

Mitigation, Fairness and Contract Law

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A Mitigation and Loss Sharing

1 Failure to Act

Consider the following case:

I. A promises B to drive him to the airport but he fails to turn up.

Few would deny that A has breached a moral duty owed to B, and that A has secondary obligations towards B as a result of that breach. At the very least, A has a duty to apologize and to express regret. This is so whether or not B suffers loss as a result of the breach. But now let's assume that the promisee has suffered loss:

II. A promises B to drive him to the airport but he fails to turn up. B misses his flight, which costs him £1,000.

Do A's secondary obligations include the duty to cover the promisee's loss? Again, few would deny that, *other things being equal*, A is responsible for B's loss. But what if things are not equal? Consider this case:

III. A promises B to drive him to the airport but he fails to turn up. B can take a £50 cab to the airport and make the flight. However, he chooses to do nothing and he misses the flight, which costs him £1,000.

Is A responsible for the whole of B's loss in this case? It seems far less clear that he is, because B could have easily made his flight by taking the cab. Let's stipulate that it makes no difference to B whether A drives him or whether he takes a cab. What seems to be important here is that the promisee can *easily* bring about the same state of affairs that A was under a promissory obligation to bring about. Had he done so, he would also have avoided the loss that would have occurred if he did nothing. This can be shown by contrasting III with cases where it is *difficult* for the promisee to bring about the promised state of affairs. Consider the following case:

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IV. A promises B to drive him to the airport but he fails to turn up. B can only get a cab by doing a two-hour-walk (he lives in a remote location). He chooses to do nothing and he misses the flight, which costs him £1,000.

Here it is clear that A does have to cover the cost of the flight. Although B could have brought about the same state of affairs that A promised, doing so would have been burdensome for B. It would have required him to undertake a two-hour-walk. Moreover, we would not take a different view if the cost of the flight were to be substantially higher (say £10,000). The two-hour-walk would not become less burdensome, the higher the cost of the flight. A two-hour-walk is an unreasonable means of bringing about the promised state of affairs regardless of the size of the loss that would be avoided. By unreasonable we simply mean that this is not an alternative that most people would expect to take, given the nature of the promised performance and the effect that taking the alternative would normally have on people's plans. Even if the promisee were a marathon runner, for whom a two-hour-walk is a piece of cake, it would still count as a burden since it is not a substitute that most people would expect to use for getting to the airport. Our notion of burdensomeness is, therefore, agent-neutral.¹

This suggests that the operative principle here is not efficiency, since efficiency would require comparing the cost of walking, which we should quantify, with the cost of alternatives, including the alternative in which the promisee does nothing and suffers loss. Efficiency would *require* the promisee to walk, if walking was the most cost-effective option, or would impose the cost of any losses on him if he chose not to walk.

Still, there will be cases where the alternative way of securing performance is not at all burdensome, but its cost exceeds the cost of the losses that would otherwise flow from the breach. Consider this case:

V. A promises B to drive him to the airport but he fails to turn up. The only way B could have made the flight was by hiring a £10,000 helicopter to take him to the airport. B chooses to do nothing, and misses the flight which costs him £1,000.

Here, the existence of an alternative way to secure performance whose cost exceeds the cost of the losses that flow from the breach, does not affect the responsibility of the promisor. So, the size of the loss appears to have some relevance for determining the responsibility of the promisor.

Cases I-V support the following mitigation principle:

MPI: When a promise is broken, AND (1) there is an alternative way to secure the state affairs promised by the promisor, AND (2) it does not matter to the promisee whether the promisor or someone else performs, AND (3) the

¹ Our approach may be conceived of as majoritarian in nature, appealing to whether the majority of people similarly situated would regard the alternative to be burdensome. Majoritarianism is often used to justify default rules in contract law. We are however not committed to standard normative justifications offered in favor of majoritarianism, such as that majoritarianism is a rule of thumb for maximizing efficiency.

promisee can easily take that alternative, AND (4) the cost of that alternative does not exceed the loss that would occur if the promisee did nothing, AND (5) the promisee fails to take it, THEN the promisor is not responsible for covering the whole cost of the losses that flow from his breach.

There will also be cases however where there is no easily available alternative open to the promisee to secure the promised state of affairs, but there is an easily available means for avoiding the loss that would otherwise flow from the promisor's breach.² So, for example, imagine that after A's breach there was no available means for B to get to the airport, but he could easily phone the airline to cancel the flight and obtain a significant refund. This is a type of what we shall call a 'pure loss avoidance' case. At the expense of completeness, but to avoid undue complexity, we will not discuss those cases here. Suffice it to say that we believe a similar mitigation principle applies in these cases, the main difference being that it refers to the promisee avoiding the loss that would be caused by the breach of promise, rather than to securing the state of affairs promised.

According to MP1, the existence of alternatives, which the promisee can easily take but fails to do so, mitigates the responsibility that the promisor has for the promisee's losses. In cases like III, the promisor is not responsible for the *entire* loss caused by his breach of duty. Surely however the promisor is not completely off the moral hook for these losses? He committed a wrong and he still has secondary obligations in relation to at least some of the losses caused by it. This leads to a loss-sharing principle:

LS1: When MP1 applies, the promisor shares some responsibility for the loss caused by the broken promise with the promisee.

MP1 mitigates the responsibility of the promisor for the loss, and LS1 requires the promisee, when MP1 applies, to share some of the responsibility for the loss caused with the promisor.

2 Action Taken

So far, we have been considering cases where the promisee does *not* take an easily available alternative that would have secured the promised state of affairs. What if, however, the promisee *had* successfully taken such action?

VI. A promises B to drive him to the airport but he fails to turn up. B takes a £50 cab to the airport and makes the £1,000 flight.

Here it is clear that A is responsible to cover the cost of B's loss. After all, it is because A breached his promise that B had to take a cab. Though B would have lost £1,000 if he hadn't, his loss now is only £50. A is responsible for B's actual loss, not the loss he would have incurred had he acted otherwise. Normally one is not

² Thank you to Ben Mcfarlane and Seana Shiffrin for drawing our attention to these cases.

responsible for a loss that hasn't obtained. Few moreover would argue that A should pay B £1,000 even though he is not responsible for a loss of that amount.

Consider now the following case:

VII. A promises B to drive him to the airport but he fails to turn up. B could have taken a £50 cab to the airport, but instead hires a £500 chauffer-driven limousine to take him to the airport. B makes the £1,000 flight.

It seems clear that A is not responsible for the full cost of the limousine, because there was a cheaper alternative, easily available to B, to obtain the state of affairs that would have obtained had A performed his promise.

Now, consider the following case:

VIII. A promises B to drive him to the airport but he fails to turn up. B could undertake a two-hour-walk and then get a cab (he lives in remote location), but instead hires a £500 chauffer-driven limousine to take him to the airport. There were no other ways of getting to the airport on time. B makes the £1,000 flight.

Here A should cover the cost of the limousine, because it would have been burdensome for B to undertake the walk. The walk was not an easily available alternative means of securing the state of affairs that A had promised.

Cases VI-VIII suggest the following mitigation principle:

MP2: When a promise is broken, AND (1) the promisee successfully takes action to bring about the state of affairs that would have obtained had the promise been performed, AND there was (2) an easily available, AND (3) cheaper alternative way of securing the promised performance, THEN the promisor is not responsible for covering the whole cost of the losses that flow from his breach.

A similar mitigation principle applies where it is no longer possible for the promisee to secure performance, and he takes action instead which avoids the loss that would otherwise be caused by breach. In such circumstances, the promisor's responsibility for the loss is mitigated, if there was, open to the promisee, an easily available and cheaper alternative way of avoiding that loss. So, for example, assume that after A's breach, there is no available means for B to catch the flight, but that he could easily obtain a significant refund on the price of the ticket by calling the airline to cancel the flight. Instead of calling, however, which is cheap B hires an expensive cab to take him to the airport to cancel the ticket in person. In such circumstances, A's responsibility for the cost of the cab is mitigated. This is another type of pure loss avoidance case. To avoid making things too complex, we will not go into the detail of the mitigation principle that applies to this case.

Let's go back to the cases where the promisee takes action to secure the promised state of affairs. Consider the following case:

IX. A promises B to drive him to the airport but he fails to turn up. The *only* way B could make the flight is by hiring a £10,000 helicopter to take him to the airport. B chooses to hire the helicopter and catches the flight on time. Had he missed the flight he would have suffered a loss of £1,000.

It is clear here that A's responsibility for the loss caused is mitigated. The promisor is not responsible for the entire cost of the course of action that the promisee took in order to secure the promised performance when the cost of that action exceeds the loss that would otherwise have been caused by breach.

This case suggests the following mitigation principle:

MP3: When a promise is broken, AND (1) the promisee successfully takes action to bring about the state of affairs that would have obtained had the promise been performed, AND (2) the cost of the course of action taken by the promisee exceeds the loss that would have occurred had the promisee done nothing, THEN the promisor is not responsible for covering the whole cost of the losses that flow from his breach.

A similar principle exists in cases where the promisee can no longer secure the promised state of affairs, but instead takes action to avoid the loss that would otherwise be caused by breach, but the cost of that action exceeds the loss that would have occurred had the promisee done nothing. This is another type of pure loss avoidance case. Again, we will not go into the detail of these cases here.

Let's go back to cases where B *does* successfully take action to secure the promised state of affairs. We have seen that in these cases, A's responsibility for the loss caused by his breach of promise is mitigated if principle MP2 or MP3 applies.

However, in cases like VIII and IX should A be responsible for at least *some* of the loss caused to B? It seems fair that he should be. This leads to a second loss-sharing principle:

LS2: When MP2 or MP3 apply, the promisor shares some responsibility for the loss caused by the broken promise with the promisee.

3 Summary

The MP and LS principles above tell us that when a promise is broken and loss caused to the promisee, responsibility for that loss is shared by the promisor and the promisee in three types of case. First, cases where the promisee fails to take some easily available course of action that would have secured the promised state of affairs. Second, where the promisee does successfully take action to bring about the promised state of affairs, but there was a cheaper and easily available alternative course of action that could have been taken to secure that state of affairs. Third, when the promisee does successfully take action to bring about the promised state of affairs, but the costs of that action exceed the loss that would have occurred had the promisee not acted.

So far this is all at the level of systematizing our intuitions about particular cases of breach of promise. What justifies having those intuitions and the principles to which they lead? We turn to this question in the next section.

B Justification: Altruism vs. Fairness

In MP1, the promisee takes no action to bring about the promised state of affairs, even though he could have done so easily. According to MP1, the existence of easily available alternatives is relevant for determining the responsibility of the promisor for losses caused by his breach. MP1 however is silent on whether the promisee has a duty to take the easily available alternative. All that MP1 says is that *if* the promisee fails to take the easily available alternative, then the promisor's responsibility for the promisee's losses is mitigated. Now, one way to try and justify MP1 is to argue that the promisee has a moral *duty* to take the easily available alternative, and that breach of that duty mitigates the responsibility of the promisor. This is the view taken by Charles Fried. For Fried, the moral foundation of that duty lies in the idea of altruism: the promisee's position is analogous to that of a Good Samaritan; there is a relation of trust between the promisor and the promisee which makes 'the two parties neighbors rather than strangers'.³ Fried argues that when such relations of trust hold, they give rise to duties to save the other party 'from serious loss when the actor can do so with little trouble, risk of loss, or harm to himself'.⁴

The logic of Fried's argument seeks to justify MP1 in two steps. First, it postulates a duty on the part of the promisee to act in order to reduce a loss for which, it is assumed, the promisor is *pro tanto* responsible. Second, it argues that the breach of that duty has the normative effect of mitigating the remedial responsibility of the promisor. Though the promisor remains responsible for the losses caused by not performing his promissory obligation, his responsibility is now outweighed, qualified or cancelled by the fact that the promisee failed to act as a Good Samaritan.

Let's start by granting, *arguendo*, that the promisee has a duty of altruism to help the promisor by reducing the losses caused by the breach of his promissory obligation. So, let's assume that at *t1*, when A fails to turn up to drive B to the airport, B *ought* (in the sense of has a mandatory reason to) take a cab with a view to reduce the losses for which A is *pro tanto* responsible. At *t2*, the promisee has sat back and done nothing, breaching his duty to help the promisor and allowing losses to accumulate. How would the promisee's breach of his duty to help the promisor have the normative effect of altering the promisor's responsibility for the losses caused by non-performance? The normative explanation would, we think, run as follows. Upon breaching his duty to help the promisor, the promisee would be under an obligation to do 'the next best thing'.⁵ This normally involves putting the person to whom one

³ Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 8 (2007).

⁴ *Id.* at 7-8.

⁵ For the explanation why see Joseph Raz, *Personal Practical Conflicts*, in PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS 172 (Peter Baumann and Monika Betzler eds., 2004); and John Gardner, *What is Tort Law for? Part 1. The Place of Corrective Justice*, 30 LAW & PHILOSOPHY 1 (2011).

owes the obligation into the position he would have been in had one not breached. In this case, had B not breached his duty to help A, i.e., had B taken a cab to make his flight, A would be responsible for the much smaller loss (£50), than the one he is now responsible for (£1,000). In order to put A in the position he would have been in had B complied with his duty of altruism, B would need to make it the case that A is responsible for £50 rather than £1000. B can achieve this by exercising a normative power: he can waive the claim he has against B for missing the flight (a loss for which A remains responsible). So, B's secondary obligation would require him to waive his claim against A for the amount of £950.

According to the argument from the duty of altruism, the promisor is *pro tanto* responsible for the loss caused by his breach of promise but, at the same time, he has a valid moral claim that the promisee waive his right to hold the promisor responsible for the difference between the actual loss and the one that would have occurred had the promisee complied with his duty of altruism. Both the promisor and the promisee are wrongdoers. By combining the secondary obligations they owe to each other, in virtue of their wrongdoing, we can conclude that the promisor's responsibility for the actual loss suffered is diminished and shared with the promisee, which is what MP1 and LS1 require. Moreover, the argument from the duty of altruism tells us exactly how the promisor and the promisee are to share the losses: the promisor's share of responsibility consists in the loss that would have arisen had the promisee complied with his duty of altruism. The rest of the losses stay with the promisee, as he is responsible for them.

The duty of altruism, if true, provides normative support for MP1 and LS1. It also provides normative support for MP2 and LS2, i.e., for cases where the promisee took action to bring about the promised state of affairs. Where there was an alternative course of action that the promisee could have taken to bring about the same state of affairs which was cheaper than the course taken, easily available, and not more costly than doing nothing, then the promisee is under an altruistic duty to take it. The promisee should avoid taking courses of action that needlessly impose costs on the promisor. If, in these circumstances, the promisee fails to take the cheaper alternative he is then under a duty to waive the responsibility of the promisor for the losses that accrue as a result of the promisee not taking the cheaper route. The promisor's responsibility is limited to the loss that would have arisen had the promisee taken the cheaper course of action. Finally, MP3 and LS2 would be explained as follows. When the cost of the only available action to secure the promised state of affairs exceeds the cost of inaction, the promisee has a duty of altruism not to do anything and to suffer the smaller loss. When the promisee fails to do so, taking the action that results in a loss whose cost is greater than inaction (in example IX by taking a helicopter), then he has a duty to waive his claim against the promisor by that amount which represents the loss that he could have avoided by not taking any action. The promisor's overall responsibility is then limited to the loss that would have arisen had the promisee taken no action at all. This is because the promisee having failed to comply with his altruistic duty, is now required to do the next best thing which is waive his claim to the losses that arose as a result of his failure to comply with that duty.

Many philosophers have challenged the claim that a duty of altruism exists in this context. Why should the promisee be under a duty to *help* the promisor by waiving the claim he has against him as a victim of his wrongdoing? Normally, altruistic

duties to assist others hold between people who are in a special relationship like friendship, love, family or membership of the same moral community. The idea that promises, as a matter of fact, trigger such relationships is questionable. The making of a promise may, but need not, bring the promisor closer to the promisee in terms of ethical values such as intimacy, friendship, or trust. Whether it does so is a contingent matter. Promising a stranger that I will watch his bag while he makes a phone call will not necessarily bring us closer together. I may not trust that he will return, and he may not trust that I will watch his bag.

Those who defend altruism may however have in mind a stronger, non-contingent connection between promise and the value of trust, according to which the very making of a promise invokes trust between the promisor and the promisee, thereby triggering altruistic duties of assistance, over and above the duty to perform what was promised. On this view, there is a necessary connection between the existence of a promissory obligation and the existence of a degree of trust between the promisor and the promisee.⁶ The promissory obligation in part *consists* in there being a relationship of trust between two parties. For example, on Thomas Scanlon's view, there is no promissory obligation in cases where the promisee does not believe that the promisor will perform.⁷ Nevertheless, even on the non-contingent account, it is not clear why the existence of trust between the promisor and the promisee should ground duties *in addition* to the duty to perform what was promised.

Moreover, there are further worries about the duty of altruism. Why should the promisor's responsibility for the losses he caused be capped by the amount of the least costly alternative available to the promisee? It seems harsh that the promisee, by failing to help the promisor, might end up shouldering the biggest part of the actual losses suffered.

Leaving aside for the moment whether the duty of altruism holds between promisor and promisee, we want to explore whether there can be an alternative justification for MP1-MP3 and LS1-LS2, which does not turn on there being a moral duty on the part of the promisee to act in a particular way, following the promisor's breach. Private lawyers sometimes say that the innocent party has no duty to mitigate but that, if he doesn't, then he loses the right to claim full damages.⁸ We want to explore this intuition at the moral level.

Consider again *tI*, when the promisor has either breached or has informed the promisee that he will breach. Why would it follow, upon the fact of breach of promise, that the promisee has a duty to take a particular course of action? Surely, the promisee is free to decide that he no longer wishes to bring about the state of affairs promised. In our example, B may decide that he no longer wishes to travel but that he

⁶ We take this to be Fried's position. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 8 (1981).

⁷ THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* 312, 314 (1998) (using his famous example of the profligate pal to illustrate the point).

⁸ See, e.g., ROBERT STEVENS, *TORTS AND RIGHTS* 170 (2007). There are also plenty of judicial statements that support this view in the case law. See, e.g., *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at 1075 (Eng.): 'The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else'. See also, *The Solholt* [1983] 1 Lloyd's Rep. 605 at 608 (Eng.). Thank you to Andy Dyson for highlighting these case law references.

will not hold A responsible for his decision. Or he may decide that he now feels like taking a more expensive means of transport to the airport (a limousine), without expecting the promisor to cover it. Such decisions would not violate any duty on his part. In fact, it seems that he has a right to make these decisions. It would be odd to say that the promisee has a duty to travel, or a duty to take the cheapest means of getting to the airport. He has a right to treat himself, so to speak, as well as a right to change his preferences. What appears morally problematic is the case where the promisee decides to do those things *and* seeks to blame the promisor for the loss or claim the cost of it from the promisor. This suggests that there is a moral duty not to claim losses that the promisee could have easily avoided, rather than a duty not to incur these losses. But what could the foundation of that moral duty be? Altruism is ruled out since altruism postulates a duty to avoid losses rather than a duty not to claim losses that one could have avoided.

We believe that the foundation lies in the principle of fairness. It would be unfair if the promisee were entitled to claim losses from the promisor that he could easily have avoided, while obtaining what was promised. A cannot complain when B fails to take a cab to the airport and misses the flight, if B makes no claim against A. He cannot tell B: “why didn’t you follow through on what my promise was meant to help you achieve, when you could have done just that?” But it is unfair for B to choose to sit back and miss his flight, which he can easily make by getting a cab, *and then* blame A for it, seeking compensation. Upon passing up on less costly alternatives ways of securing the promised performance that are easily available, the moral profile of the promisor and the promisee changes. The principle of fairness bars the promisee from blaming the promisor for those easily avoidable losses or claiming compensation for them, at the same time as extinguishing the promisor’s responsibility for them. The promisee has no right to claim these losses and, correlatively, the promisor is not responsible for them. This is so even though the promisee was under no duty to minimize or not to exacerbate losses.

By appealing to the principle of fairness, we are availing ourselves of the well-known method of asking which normative principles people would choose if they did not know their position in the relevant normative relationship.⁹ In the present case we are asking what principles promissory parties would choose if they did not know whether they are the guilty promisor or the innocent promisee. And we assume that this method may lead parties to select principles simply on the basis that they are fair and not on the basis of some other value, such as equality or efficiency.¹⁰ In other words, the fairness-based approach is not just a heuristic device for discovering what other values require.

According to the fairness-based explanation, when passing up on less costly alternatives (as in MP1), the promisee is exercising a choice rather than suffering a loss.¹¹ The principle of fairness is indifferent on how the promisee exercises that

⁹ A method familiar of course in political philosophy, thanks to the work of John Rawls. See JOHN RAWLS, *A THEORY OF JUSTICE* 15-19 (rev. ed. 1999).

¹⁰ Goetz & Scott, for example, use joint-cost-minimization as a basis for determining which mitigation principle parties would select. See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 973 (1983).

¹¹ It can be claimed that by exercising this choice, the promisee ‘breaks the chain of causation’ or constitutes an intervening cause. This claim relies on a common-sense notion of causation, according to

choice. It simply bars a claim on the promisee's part and extinguishes part of the promisor's responsibility for losses caused following his breach. It's not the case that the promisee *assists* the promisor in any way, as the altruism-based approach suggests. This is because the cost of the choice not taken is not, from a normative standpoint, a loss for which the promisor is even *pro tanto* responsible. The promisor's position is therefore no better off if the promisee chooses action over inaction in a case like III. It is not that the promisor would be worse off if the promisee failed to take action, since if he were to do so, then the promisor would not be responsible for the loss resulting from inaction. Hence, the promisee's inaction is not a failure to assist the promisor, nor is his taking the easily available alternative a helping hand towards him. In a way, the promisee could not help the promisor even if he wanted to. If fairness is the correct normative explanation of MP1-MP3, and LS1-LS2 then mitigation has nothing to do with assistance.

We should also note here that if fairness is the correct explanation of mitigation, then the subject matter of the mitigation is the promisor's responsibility, rather than the losses caused by his breach. According to the fairness-based account, what gets mitigated when the promisee takes the easily available alternative is the promisor's responsibility for breaching his promise, rather than the losses caused as a result of the breach.

The normative explanation based on fairness has the same structure as arguments justifying estoppel. So, to use a common example, I see you building a house on my land, mistakenly thinking that the land is your own, and instead of informing you of your mistake I allow you to continue building. Although I had no duty to inform you of your mistake, it would be unfair for me to rely on my right over the land in order to benefit from what you built, say by acquiring property rights over it. Property lawyers would say that I'm estopped from relying on my property rights against you or that by not informing you I waived those rights. These are alternative ways of making the same point, namely that my failure to inform you changes our moral profiles and extinguishes rights that I would otherwise have had against you and creates new ones.¹²

C Advantages of the Fairness-Based Approach

There are three advantages to the fairness-based explanation of mitigation. First, it explains the intuition that when a promise is broken in a case like III above, the

which the test for whether the promisee's conduct is an intervening cause is whether his conduct is fully voluntary. But it would be a mistake to argue that the promisor is not responsible *because* the promisee has caused the relevant loss. In our view, this gets matters backwards. Whether the promisee's failure to act constitutes an intervening cause in this sense depends on the prior question of whether it is fair for the promisee to share losses with the promisor. Causation here tracks responsibility, not the other way around.

¹² The argument does not rely on the property owner deriving any kind of benefit from his silence. The relevant normative concern here is not unjust enrichment. For an example in law of a successful estoppel claim even in the absence of such benefit, see *Jackson v. Cator*, [1800] 5 Ves. 688, which involved an owner remaining silent out of spite. Loughborough L.C. asked rhetorically 'Is it not just as competent to the Court to prevent an injury arising from mere spite as to prevent him from doing it in order to put money in his pocket?' *Id.* at 691. Thank you to Ben McFarlane for the reference.

promisee is under no obligation to take the cab and make the flight. The promisee chose not to travel, even though he could easily have done so, and therefore is barred from claiming the cost of his choice from the promise-breaker. So, by failing to take easily available alternative courses of action, the promisee does not breach a duty and hence has nothing to regret or apologize for. By contrast, on Fried's view, the promisee would have reasons to feel regret and to make an apology even when he complies with his secondary obligation to waive his claim against the promisor. This is because he ought not to have allowed the losses to accumulate in the first place.

A second advantage of the fairness-based account is that it doesn't presuppose any special duties between the promisor and the promisee. It therefore avoids all of the objections against Fried's account that promises do not create any special relationships between the promisor and the promisee. All that the principle of fairness requires is that promisees not claim compensation from the promisor for losses that they could have easily avoided. It's therefore compatible with many competing accounts of the nature of promissory obligation, and doesn't presuppose the view that promising creates, either contingently or intrinsically, close relationships of the kind that trigger duties of assistance.

A third advantage of this normative explanation is that it can justify mitigation in non-promissory contexts. Mitigation and loss sharing principles seem to apply in these contexts. Consider for example moral wrongs other than breach of promise. If you negligently injure me, and I choose not to treat my injuries even though it was easy for me to do so, then it is unfair for me to blame you for the resulting harm and seek to recover the cost from you. Here it would make no sense to argue that I have a duty of altruism towards you to reduce the extent of the harm you caused me. Though I do have a strong reason to reduce the harm you caused me, this is not because by doing so I comply with a duty I have to assist you. Duties of assistance arise only when there is a special or close relationship between the parties, and unlike promising, one could not even begin to argue that there is a special relationship of this kind between the negligent injurer and his victim. It is interesting, though of course not in itself an argument in favor of fairness, that mitigation in tort law works no differently than in contract law.¹³

Finally, we should also like to point out that the explanation from fairness, if true, forms part of promissory morality broadly conceived. Few, if any, would equate promissory morality with the single principle that promises ought to be kept other things being equal.¹⁴ Such equation would give an incomplete account of promissory morality given that the promise principle interacts with a multiplicity of other moral principles, for example, principles against exploitation, undue influence, unreasonable reliance, and so on. Fairness is a foundational value that is *pro tanto* relevant each and every time a promise is made and, in the context of mitigation, it changes the moral position of the parties. The application of the principle of fairness doesn't presuppose any institutional background (for example, the existence of the state or courts). Nor is

¹³ *McAuley v. London Transport Executive*, [1957] 2 Lloyd's Rep. 500 (Eng.) (worker's injury to hand resulting from employer's negligence, but worker's unreasonable failure to get medical treatment meant that employer not responsible for loss that could have been avoided. Worker could have avoided loss of earnings from point when injured hand would have recovered from medical intervention).

¹⁴ It is a common misreading of Fried to think that he held this view. See Fried, *Convergence*, *supra* note 3, at 7.

it limited to a practical concern about how to shift losses caused by a breach of promise. Recall, that the principle of fairness also requires the promisee not to *blame* the promisor for losses that he could easily have avoided.

In sum, unlike the duty of altruism, the structure of the explanation from fairness is one that applies to all cases where there are secondary obligations arising out of the breach of a primary obligation. It qualifies or cancels part of the wrongdoer's responsibility for the loss caused by his breach. Unlike the duty of altruism, it construes cases of failure to avoid losses as a choice on the part of the innocent party rather than as a breach of a duty. In that respect, it offers a more direct normative justification for principles MP1-MP3 and LS1-LS2, than the duty of altruism. What we aim to do now is show that, by and large, contract law satisfies these mitigation and loss sharing principles.

D Contract Law

The mitigation and loss sharing principles that we find in morality are also present in the common law mitigation doctrine. When a contract is broken, the legal responsibility of the promisor for any loss caused by his breach is mitigated in two types of case. First, there are those cases that Andrew Burrows describes as cases of 'unreasonable inaction'. These are cases where the promisee is precluded from recovering any losses from the promisor that the promisee 'could reasonably have avoided but has failed to avoid'.¹⁵ Secondly, there are cases where the claimant takes 'unreasonable action' in avoiding losses caused by a breach of promise. The claimant cannot recover for expenses unreasonably incurred.

According to the common law doctrine, the promisor's responsibility for loss is limited to the losses that the promisee would have suffered had the promisee taken reasonable action to bring about the state of affairs that would have obtained had the contract been performed.

Burrows, as well as the other leading contract lawyers,¹⁶ says that whether reasonable steps should have been taken 'depends on the particular facts in question'.¹⁷ When lawyers say that this determination is a matter of fact, we are unclear about what exactly this means. If it means that it is an extra-legal or purely factual question, and that no underlying legal principle determines whether or not the promisor's responsibility for loss in cases of this type is mitigated, then we disagree. If, on the other hand, the claim is that there is an underlying legal principle, but that we have to look at the facts of a particular case to determine whether the conditions for the

¹⁵ ANDREW BURROWS, *REMEDIES FOR TORTS AND BREACH OF CONTRACT* 122 (3d ed. 2004). Burrows cites for this proposition Viscount Haldane L.C.'s classic statement of the principle in *British Westinghouse Elec. v. Underground Elec. Ry. Co. of London.*, [1912] A.C. 673. The law said Haldane '... imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.' *Id.* at 689.

¹⁶ See, e.g., MINDY CHEN-WISHART, *CONTRACT LAW* 510 (4th ed. 2012); and EWAN MCKENDRICK, *CONTRACT LAW: TEXT, CASES, AND MATERIALS* 895 (5th ed. 2012).

¹⁷ BURROWS, *REMEDIES*, *supra* note 15, at 123.

application of that principle are satisfied, then we agree.¹⁸ We think that the cases clearly demonstrate that the courts apply the mitigation and loss sharing principles that we find in morality to determine at least in part the responsibility of the promisor for the loss caused by his breach of contract.

1 Unreasonable Inaction

Recall, that we claim that in cases where the promisee has failed to act, the promisor's responsibility for the loss caused by breach is shared if the promisee could have taken an easily available alternative course of action to secure the promised state of affairs (assuming that the cost of taking that alternative does not exceed the loss that results from the promisee's inaction). It is *unfair* for the promisee to place the entire burden of this loss on the promisor's doorstep. We will now show that this principle, or to be more accurate combination of principles MP1 and LS1, explains the legal cases where responsibility was shared from those where it wasn't.

Take, for example, the case of *Payzu Ltd. v Saunders*.¹⁹ The defendant in breach of contract refused to deliver silk in installments to the claimants unless the claimants agreed to pay cash on delivery of each installment. The claimants declined these terms, and instead brought an action for breach of contract claiming the difference between the contract and market price of the silk. The market price of the silk had risen. The Court of Appeal, however, held that the defendant did not have to pay the difference, because the claimants should have accepted the defendant's offer to pay cash. Instead, the claimants were awarded damages to reflect the residual loss that they would have suffered had they accepted the offer. The defendant's responsibility was mitigated, because the claimants:

[W]ere in fact in a position to pay cash for the goods, but instead of accepting the defendant's offer, which was made perfectly bona fide, the plaintiffs permitted themselves to sustain a large measure of loss which as prudent and reasonable people they ought to have avoided.²⁰

In other words, the claimants had an easily available alternative course of action open to them for securing the state of affairs that would have obtained had the promise been performed. They had no difficulty paying cash, and that would have led to them receiving the performance due under the contract, i.e., receiving the silk.²¹

The critical issue is whether the alternative or substitute if available is *easy* for the promisee to take. This explains why the law tends to take what Tomlinson J described as a 'tender approach to those who have been placed in a predicament by a breach of

¹⁸ There is reason to think that Burrows does mean the latter. He says that examination of the cases demonstrates the presence of certain factors which are relevant to the question of whether the promisor's responsibility for the loss should be mitigated. *Id.*

¹⁹ [1919] 2 K.B. 581 (Eng.).

²⁰ *Id.* at 586 (McCardie, J.).

²¹ *See also*, *The Solholt* [1983] 1 Lloyd's Rep. 605 (Eng.) (buyer should have accepted late delivery of a ship, which was still perfectly suitable for buyer's purposes).

contract'.²² The approach is tender, because if the alternative imposes any serious difficulty on the claimant, then the courts will not mitigate the defendant's responsibility. In such circumstances, it is not unfair for the promisee to place the burden for the loss onto the promisor. This is brought out in Scrutton L.J.'s judgment in *Payzu* when he distinguishes commercial contracts from contracts of personal service.

In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.²³

The reason why the defendant's responsibility is harder to mitigate in contracts of personal service is that usually it will be much more burdensome for the claimant to accept the defendant's offer to re-negotiate in that context. The main reason being that the relationship between the parties may already have broken down, because, for example, the dismissal occurred in circumstances that were humiliating or an attack on the employee's integrity, and in that context re-employment may impose a significant burden on the claimant, who may have to continue to work with the defendant.

It is important, however, to stress Scrutton L.J.'s remark that the issue of burdensomeness is a question of fact to be determined on a case-by-case basis. There will be cases of commercial contracts where re-negotiation would be burdensome,²⁴ and cases of personal service contracts where it would not be.²⁵ Scrutton L.J. is just making the point that, as a general rule, re-negotiation is likely to be easier in a commercial, rather than personal service, context. The underlying principle is that mitigation of the defendant's responsibility for the loss depends on whether the claimant had an *easily* available alternative way of securing the promised performance.

A personal service case where the defendant's responsibility was not mitigated by an offer to re-negotiate and which illustrates the application of this principle is the decision of Blain J in *Yetton v. Eastwoods Froy Ltd.*²⁶ The managing director of a company was wrongfully dismissed by his employer, and then offered re-employment as an assistant managing director by the same company. The claimant's refusal to accept the offer did not reduce the defendant's liability. Blain J stated the principle on which the case rested as follows:

[T]he opportunity to reduce damages by finding reasonable (I repeat reasonable) alternative employment should be taken and, indeed, sought, whether such employment is by the same defaulting employer or by someone

²² *Britvic Soft Drinks Ltd. v. Messer U.K. Ltd.* [2002] 1 Lloyd's Rep. 20 [46] (Eng.).

²³ *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581 [589] (Eng.).

²⁴ So, for example, the claimant does not in a sale of goods context have to accept goods of a lower quality. *Heaven & Kesterton Ltd. v. Et Francois Albiac & Cie* [1956] 2 Lloyd's Rep. 316 (Eng.).

²⁵ *Bruce v. Calder* [1895] 2 K.B. 581 [589] (Eng.).

²⁶ [1967] 1 W.L.R. 104 (Eng.).

else; in either case the test being whether it is reasonable to refuse it or not in the circumstances of each case.²⁷

This is the same principle that underpinned the decision in *Payzu*. The key issue was whether it was reasonable to expect the claimant to accept the revised terms offered. Blain J repeated the point made by Scrutton L.J. in *Payzu* that re-negotiation with the defendant may be much more of a burden in the context of an employment contract:

[P]ersonal factors clearly are more likely to be of weight or are likely to be of greater weight in cases of personal services than in (for want of a better word) what I call soulless cases of sale of goods contracts where money may often be the only important factor.²⁸

On the facts, Blain J. decided that it was not unreasonable for the claimant to refuse the offer. Key to this finding was that the new job offered by the defendant to the claimant was a significant step-down from the position the employee had occupied, and that relations between the parties had broken down to such an extent that it was unclear how they could now work together. It is clear from the decision, that requiring the claimant to accept the offer would have imposed a significant burden on him.

2 Unreasonable Action

Remember, that when considering the moral position we claimed that the promisor's responsibility for the loss caused by his breach of promise is shared in cases where the promisee successfully takes action after breach to bring about the promised state of affairs, but the promisee could have taken an alternative course of action to obtain that same state affairs which was easily available and cheaper than the course of action actually taken by the promisee.

This principle, or to be more accurate combination of principles MP2 and LS2, we believe, explains the decisions reached in the contract cases where the promisee takes action to secure the promised state of affairs. The common law rule is that the promisee cannot recover expenses that were unreasonably incurred, and the promisor's liability is capped at the loss that would have arisen had the promisee acted reasonably in bringing about the promised state of affairs.

The MP2 principle identified earlier determines when the courts find the promisee's action in these legal cases unreasonable. Take, for example, the case of *The Borag*,²⁹ where the claimant ship owners took out a very high interest rate loan in order to secure the release of a ship wrongfully detained, because of a breach of contract by the ship managers. Lord Templeman L.J. in his judgment, said on the issue of mitigation that the ship managers were not liable to cover the expenses associated with the high interest loan, because the ship owners had easily available to them cheaper alternative ways of securing the release of the ship:

²⁷ *Id.* at 115.

²⁸ *Id.* at 118.

²⁹ [1981] 1 W.L.R. 274 (Eng.).

[T]he owners could and should have adopted a form of mitigation which was reasonable either by refusing to pay the interest charges to their bankers or by seeking a guarantee elsewhere or by some other available form of securing the release of the vessel more cheaply.³⁰

This is a clear application of the MP2 principle that we find in morality. Given the existence of easily available and cheaper alternative methods for securing the performance, the promise breaker is not responsible for covering the entire loss caused by the breach, and it is unfair for the promisee to claim damages for that loss from the promise-breaker.

The same or very similar principles are applied in cases where the promisee's actions either to secure the promised performance or, where that is no longer possible, to avoid the losses caused by the promisor's breach and held to be reasonable. So, for example, in *Britvic Soft Drinks Ltd. v Messer U.K. Ltd.*,³¹ ingredients contaminated with benzene, which is carcinogenic, were supplied to a soft drinks manufacturer. It was no longer possible to secure the promised performance, and instead the manufacturer took action to reduce the consequential loss caused by the breach. In other words, this was what we described earlier as a pure loss avoidance case.³² Even though the levels of benzene in the ingredients did not pose a risk to health, the Court of Appeal decided that the manufacturer acted reasonably in destroying and withdrawing products that contained those ingredients, because that was the *only* way to preserve its commercial reputation. The supplier was responsible for covering the costs incurred by the manufacturer.³³ There was no easily available and cheaper alternative course of action that the manufacturer could have taken to preserve its commercial reputation, and, therefore, the courts refused to mitigate the responsibility of the supplier for the loss caused, and it was fair for the manufacturer to claim damages for that loss from the supplier.

Recall that we said earlier that in cases where a promise is broken and the promisee successfully takes action to secure the state of affairs that would have obtained had the promise been performed, there is a separate moral principle which we called MP3 which mitigates the responsibility of the promisor for the loss caused where the costs of the action taken exceed the loss that would have occurred had the promisee not taken any action to bring about the state of affairs. LS2 also applies in this type of case and requires loss sharing. According to *Treitel's The Law of Contract* the common law mitigation doctrine contains a similar principle. *Treitel* formulates the principle in the following terms: 'he [the promisee] should not... spend more on

³⁰ *Id.* at 285.

³¹ [2002] 1 Lloyd's Rep. 20 (Eng.).

³² Strictly speaking, therefore, this is not a case where MP2 would apply, because MP2 involves cases where the promisee takes action to bring about the promised state of affairs. However, as we said in section A(2) above, a similar principle to MP2 applies to cover cases of action taken to reduce or avoid consequential loss. As with MP2, central to whether the promisor's responsibility is mitigated in these pure loss avoidance cases is whether there was an easily available and cheaper alternative course of action that the promisee could have taken. The main difference is that the promisee's action in these pure loss avoidance cases relates to avoiding or reducing loss, rather than securing substitute performance.

³³ *Britvic Soft Drinks Ltd. v Messer U.K. Ltd.* [2002] 1 Lloyd's Rep. 20 [114] (Eng.).

curing a defect in performance than the subject matter without the defect would be worth'.³⁴

The principle was applied in *Grant v. Dawkins and Others*.³⁵ The case concerned a contract for the sale of a house free from incumbrances. However, the house was subject to two mortgages. The purchaser wanted specific performance, and an order to allow him to pay off the mortgages and claim as damages any loss that exceeded the purchase price. Goff J. granted the order but said that the damages recoverable to the extent that they could not be compensated by the purchase price of the house were capped by the value of the house.³⁶ This is a clear application of the MP3 and LS2 principles. Responsibility for loss caused by the broken promise is shared when the promisee takes action to secure the promised state of affairs, in this case the costs of discharging the mortgages, the costs of which exceed the loss that would have been suffered by the promisee had the promisee done nothing, in this case that loss is represented by the value of the house. It was unfair, in these circumstances, for the purchaser to claim the *entire* cost of discharging the mortgages from the vendor.

Another example of the application of these principles is the tort case *Darbishire v. Warran*.³⁷ The defendant negligently damaged the claimant's car. The claimant had the car repaired and claimed the costs of repair which were £192 (minus an £80 insurance payout that he had received) and the costs of a hire car which he used while his car was being repaired as damages from the defendant. However, the costs of repairing the car exceeded the market value of the car, which was £85. The Court of Appeal declined to award the claimant the cost of repairs on the basis that 'the cost of repairs greatly exceeds the value in the market of the damaged article'.³⁸ Instead, the market value of the car and the costs of the hire car capped the sum that could be recovered. Responsibility for the loss caused by the defendant's negligence was shared between the parties.

There may be cases where due to the unique nature of the good it may be reasonable to incur the cost of securing the promised performance, even though it exceeds the market value of the good. So, for example, the cost of repairing a car was awarded in *O'Grady v. Westminster Scaffolding Ltd.*, even though they massively exceeded the market value of the car.³⁹ The reason was that the car in that case was unique. Before the crash that led to the car being damaged the claimant spent £300-400 per annum maintaining the car, and he had replaced the engine three times, put in new coachwork, and among other things carried out work on the wheels, the hood and the steering column. The decision in this case is compatible with the moral principle MP3. According to that principle, the costs incurred by the promisee in securing the promised performance, should not exceed the loss that would be suffered if the promisee took no action. In a case like *O'Grady*, the loss that the claimant would have suffered had he not repaired the car would have been huge given the unique nature of the car. Therefore, even though the cost of repairs exceeded the market value of the car, they did not exceed the loss that the claimant would have suffered had he not

³⁴ EDWIN PEEL, TREITEL: THE LAW OF CONTRACT 1064-1065 (13th ed. 2011).

³⁵ [1973] 1 W.L.R. 1406 (Eng.).

³⁶ *Id.* at 1411.

³⁷ [1963] 1 W.L.R. 1067 (Eng.).

³⁸ *Id.* at 1071.

³⁹ [1962] 2 Lloyd's Rep. 238 (Eng.).

undertaken them.⁴⁰ What this case shows is that the market value of the good in question does not exhaust the value of that good to the claimant, or the loss that the claimant would suffer if the state of affairs to which he is entitled does not materialize. In such cases, the defendant is responsible for all of the losses that flow from his breach of duty. MP3 is not satisfied in cases of this kind, which is why the decision in *O'Grady* does not contradict that principle.⁴¹

E The Convergence of Contract and Promise

In the previous section we argued that the doctrine of mitigation as it is found in English law satisfies principles MP1-MP3 and LS1-LS2. The fact that it does is of course no argument for the merits of those principles. In section B of this chapter, we argued that these principles are morally defensible either on the grounds of altruism or on the basis of fairness. We opted for the fairness-based explanation on the basis that, first, it explains the intuition that the promisee has no duty to reduce losses, second, it does not presuppose any special or close relationship between the promisor and the promisee, and, third, it explains why mitigation principles apply to other moral wrongs and not just promise-breaking. If fairness provides support for MP1-MP3 and LS1-LS2, and the doctrine of mitigation as it exists in contract law as we have it satisfies these principles, then there is convergence between morality and contract law.

However, in recent times a number of contract theorists have argued that the doctrine of mitigation *diverges* from what promissory morality would require. This alleged divergence is welcomed by those who deny that contracts are promises, whereas it is an anathema to some who claim that contracts are promises (who we will call 'promise theorists'). These promise theorists reject the mitigation doctrine and call for law reform. As mentioned already, our own view is that there is convergence between contract law and morality. Our view however differs from Fried's in that we propose the principle of fairness as the best normative justification of the doctrine, rather than altruism. In this section we want to criticize both strands of the alleged divergence since we think that their objections are directed against Fried's account of mitigation, and can be successfully met by our fairness-based account.

We will begin with the promise theorist Seana Shiffrin's critique of the mitigation doctrine. Shiffrin's argument relies on a number of premises. First, she argues that morality does not normally impose a duty on the promisee to accept alternatives.

⁴⁰ Lawyers distinguish between pecuniary and non-pecuniary losses. We are making the same distinction here, and clearly it is very important in morality and law to see that pecuniary loss does not exhaust the category of loss. For other examples of where this point has been made in contract law see *Ruxley Electronics and Construction Ltd. v Forsyth* [1996] A.C. 344 (Eng.), and *Farley v. Skinner* [2002] 2 A.C. 732 (Eng.).

⁴¹ Therefore, the comparison between the cost of repairs and the market value of the good in question in *Darbishire* was too narrow. *Treitel's* formulation which focuses on what the subject matter would be worth, not just what it is worth on the market, is broader, and captures the *O'Grady* case where the focus was on what the subject matter was worth to the promisee rather than what it was worth on the market.

Second, when morality exceptionally requires the promisee to accept an alternative, then it is usually the promisor's duty to provide it. Third, the exceptional cases, where it might be argued that the promisee has a moral duty to avoid losses by taking alternatives, turn on a limited range of factors such as: '... the closeness of the relationship, the history of the relationship, the reason for breach, the reason the promisor wants to shift the burden, and how cumbersome mitigation activities would be'.⁴² Shiffrin finds that the doctrine of mitigation in contract law diverges from all three of these features of promissory morality. On her view, contract law imposes a *general* duty on the promisee not only to accept alternatives but also to seek them out, and to do so whether or not there are exceptional circumstances that – morally speaking - would justify a duty of assistance. She concludes that the effect of this divergence is to make the doctrine of mitigation morally objectionable. This is because it enables the promisor who commits a wrong by breaching his promise to impose a duty on the innocent promisee, the aim of which is to benefit the promise-breaker, i.e., the guilty party. Why would one have a duty to help the person who wronged one? This looks morally perverse. As Shiffrin puts it: 'It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing'.⁴³

Critiques like Shiffrin's above are motivated by hostility towards altruism-based accounts of mitigation, of the kind that Fried offered. Shiffrin finds it 'distasteful' that the innocent party should be expected to be altruistic towards the person who wronged him, particularly in cases where he did so without any excuse or justification. If there is a reason to help promise-breakers, this is usually because of a moral value (for example, friendship, charity, etc.) other than promise. Fried's response is to bite the bullet and say that the promissory bond is special enough to trigger general duties of altruism, and that the more in the wrong the promisor is, the more altruistic the promisee's act of loss-avoidance would be.⁴⁴

In our view, the Shiffrin-Fried debate presupposes that the candidate normative explanation for the doctrine of mitigation is an altruistic duty on the part of the innocent promisee to help the guilty promisor. Shiffrin disputes the existence of such a duty and criticizes contract law, whereas Fried argues in favor of the duty and defends existing doctrine. But what if the candidate normative explanation is not based on altruism, but is based instead on the principle of fairness? Recall that, according to the fairness-based explanation that we put forward, the promisee has no duty to avoid losses but rather is barred from claiming damages that could have been easily avoided. Would Shiffrin's critique of the mitigation doctrine apply, were the fairness-based account correct? We do not think so.

First, *contra* Shiffrin, it does not follow from the existing case law that the promisee has a moral duty to avoid losses. As we have shown above, principles MP1-MP3 and LS1-LS2, which underpin existing case law, are compatible with the view that the promisee has no duty to avoid losses. In fact, the dominant reading of cases amongst private lawyers is that the so-called 'duty to mitigate' is a misleading label, because

⁴² Seana V. Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 725 (2007),.

⁴³ *Id.* at 724-725.

⁴⁴ FRIED, CONTRACT AS PROMISE, *supra* note 6, at 131.

no legal liability attaches when this ‘duty’ is breached.⁴⁵ It follows that it cannot be assumed that the question of whether the doctrine of mitigation diverges from morality turns exclusively on whether the *duty* to avoid losses is morally defensible. Another possibility is that the law’s position is morally defensible, without assuming the existence of a duty on the part of the promisee to avoid losses, let alone a duty based on altruism.

Second, the fairness-based account renders redundant Shiffrin’s complaint that the mitigation doctrine is morally perverse. The basis of this complaint is that the promisee is under a legal duty to assist the person who has wronged him, which in moral terms is indefensible. As we argued earlier, under the fairness-based account, there is no moral duty of assistance on the part of the promisee. The promisee is morally free to sit back and not to seek alternatives. All that he is prevented from doing is to claim damages for losses he could have easily avoided. In fact, according to the fairness-based account, the promisee is unable to help the promisor even if he wanted to. If it is true that the promisor is not morally responsible for losses that the promisee could have easily avoided, then by avoiding them the promisee helps no one but himself.

Third, Shiffrin takes Fried to task for proliferating the circumstances in which altruistic duties to assist arise. On her view, such duties are exceptional and depend on a number of factors that go beyond the mere existence of a promise. But this complaint has no bite against the fairness-based account, which does not presuppose the existence of a special relationship between the promisor and the promisee, let alone one in which duties to assist necessarily obtain.

In sum, none of Shiffrin’s objections cut against the fairness-based justification of the doctrine of mitigation. Even if she is right to dismiss altruism as a morally defensible account of the mitigation doctrine, we should not assume that altruism is the only candidate justification. Moreover, we have shown that the principle of fairness not only supports principles of mitigation of the promisor’s responsibility and loss sharing at the moral level, but also explains existing doctrines and cases that would otherwise appear morally problematic.

The claim that the mitigation doctrine diverges from what inter-personal morality would require is also made by those who claim that contract law is not based on the morality of promising. So, for example, Dori Kimel has claimed, making arguments that are similar to Shiffrin’s, that Fried’s altruism-focused account of the mitigation doctrine is defective. First, Kimel argues that the promissory relation alone cannot explain the existence of these kinds of duties, because in the promissory context they only arise when other relational facts obtain, for example, when the parties are friends.⁴⁶ The mitigation doctrine is, however, as we saw earlier, insensitive to the presence of these facts, i.e., responsibility for loss caused by the promise-breaker may be mitigated even if the only way that the parties are connected is by the promise.

⁴⁵ See, e.g., JACK BEATSON, ANDREW BURROWS & JOHN CARTWRIGHT, *ANSON’S LAW OF CONTRACT* 555 (29th ed. 2010); CHEN-WISHART, *supra* note 16, at 509; PEEL, *supra* note 34, at 1062; STEVENS, *supra* note 8, at 170.

⁴⁶ Kimel argues that these facts do typically obtain in the promissory context, because promises are usually made in the context of on-going relationships. DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* 110 (2003).

Second, Kimel argues, following Atiyah, that given that altruism has a limited role in contract law, it looks incongruous that when it does make an appearance it requires the promisee to render assistance to the promisor who has wronged him.⁴⁷

Kimel's critique of Fried's account of mitigation suggests that there is divergence between promissory morality (broadly conceived, to include other inter-personal moral principles, that interact with the promise principle) and the mitigation doctrine. However, Kimel thinks that the mitigation doctrine may nevertheless be justified. The doctrine is justified in law by the harm principle which requires the courts to refrain '... from the imposition of a certain remedial duty where this could not be justified as the least demanding or restrictive way of preventing or redressing a given harm'.⁴⁸ Kimel's argument is that imposing responsibility for the entire loss on the breaching party, is an '... unnecessary and excessive interference with this party's freedom...' in circumstances where the harm caused by the breach can be easily avoided by the innocent party.⁴⁹

We are not going to evaluate Kimel's own account of the mitigation doctrine here. Instead, we just want to point out that the suggestion that there is divergence between law and promissory morality here, presupposes Fried's claim that the candidate moral justification for the mitigation doctrine is the duty of altruism. Kimel's objections, like Shiffrin's, that the duty of altruism cannot explain mitigation in law, have no force against our fairness-based account of the mitigation doctrine. First, our account does not require there to be a special relationship like that of friendship between the promisor and the promisee. It is sufficient for the promisee's claim to damages to be barred that he had an opportunity to easily avoid the loss. Secondly, the fairness-based account involves no incongruity. The promisee, as we have argued, is under no duty to assist the promise-breaker, but rather is blocked on the basis of fairness from claiming loss that he could easily have avoided.⁵⁰

Therefore, although the objections made by Shiffrin and Kimel to the altruism-focused justification of the mitigation doctrine may well be sound, they are insufficient to establish that there is any divergence between the law and promissory morality. In particular, those objections have no bite against the fairness-based account of the mitigation doctrine that we defend here. That account, we believe, establishes that contract doctrine is morally defensible at the level of first-order moral principles. One can justify the doctrine of mitigation without appealing to considerations that apply uniquely in the context of institutional action or the taking of coercive measures.⁵¹ This is another way of saying that there is no divergence

⁴⁷ *Id.* at 110-111, citing PATRICK S. ATIYAH, *ESSAYS ON CONTRACT* 124 (1986).

⁴⁸ *Id.* at 111.

⁴⁹ *Id.*

⁵⁰ It may be that Kimel's account is compatible with our own. However, his account is distinct. Kimel relies on an aspect of political morality, to do with liberal constraints on state coercion, to justify the doctrine. We claim that an appeal to political morality is unnecessary to justify the doctrine, and that it can be justified on the grounds of what inter-personal morality requires alone. Kimel seems, at least in the promissory context, to deny this. *See id.* at 110.

⁵¹ Fried in his chapter for this volume is tempted now by an institutional justification for the mitigation doctrine based on considerations relating to justice and the rule of law. He claims that mitigation can be explained by reasons to minimize judicial intervention (such as cost and availability of resources). Fried says: 'The objective theory advocated by Barnett, like the regime of default rules, the

between what promissory morality (broadly conceived) requires and what contract law enforces.

We should end with a brief comment about the divergence/convergence debate, which has taken center-stage in contract theory in the past decade. The doctrine of mitigation, just like, for example, the doctrine of expectation damages, punitive damages, the rule against penalty clauses, and the consideration doctrine, appears to contradict the claim that the promise principle is the foundation of contract. In response to the perceived contradiction, contract theorists have reacted either by rejecting these doctrines as morally unjustifiable (like Seana Shiffrin in relation to remedies,⁵² and Charles Fried in his early work with respect to the consideration doctrine),⁵³ or by rejecting the view that contracts are promises (like James Penner,⁵⁴ Randy Barnett,⁵⁵ and Dori Kimel).⁵⁶ We find both of these reactions too quick. What the fairness-based account of mitigation can teach us is that seemingly divergent doctrines of contract law can be justified if one considers the interaction between the promise principle and other moral principles, at the level of first-order moral reasoning. We ought to consider the interaction between the promise principle and other first-order moral principles without assuming that the promise principle has any special role to play in that interaction.⁵⁷

F Conclusion

In conclusion, we have argued that the principles MP1-MP3 and LS1-LS2 that we identified in the first section of this chapter are morally defensible on the grounds of fairness. Fairness requires that the promisor is no longer responsible for losses that the promisee could have easily avoided. We have also argued that these principles justify contract doctrine and case law, and that there is therefore no divergence between promissory morality (broadly conceived) and contract law. The argument that the mitigation doctrine diverges from morality has focused on the claim, famously made by Fried, that the point of mitigation is to get the promisee to assist the promise-breaker on the grounds of altruism. We have offered an alternative justification of the mitigation and loss sharing principles, based on the principle of fairness. This alternative account does not depend on the claim that the promisee has a duty of altruism to assist the promisor, and avoids the objections made to the altruism-based explanation of the mitigation doctrine. If successful, our account dissolves the apparent divergence between the mitigation doctrine and promissory morality, at the level of first-order moral reasoning.

requirement of mitigation and much else, are practical necessities if the government is to become involved in enforcing agreements at all'. Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW __, [MS at 18] (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

⁵² Shiffrin, *supra* note 42.

⁵³ Fried, *supra* note 6, at ch. 3.

⁵⁴ James E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325 (1996).

⁵⁵ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

⁵⁶ Kimel, *supra* note 46.

⁵⁷ As we argue in our paper *Contract Law Without Foundations* (unpublished manuscript) (on file with authors).