suggests that their implications for agency are more ambiguous than philosophers have allowed.[87]

In other words, fickle people (or rather, all people, because we are all fickle to varying degrees) are subject to a duty not to harm others, including by way of promise making and promise breaking.[88] The question is whether we should recognize an obligation to execute promises just because we made them and not merely because performance is morally commendable on other grounds, such as avoiding harm or promoting good consequences. Again, my contention is not that promises are a poor moral practice all things considered. We can choose whether and how to make promises, and in which domains of our life. Promises are also probably more conditional in practice than some theoretical accounts imply. For all these reasons, the challenge of persistent agency can be attenuated, though never diffused entirely. My claim here is not that promises are never properly regarded as binding. Instead, I urge caution with respect to the domain of promissory morality and insist that it not encroach on contract.

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84. SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING 123 (1998).

85. Marsalis v. La Salle, 94 So. 2d 120, 125 (La. Ct. App. 1957) ("One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking." (quoting RESTATEMENT (FIRST) OF TORTS § 325 (AM. LAW. INST. 1934))).

86. RAWLS, *supra* note 66, at 114.

87. *See* Jennifer M. Morton, *Deliberating for Our Far Future Selves*, 16 ETHICAL THEORY & MORAL PRAC. 809, 823 (2013) ("Cross-temporal authority, according to my view, is grounded in sharing a normative perspective with a particular future self on what matters. Whether a current self will share a normative perspective with a future self depends on the kind of reasons she has, whether her future self will see those reasons, and crucially, whether he future self will feel their force in a similar way.").

88. *See supra* note 85.

Thus far, I have emphasized the ways in which changing one's mind reflects the proper exercise of our moral faculties. However, though responsiveness to new information and experiences is an ideal, it does reflect the nonideal conditions under which we exercise agency.[89] If our capacity for reason were perfect and presented with complete information about the external world, we might, in principle, arrive at a stable set of values and beliefs that would generate right reasons in all cases. In that state of the world, no new information would require us to revise our existing views. Nor would self-doubt motivate us to revise settled questions. As agents, we would continue to generate reasons, but the reasons we generate would be identical to the ones that we would have generated at any earlier moment in time and the same as the ones we would recognize at some later point.[90] Because our exercise of agency is instead inevitably flawed, we can expect the reasons we recognize today to be somewhat different from the ones we recognized some time ago.[91]

If our capacity for reason were perfect, we could expect the reasons we recognize at any given moment to be consistent with each other. The set of beliefs that generate our reasons would be coherent, as we would have brought them in perfect alignment with each other. But our ability to conceive of the totality of our beliefs, let alone assess them as a totality, is limited too. We do not always see the ways in which our beliefs and values conflict or know how to resolve those conflicts when we see them.[92] Self-awareness might reduce some conflict to uncertainty but some internal conflict will persist, acknowledged or not.[93] This disunity reflects, in part, the fact that beliefs and values are updated in response to what we experience, and this updating is a good thing—even if our limited faculties render the process of updating incomplete. Given human limits, apparent unanimity among a society of *separate* persons on deep questions of life meaning and purpose is likely to reflect some oppressive social or

89. *See* Morton, *supra* note 87, at 812 (offering examples of the nonideal conditions of agency, such as "irrationality" and "akrasia").

90. *See* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 62 (Sydney Shoemaker et al. eds., 1989) ("We appeal to an agent's reasons for action in explain her behavior.").

91. *See* Morton, *supra* note 87, at 821 ("The agent's confidence in deliberating for her future self depends on her taking her future self to have a similar normative perspective on the world as she does now, but if she is carving up all of her current normative perspective through sheer acts of will how can she assume that her future self will see things as she does?").

92. *See* RAWLS, *supra* note 61, at 20 ("But if so and these principles match our considered convictions of justice, then so far well and good. But presumably there will be discrepancies.").

93. *See* Caroline Goukens et al., *Me, Myself, and My Choices: The Influence of Private Self-Awareness on Choice*, 46 J. MARKETING RES. 682, 690 (2009) ("[S]elf-aware people are more conscious of their presence, attitudes, and beliefs.").

political force.[94] Similarly, the appearance of total *internal* cohesion within a single person is likely to reflect either a failure to process new data or a lack of self-awareness.[95]

In making choices, we rely on beliefs and values that we know must be faulty but are nevertheless the best we can do at a given moment in time.[96] We have to rely on those beliefs and values to generate reasons for action even as we revise them. Our revision may be more or less deliberate; some will seek out revision while others will resist it. But we cannot altogether refuse to revisit our beliefs and values because we should know that they are probably incorrect. Such a refusal to revisit would deny our own agency, in that it would not undertake to generate reasons anew. And it would abandon the aspiration to autonomy, or self-governance, by right reasons.

The idea that we should doubt our own beliefs and values and be committed to revising them so that we can act on right reasons does not presuppose any particular view of the objective status of those reasons.[97] One might think (though I do not) of the right reasons as the best reasons out there to be discovered; our recognition of them would amount to seeing them.[98] In that case, we would expect each attempt to discover right reasons to be somewhat off in the way that

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94. Christoph Hanish, *Acting Rightly for the Right Reasons: An Amendment to Wolf's Reason View*, 42 TEOREMA: REVISTA INTERNACIONAL DE FILOSOFIA 55, 61 (2015).

95. JEFFREY B. RUBIN, A PSYCHOANALYSIS FOR OUR TIME: EXPLORING THE BLINDNESS OF THE SEEING I 109 (1998) ("Not only is a monolithic sense of the self limiting, but psychological health may involve access to, and comfort with, our multidimensionality. From this perspective, a sense of the complexity, multidimensionality, and polyvalency of the self is a developmental milestone and achievement."). David Velleman also concludes from a philosophical standpoint that "wholeheartedness is an object of wishes that do not necessarily represent a healthy trend in our thought." J. DAVID VELLEMAN, *Identification and Identity*, *in* SELF TO SELF: SELECTED ESSAYS 330, 346 (2005). Although he regards a coherent and consistent self as something we should aspire to, Velleman allows that in the course of the internal debates by which we would try to arrive at settled convictions, "we vacillate – which entails speaking in different voices, not just hearing them." J. DAVID VELLEMAN, *The Voice of Conscience*, *in* SELF TO SELF: SELECTED ESSAYS, *supra*, at 110, 113.

96. *See* Morton, *supra* note 87, at 815 ("This would seem to suggest that in deliberating for her far future self, an agent would consider her desires, or the objects and states of affairs they present as valuable or good, as a basis on which to make her decision. However, desires as we commonly understand them do not have the cross-temporal authority needed for prospective deliberation.").

97. For a range of views on related questions see, for example, ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 102–14 (2d ed. 1946); BLACKBURN, *supra* note 84, at 307; BRINK, *supra* note 90, at 14; DAVID B. WONG, MORAL RELATIVITY 1 (1984); James Dreier, *Meta-Ethics and the Problem of Creeping Minimalism*, 18 PHIL. PERSP. 23, 25 (2005); Philippa Foot, *Morality as a System of Hypothetical Imperatives* 81 PHIL. REV. 305, 305 (1972); Gilbert Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3, 4 (1975).

98. Andrew Reisner, *The Possibility of Pragmatic Reasons for Belief and the Wrong Kind of Reasons Problem*, 145 PHIL. STUD. 257, 265 (2009).

we can expect each attempt to measure the length of a table precisely to produce a somewhat different result, given the crudeness of our tools as well as our perception.[99] Alternatively, one might think that there are many reasons that are right, in the sense of "not wrong," but still regard the question of rightness as a transcendental matter outside the hands of agents.[100] Still another way of thinking about the effort to act on right reasons endows the agent with more constructive power.[101] Her reasons can be regarded as right insofar as they are the result of perfect deliberation (i.e., inasmuch as they reflect the proper use of her faculty of reason). We might go further and say that right reasons may not be right from any universal standpoint, but if they are right for the agent, she cannot be blamed for acting on them.

We do not need to resolve these questions about the nature of right reasons to endorse the more limited point on which I rely, which is that people are properly motivated to revise their own reasons in order to get them right. And they have reason to think that the underlying beliefs and values that generate their reasons are probably not *correct* in any relevant sense. The imperative to get it right reflects our situation as agents, put in the position of always choosing.[102] It also derives from the principle of autonomy, which directs us to govern ourselves not just by any reasons but by the right ones.[103]

Although the principle of autonomy does important work in explaining why we revisit existing beliefs and values, the idea of agency helps get the problem started because it makes the activity of choosing among reasons central to our self-conception. The idea that we generate reasons for ourselves and others is sometimes collapsed under the principle of autonomy.[104] Autonomy, or self-governance by reason, indeed presupposes an ability to generate reasons.[105] But it is worth separating out this aspect of self-authorship in the context of promising and contract. It is because agency lies in our capacity to generate reasons that it is not inevitable that my present reasons coincide with my former reasons; those earlier reasons cannot be

99. *See* Stephen B. Vardeman et al., *Elementary Statistical Methods and Measurement Error*, 64 AM. STATISTICIAN 46, 49 (2010) ("The difference between devices is explained completely by the difference between the humans involved in measurement.").

100. Reisner, *supra* note 98, at 257.

101. *See* Suzy Killmister, *Autonomy and False Beliefs*, 164 PHIL. STUD. 513, 514 (2013) ("[I]t has been suggested than action is autonomous if it is performed on the basis of a preference that has been vetted by an agent's conception of the good.").

102. *See* Kraus, *supra* note 1, at 1608–09.

103. *Id.* at 1608.

104. *See* FRIED, *supra* note 1, at 1–2.

105. *See* Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK UNIV. L. REV. 961, 962–63 (2012).

merely inherited. They have to be endorsed by myself as presently constituted. Reasons created by the fact of promise exclude other relevant reasons to keep or breach the promise only insofar as the self that made the promise is authorized to bind the self called upon to keep it. We might benefit, as Kimel concludes, from being able to assert such authority over ourselves; and if it is just me that I am binding, who is to object?[106] The problem is that my agency precludes us from treating me as just the same at a later time; [107] it forces the possibility of rupture. The present self does not confront my earlier reasons as entirely my own where I reject some of the beliefs and values that underlay the initial commitment. These changes of mind are not limited to facts concerning the substance of the promise or its wisdom but may relate to any aspect of my identity implicated in the choice to make that promise.

The tension created by agency over time may be obscured in most contemporary discussions of autonomy—especially in law—which, unlike the foundational Kantian work, tend to emphasize its jurisdictional aspect.[108] We emphasize the prerogative of the self to decide and not the underlying capacities that justify that prerogative. The principle of autonomy does not just reserve for me the right to decide; it directs me to identify the right reasons and it allocates the project of governing by reference to those reasons to me.[109] The jurisdictional side of autonomy, though, concerns only the boundaries between people and the powers people have or ought not to have over each other.[110]

Agency, by contrast, focuses on our relationship with the world writ large.[111] It does not adjudicate disputes between the rights of people against each other but allocates responsibility as between the active and the inert.[112] Our former selves do not fall cleanly on the

106. *Id.* at 964–65 ("Most distinctive for both the law and economics analysis of contracts and the morality of promising that underlies *Contract as Promise* is the assumption that individuals (promising or contracting) have a certain persistence as entities over time, so that what an individual chooses for his future, he is choosing for himself, not for another person who may happen to have the same name and DNA; and what he gets by that choice he may not complain of, as if it had been chosen for him by someone else.").

107. Again, at issue is not whether I am the same person in the metaphysical sense or, more casually, whether we are talking about the same person. I refer to whether the moral agent bears the same set of values and plans. It is the difference, for example, between asking whether there has been a mix-up in the parking garage such that the attendant has brought you someone else's car and asking whether the car is in the same condition that it was in at the time you parked it. Only the latter sense of identity is at issue here.

108. *See* Fried, *supra* note 105, at 961–63 (describing the various contemporary discussions of autonomy in the law).

109. *See* Kraus, *supra* note 1.

110. *See* Fried, *supra* note 105, at 961–70 (detailing opposing views of autonomy in the law).

111. *See* NAGEL, *supra* note 63, at 37.

112. *See id.*

side of the active or inert. They were active. It is not surprising, then, that our interest in moral agency demands both fidelity and rebellion against that former self.

IV. DIVERGENT TOLERANCE FOR FICKLENESS

Thus far, I have made fickleness out to be an unavoidable trait of agents under nonideal conditions. But some of us are clearly more fickle than others. More importantly, this variation is not unreflective. Although we sometimes characterize a person as fickle because she regularly fails to control impulses that she does not endorse, we also observe considered disagreement about how much revision we should aspire to. Some people pride themselves on being constant and only reluctantly let go of beliefs and values as they prove untenable.[113] They call it personal stability.[114] Others pride themselves on self-reinvention, shedding identities often.[115] They call it personal growth.[116]

There may be arguments for why a particular person is too fickle or rigid, but there is almost certainly a range within which there is reasonable disagreement. Agency cuts in both directions and we lack the basis for radically prioritizing either the interest in expanding normative powers or the interest in active pursuit of right reasons.[117] Within this range, a state committed to neutrality among conceptions of the good cannot take the position that the relative weight that an individual assigns these interests is wrong. Our relative valuations are better characterized as an important part of our respective self-conceptions.[118] The relative weight we assign to constancy and revision is a metapersonal value.

Although no single person is likely to endorse either stability or instability in its purest form, particular practices may reflect one view of the person at the expense of the other. The essential split I describe is between a view of the person as unitary and stable, on the one hand, and fragmented and unstable, on the other. In the remainder of this Part, I will argue that a view of the person as essentially unitary and stable underlies the practice of promise. But neither view dominates within the institution of contract.

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113. Karen Susman, *Seven Tools for Managing Change in Every Area of Your Life*, 18 COM. L. BULL. 18, 18 (2003).

114. *Id.*

115. *See* Janet Weinstein & Linda Morton, *Interdisciplinary Problem Solving As A Context For Nurturing Intrinsic Values*, 13 CLINICAL L. REV. 839, 840–41 (2007).

116. *Id.*

117. *See* Korsgaard, *supra* note 15, at 101–03.

118. Our assessment of the relative weight of personal virtues is a clearly normative question. *See supra* note 6.

A. Promise Is Big and Small

Many scholars have linked promise to autonomy.[119] The main questions on the table have been: Should we acknowledge a promissory principle, under which promisors can obligate themselves to promisees by communicating an intention to do so? Or, formulated somewhat differently, why are promises binding? The answers we are given are largely compatible and persuasive on their own terms: Promising is a valuable practice because it expands the range of undertakings possible.[120] It facilitates meaningful relationships of trust and dependence.[121] And it makes our normative position more the product of our making.[122] Given that it is a practice we can endorse, we should recognize it. And because it cannot be sustained if promisors break their promises, any given promisor is bound to comply.[123] In the Kantian line of argument used by Charles Fried, free-riding on the practice would be to act on material and worldly considerations instead of that part of ourselves that identifies with universal reason.[124] We would, moreover, be treating our promisee as a means to our ends, failing to acknowledge her equal status as a moral agent.

Some scholars have denied that promise successfully creates any new obligation—the magic of promise, they would claim, really is just magic.[125] They do not deny that promisors are often required to keep their promises but not because of any independent wrong derivative from the promise principle.[126] We should not lie so we should not represent our intentions falsely. Even where we were sincere at the time we issued the promise, we should not harm people by inducing reliance and then failing to follow through. We should not betray trust or the legitimate expectations that arise in relationships or as a result of patterns of conduct. A promise skeptic would argue that we have confused these reasons to keep promises—grounded in truth, trust, and harm—with a bare reason to keep promises as such.

Promise skeptics must be right that there are many reasons for keeping promises outside of the promissory principle. But they are wrong that these reasons exhaust the force of promise. Although a practice of promise is not necessary to sustain our self-conception as

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119. FRIED, *supra* note 1, at 2; Kraus, *supra* note 1, at 1608; Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419 (2004); Joseph Raz, *Promises and Obligations*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 210, 211 (Peter Michael Stephan Hacker & Joseph Raz eds., 1977).

120. Kraus, *supra* note 1, at 1648.

121. Markovits, *supra* note 119, at 1419–20; Raz, *supra* note 119, at 228.

122. FRIED, *supra* note 1, at 8; OWENS, *supra* note 3.

123. FRIED, *supra* note 1, at 9, 16.

124. KANT, *supra* note 16, at 14–15.

125. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121 (1996); *see also* DAVID HUME, A TREATISE OF HUMAN NATURE 518 (Lewis Amherst Selby-Bigge & Peter H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1740).

126. HUME, *supra* note 125, at 516–17.

moral agents, it contributes to that picture. It is probably true that for some people, moral agency does not hold any special significance. Some people may also be quite bad at promising, handing them out "willy-nilly" and then perpetually regretting them almost as quickly as they are made. Others might react viscerally to obligation, experience the totality of involuntary duty as almost unbearable, and regard the prospect of assuming additional voluntary obligations inconceivable. For all of these people, promise is a bad deal. But surely there are others for whom the practice serves a positive moral function. Since those who would reject promise do so largely for reasons that involve a burden on themselves, they have the option of opting out and avoiding most of its negative aspects.

Promise theorists appear to be right about the potential value of promise to autonomy, both in the role it plays in establishing a continuous identity and in the significance of the normative power.[127] But they are wrong to think that this exhausts the relationship between promise and autonomy. Promise presupposes just that continuity which persistent agency tends to undermine. Instability of identity reflects a competing moral value even in those for whom promise is a valuable practice all things considered.

The dimension of autonomy that calls for continuous agency and self-authorship constrains promise from the outside. Contrary to Kimel, the practice does not have resources to account for the challenge posed by this other dimension of autonomy.[128] The value of changing one's mind lies precisely in rejecting the earlier commitment, in asserting the right of the new self to revise the normative relations created by the former self with new ones that reflect present values. If the value of the initial promise lay in "shaping the normative landscape" to match the promisor's own conception of the good, the value of revising the commitment lies in reshaping that landscape to match a revised conception of the good.[129] Both types of agency are essentially narcissistic—we want to see ourselves in our obligations. We wish them to be rooted in our values. In the making of a promise we may do this on clean ground. In the rejection of a promise (and not just reconsideration of its merits in light of new information), we react to ostensibly self-authored obligations misaligned with our present self. There is no way to get around the fact that the value of changing one's mind is antithetical to the promissory principle, notwithstanding their common origins in our interest in moral agency.

It is not necessary, though, for promising to reconcile conflict in the demands of agency within the practice. Agents must reconcile the tenets of their own agency, and promise comprises but one moral

127. *See* Kimel, *supra* note 17; MacCormick & Raz, *supra* note 2, at 101.

128. *See generally* Kimel, *supra* note 17 (discussing personal autonomy and promise).

129. OWENS, *supra* note 3.

practice, one way in which we cultivate relations with others. We can make it a larger or smaller part of our world on an individual basis. Those more keen to create a stable self that consistently navigates relations with others will often promise important things. Those for whom the interest in breaking with past commitments is more salient can avoid putting those commitments in promissory form except in contexts where they desire continuity. The challenge of regret does not disappear altogether, because we can revise our level of commitment to stability itself. But when we come to regret a promise, it is an unforced error. And we can each adjust our personal balance between continuity and rupture one promise at a time.

B. The Distinct Ambitions of Contract

Contract, though, is different. It does not just sit alongside an array of moral practices. It is a legal relation that anticipates the use of state power to enforce obligations.[130] As such, it must reflect a more expansive view of its subjects, one that incorporates both the value of continuity and the value in fragmentation and instability.

As a legal institution, contract law must adopt a dual perspective. It should take into account the social consequences of contract. But it should also attend to the effects of the law on contracting parties as subjects. Contract law should set up the context in which individuals act in a way that makes it possible for them to act morally. As Shiffrin has argued, taking morality into account does not entail implementing it; it requires accommodation of the moral subject.[131] More broadly, it requires that contract law operate in the background to facilitate rather than undermine moral agency.

Moral agency is a complicated ideal, though, and the moral subject is a complicated person.[132] The law is faced with accommodating any number of its aspects, some of which are conflicting.[133] Once one begins the project of accommodation, one is enmeshed in rival views of the good. It is not that contract law should not try to accommodate, only that it has to accommodate with distance lest it end up burdening a moral subject operating by a conception of the good disfavored by the people who make the rules.

One might expect contract to be still more insistent on continuity and cohesion than promise because of the focus by the former on the results of contract for others and their interest in being able to predict and rely on the words and actions of promisors. It is no doubt true that one of contract's primary functions is to protect the interests of others, including but not limited to promisees.[134] But it does so more

130. Shiffrin, *supra* note 36, at 721.
131. *Id.* at 716–17.
132. *See id.* at 741 (discussing the complexity of moral agency).
133. *See id.* at 717–19 (illustrating how the legal system should accommodate moral agency).
134. Markovits, *supra* note 119, at 1457–58.

agnostically than promise theorists would have us believe. It does not assume or promote a thick conception of the person, either by insisting on promissory obligation or by protecting the private practice. As I have elsewhere argued, contract has an internal logic that is not just an elaboration of promise.[135] The legal institution protects the interests of others with indifference to the virtue of promisors.[136]

This agnosticism of contract about the particular makeup of its subject, beyond her basic moral capacities, is important because partiality to one conception of the person at the expense of another would burden the disadvantaged conception severely. If the view of the person as fragmented and discontinuous is given short shrift within the practice of promise, individuals who do not relate to that practice's priorities can minimize their participation in the practice accordingly. But one cannot avoid participation in the institution of contract without suffering substantial material disadvantage, if indeed such avoidance is possible at all. Assuming one participates in a market economy and therefore avails oneself of contract as a legal instrument, one is subject to the material consequences attached to legally binding agreements.[137] Were the institution designed in a manner that substantially favored the *continuous and stable* conception of the person, those with a different conception would be subject to a regime ill suited to them. That is not to say that contract law might not have reason to penalize the behaviors associated with discontinuity and fragmentation, but its reasons for attaching material consequence to those behaviors should be based on their material consequences for others. Contract should not invoke the autonomy of promisors as justification for the burdens it places on the *discontinuous and fragmented* conception of the person. If contract is appropriately agnostic about the implications of autonomy for promise, then it will not rely on the promissory principle as grounds for enforcing contractual promises.

If contract poses greater risks for the discontinuous and fragmented conception of the person, it is also uniquely positioned to allow its expression. Notably, the point that follows is not that contract can provide affirmative support for or otherwise favor that conception at the expense of a stability conception—only that a neutral contract law can accommodate fragmented identities in a way that is valuable to those for whom that conception resonates.

Contracts are typically entered at arm's length.[138] That is, at least, the assumption on which contract law proceeds.[139] As Daniel

135. Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 711–12 (2011).
136. *Id.*
137. *Id.*
138. *Id.* at 712.
139. *Id.*

Markovits has observed, the norms that apply in contract are not the ones we expect of intimates and, in fact, special rules apply where contracting parties can establish that they do not stand at arm's length to each other.[140]

The impersonal relations of contract make it possible to limit the dimensions on which we relate to contracting parties. That power is especially important to those for whom agency implies value revision and therefore instability of the self. The thinner the terms on which we relate to others, the less our own instability implicates others and the less likely we will be bound by terms we regret. For example, if two parties plan a business transaction over a lengthy period, the court will usually enforce only those terms that it has specific evidence the parties wished to make enforceable.[141] Agreements to agree are not enforceable, and letters of intent must be shown to have operated as legal documents in the understanding of the parties.[142] The effect is to allow parties some latitude in the manner in which they conduct themselves interpersonally without fear that they will later be held to a term that might have seemed probable given their expressed attitude at one moment in time.[143] With a few exceptions, parties are free to change their minds until they quite deliberately forego that prerogative.[144]

Contract thus applies a light touch in its reconstruction of parties' contractual relationships. It does not impute norms unless there is either objective evidence that the parties intended those terms to be binding or if those terms implicate the material interests of others.[145] In an earlier work, Kimel argued for the value of personal detachment and the role of contract in facilitating relationships at

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140. Markovits, *supra* note 119, at 1437, 1457–58.

141. *See, e.g.*, Alexandria Billiard Co. v. Miloslowsky, 149 N.W. 504, 508 (Iowa 1914) ("[A party] must show that all the conditions on his part have been complied with, that the minds of the parties met upon all the terms and conditions of the intended lease; and it must also appear that the proposed lessee was at fault in not making the lease.").

142. *See, e.g.*, *In re* Estate of Wyman, 8 N.Y.S.3d 493, 494 (N.Y. App. Div. 2015) ("[An] agreement to agree, where [material] terms are left to future negotiations, is unenforceable."); *see also* Quake Const., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 993 (Ill. 1990) (assessing whether the letter of intent at hand was an enforceable contract such that a cause of action may be brought by the parties).

143. *See, e.g.*, Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1221 (7th Cir. 1988) ("Neither party needed to fear that the other would mistake an almost complete draft for a binding contract and try to foreclose the chance to change one's mind or negotiate further.").

144. *Id.*

145. *See* Boatmen's Bank of Mid-Missouri v. Crossroads W. Shopping Ctr., Ltd., 907 S.W.2d 800, 803 (Mo. Ct. App. 1995) ("When the parties to a contract have not agreed with respect to a term which is essential to determination of their rights and duties, the term which is reasonable in the circumstances is supplied by the Court. . . . [T]erms may be implied where necessary to give business efficacy to the contract.").

arm's length.[146] By making it possible to coordinate, plan together, and agree on terms without engaging one's transactional partner in a personal way, contract allows us to interact with others in a greater variety of ways.[147] Some of that variety, or our desire for it, will reflect inconsistency in our own ends. In this way, contract's presumption of impersonal relations accommodates discontinuity and fragmentation.

Relationalists doubt both the empirical bases for and the normative implications of the presumption of arm's length relations in contract.[148] If parties to a contract have expectations beyond those of the formal agreement, then arguably the informal norms that govern their relation should inform courts' construction of their legal relation. Economic-minded relationalists like Robert Scott have challenged this logic, observing that parties may specifically wish to have separate legal and informal arrangements, in part because they fear courts will get relational norms wrong.[149] Similarly, Lisa Bernstein has empirically shown that parties do not want or expect courts to enforce all the norms of a trade, in part because courts poorly decipher those norms.[150] The argument here offers further grounds for caution in enforcing norms that were not contemplated as terms; enforcing those norms further constrains persons to remain true to former selves and their values and preferences. Where the boundary between legal and private norms is well delineated, the material interests of contracting partners are protected without compromising the interest in changing one's mind.

The detachment of contract from promise, to some extent, flows from its status as a legal institution.[151] Optional moral practices can serve one moral interest at the expense of another in a way that legally coercive institutions should not. But a liberal state must be especially sensitive to the dual demands of agency on contract. According to the influential view articulated by John Rawls, one of liberalism's central tenets is that the state should avoid using its coercive powers (including its private law regime) to favor one conception of the good over another where both are reasonable and

146. DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 134 (2003).

147. *Id.* at 78–80.

148. Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 654 (2010) ("Although contracts between strangers are, of course, possible, relational contract theory emphasizes that many contracts do not show this pattern of 'strangership.'").

149. *See generally* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. L. REV. 847 (2000) (reviewing the debate and outlining the core arguments for and difficulties with alternative strategies for interpreting relational contracts).

150. *See generally* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (challenging the idea that courts should seek to discover and apply immanent business norms in deciding cases).

151. *See* KIMEL, *supra* note 146, at 101.

compatible with a common political conception of justice.[152] Where there are two rival conceptions that coexist within persons but which we can expect to balance out differently across persons, the state should be careful not to implicitly invoke one as a basis for law.

The reasons for a liberal state to avoid favoring the stability conception of the person are not just negative. Because both that conception and the discontinuity conception of the person are so closely bound up with a quest for moral agency, liberal states have affirmative reason to accommodate both. There is a thin line between neutrality and accommodation;[153] it is a dilemma that rears its head in many parts of law. But the line that a liberal regime of contract should walk—between favoring a view of the person and accommodating it—is familiar, however difficult it may be to identify in practice.

V. ACCOMMODATING PERSISTENT AGENCY

Due to its strong resemblance to an ordinary exchange of promises, even more so than other areas of law, contract might appear to treat us "as if" we were a single person. But modern contract law avoids this presumption in a number of respects. The legal regime of contract manages to allow us to operate on a fiction of stability and cohesion vis-à-vis our contracting partners without itself assuming this attitude of contracting parties.

Many features of modern contract law accommodate fickleness.[154] I will discuss an illustrative set: the principle of objectivity, pervasive construction, the requirement of consideration, the duty to mitigate, the "American rule" on litigation costs, and the possibility of bankruptcy.

In none of these cases do I claim that the legal rule was motivated by a view about personhood or any deliberate design on the part of judges to remain neutral among competing views of personhood. At best, the intuitive normative appeal of these legal rules is bolstered by their compatibility with fickleness. At the least, their compatibility is a fortuitous moral advantage.

First, *the principle of objectivity*[155] gives the law a focal point apart from the subjective persons that make contract. By making the words and actions of parties the bases for contract, not actual agreement, the law can remain agnostic as to the makeup of contracting parties and need not pick and choose among potential views of contracting subjects. Inquiry into subjective intent or the purposes parties bring to contract requires speculation about what contracting parties were actually thinking. It assumes that each

152. RAWLS, *supra* note 61, at 135–40.
153. *See id.*
154. *See infra* notes 164, 166, 177, 180 and accompanying text.
155. *See* Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 778–79 (Mo. Ct. App. 1907).

party had an articulable belief about the content of an agreement or a fixed purpose with respect to it. Fickle people lack such beliefs and purposes.[156] Any attribution will accidentally privilege those aspects of a party's beliefs that she or the other party can document. One might worry that the principle of objectivity is similarly arbitrary in giving weight only to the intention that a person happens to communicate. But communication of intent is a morally significant act, both because of the potential for reliance and because of the control a party exercises over her communicative acts. The principle of objectivity is defensible just on the grounds that parties rely on each other's objective intent. But it is also the only version of intent that does not presuppose a false and narrow view of the person whose intent is at issue. And it is the rule that renders contractual obligation most likely to reflect an intention to legally obligate oneself (i.e., a choice to prioritize the advantages of a continuous self over a discontinuous one in a given context).

Modern contract law also acknowledges the limits of agreement through *pervasive construction*.[157] Greg Klass has discussed our common mischaracterization of many acts of construction in contract as interpretation.[158] Although snuck in under the label of interpretation, default rules commonly supply terms where agreement is absent.[159] By now, we expect ordinary agreements to be riddled with important gaps.[160] Economists think of these gaps as the product of transaction costs, including incomplete information about future contingencies and the cost of negotiating terms and drafting text that specifies obligations clearly.[161] We can also explain such gaps by way of parties' uncertainty over their own ends and priorities.[162] That uncertainty will amplify each of the classic

156. In *Flower City Painting Contractors, Inc. v. Gumina Constr. Co.*, a contractor and his subcontractor differently understood the latter's painting duties. 591 F.2d 162, 163–64 (2d Cir. 1979). Neither party suspected this difference. *Id.* Finding the intentions of the parties uncertain, the court held that there was no enforceable contract. *Id. at* 164.

157. *See, e.g.*, Greg Klass, *Interpretation and Construction 1: Francis Lieber*, NEW PRIVATE L., (Nov. 19, 2015), http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/ (describing the interplay between construction and interpretation and describing that construction, for Lieber, serves a gap-filling and equitable function).

158. *See generally* Gregory Klass, Interpretation and Construction in Contract Law (Jan. 2018) (unpublished manuscript), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2971&context=facpub (examining the distinction between contract interpretation and contract construction and the complex relationship between the two activities).

159. *Id.* at 12.

160. *See* Alan Schwartz, *Incomplete Contracts*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 277 (Peter Newman ed., 1998).

161. Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 188–95 (2005).

162. Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 413 (2009).

transaction costs; it will be that much harder to know what weight to give factual uncertainty where our ranking of possible states of the world is uncertain. It is more costly to work out terms with a partner where neither party has stable preferences, especially with respect to remote contingencies. The exercise of specification that drafting usually entails forces parties to resolve vagueness, but that vagueness has to be resolved internally before it can be worked out between parties.[163] More generally, we might attribute gaps in contractual agreement to the limits of intersubjective intelligibility.[164] That is, we never really know what other people are talking about—not completely.[165] But this limitation is itself a by-product (in part) of intrasubjective fragmentation and discontinuity. We cannot reach full agreement because neither of us can be counted on to have a stable and coherent belief about anything complex, as transactions often are. Under these conditions, subjective agreement will be fleeting and complete agreement illusory. Modern contract law requires neither.[166] It is increasingly tolerant of incomplete agreement and prepared to supply defaults that produce workable, enforceable agreements even in the absence of mutual understanding.[167]

Third, *the bargain principle*, as expressed in the requirement of consideration, identifies those commitments that we are not entitled to revise in light of the interests of others.[168] It is the doctrine that best shows contract to be about something other than promise; promises are not enforceable unless they are part of an exchange.[169] Kimel suggests that the requirement of consideration identifies those promises which promisors are least likely to regret.[170] It is not clear why one is less likely to regret an agreement of exchange than a unilateral commitment, but it is clear why the state should be more interested in holding one to a planned exchange. Those reasons have to do with the harm one can do to contracting partners and the interest of the public in a system of commercial exchange in which complex transactions can be executed and relied upon. Those reasons eschew a thick view of the person and the reasons a party may have

163. *See* Scott & Triantis, *supra* note 161, at 196–98.

164. Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 19 S. ILL. U. L.J. 447, 450 (1995) (defining "intersubjective intelligibility" as "a rule written by one person can be substantially understood by another").

165. *Cf. id.*

166. Omri Ben-Shahar, *Agreeing to Disagree: Filing Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 393–94 (2004).

167. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

168. Kirksey v. Kirksey, 8 Ala. 131, 133 (1845) (refusing to enforce a promise for lack of consideration); Melvin Aron Eisenberg, *Principles of Consideration*, 67 CORNELL L. REV. 640, 641 (1982).

169. Eisenberg, *supra* note 168, at 640.

170. Kimel, *supra* note 17, at 114.

for wanting to be regarded as bound and focus instead on the rights of others to have her bound.

Fourth, *the duty to mitigate* in contract minimizes the burden of breach to that necessary to protect a material interest of the promisee.[171] *Qua promisor*, the breaching party may not be entitled to enlist the nonbreaching party in whatever change of plans resulted in her breach.[172] But as an agent, the breaching party has an interest in changing her mind.[173] The duty to mitigate protects that interest and in doing so accommodates an aspect of her agency for which her position as promisor alone does not account.[174]

Fifth, plaintiffs face systematically *undercompensatory damages*.[175] Notwithstanding the refrain that the standard remedy for breach of contract—expectation damages—is intended to make the plaintiff whole,[176] nonbreaching parties are not indifferent as between performance and damages from the other party.[177] Expected court damages fall below actual expectation as the result of the general rule that damages are limited to the actual,[178] foreseeable,[179] and reasonable loss that plaintiff can prove.[180] The voluntary payoff offered to a nonbreaching party may be lower still.[181] Even where limiting doctrines do not ultimately apply, expected damages must be discounted for uncertainty about whether those doctrines will apply (or whether a court may be persuaded that they do) and whether a court will otherwise err in its calculation of damages.[182] Plaintiffs

171. M. Golodetz Export Corp. v. S/S Lake Anja, 751 F.2d 1103, 1112 (2d Cir. 1985).

172. Shiffrin, *supra* note 36, at 724–25.

173. Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 980 (2005).

174. Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565, 576 (2002).

175. Debora L. Threedy, *Liquidated and Limited Damages and the Revision of Article 2: An Opportunity to Rethink the U.C.C.'s Treatment of Agreed Remedies*, 27 IDAHO L. REV. 427, 452 (1990).

176. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW. INST. 1981) ("The traditional goal of the law of contract remedies . . . [is] compensation of the promisee for the loss resulting from breach.").

177. Michael D. Knobler, Note, *A Dual Approach to Contract Remedies*, 30 YALE L. & POL'Y REV. 415, 427 (2012).

178. Inshaustegui v. 666 5th Ave. Ltd. P'ship, 706 N.Y.S.2d 396, 400 (N.Y. App. Div. 2000) (limiting recovery to actual outlay).

179. Hadley v. Baxendale (1854) 156 Eng. Rep. 145, 147–48 (enshrining the foreseeability rule).

180. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW. INST. 1981) ("A party cannot recover damages for breach of a contract for loss beyond the amount that the evidence permits to be established with reasonable certainty.").

181. William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 4 STAN. L. & POLY' REV. 221, 223–24 (1993).

182. *See* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005) (identifying judicial error costs

may not be able to document the full extent of their losses, especially where those losses involve lost profits.[183]

Still, other losses are irrecoverable. There is limited recovery for transaction costs—most notably, the costs of litigation.[184] It is the American rule that litigants presumptively bear their own costs.[185] Nonpecuniary damages are disallowed in most cases.[186] Damages in cases of substantial performance,[187] or where performance is deemed "wasteful,"[188] are limited to diminishment in market value. Equitable doctrines of rescission that allow the breaching party to avoid damages may also be regarded as limitations on remedy.[189] The result is that expected damages rarely make a nonbreaching party whole.[190]

Incomplete remedies effectively weaken the coercive means by which contract law motivates parties to perform. It goes farther than most of the other doctrines discussed here in that it accommodates the moral interest in changing one's mind at the material expense of the breaching party. While the competing interests of agency are too vague to justify any particular distribution of costs, incomplete damages have the effect of penalizing fickleness less harshly than would more complete remedies.

The same can be said of our final example, the institution of *bankruptcy*. Bankruptcy is also a particularly interesting example because cross-national variation in leniency seems to reflect cultural and political undercurrents.[191] It might be that, though stability and

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as among the costs of contract); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 277 (1979) (noting that damage awards are often undercompensatory).

183. Hydraform Prods. Corp. v. Am. Steel & Aluminum Corp., 498 A.2d 339, 347 (N.H. 1985) (refusing to award speculative lost profits).

184. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

185. *Id.*; FED. R. CIV. P. 54(d).

186. *See* Bohac v. Dep't of Agric., 239 F.3d 1334, 1340 (Fed. Cir. 2001) (holding that ordinary contract damages exclude "emotional damages" because the scope of emotional suffering is unforeseeable).

187. *See* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 892 (N.Y. 1921) (establishing the doctrine of substantial performance).

188. *See* Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 114 (Okla. 1962) (refusing full recovery because the cost of performance was disproportionate in relation to the market value of land at issue).

189. Doctrines relating to defects in formation, such as mistake, misrepresentation, and duress, as well as those relating to changed circumstances, such as impracticability or frustration of purpose, clearly have other justifications. But this is true of most doctrines discussed in this Part. What matters here is that the effect of these defenses is to reduce the cost of changing one's mind, especially since a potential defense can be the basis for a low settlement even where it ultimately lacks merit.

190. *See supra* note 189.

191. *See generally* BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2009) (documenting the turn to a distinctly American attitude toward debt and its relation to cultural shifts).

instability rival each other in every person and in every culture, the American narrative of self-reinvention makes our own culture especially solicitous of fickleness.[192] Remaking yourself, which necessarily involves casting off the vestiges of the self you reject, is a classic American ideal. Popular culture is rife with narratives of redemption. Sometimes these are stories about fickle individuals who learn to walk the line, but sometimes they are stories about stiff, repressed people who are liberated and come to see the value in spontaneity and change. Both types of evolution are celebrated but, in the balance of classic and modern virtues, Americans may lean more than others toward the latter.

One might also speculate that elites identify with the classic virtues more than those unhappy with their lot, and perhaps their values do not dominate American legal culture as pervasively as elsewhere.[193] This could be either because of a populist strain in American law (at least bankruptcy law), or just a more liberal one.[194] That is, maybe the state more steadfastly avoids favoring continuity as an ideal over a conception of the person as always a work in progress. As noted, these possibilities are merely speculative and their empirical premises are highly contestable. But the fact of cross-national variation at least reinforces the idea that people legitimately vary on this dimension and calls out for an account of the relationship between agency and commitment over time richer than the one promissory theory has provided us thus far.

It is characteristic of promissory theory generally, though especially of its earlier development by Fried, that it is oddly centered on the promisor and her autonomy.[195] Even if contract serves the principle of autonomy—and by recognizing normative powers, it does, among other purposes—contract law does not rest enforceability of private agreements on a particular theory of how promising serves autonomy.[196] It does not rest on promise per se. To do so would have contract adopt the animating values of that practice at the expense of other values, like the value of changing one's mind, that the legal institution needs to accommodate too. Of course, one is not free to change one's mind in contract as we know it.[197] But the apparent reasons for restricting that aspect of agency have to do with the moral claims of others, not some rival dimension of the promisor's own agency. Our moral interest in changing our minds does not generate a right to harm others, but it does generate a reason not to have courts hold us to our commitments for our own sake.

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192. *See* HARRE, *supra* note 11.
193. *See* MANN, *supra* note 191, at 257–58.
194. *See* Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379, 384 (2003).
195. FRIED, *supra* note 1.
196. *Id.* at 16.
197. *Id.* at 15.

VI. CONCLUSION

Contracts are bilateral relationships and much of their normative dynamic centers on what contracting parties owe each other.[198] But the choice by each contracting party to enter a contract, as well as the choice to perform it, also reflects her separate moral life, including her own plans and priorities. These two normative frameworks, one bilateral and one single-agent-centered, intersect in promissory accounts of contract. Promissory theories regard contract as a species of promise.[199] Promise creates an obligation to another person, but we accept promises as binding in the first place because they promote individual autonomy.[200] This Article has examined the latter contention (i.e., that promises promote autonomy). I have elaborated the ways in which self-created obligations that sustain over time undermine persistent agency, which is a premise of autonomy as it is construed in most contract theory. The tension between our interest in the normative power of promise, on the one hand, and our interest in allowing persistent agency its mark, on the other, cannot be diffused within the practice of promise. But promise is a private practice into which people can opt in or out as they see fit. Extending its logic into the coercive domain of contract is more problematic.

We enter into employment contracts expecting work of a particular kind to give meaning to our life. We enter into a residential lease in order to live in a certain way—in a given place, with particular other people (or not). We buy products or sign up for services because we prefer those goods and services over others, and we express something about ourselves by spending our money in those ways. Contract, like promise, is enormously powerful because it enables us to coordinate with others in service of our values and plans. But sometimes we change our minds and those contracts turn out to be disempowering. This does not mean we should get out of them; after all, contract is bilateral and other people's interests are at stake. But we cannot ground our legal obligation to abide by those contracts in a promissory morality that radically privileges our earlier agenda over our new values and projects.

My claims are not radical. I have not claimed that we cannot be described as continuous persons over time in any metaphysical sense. Nor have I suggested that our values and plans do not span time.[201]

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198. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 203 (1997).

199. *See generally* FRIED, *supra* note 1, at 7–8 (discussing promise as a theory of contractual obligation); Shiffrin, *supra* note 1, at 496 n.30 (treating promise and contract as interchangeable).

200. FRIED, *supra* note 1.

201. *Cf.* Samuel Scheffler, *Ethics, Personal Identity, and Ideals of the Person*, 12 CAN. J. PHIL. 229, 237 (1982) ("Morality as we normally think of it is intimately bound up with a conception of ourselves as agents existing over time with ongoing

Indeed, the idea of a life plan for the moment is incoherent. The picture of the person I have drawn instead is familiar: We endorse values that apply over the course of our lives, and we make plans that can only be realized over time. However, we revise our values and we revise our plans, and then those new values and plans stretch out into the future, no less vulnerable to revision than those that they replaced.

I have argued that people are fickle in this way and also that we should endorse this aspect of ourselves as reflective of moral agency. How much we endorse it and how much weight we give to this dimension of moral agency amounts to our conception of the person. We share a conception inasmuch as we all value stability to some extent and change to some extent. We diverge inasmuch we attach different weight to those values.

Promise prioritizes a stable picture of the self over its fickle rival, but contract ought not to similarly prioritize moral stability over moral evolution. Although the interests of others limit our right to change our minds, contract law avoids any parochial view of moral agency and declines to promote a stable conception of the person as an ideal in itself. It is not for contract law to promote a personal ideal of internal stability and coherence any more than it would be appropriate for private law to promote a dynamic, pluralistic worldview. Liberalism is associated with a special solicitude for autonomy,[202] but we should regard agnosticism about the implications of autonomy for self-commitment as the true liberal imperative in contract.

values, plans, personalities, loyalties, and commitments."). The arguments of this Article are not inconsistent with this claim but grapple with the tension between the continuity of our moral agency (persistent agency) and the continuity of its work-product (any given set of values and plans).

202. *See* Kanishka Jayasuriya, *Autonomy, Liberalism and the New Contractualism*, 18 LAW CONTEXT: SOCIO-LEGAL J. 57, 57–58 (2000) (discussing liberalism and autonomy).