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ESSAY

MANAGING MORAL RISK: THE CASE OF CONTRACT

*Aditi Bagchi**

The concept of moral luck describes how the moral character of our actions seems to depend on factors outside our control. Implications of moral luck have been extensively explored in criminal law and tort law, but there is no literature on moral luck in contract law. This Essay shows that contract law is an especially illuminating domain for the study of moral luck because it highlights that moral luck is not just a conundrum to solve, deny, or ignore. We anticipate moral luck, that is, manage our moral risk, when we take into account the possibility that our actions might result in serious harm to others for which we would be morally responsible and adjust our conduct accordingly. Moral risk is present in contract both at the stage of contract formation and, later, when a party must decide whether to breach or whether to accommodate a request for modification. Parties negotiate these risks both through collective background institutions that limit the harms they can inflict on others and through the rules of contract law itself, which align material and moral interests.

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INTRODUCTION

Moral luck describes the effect that events outside our control have on the normative upshot of our actions, or at least how others credit and blame us for those actions.¹ Our ordinary actions are subject to ordinary luck, in that events outside of our control determine whether those acts ultimately increase or decrease our wealth, well-being, or happiness. These ordinary actions are also subject to moral luck, in that events outside of our control determine whether these actions improve or detract from our standing as moral agents. Ever since Bernard Williams and Thomas Nagel first introduced the concept of moral luck, scholars have debated whether it exists and, if so, how devastating it is for longstanding conceptions of morality.² Legal scholars have debated whether the con-

1. See Thomas Nagel, *Mortal Questions* 24–38 (Canto ed. 1991) [hereinafter Nagel, *Mortal Questions*] (defining concept of moral luck and exploring challenge it poses for Kantian moral theory); Bernard Williams, *Moral Luck* 20–39 (1981) [hereinafter Williams, *Moral Luck*] (same). Together, these works introduced the concept and founded the literature on moral luck.

2. See, e.g., *Moral Luck* (Daniel Statman ed., 1993) (exploring various dimensions of moral luck in collection of articles); Robert Merrihew Adams, *Involuntary Sins*, 94 *Phil. Rev.* 3, 3 (1985) (arguing one may be morally responsible for involuntary states of mind); Jonathan E. Adler, *Luckless Desert Is Different Desert*, 96 *Mind* 247, 247 (1987) (defending problem of moral luck on grounds that there is “imperfect alignment of our ideals for attributing desert and the practices in which those attributions are rooted”); Brynmor Browne, *A Solution to the Problem of Moral Luck*, 42 *Phil. Q.* 345, 345 (1992) (arguing it is mistaken to understand problem of moral luck as based on assumption that moral responsibility requires control by agent); Randolph Clarke, *Agent Causation and the Problem of Luck*, 86 *Pac. Phil. Q.* 408, 408 (2005) (defending agent causation against argument that one’s very decision to act one way or the other is matter of luck); Darren Domsky, *There Is No Door: Finally Solving the Problem of Moral Luck*, 101 *J. Phil.* 445, 446 (2004) (denying problem of moral luck because “[b]lameworthiness does not vary with luck in cases of negligence”); David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 *Law & Phil.* 405, 410–11 (2007) (rejecting problem of moral luck on grounds that agent is not properly regarded as responsible for all causally connected consequences of her acts); Alfred R. Mele, *Ultimate Responsibility and Dumb Luck*, 16 *Soc. Phil. & Pol’y* 274, 275 (1999) (defending notion of ultimate responsibility and moral responsibility against specific deterministic challenges); Brian Rosebury, *Moral Responsibility and “Moral Luck,”* 104 *Phil. Rev.* 499, 524 (1995) (arguing there is no problem of moral luck once one recognizes “moral agents are to be judged in light of knowledge available to them at point of decision to act, given acknowledged underlying condition of universal

cept of moral luck poses fundamental challenges for tort law³ and criminal law.⁴

This Essay considers how we deal with moral luck—not theoretically, or psychologically, but in the course of individual and collective action. Accepting that moral luck is indeed a fundamental challenge to the common and deeply held belief that morality ought not to be subject to luck, it suggests that political and legal practices already limit the ways in which, as Williams and Nagel argue, moral standing is in fact subject to luck. Just as individuals navigate uncertainty as to the material outcomes of their actions when they choose to take ordinary risks, they anticipate the uncertain moral repercussions of their actions when they assume what this Essay calls *moral risk*. This Essay proposes that legal rules and other institutions help manage the risk that actions of contracting parties will result in negative moral responsibility.

The law helps manage moral risk in contract. Background institutions—such as distributive tax and transfer regimes, mandatory insurance and insurance regulations, and bankruptcy protections—provide a social safety net, or social insurance, that tempers the material risks that individ-

fallibility in pursuit and deployment of knowledge”); Michael Zimmerman, Taking Luck Seriously, 99 J. Phil. 553, 562 (2002) (arguing “anyone who takes seriously the view that we cannot be morally responsible for that which is not in our control must . . . accept the more general claim that luck is irrelevant to moral responsibility” and suggesting practice of punishment must be revised accordingly).

3. See generally Larry A. Alexander, Causation and Corrective Justice: Does Tort Law Make Sense?, 6 Law & Phil. 1, 22–23 (1987) [hereinafter Alexander, Corrective Justice] (arguing backward-looking focus of “but-for” causation inquiry in tort law is unjustified); Ronen Avraham & Issa Kohler-Hausmann, Accident Law for Egalitarians, 12 Legal Theory 181, 181 (2006) (arguing corrective justice and existing tort law are unjust to both defendants and plaintiffs because damages depend on arbitrary factors); John C.P. Goldberg & Benjamin C. Zipursky, Tort Law and Moral Luck, 92 Cornell L. Rev. 1123, 1132–63 (2007) [hereinafter Goldberg & Zipursky, Tort Law] (rejecting arguments that tort law is unjust because wrongdoers’ compliance and liability both turn on luck); Jeremy Waldron, Moments of Carelessness and Massive Loss, in *Philosophical Foundations of Tort Law* 387, 389–91 (David G. Owen ed., 1995) [hereinafter Waldron, Moments of Carelessness] (arguing massive liability imposed on individuals for ordinary negligence is morally arbitrary).

4. See, e.g., Michael Davis, Why Attempts Deserve Less Punishment than Completed Crimes, 5 Law & Phil. 1, 28–32 (1986) (defending differential punishment for attempts on grounds that criminals who have not successfully completed their crimes have not usurped same advantage as those who have accomplished their crimes); Joel Feinberg, Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It, 37 Ariz. L. Rev. 117, 119 (1995) [hereinafter Feinberg, Equal Punishment] (arguing attempts and completed crimes should be treated equally because arbitrariness has corrosive effect on criminal law); Stanley Kadish, Forward: The Criminal Law and the Luck of the Draw, 84 J. Crim. L. & Criminology 679, 679 (1994) (arguing harm principle at work in array of criminal law doctrines is indefensible); David Lewis, The Punishment that Leaves Something to Chance, 96 Phil. & Pub. Aff. 53, 58 (1989) (suggesting we can understand less severe punishment for attempts as kind of penal lottery, in which criminal who commits given act is subject to risk of punitive harm that turns in part on harm he commits).

uals face in the labor and capital markets.⁵ This has the effect of attenuating the range of outcomes that contracting parties may experience; that is to say, background institutions limit the consequences of individual transactions, or their cumulative effect, on each of the contracting parties. For example, when the system works, an employer can set employment terms with reference to the labor market without worrying about whether compensation will be adequate to support a decent standard of living for a given employee in light of her particular, evolving needs. By lowering the stakes of contract, background institutions mitigate the moral risk to each party that her dealings with others will render her responsible for their misfortunes.⁶

While background institutions reduce the risk that contracting on a given set of terms will result in negative moral responsibility, contract law itself helps mitigate the risk that post-contract events will make it rational for a party to breach or request modification. By opting into contract, parties help frame the choices they may face should circumstances make breach attractive to them or cause the other party to request modification. Choosing contract over extralegal promise, and thereby subjecting themselves to the prevailing regime of contract remedies, limits the economic harm that parties might later be tempted to inflict should they pursue their economic interests at the expense of their contracting partner. For example, a factory owner who promises to deliver widgets to a retailer by a fixed date may learn of an opportunity to redirect her resources to a more lucrative order. In the classic efficient breach analysis, an expectations damages award will usually cause the producer to breach his initial promise to deliver widgets if and only if her increased gains from the alternative widget contract exceed the losses of her initial contracting partner, which she will have to cover.⁷ But one may also charac-

5. See David M. Cutler & Richard Johnson, *The Birth and Growth of the Social Insurance State: Explaining Old Age and Medical Insurance Across Countries*, 120 *Pub. Choice* 87, 88, 91–96 (2004) (providing overview of political and economic theories of social insurance); Mark Huggett & Juan Carlos Parra, *How Well Does the U.S. Social Insurance System Provide Social Insurance?*, 118 *J. Pol. Econ.* 76, 76–77 (2010) (“One rationale for a government-provided, insurance system is the provision of insurance for risks that are not easily insured in private markets.”). For economic literature explaining social insurance as a response to the inadequacy of private insurance for labor market risk, see J.A. Mirrlees, *Private Risk and Public Action: The Economics of the Welfare State*, 39 *Eur. Econ. Rev.* 383, 384, 388 (1995) (summarizing social insurance as response to problems of adverse selection and impossibility of individuals purchasing insurance privately at optimal time of birth). See generally Greg Warren Kaplan, *Essays in Inequality, Risk-Sharing and the Lifecycle* (May 2009) (unpublished Ph.D. dissertation, New York University) (on file with the *Columbia Law Review*) (detailing different models of risk sharing to deal with labor market risk).

6. See *infra* Part IV.A (suggesting background institutions mitigate moral risk inherent in contract formation by providing social safety net).

7. See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 *Rutgers L. Rev.* 273, 284 (1970) (“Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.”);

terize the damages rule as making it possible (and easy, relative to other possible default rules) for the factory owner to manage, at the time of her initial promise, the moral risk that she will later be tempted to break that promise. By entering a legally binding commitment subject to the expectation damages rule, she makes it less likely that she will inflict economic loss on her contracting partner should new opportunities arise that cause her to regret their initial contract.

The economic harm that the availability of damages protects against may not constitute the core harm that results from ordinary promise breaking, but it is the key harm of concern in connection with breach of commercial promises.⁸ In tying parties' hands through contract, the law not only facilitates credible commitments among business partners, but also keeps their material and moral interests in rough alignment.

The contract law doctrine of impracticability makes it easier to decide—from a moral point of view—how to respond to another party's request to modify contract terms. Contract makes it possible for a party to escape her obligations in those cases where the other party's refusal to modify would be most damaging to her, which in turn makes it difficult for the other party to avoid modification in circumstances where it would be most morally appropriate.⁹ The result is to make less morally hazardous the decision whether to acquiesce to a request for a modification of the original agreement. For example, if a contractor seeks a price adjustment due to unforeseen difficulties that would subject her to a substantial loss at the contract price, a homeowner may acquiesce to an appropriate adjustment in part because the homeowner's legal remedies should the contractor breach are at least uncertain.¹⁰ Contract rules governing

Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and Theory of Efficient Breach*, 77 *Colum. L. Rev.* 554, 558 (1977) ("Generally, breach will occur where the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him 'better off' than performing his obligation."); Steven Shavell, *Damage Measures for Breach of Contract*, 11 *Bell J. Econ.* 466, 478 (1980) [hereinafter Shavell, *Damage Measures*] ("The seller will default if and only if his gain exceeds the buyer's expectancy . . ." (internal quotation marks omitted)).

8. See 24 Samuel Williston, *A Treatise on the Law of Contracts* § 64:7 (Richard A. Lord ed., 4th ed. 2002) ("Mental suffering caused by a breach of contract, although it may be a real injury, is not generally considered as a basis for compensation in contractual actions."); R. Joseph Barton, *Note, Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 *Wm. & Mary L. Rev.* 1789, 1789 (2000) ("[C]ontract law . . . [is] expressly designed to deal with disappointed economic expectations and, therefore, the recovery of economic losses.").

9. See *Restatement (Second) of Contracts* §§ 89, 261–268 (1981) (outlining circumstances under which performance of promise is difficult or impossible). Section 261 holds that a party's obligation may be discharged if performance "is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.* § 261.

10. Consider a contractor who asks a homeowner to increase the contract price to \$12,000 from \$10,000 because the poor state of the existing plumbing will require a variety of pipes to be replaced before the planned work can proceed. The expected duration of

changed circumstances—rules that the homeowner and the contractor adopted by entering a contract and by not specifying alternatives where possible—relieve the homeowner of the choice to impose substantial losses on the contractor. The psychological consequence of one's ability to manage moral risk is to temper the moral salience of decisions in contract.

This Essay does not suggest that social policy or contract law itself is directly motivated by a desire to manage moral risk. Complicated institutions are variously motivated, and perform a still greater variety of pragmatic and moral functions. The purpose of this Essay is to explain the notion of moral risk, locate it in the practice of contract, and demonstrate how it is already managed by existing institutions. Moral risk generally, and in the context of contract in particular, has been easy to overlook precisely because of the background work of large social and legal institutions that are usually associated with other purposes. When those institutions effectively limit the harm done to others, individuals are less likely to dwell on those potential harms in the course of everyday decisions, including choices made in the course of contract.

Part I describes the problem of moral luck and the possibility of managing moral risk. Part II considers whether moral luck can survive consent by the very person whom one is "at risk" of wronging. Part III identifies the ways in which moral risk operates in both contract formation and contract performance. Finally, Part IV discusses how social institutions and contract law in particular help manage moral risk. Part V concludes.

I. MANAGING MORAL RISK

A. *The Challenge of Moral Luck*

The concept of moral luck was introduced by Bernard Williams.¹¹ In his seminal article naming the concept, Williams set out to challenge the prevailing orthodoxy that while much of life is subject to luck, in the all-important domain of morality one is free of it.¹² The exclusion of matters of luck from moral affairs has been so foundational as to be almost defini-

the work was not specified in the written agreement. The contractor may have been in a better position to appreciate the significance of existing conditions, but the homeowner was in a better position to know of conditions behind a wall. It is therefore unclear whether the contractor could successfully avoid the contract on the grounds of mistake of fact or some variety of changed circumstances. The possibility that the contractor may escape liability for breach makes it more likely that the homeowner will acquiesce to some modification that pools the harms associated with the poor quality of the existing plumbing.

11. See Williams, *Moral Luck*, *supra* note 1, at 20–39 (noting "morality is subject . . . to constitutive luck" and exploring moral luck through series of examples).

12. See *id.* at 21, 29 ("[T]he aim of making morality immune to luck is bound to be disappointed.").

tional.¹³ That something was a matter of luck was taken to demonstrate that it was, in at least that respect, not a moral issue. This view of morality has ancient roots,¹⁴ but was most notably advanced by Kant, who in a sense set out to provide an account of morality that could be divorced from worldly contingency.¹⁵ Kant suggested that moral reasoning expresses and embodies freedom because morality exists in the domain of reason, and through reason a domain can be created separate from worldly causation and contingency.¹⁶ Thus, in Kantian morality, much is at stake in the separation of morality and luck.¹⁷

In light of these stakes, the challenge of moral luck was not an especially welcome one. As Williams was quick to point out, the challenge could not “leave the concept of morality where it was.”¹⁸ Moral luck disrupted and threatened basic tenets of both ordinary and theoretical

13. See Nafsika Athanassoulis, *Common-Sense Virtue Ethics and Moral Luck*, 8 *Ethical Theory & Moral Prac.* 265, 265 (2005) (noting “morality . . . is about control, choice, responsibility and the appropriateness of praise and blame and on the other hand luck . . . is about lack of control, unpredictability and the inappropriateness of praise and blame”); A.W. Moore, *A Kantian View of Moral Luck*, 65 *Philosophy* 297, 297–98 (1990) (observing Kant and Plato share “the belief that our true worth, indeed our true being, is something isolable and pure which is not subject to the contingencies and vicissitudes of our empirical surrounds”).

14. See Aristotle, *Nicomachean Ethics* bk. I, ch. 9, §7 (Terence Irwin trans., Hackett Publ’g Co. 2d ed. 1999) (“[I]t would be seriously inappropriate to entrust what is greatest and finest to fortune.”); John Cooper, *Reason and Human Good in Aristotle* 123 (1975) (“Aristotle points out that the actual attainment of external goods is in large measure the result of sheer good fortune; but *eudaimonia* [human flourishing] must be something which is attained, if at all, by a person’s own efforts.”); Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* 1–8 (1986) (discussing dichotomy between luck and human goodness in Greek ethical thought); see also Julia Annas, *Ancient Ethics and Modern Morality*, 6 *Ethics* 119, 125 (1992) (“[V]irtue requires voluntariness, the free exercise of choice to act one way rather than another.”).

15. See Immanuel Kant, *Grounding for the Metaphysics of Morals* 20 (James W. Ellington trans., Hackett Publ’g Co. 3d ed. 1993) (1785) [hereinafter *Kant, Grounding*] (“[M]oral law . . . must be valid not merely under contingent conditions and with exceptions but must be absolutely necessary.”). The moral theory is complex and cannot be adequately treated here. A brutally reductive version of the argument is that human beings may be motivated by desires that are the product of the external world and subject to the natural laws of the physical world. To the extent our actions are guided merely by these desires, we do not act freely but are subject to laws outside ourselves. Only when we subject our will to the internal law of reason, i.e., the categorical imperative, do we act freely. See also Henry E. Allison, *Kant’s Theory of Freedom* 239–42 (1990) (discussing deduction of freedom from moral law in Kant’s theory); Christine M. Korsgaard, *The Authority of Reflection*, in *The Sources of Normativity* 90, 97–98 (Onara O’Neill ed., 1996) [hereinafter *Korsgaard, Reflection*] (“[B]ecause the will is free, no law or principle can be imposed on it from outside.”).

16. Kant, *Grounding*, supra note 15, at vi–viii.

17. See Judith Andre, Nagel, Williams, and Moral Luck, 43 *Analysis* 202, 202 (1983) (describing Kantian view that morality is “the sphere of life in which, no matter what our circumstances, each of us can become worthy” and suggesting “moral worth is the highest worth of all, and so there is a kind of ultimate justice in the world”).

18. Williams, *Moral Luck*, supra note 1, at 39.

moral thinking.¹⁹ That, indeed, was Williams's aim.²⁰ Williams sought to dislodge moral theory's focus on universal accounts of right and wrong action and to replace it with attention to individual reflection about one's own actions. According to Williams, a person's rational justification of his own actions to himself is the better site of moral theory. He wished to demonstrate that this type of reflection necessarily and appropriately turns on matters of luck, especially how one's actions, undertaken with various purposes, actually turn out.²¹ When actions turn out such that, in hindsight, one would have rather not committed them, one experiences what he calls agent-regret.²²

In his equally well-known reply to Williams, Thomas Nagel was unwilling to give up the traditional account of morality centered on how individuals can and should justify their voluntary acts to one another.²³ Nagel, nevertheless, identified four systematic ways in which luck pervades the moral sphere.²⁴ First, constitutive luck concerns the "kind of person you are, where this is not a question of what you deliberately do, but of your inclinations, capacities, and temperament."²⁵ Second, circumstantial luck concerns "the things we are called upon to do, the moral tests we face."²⁶ Third, causal luck is concerned with all that determines what we (choose to) do.²⁷ Finally, the most well-known, resultant luck, covers the uncertain outcomes of our actions.²⁸ These four kinds of luck overlap considerably but nevertheless help map out the many paths by which arbitrary factors contaminate the moral domain.

Nagel's version of moral luck calls for less wholesale revision of the basic tenets of Kantian moral theory than Williams's account. Nagel did not come to terms with moral luck by rejecting the proposition that moral blame attaches only where conduct is blameworthy in the eyes of others for reasons that can be articulated at the time of the action in question. Williams's aim in raising the problem of moral luck was to re-

19. It disrupted theoretical understandings of morality, which take moral agency to entail control over the moral quality of actions. See *supra* note 13 (discussing importance of individual control to conceptions of morality). It similarly disrupted the basic intuition that many have that we ought not to be credited or blamed for things beyond our control. See Margaret Urban Walker, *Moral Luck and the Virtues of Impure Agency*, in *Moral Luck*, *supra* note 2 at 235, 237 (describing "'control condition,' the intuitive principle limiting moral assessment to just such factors as an agent controls" as "held to be virtually self-evident").

20. See Daniel Statman, Introduction, in *Moral Luck*, *supra* note 2, at 1, 6 (noting normative aspect of Williams's agent-regret theory).

21. Williams, *Moral Luck*, *supra* note 1, at 36.

22. *Id.* at 27.

23. Nagel, *Mortal Questions*, *supra* note 1, at 27.

24. *Id.* at 28.

25. *Id.*; see also Adams, *supra* note 2, at 3–4 (arguing individuals should be held ethically accountable for "involuntary sins").

26. Nagel, *Mortal Questions*, *supra* note 1, at 33.

27. *Id.* at 33–34.

28. *Id.* at 35.

ject precisely this orthodoxy,²⁹ but it was further than Nagel was prepared to go. Instead, Nagel saw the problem of moral luck as part of a larger, unavoidable tension in the desire to see oneself as separate from the world and under one's own control, but also of the world, constituted by it, and capable of acting on it and in it.³⁰ Nagel suggested that, to the extent one sees oneself as separate and apart from everything outside oneself, one wishes moral standing to be within one's control, but to the extent one sees oneself as connected with the world, one accepts responsibility for one's imprint on the world, however imperfectly it reflects one's internal image. Subsequent authors have also justified moral responsibility for outcomes outside one's control as expressive of agency in the world, though distinct from moral judgments of culpability and blame.³¹

B. *Taking Moral Risks*

This section begins with two observations about the operation of moral luck. First, moral luck is not necessarily a matter of luck per se, but rather luck from the perspective of the individual upon whom it acts in a given instance. Discussion of moral luck is generally focused on natural luck, that is, noninstitutionally generated or controlled sources of luck, such as whether a pedestrian embarks on an ill-fated street crossing, whether a child drowns in running water, or whether a gun misfires.³² But moral luck is often traceable to factors that are morally arbitrary in

29. Williams, *Moral Luck*, supra note 1, at 37, 39.

30. Nagel, *Mortal Questions*, supra note 1, at 37–38.

31. See Tony Honoré, *Responsibility and Luck*, 104 *Law Q. Rev.* 530, 543 (1988) (“If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character.”); see also John Gardner, *Obligations and Outcomes in the Law of Torts*, in *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* 111, 136 (Peter Cane & John Gardner eds., 2001) [hereinafter Gardner, *Obligations and Outcomes*] (“To deny that success can have independent rational significance is to leave us without *any* story of our lives as practical reasoners.”); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449, 505–07 (1992) [hereinafter Perry, *Moral Foundations*] (arguing agency is “meaningful notion” because one can imagine agent with knowledge of all relevant causal regularities who is capable of controlling natural processes, and observing outcome responsibility involves “retrospective evaluation of action” that turns on what would have been foreseeable to such an idealized agent); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *Philosophy and the Law of Torts* 72, 83 (Gerald J. Postema ed., 2001) [hereinafter Perry, *Responsibility for Outcomes*] (“[O]utcome-responsibility in the achievement sense comprises a fundamental element in our understanding of our own agency.”).

32. See, e.g., Nagel, *Mortal Questions*, supra note 1, at 25, 30–31 (considering scenarios where drunk driver kills pedestrian and baby is left in running bathwater); Berit Brogaard, *Epistemological Contextualism and the Problem of Moral Luck*, 84 *Pac. Phil. Q.* 351, 351 (2003) (considering situation in which driver with uninspected brakes kills pedestrian); Heidi M. Hurd, *What in the World Is Wrong?*, 5 *J. Contemp. Legal Issues* 157, 176 (1994) (expanding upon misfiring gun example).

their particular interventions in the lives of individuals, but are in fact systemic.

For example, whether one hits a person as a result of reckless driving is, in part, a function of natural luck, but the full outcome of one's recklessness—which the concept of moral luck acknowledges as relevant to its ultimate moral salience—will turn on traffic laws, traffic enforcement, pedestrian norms, the healthcare system, and the insurance or other benefits available to those dependent on the victim. All of these latter factors are morally arbitrary from the standpoint of an individual's agency, but they help determine whether the driver has committed a minor or grievous wrong. What is notable, but generally overlooked, is that none of these factors is truly arbitrary. Each is the function of collective decisions about how social institutions should function. Some, but not all, of the relevant institutions are engineered by legal rules.

The second observation about moral luck is that, precisely because moral luck is pervasive, where the potential moral upshot of an action is especially salient, one anticipates its uncertain effect on one's act. Individuals anticipate this uncertainty much as they anticipate—and incorporate into their decision to act—other uncertainties relevant to the merits of their actions. Such considerations include whether one is likely to succeed in accomplishing an act as envisioned and what its amoral consequences could be. Examples of moral luck in the literature tend to be cases of bad moral luck that hit a moral agent like lightning (suddenly, someone runs into the street, rendering everyday negligence morally shattering), or good moral luck that goes unacknowledged (everyday negligence occurs, no one is killed, and no lucky stars are thanked).³³ But moral luck normally operates at less extreme frequencies: The outcomes of our actions are unknowable, but the fact of uncertainty is known and appreciated.³⁴

33. Cf. Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action that Causes It*, 24 *Law & Phil.* 263, 265 (2005) (describing how actors knowingly assume risk of “metaphysical luck” in certain situations (internal quotation marks omitted)). Levy defends the centrality of outcome to criminal liability on the grounds that those who engage in risky criminal behavior assume the risk that their actions will result in harms that justify criminal punishment. He stresses, as does this Essay, that just as a gambler risks that she will have poor “metaphysical luck” that will result in monetary loss, someone who shoots a gun gambles with the “dealer of *morality*.” *Id.* at 265. An agent who engages in behavior that puts others in harm's way “voluntarily create[s] a situation” that she “[knows] or at least should have known would let the moral status of her action be determined by one or another reasonably foreseeable outcome of her action.” *Id.* at 303.

34. The failure to recognize the ways in which we continually manage moral risk follows in part from our tendency to associate ordinary luck with extreme, unanticipated outcomes. Cf. Anders Schinkel, *The Problem of Moral Luck: An Argument Against Its Epistemic Reduction*, 12 *Ethical Theory & Moral Prac.* 267, 269 (2009) (“We call something a matter of (good or bad) luck when 1) it is of interest or importance to us, 2) it was not under our control, and 3) we had no reason to expect its occurrence.”).

As a result, moral uncertainty is a factor in decisionmaking by moral agents. This insight is lost upon, or perhaps uncomfortable for, those committed to the priority of moral principles in decisionmaking, because that priority might be mistaken to require that no action that may result in unjustified wrong to another is permissible. But most people understand moral duties to require less; one must not impose unreasonable risks on others.³⁵ When a reasonable risk results in great harm to another, however, it is the insight of the concept of moral luck and related literature that one is nevertheless morally on the hook, or at least regarded as such by both oneself and others.³⁶ The result is that even when one acts reasonably, one acts knowing that one may commit wrongs, or at least incur negative responsibility. Even acts that are wrongful on facts known at the moment of commission may turn out to be more or less serious wrongs; the wrongdoer gambles accordingly. Individuals deliberately act in ways that expose them to moral luck, and this conscious negotiation of moral luck may be called moral risk taking.

Moral risk taking is the knowing undertaking of actions that may or may not result in moral opprobrium, which is to say, most actions. But the term should connote more conscious risk taking than the more fundamental concept of moral luck may allow. Every act is subject to moral luck. But only some actions are properly understood as entailing moral risk. When one takes moral risk, one understands that by engaging in an act or activity one is at risk of committing moral wrongs, and that fact of risk is part of one's ordinary calculations in deciding whether to undertake the activity, how often, and with what care.

C. *The Possibility of Managing Moral Risk*

If one bites the bullet and accepts the existence of moral luck, it cannot be denied that luck matters to moral judgments. But one can maintain that luck ought not to matter. That is, it is morally attractive to minimize the extent that luck determines the moral quality of actions. To

35. See Jules L. Coleman, *Contracts and Torts*, 12 *Law & Phil.* 71, 90–93 (1993) (exploring requirement that one impose only “reasonable risk” as neither fully encompassing nor limited to cost-justified risks, and expressly allowing that imposition of such risk may be justified). Of course, there is substantial disagreement on what constitutes unreasonable risk. See, e.g., Jules L. Coleman, *Risks and Wrongs* 238–39 (1992) [hereinafter *Coleman, Risks & Wrongs*] (“[T]he agent who fails to take cost-justified precautions acts unreasonably, and the risks he imposes are unreasonable.”); Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151, 152–60 (1973) (“If the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable”); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 *Harv. L. Rev.* 537, 542–56 (1972) (“[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks.”).

36. Cf. Daniel Statman, *Doors, Keys, and Moral Luck: A Reply to Domsky*, 102 *J. Phil.* 422, 423–24 (2005) (explaining there is more to problem of moral luck than blameworthiness).

concede that luck matters is not to concede that it is not a matter of degree and whether its role is greater or smaller matters morally. The Kantian picture of morality is attractive in part because it draws on the intuition that an individual should be able to control her moral status. This may be an ideal that cannot be actualized, but it also serves as a guiding principle that weighs in favor of promoting certainty. Certainty is created by developing protective mechanisms, whether private insurance, social insurance, or safety belts. All of these make the accidents we cause less calamitous for those who we injure. They truncate the wild card variable of outcome in moral judgments of action.

One might be tempted to think that moral luck may be eliminated altogether through these mechanisms. For example, Tom Baker has argued that liability insurance effectively eliminates the liability luck associated with auto accidents.³⁷ He argues that mandatory insurance, the individual cost of which is largely insensitive to one's past accidents, ensures that drivers are almost always able to compensate victims with widely varying injuries at a fixed, predetermined cost to themselves.³⁸ Baker's focus is on the effect of insurance on the luck of drivers, rather than its effect on the luck of victims,³⁹ but the insurance scheme he describes is of significance to both; mandatory insurance has a leveling effect on victims as well. Baker himself does not claim that insurance eliminates moral luck, but one might be tempted to extend his point regarding liability luck to moral luck on the theory that insurance guarantees that all victims are fully compensated and therefore unharmed. This would be a mistake. The moral consequences to a driver involved in a serious accident are not "undone" by financial compensation to the victim. Financial compensation fulfills a remedial obligation that arises from the injury and, where commensurate to ascertainable losses, alters the moral quality of the accident (hence the possibility of mitigating moral risk), but it does not undo the accident. No social policy or market mechanism can dissipate moral luck. But institutions, policies, and legal rules may alter the scale of havoc it wreaks on ordinary moral judgment and everyday action.

Note that the idea that one can mitigate moral risk follows from the critical insight that outcomes matter to the moral character of action.⁴⁰ A moral framework in which the morality of an action turns entirely on the agent's mental state—will, intention, or purpose—does not allow for social instruments to elevate or detract from individual morality (except, perhaps, through the inculcation of virtue). But moral luck paints a pic-

37. Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 *Theoretical Inquiries L.* 165, 166 (2008).

38. *Id.* at 172–75.

39. See *id.* at 184 (shifting discussion away from luck of drivers to luck of victims).

40. That is, the principle of moral luck implies that outcomes affect the moral quality of acts. Negative outcomes may be mitigated by social institutions like law; therefore, these institutions may help mitigate the risk that luck will render us vulnerable to moral opprobrium.

ture of morality in which outcomes matter morally to the agents that set in motion causal chains culminating in those outcomes. This opens the door to the possibility that the state enhances individual morality (with or without that purpose) not through persuasion or incentives, but through policies that make the potential negative consequences of certain kinds of individual action more predictable and less devastating. Consider Williams's well-known early example of the moral luck of the artist Gauguin: The moral character of Gauguin's abandonment of his family depends not just on how his art turns out, but also on what befalls his family.⁴¹ A welfare state that renders his absence emotionally but not financially disastrous would mitigate the magnitude of his wrong. Similarly, if the moral character of leaving a baby in a running bath depends on whether the baby survives, safe baby bath seats that make it less likely that water will ever reach the baby's mouth could make less terrible the baby's brute luck and also dampen her caregiver's bad moral luck.⁴²

That moral luck can be reduced seems counterintuitive only because the concept of moral luck has not fully dislodged the Kantian notion that morality is immune to the vagaries of the tangible world.⁴³ But moral luck is only a problem to the extent that it has chipped away at that picture, and it is precisely to that extent that moral luck is open to mitigation by the banal instruments available in the concrete world of contingency, including instruments of law. One can use law to mitigate the moral risks that one assumes.

The real question is when and how the law should facilitate such mitigation. As a general matter, because moral wrongs and moral responsibility arise in the context of injury to others, moral luck is the wrongdoer's counterpart to her victim's brute luck.⁴⁴ Thus, because individuals are responsible for less calamity when calamities are prevented, institutions that mitigate brute bad luck similarly mitigate the moral luck of those whose actions set in motion the course of events that would otherwise have ended in calamity. Straightforward reduction of brute luck is unproblematically morally attractive; the dilemmas relate largely to cost. But sometimes the attainable alternative to reducing aggregate brute luck—and corresponding moral risk—is to distribute brute luck more evenly. For example, the law may reduce the aggregate loss associated with accidents that cause disability by promoting employment opportuni-

41. See Williams, *Moral Luck*, *supra* note 1, at 22–26 (examining whether fictionalized Gauguin's success as artist affects moral character of his earlier act of abandoning his family).

42. See Nagel, *Mortal Questions*, *supra* note 1, at 30–31 (discussing how resultant luck determines moral upshot of leaving baby unattended in bath).

43. See *supra* note 13 and accompanying text (describing persistent and fundamental nature of claim that morality is immune to luck).

44. Cf. John Gardner, *Wrongs and Faults*, 59 *Rev. Metaphysics* 95, 107 (2005) [hereinafter Gardner, *Wrongs and Faults*] (noting although “[I]awyers are used to thinking of the person wronged as the main person whose life was made worse by the wrong,” there is also “moral damage to the life of the wrongdoer”).

ties and nondiscrimination against disabled persons (thus limiting avoidable waste of human capabilities), but it cannot totally eliminate the economic loss associated with some disability. A welfare state that pools the (substantial) residual economic loss through a broadly funded benefits program effectively pools the brute luck that each of us may be in a disabling accident. Similarly, it may be undesirable (or prohibitively expensive) to prevent individuals from suffering economic loss as a result of contracts in which they assume risks that subsequently materialize. But it may be morally attractive (and possibly economically beneficial, though that is not of concern here) to limit the severity of those losses through the tax code and bankruptcy, or the personal consequences of such losses through the welfare state. Either policy response effectively pools the brute luck of individuals in contract and thereby mitigates the moral risk of their contracting partners.

Of course, there are many reasons to pool brute luck. There are reasons of distributive justice and there are humanitarian reasons stemming from the imperative to reduce suffering and improve the quality of individual lives, quite apart from how those lives compare to those of others. But most institutions can serve more than one function at the same time; good reasons for pooling brute luck coexist with good reasons for mitigating moral risk. This Essay's claim is not that one can explain the existence of any particular institution by reference to the desire to manage moral risk, but rather that one can understand some institutions as performing such a function. Some background social institutions systematically mitigate moral risk by pooling brute luck across all residents. One can opt into and use other institutions, like contract, as a tool with which to manage individual moral risk. The centrality of outcomes to the operation of most legal rules may clash with an ideal of pure moral agency, but it also makes possible a brand of collective agency that improves the quality of individual moral lives.

II. CONSENT AND MORAL LUCK

By calling attention to the arbitrary factors that influence moral standing, moral luck challenges our ordinary moral judgments as well as certain core beliefs about the nature of morality. It also raises interesting legal questions, which, until now, have been explored primarily in the context of either criminal law or tort law.⁴⁵ In both contexts, the problem of moral luck potentially complicates the assignment of culpability and responsibility. In criminal law, the law of attempts is the most immediate context in which moral luck plays out.⁴⁶ Scholars differ on whether one

45. See *supra* notes 3–4 and accompanying text (noting examinations of moral luck in torts and criminal law).

46. See, e.g., Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 *Rutgers L.J.* 725, 733 (1988) (“[T]he essence of a criminal attempt lies in the defendant’s firm intention to commit the substantive offense, and the failure to achieve that aim is invariably attributable to factors

can ultimately justify the imposition of greater punishment for acts that result in greater harm, as compared to conduct that fails to achieve its intended harm.⁴⁷ Moral luck has also provoked considerable discussion of the nature of responsibility in tort by illuminating our scheme of responsibility for tortious conduct as extending well beyond the boundaries of purely voluntary action and its intended consequences.⁴⁸ In both criminal theory and tort theory, the problem of moral luck has given rise to a rich literature regarding the nature and grounds for legal liability. By contrast, there is little scholarly consideration of the relevance of moral luck to contract.⁴⁹

Three developments in the relevant literature make it appropriate to revisit the presumed irrelevance of moral luck to contract. First, the notion of contract as an entirely consensual institution, where all contractual obligations are fully voluntary in the sense that each party specifically authorized them, has gradually been uprooted.⁵⁰ So long as all outcomes in contract were deemed traceable to consent, misfortune occasioned

such as luck, chance and misjudgment which do not significantly diminish culpability.”); Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 *Phil. & Pub. Aff.* 262, 276 (1974) (“[T]here is no difficulty in seeing that the killer who fails because his bullet accidentally hits his victim’s belt buckle is no less a social menace in the requisite sense than one who succeeds because his victim happens to be wearing suspenders.”); Feinberg, *Equal Punishment*, supra note 4, at 132 (“I find no intuitive plausibility at all in basing criminal liability on moral blameworthiness, thus securing for one’s position a certain *prima facie* respectability, but then basing moral blameworthiness upon, as luck would have it, the actual harm or absence of harm caused.”).

47. Larry Alexander is among those arguing that attempts should be punished equally. See Larry Alexander, *Crime and Culpability*, 5 *J. Contemp. Legal Issues* 1, 30 (1994) (“[T]he case for the centrality of the culpable act in criminal law is stronger than the case for taking the causation of harm into consideration, as all criminal codes currently do.”); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 *Calif. L. Rev.* 931, 935 (2000) (“[A]ttempts and successes should be regarded not only as equally culpable, but also equally blameworthy and punishable . . .”). For the argument that punishment appropriately turns on outcome, see Michael Moore, *The Independent Moral Significance of Wrongdoing*, 5 *J. Contemp. Legal Issues* 237, 237–38 (1994); see also R.A. Duff, *Criminal Attempts* 116–27 (1996) (highlighting that attempts are punished differently from incidents causing relevant harm).

48. See Gardner, *Obligations and Outcomes*, supra note 31, at 125 (“[T]he tort of negligence at common law is morally speaking a variation on the strict liability model of a tort, in which what is of the essence is what one actually does (injures P), never mind what one merely tries to do . . .”); Honoré, supra note 31, at 530 (“[T]o bear the risk of bad luck is inherent in the basic form of responsibility in any society . . .”); Perry, *Moral Foundations*, supra note 31, at 506–07 (arguing responsibility as recognized in tort encompasses outcome responsibility, not just intended consequences of our acts).

49. See Arthur Ripstein, *Closing the Gap*, 9 *Theoretical Inquiries L.* 61, 68 n.9 (2008) (noting absence of literature on moral luck in contract).

50. See Grant Gilmore, *The Death of Contract* 87–103 (1975) (arguing famously for declining role of consent in contract and related collapse of contract into tort); Richard Craswell, *Against Fuller and Perdue*, 67 *U. Chi. L. Rev.* 99, 129 (2000) (suggesting contract is no longer seen as special species of purely voluntary obligations); Hanoeh Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 *Oxford J. Legal Stud.* 205, 205–06 (2000) (same); see also Timothy Endicott, *Objectivity, Subjectivity, and Incomplete*

through contract could be deemed of limited moral import. Because this picture no longer prevails, one cannot easily dismiss losses under contract as entirely self-imposed.

The second development has been the gradual acceptance of outcome responsibility, or the recognition of a moral responsibility distinct from culpability or blameworthiness.⁵¹ This notion of responsibility was in some cases developed as a response to the problem of moral luck: It made it possible to both maintain the centrality of intention to traditional notions of culpability, and account for moral judgments of actions that turn on their unintended consequences. The notion of outcome responsibility captures how a party may be morally accountable for harms she causes through contract even when she cannot be blamed for the conduct that gave rise to those harms.

Finally, there is the increased understanding that many of our explanatory analytic concepts are normatively laden. Since at least the time of Coase's rabbits and corn, one has not been able to describe a single actor as having caused an injury.⁵² Naming the cause of an accident invokes a normative framework that assigns causation to one actor and not the myriad of other agents and objects, including the victim, that might also be said to have caused the injury.⁵³ Asserting that a given actor has imposed or created a risk requires characterizing the agent's conduct in a familiar way that makes the probability of harm somewhere between zero and one.⁵⁴ But once one conceives of risk creation in this way, it becomes less intuitive, if not implausible, to identify a particular act or agent as the single source of a given risk, or as unilaterally having caused a particular loss. Risks and losses are sometimes the product of joint agency and always the result of the simultaneous agency of numerous persons who acted in ways that made any single risk or loss possible. Strictly speaking,

Agreements, *in* Oxford Essays in Jurisprudence: Fourth Series 151, 170–71 (Jeremy Horder ed., 2000) (defending imposition of obligations parties did not intend to assume).

51. See Honoré, *supra* note 31, at 530–31 (describing and defending outcome responsibility); Perry, Responsibility for Outcomes, *supra* note 31, at 72–74 (same); see also Benjamin C. Zipursky, Two Dimensions of Responsibility in Crime, Tort, and Moral Luck, 9 Theoretical Inquiries L. 97, 97 (2008) (distinguishing between fault-expressing and agency-linking responsibility, where outcome responsibility is instance of agency-linking responsibility).

52. Coase showed that the law may protect one landowner's right not to have his corn damaged, or another landowner's right to allow his rabbits to roam and burrow with the consequence of destroying corn, but that in the absence of transaction costs, the legal entitlement would not affect whether the corn was, in fact, destroyed. R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 8, 36 (1960).

53. See Jules Coleman & Arthur Ripstein, Mischief and Misfortune, 41 McGill L.J. 91, 96 (1996) [hereinafter Coleman & Ripstein, Mischief and Misfortune] (highlighting that determining causation presupposes assignment of obligations, rights, and possible violations).

54. See Perry, Responsibility for Outcomes, *supra* note 31, at 111 (“[T]he imposition of risk . . . is not a simple factual state of affairs.”).

they are the product of collective agency, in that numerous persons acted in ways that make any single risk or loss possible.

More to the point, when contemplating the private responsibility of individuals to each other, risks and losses are usually appropriately regarded as the work product of at least two individuals.⁵⁵ A court adjudicating a claim for remedial compensation must assign losses to one party or the other. But one need not similarly pin underlying responsibility for outcomes in any transaction, voluntary or involuntary, on one party at the expense of the other. Highlighting the linguistic and normative choices built into various apparently descriptive concepts has made it less plausible to cleanly absolve one party of responsibility merely because one is comfortable attributing responsibility for the event to another party as well. If attribution of responsibility to one person does not resolve the responsibility of other persons, then contractual consent may warrant withholding remedy for a loss under contract but not absolve the contractual partner of some responsibility for that loss. Responsibility does not always find expression in legal liability.

These changes in thinking about contract and responsibility render consent one factor in a complex calculus of responsibility, rather than a simple retort to all questions of moral accountability in contract. Before considering how responsibility in contract survives consent, it is necessary to better understand why one might think otherwise.

A. *The Case Against Moral Luck in Contract*

The absence of literature regarding moral luck in contract is not just historical accident or oversight. It reflects persistent intuitions about contract; namely that there are no moral choices and there is no pure luck. There is no luck because all uncertainty is accounted for—and risks fairly assigned—under the expansive umbrella of risk assumption. The uncertainty that arises in the contexts of criminal law and tort law is unplanned and unaccounted for *ex ante*. An attempted murder that is fortuitously thwarted involves unexpected good luck, and an accident caused by an inadvertent glance away from the road involves unexpected bad luck. In both cases, the luck appears to have substantial moral consequences. But an agreement for the sale of a commodity at a fixed price anticipates that the cost of supplying the good, and the buyer's interest in obtaining the good, will rise and fall between the time of contract and performance. The parties incorporate their expectations about how uncertainty is likely to play out into their negotiations, and it is reflected in the terms of their contract, including price. While a party may be unlucky if bad events occur, whether a contract turns out well or badly for them is not similarly a matter of luck. The contractual outcome does not depend merely on events outside the control of either party but also on how the parties

55. *Id.* at 74 (defending concept of joint risk creation).

designed their contract. Thus, one might suppose, there is no luck in contract.

And if there is luck, it is not moral luck. Most crimes are immoral acts, and so, to the extent luck enters into whether a crime transpires according to the actor's wishes, luck is properly characterized as moral luck. In tort, too, there is a reluctance to give up the understanding of background involuntary obligations toward others as moral in character, even if some theories of tort do not presuppose any such moral factor. But if there is a frontier in the trend toward stripping away legal liability of any moral ramification, it may be contract, as it is common to regard contracting as morally uncomplicated.⁵⁶

Intuitions against the play of moral luck in contract stem from the perceived work of consent—there can be nothing morally wrong with the terms on which one contracts because those terms are consented to by the other party.⁵⁷ Moreover, parties often consent to a term with potential negative consequences for themselves in order to obtain a more favorable term elsewhere in the contract; thus, their consent is hardly mysterious. This consent is seen to relieve parties of responsibility for any outcomes associated with the choice of contract terms.⁵⁸ If consent operates as the magical fountain of all contractual obligation, then there is no moral luck and no moral risk in contract.

This Essay argues to the contrary that it is possible (though rare) to wrong another individual through a voluntary transaction. More often, parties are morally responsible, in a limited way, for the losses incurred by those with whom they contract.

It is useful to begin by unpacking the intuition that luck is incompatible with consent. The term luck usually applies when a person, for whom some positive or negative event occurs, is not responsible for and does not deserve the good or bad fortune at issue. But when a contract goes awry for a party, such as when the costs of her performance dramatically increase or the value of the other party's performance suddenly drops, a party's misfortune is usually clearly traceable to choices she made. In most cases, she could have insisted on terms that would have shifted the burden associated with the unexpected development to the other party,

56. See Steven Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 *Drake L. Rev.* 177, 193 (2009) (citing cases from several jurisdictions in which contract law is described variously as “amoral,” “morally neutral,” and unconcerned with “the notion of wrong-doing” (quoting *TruGreen Cos. v. Mower Bros.*, 199 P.3d 929, 933 (Utah 2008); *Ortiz v. Lyon Mgmt. Grp., Inc.*, 69 Cal. Rptr. 3d 66, 75 (Ct. App. 2007); *Glendale Fed. Bank v. United States*, 239 F.3d 1374, 1379 (Fed. Cir. 2001))).

57. Cf. Morton J. Horwitz, *The Transformation of American Law: 1870–1960*, at 35 (1992) (noting classical contract theory viewed contract doctrine as “a neutral and voluntary system in which the judge simply carried out the will of the contracting parties”).

58. Cf. Michael Zimmerman, *Moral Luck: A Partial Map*, 36 *Canadian J. Phil.* 585, 607 (2006) (“[L]uck can be a factor in the fulfillment of obligation in a way that it cannot be in the incurring of responsibility.”).

albeit at some cost. For example, a subprime mortgagee often chooses to borrow at a variable rate, assuming the risk that interest rates will rise dramatically and out of pace with any increase in the value of her home, rather than pay a fixed but higher interest rate. More generally, a purchaser of goods or services may have the choice of simultaneously purchasing insurance against certain known risks. In some cases, the probability of the risked misfortune materializing is so low that it renders any such precaution irrational *ex ante*. But the fact that alternative terms were available at the time of contract appears to render an unfortunate course of events a manifestation of bad choice rather than bad luck. If, even with hindsight, contractual design is not to blame, the party suffering misfortune under contract might have avoided or mitigated negative results by exercising other precautions, such as limiting reliance, purchasing insurance, or entering into other contracts that would have shifted certain risks to others.

The end result is that when contracts go wrong, we may feel sorry for the party who bears an increased burden, but we are inclined to trace those burdens back to choices she made. Her responsibility does not derive merely from a broad sense of personal agency; it is classic responsibility for consciously made choices. It is not what is commonly regarded as luck.

Another account might accept the phenomenon as luck, but regard it as luck of a variety that is not morally concerning: option luck. Ronald Dworkin's concept of option luck refers to luck that determines how a gamble materializes.⁵⁹ If a person chooses to enter an agreement by which she will either pay or win fifty dollars depending on whether she wins a coin toss, she faces option luck. By contrast, brute luck arises where the individual did not choose to subject herself to the particular constellation of outcomes she faces.⁶⁰ In instances of brute luck, the unlucky cannot be said to have brought their misfortune upon themselves. In cases of option luck, the reality of misfortune seems offset, from a moral point of view, by the unactualized possibility of good fortune. Luck egalitarians often rely on Dworkin's distinction to identify the kind of luck they seek to neutralize.⁶¹ It may be morally appealing to use social policy to dissipate brute luck to the greatest extent possible—but rarely do we seek to neutralize option luck. Option luck seems critical to personal responsibility; it captures the typical exercise of choice with attendant consequence.⁶² If those who suffer losses in contract are victims of mere op-

59. Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 *Phil. & Pub. Aff.* 283, 293 (1981).

60. *Id.*

61. See, e.g., Avraham & Kohler-Hausmann, *supra* note 3, at 184 (using option luck/brute luck distinction to identify morally problematic luck).

62. Gambling represents the purest example of option luck. If two people who are identically situated choose to bet a fixed amount on a coin toss, few have the intuition that awarding that amount to the winner is unfair.

tion luck, then their losses are not properly understood as harm for which the other party could bear responsibility. In that case, the other party is not subject to moral luck.

Dismissal of moral luck in contract for reasons along these lines is misguided. While it is true that gambles generate option luck and no corresponding moral risk, moral risk is the counterpart to brute luck where the events that subject one individual to brute luck are the product of another individual's agency. Both option luck and brute luck are present in the course of a normal contract because the initial terms of a contract are never so freely chosen as to eliminate the role of brute luck. One chooses contract terms from a limited and uncertain set of options, each of which is imperfectly cognized, and the preferences one brings to bear on that choice reflect the burdens of circumstance. Contract terms, however, are enough of a function of *joint* agency as to render both parties responsible for subsequent outcomes as experienced by either party. The argument that consent to contract does not eliminate moral risk thus amounts to three claims, related to the three theoretical developments suggested above: (1) brute luck is present in contract, such that negative outcomes in contract cannot be dismissed as entirely reducible to the choices of that party; (2) notwithstanding consent, individuals are sometimes culpable for the losses their contractual partners sustain; and (3) more often, both parties to a contract are responsible for outcomes generated by their agreement, including outcomes for the other party.

B. *Brute Luck in Contract*

Modern contract theory emphasizes the extent to which much of contract design does not reflect affirmative choice on the part of one or even both parties to a contract. The famous but exaggerated collapse of contract into tort ("the death of contract") refers to a lifting of the veil: Contractual obligations are not fully voluntary.⁶³

Economic theories of contract help distill the arbitrary elements in the origin of any contract. Segmented markets and information costs limit the number of potential contracting partners that any one person can consider,⁶⁴ limiting the choosing element in the choice of contractual partner. Once contract partners are paired, the obligations they each assume are not usually entirely traceable to choice either. Cognitive limitations make it difficult, if not impossible, for parties to correctly gauge the probability of future events.⁶⁵ To the extent that they simply fail to register certain potential contingencies, the parties' allocation of risk re-

63. See Gilmore, *supra* note 50, at 95–103 (arguing for "death of contract" as it collapses into tort).

64. See Richard A. Posner, *Economic Analysis of Law* 75 (8th ed. 2011) (discussing identification costs as obstacle to efficient contract).

65. See Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan. L. Rev.* 211, 213–25 (1995) [hereinafter Eisenberg, *Limits of Cognition*] (discussing limits on rational decisionmaking when faced with uncertainty).

lated to those events is not conscious at all; it may reflect default rules that are sometimes motivated by courts' best guesses as to what parties are expected to prefer—hypothetical preferences that are importantly different from actual choices.⁶⁶ Sometimes default rules are motivated by independent public policy considerations,⁶⁷ and are thus even further removed from the choices of the contracting parties. To the extent the contract does actively allocate risks, lack of information and cognitive limitations under uncertainty may render the choice to handle these contingencies in one way rather than another something short of “free.”⁶⁸

Transaction costs—including the cost of identifying contingencies that could arise, the cost of understanding each party's preferred method of handling those contingencies and determining the efficient way of allocating related risk, as well as the cost of drafting a contract that reflects these design choices—make it prohibitively expensive to completely transform brute luck into option luck by means of contract design.⁶⁹ For many parties, their market position (or the market itself) does not permit a choice of terms.⁷⁰ All told, modern contract theory emphasizes the de-

66. See Ian Ayres & Robert Gerner, *Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 90 (1989) (describing existing academic view that defaults represent terms parties would have negotiated).

67. *Id.* at 93–94 (noting penalty defaults may be used to motivate parties to supply terms where they are more efficiently supplied *ex ante* than by court *ex post*, and in order to motivate parties to reveal information they strategically withheld in order to obtain greater proportion of transactional surplus).

68. See Eisenberg, *Limits of Cognition*, *supra* note 65, at 213, 224–25 (explaining limits on cognition and risk assessment).

69. See Shavell, *Damage Measures*, *supra* note 7, at 468 (“[I]t may be less costly in the expected sense for the parties to resolve difficulties only on the chance that they arise than to bear with certainty the costs of providing for the contingency in the contract.”).

70. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 *N.Y.U. L. Rev.* 429, 446 (2002) (“[T]he terms included in standard-form contracts tend to be uniform within an industry”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. Chi. L. Rev.* 1203, 1263 (2003) (citing several cases in which courts recognized that most employees have no choice but to accept odious arbitration clauses); Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 *Yale L.J.* 1855, 1931 (1985) (indicating that certain form contracts are “used by all members of a particular industry such that a consumer could not acquire certain goods or services at all except on a particular set of terms”); Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 *Lewis & Clark L. Rev.* 1035, 1040 (2010) (“Residential mortgages have been classified as contracts of adhesion because their terms are selected by professional lenders for unsophisticated borrowers who have no choice but to accept the lenders’ terms or forego purchasing their home.”).

This characterization of the lack of choice in these instances is not so much factual as normative. There is always some literal sense in which each party has a choice to reject proposed terms. What is implied when this Essay argues that choices were not freely chosen is that the party in question should not be held fully or solely responsible for their consequences. This point is analogous to that made by John Rawls with respect to market outcomes for individuals more generally. Rawls observed that whatever one's talents, one's remunerative value turns on the state of the world in which one finds oneself. John Rawls, *A Theory of Justice* 72 (1971) (“The existing distribution of income and wealth . . . is the

gree to which the scope of contractual obligation under a given agreement is only partly a function of each party's free choices.⁷¹ Contractual obligation is not limited to voluntary obligation, and the unexpected good fortune and misfortune that arises in the course of contract cannot be reduced to option luck alone.

C. *The Possibility of Culpability for the Losses of a Consenting Party*

Background conditions may render the terms on which any two parties will contract predictable to outsiders. But in reality terms vary. Though they may be struck under strikingly similar conditions, they are only imperfectly predictable.⁷² This reflects the fact that, for at least one contracting partner, there is a moment of *ex ante* choice as to the terms he will exact from his partner. One might argue that this choice, with its uncertain consequences for both parties, is not a moment of moral risk because, whatever may befall the weaker party under the contract, that party consents to assume that material risk.

While public policy may provide abundant reason to treat the choices of others to enter into contract as entirely free (in the usual case), this is not the correct vantage point from which to judge one party's decision to contract on terms highly unfavorable to the other party.⁷³ The bare exercise of choice, like the taint of brute luck, is omni-

cumulative effect of prior distributions of natural assets . . . and *their use favored or disfavored over time by social circumstances* and such chance contingencies as accident and good fortune." (emphasis added). It is mere luck (though not accident) that one finds oneself in an economy that rewards those with a talent for banking acumen more handsomely than one with a knack for resolving the mysteries of plumbing. Similarly, it is morally arbitrary that one's contractual options are what they are. If misfortune befalls someone who chooses not to purchase protection in the contract under which that misfortune arose, it was partly that person's choice, but partly the luck-saturated market within which that person exercised the choice that caused the negative outcome. To the extent contractual behavior reflects morally arbitrary features of our environment, transactional conduct—like the market outcomes it generates over time—cannot be taken as self-justifying on grounds of free choice.

71. David Enoch and Andrei Marmor argue that the idea of luck is "not relative to some initial assessment of probabilities." Enoch & Marmor, *supra* note 2, at 407. This might be taken to imply that the difficulty of assessing risks at the time of contract does not bear on the presence of luck. Technically, this is true. However, where the assumption of risk is taken to wash away the moral significance of uncertainties that would otherwise clearly qualify as matters of luck, the difficulty in assessing risk is relevant to whether assumption of risk in fact has that normative effect. See also *supra* note 50 and accompanying text (describing developing consensus that contract is not fully voluntary).

72. This is not a metaphysical claim—whether the unpredictability is ultimately traceable to the bare exercise of free will or just imperfect information about relevant circumstantial facts is not important here.

73. This point is analogous to the objections raised against John Rawls's theory of justice. A number of critics contend that the argument justifying inequalities as necessary to incentivize the talented to productively employ their talents fails because it puts the talented themselves in the morally indefensible position of taking their own talents hostage. See generally Joseph H. Carens, *Equality, Moral Incentives, and the Market* 2, 200–08 (1981) (discussing possibility and scope of social duty to contribute talents for

present and cannot be used either to assign or deny responsibility for particular outcomes.⁷⁴ The state has good reasons to empower individuals to enter binding agreements without inquiry into the quality of consent and to hold individuals accountable for their commitments, but those reasons do not necessarily apply to other individuals. The state must take the probable behavior of individuals as a given, while an individual contracting party may decide what to do. In its choice of a legal rule, the state must expect to influence the behavior of future contracting parties; most private individuals cannot rationally expect their individual acts to meaningfully affect the behavior of future parties. Thus, the state can achieve outcomes that individuals cannot, and vice versa. The state also has reasons for acting or not acting that stem from its particular mandate and the boundaries of legitimate state action. In this way, the state is subject to moral reasons that do not apply to individuals, even as individuals are subject to agent-relative considerations that do not apply to the state. It is not surprising that the threshold for, and implications of, consent should differ in the reasoning of private and state actors.

Courts have both principled and pragmatic reasons to narrowly circumscribe inquiries into the quality of contractual consent. The state's attitude toward each individual, including its presumptions about his or her capacity to deliberate and exercise choice, may be important to legitimating state authority.⁷⁵ Because the state plays an important role in shaping public culture and our understanding as to the conditions under

collective gain); Joseph H. Carens, *Rights and Duties in an Egalitarian Society*, 14 *Pol. Theory* 31, 35–36 (1986) (revising maximalist version of social duty to require only that individuals make good use of their talents); G.A. Cohen, *Incentives, Inequality, and Community*, in *The Tanner Lectures on Human Values* 263, 268–69 (G.B. Petersen ed., 1992) (noting talented people “would not need special incentives if they were themselves unambivalently committed to the [difference] principle”); G.A. Cohen, *The Pareto Argument for Inequality*, 12 *Soc. Phil. & Pol.* 160, 172–73 (1995) (rejecting as inconsistent Rawls’ argument that notwithstanding prima facie commitment to equal outcomes we should prefer unequal state where it is possible to improve situation of talented individuals without injuring others); G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *Phil. & Pub. Aff.* 3, 8–9 (1997) [hereinafter Cohen, *Where the Action Is*] (“[T]he difference principle can justify inequality only in a society where not everyone accepts that very principle.”). While a third party, like the state, may have to take the actions of talented persons (in the context of justifying inequality) or potential breachers (in the context of contract law) as given, the talented and the would-be breachers cannot themselves cite a lack of material incentive as justification for otherwise immoral conduct. But see Andrew Williams, *Incentives, Inequality, and Publicity*, 27 *Phil. & Pub. Aff.* 225, 226–27 (1998) (arguing against Cohen’s critique of Rawls’s defense of inequality-generating incentives).

74. See Coleman & Ripstein, *Mischief and Misfortune*, *supra* note 53, at 123 (“[O]ption luck seems to be everywhere and so provides no way of deciding to whom particular misfortunes belong.”).

75. See Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 *Penn St. L. Rev.* 1, 22–26 (discussing conditions for rational belief in duty of obedience to legitimate state authority). That article argued that the legitimacy of the state depends on it being possible for individual citizens to view the state as acting on their behalf, such that they have reasons (other than fear) to defer to political authority. Individuals cannot view

which we are bound by what we or others have said or done, courts may be reluctant to chip away at the strong presumption that contractual promises are morally binding by sometimes denying them legal effect.⁷⁶ Courts are also aware that denying the power of contractual consent to certain groups may actually diminish the welfare of those groups by cutting them off from a range of goods and services.⁷⁷ It may also often simply be cheaper and more effective for the state not to inquire into the status and prospects of contracting parties and to instead use other means to advance welfare and distributive ends. Finally, a party contemplating particular terms or whether to breach has information pertaining to her own situation, and possibly that of the other party, that the state does not. She may also have the capability to effectuate a range of outcomes that the state lacks the wherewithal to bring about.⁷⁸ The normative consequences of these differences in information and capacity are that the state may justify its rules and policies toward contracting parties on grounds that are not available to individual contracting parties attempting to justify their actions to one another.⁷⁹

Many of the normative and pragmatic reasons the state may have to treat consent as dispositive with respect to the legal claims available to a person do not extend to individuals considering the scope of their moral responsibility in contract. Consent may obligate or constrain the state, but consent to our actions by another party does not obligate us to do whatever it is to which they consent. It is mere permission.⁸⁰ We can imagine a range of acts to which others may consent which we would nevertheless deem wrongful. An imprudent person may offer to lend me her car, but if I know that she needs it as much or more than I do, it would be wrong to take it from her. A generous person may invite you to stay in her second apartment as an extended guest, but if you know she needs the rental income it would be wrong to knowingly worsen her financial situa-

the state in this way if it conducts itself on the apparent presumption that those individuals lack the capacity to deliberate and exercise choice. *Id.*

76. See Joseph Raz, *Promises in Morality and Law*, 95 *Harv. L. Rev.* 916, 933–38 (1982) (suggesting contract law supports moral practice of promise).

77. See *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 522 (7th Cir. 1986) (Posner, J.) (arguing poor man may be “worse off by a rule of nonenforcement of hard bargains”).

78. Cf. Cohen, *Where the Action Is*, *supra* note 73, at 6–10 (arguing that Rawls’s defense of distributive inequities as necessary to motivate talented individuals to employ their talents productively is not available to those very individuals when they demand high compensation for something they could choose to do without).

79. The prospect of interpersonal (or intersubjective) justification grounds many contemporary theories of morality. See, e.g., T.M. Scanlon, *What We Owe to Each Other* 153 (1998) (characterizing right actions as ones that we can justify to others on grounds they could not reasonably reject); Korsgaard, *Reflection*, *supra* note 15, at 136 (describing right actions as reflecting reasons we can share).

80. See Heidi M. Hurd, *The Moral Magic of Consent*, 2 *Legal Theory* 121, 123 (1996) (“[C]onsent can generate a permission that allows another to do a wrong act. When consent operates in this . . . manner, it does not morally transform a wrong act into a right act . . .”).

tion. Permission cannot prevent culpability. We can wrong a person even when she has consented to it.⁸¹

Consent may justify the absence of any legal remedy for the infliction of harm but it may not justify that infliction of harm as an individual act, which may still be appropriately regarded as blameworthy. The reasons that apply to the state's decision as to whether to offer a remedy differ from those that apply to the prospective wrongdoer. Again, the reasons that apply to a promisor are prototypically agent-relative; they are reasons that apply specifically to the promisor to fulfill obligations she has created specifically to the promisee.⁸²

Not every contract term that subsequently results in loss to one of the parties is appropriately regarded as a wrong inflicted by the other. If a business purchases fire insurance and the insurance company subsequently incurs a substantial loss as a result of the obligation to pay out on that policy, the business cannot be understood to have wronged the insurance company. But the implausibility of that result should not stand in the way of a more limited claim. If the choice of a particular contract term is otherwise properly regarded as blameworthy—for example, because it exploits and exacerbates background injustice—then the bare fact of consent does not relieve blame from the party that extracted it. The state may have good reasons for enforcing (and recognizing as consensual) contracts in which retailers have sold items like flashlights or bottled water at prices far above their usual cost during a temporary supply shortage. But individual retailers may still have reason not to charge *some* customers the prices they are entitled to charge to all customers, where the higher prices are not necessary to recoup their own costs and will result in foreseeable harm either to those who must spend a substantial portion of their resources to acquire the items or to those who will forego them as a result of the higher prices.

As a general matter, losses under a contract say little about the culpability of the parties. And in the vast majority of contracting scenarios

81. For an account of when a choice of terms might amount to a culpable wrong, see *infra* Part III.A.

82. See Philip Pettit & Robert Goodin, *The Possibility of Special Duties*, 16 *Canadian J. Phil.* 651, 653 (1986) (“[A]n agent has special duties towards those to whom he has implicitly or explicitly made certain commitments. These are obligations to fulfill those commitments, even though the general welfare might be improved far more by ignoring them.”); Douglas W. Portmore, McNaughton and Rawling on the Agent-Relative/Agent-Neutral Distinction, 13 *Utilitas* 350, 350 (2001) (using example of promise as creating agent-relative reasons for promisor). Agent-relative reasons may permit agents to do something that will not lead to the best results over all, or they may require it. See Thomas Nagel, *The View from Nowhere* 175 (1986) (“An individual is permitted to favor himself with respect to an interest to the degree to which the agent-relative reason generated by that interest exceeds the corresponding agent-neutral reason.”); Shelly Kagan, *The Structure of Normative Ethics*, 6 *Phil. Persp.* 223, 231–32 (1992) (discussing agent-relative permission as factor relevant to determining moral status of act); see also Philip Pettit, *Universalizability Without Utilitarianism*, 96 *Mind* 74, 75 (1987) (defining agent-relative reasons).

there may be little moral constraint on the terms which one party may negotiate with another (at least with respect to losses that the agreement may generate for those two parties). But to the extent that contracting behavior is otherwise culpable, as Part III argues it sometimes is, the bare fact of consent by the other party does not wipe the slate clean.

D. Shared Responsibility for Losses in the Course of Contract

Most contracts that end up badly for one party do not amount to a wrong by the other. One *can* wrong another person through a consensual transaction: The fact of their consent is in part a function of facts beyond their control, and in some cases, those facts represent an injustice, the exploitation of which constitutes a wrong. This Essay has argued thus far that consent to contract does not absolve one party of blame for an otherwise blameworthy act. But only some transactions are wrongful in this sense. More frequently, the choice of terms can be treated as an exercise in joint agency (even in the absence of bargaining), and agents are jointly responsible for the losses that result from their joint actions with others, including actions of exchange. The fact that the person to whom one agent is responsible is a joint author of the action that resulted in her loss does not immunize her. The agency of one party more generally does not immunize the other.

Consider a joint business venture governed by contract. Two individuals each commit to contribute \$20,000 per year for five years, with payment at fixed dates, in order to capitalize the business. Liquidated damages specify the consequences for late payment. Should the financial circumstances of one party change such that she must take out loans at high interest rates in order to meet her contractual obligations, and should this debt subsequently drive her into personal bankruptcy, her business partner shares responsibility for this misfortune. Her partner is not liable and may not owe her anything in particular. And clearly the now bankrupt party is herself responsible for her own circumstances. But a thin responsibility, outcome responsibility, is shared with the contractual partner who helped engineer the obligations that ultimately led to financial ruin. The business partner exercised control over the events that precipitated misfortune for the other, and the terms of their agreement led predictably (though not probably) to that misfortune. He is responsible for the misfortune he had the capacity to avoid.

For those reluctant to espouse hypothetical responsibility on these facts, consider a parallel tale. Two individuals each commit to contribute \$20,000 per year for five years, with payment at fixed dates, in order to capitalize the business. At an early stage of the venture, one partner exits on mutually agreed terms. In later years, the business becomes fabulously profitable and the remaining partner is very wealthy and respected as a result. Would the partner who left the venture feel some responsibility for

the remaining partner's success? Anecdotal evidence suggests he would.⁸³ Responsibility is sometimes an occasion for pride and at other times occasion for regret or shame. It tends to be more eagerly claimed in the former case, but it attaches with equal liberality in the case of both positive and negative outcomes.

Each party to a contract may be in the best position to protect itself against potential loss in various ways, whether by decreasing reliance or through the purchase of insurance. But precautions against loss by anonymous wrongdoers is available in the context of tort law, and to a lesser extent even in criminal law. Tort claims no longer fail on grounds of contributory negligence in most jurisdictions.⁸⁴ While liability is reduced in proportion to comparative negligence,⁸⁵ unlike the monetary damages sought in a civil case, responsibility for a loss is not of a fixed quantum that needs to be distributed between victim and wrongdoer such that any contributorily irresponsible conduct by the victim would proportionally reduce responsibility of the wrongdoer. This may be one of the ways in which legal and moral responsibility diverge.⁸⁶ For example, where one person grossly deceives another, legal responsibility for the misrepresentation might be reduced if most people would recognize the fraud on its face. However, moral responsibility for the fraud would not be ameliorated because the fraud was so obvious and outrageous that the defrauded person should have recognized it too.

The idea that legal responsibility for a loss must be assigned to one individual or another, while moral responsibility may be shared, is not surprising in light of more obvious asymmetries between legal and moral responsibility. The question of liability itself is binary⁸⁷—either a defendant is liable or not—while moral responsibility intuitively rests along a

83. See Steve Lohr, An 'Unvarnished' Peek into Microsoft's History, *N.Y. Times*, Apr. 18, 2011, at B3 (describing Paul Allen's view of central role he played in early years of Microsoft and his relationship with Bill Gates).

84. See Christopher J. Robinette & Paul G. Sherland, Contributory or Comparative: Which Is the Optimal Negligence Rule?, 24 *N. Ill. U. L. Rev.* 41, 44–45 (2003) (describing how doctrine barring recovery in cases of contributory negligence has been repealed in almost all states).

85. Comparative negligence usually requires each party to pay his or her proportion of the damages. *Scott v. Rizzo*, 634 P.2d 1234, 1242 (N.M. 1981) ("Pure comparative negligence . . . holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm.").

86. See Pettit & Goodin, *supra* note 82, at 666 (presenting criteria for allocation of responsibility which permits assignment of responsibility to agent where multiple agents may exercise simultaneous control over outcomes); Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 *Harv. L. Rev.* 708, 724 (2007) (noting duty to mitigate in legal institution of contract is point of divergence from moral practice of promise).

87. Even in cases of comparative negligence, the legal liability of the parties is reduced to reflect the liability of the others. See *Alvis v. Ribar*, 421 N.E.2d 886, 897 (Ill. 1981) ("In a suit under a 'pure' form of comparative negligence in which the defendant counterclaims for his own damages, each party must bear the burden of the percentage of damages of all parties in direct proportion to his fault.").

spectrum. We cannot treat legal responsibility as other than binary because a range of remedies is available, since the scope of remedy reflects the magnitude of what an individual is responsible for, not how responsible she is for it in light of all the other agents that might be implicated.

Legal and moral responsibilities diverge in other ways. The absence of legal liability for one individual does not comment on the affirmative legal liability of any other individual. By contrast, denying the moral responsibility of one individual for an outcome that was under human control often does reflect on the moral responsibility of someone else.⁸⁸ In any given case, legal liability diverges from moral responsibility for a number of reasons—institutional, pragmatic, evidentiary—that have nothing to do with whether other agents might be responsible. There should be no expectation that they should track each other with respect to the question of apportionment of responsibility.

One might nevertheless resist the idea of shared responsibility for contractual outcomes as inconsistent with the absence of a remedial duty where one fully performs under a contract which nevertheless results in loss for the other party. The law recognizes no such remedial duty and one would not normally regard someone as morally obligated to remedy losses they have not caused through breach. The plausibility of responsibility in light of this objection ultimately rests on the possibility of responsibility in the absence of remedial obligation more generally. The original notion of outcome responsibility certainly accounted for such a possibility. Stephen Perry expressly argued that outcome responsibility “does not normally give rise by itself to a moral obligation to compensate, although by normatively linking an agent to a harmful outcome it serves as a basis for such an obligation.”⁸⁹

Outcome responsibility generally is more detached from obligation than the deeper sense of responsibility reflected in notions of culpability or blame. Culpability or blame attaches upon breach of a moral obligation. But one can be responsible for outcomes that could have been prevented though one had no moral obligation to prevent them *ex ante*. Similarly, one can be responsible for an outcome though one has no moral obligation to cure harm *ex post*. As Perry suggests, the extension of outcome responsibility outside of obligation is consistent with the motivation behind the concept in both his and Tony Honoré’s accounts, that is, to give agency meaning.⁹⁰ Agency is exercised, and responsibility created, through a range of actions that are neither obligatory nor in breach of obligation.

88. For example, in situations where we assume that a risk warrants some preventive measure, the conclusion that one person could not have been expected to prevent the accident may suggest that another individual ought to have taken steps to prevent the accident.

89. Perry, *Responsibility for Outcomes*, *supra* note 31, at 73.

90. *Id.*; see *supra* note 31 (discussing key articles laying out concept of outcome responsibility).

The agency of one contracting party, evident in her consent to contract terms and her ability to attenuate potential losses arising under the contract, does not undo either the agency of the other party or the other party's corresponding responsibility for losses suffered by the first. This potential responsibility may not find expression in legal liability, in which case there is no legal risk. Nor need it give rise to a remedial duty, though in some cases it may. If a party engineers a transaction that harms her contractual partner, she shares responsibility for her partner's loss just as she would share responsibility were she to participate in some other innocent act that resulted in injury. Her partner's consent to the transaction has normative significance along many dimensions, but it does not eliminate the risk of moral responsibility.

III. MORAL RISK TAKING IN CONTRACT

While contract has been overlooked in discussions of moral luck in law,⁹¹ contract is particularly illuminating once one focuses on the conscious navigation of moral luck, and not just on its background presence as a factor in the assessment of all human action. Moral luck is present in the course of contract, as it is over the course of injurious acts we call torts, or in the course of committing a crime. But contract highlights that moral luck does not always fall upon us unanticipated. It mediates between our conscious choices and the moral salience of our acts in the way that market unpredictability mediates between our choices and our wealth. While market uncertainty indicates uncertainty as to market outcomes, the fact of market uncertainty is well known and accounted for, hence the assumption of market risk. Similarly, moral risk is assumed in ordinary acts, among which are the execution and performance of contracts.

Moral luck enters contract at two stages: contract formation (*ex ante*) and contract performance (*ex post*). In the making of agreements, luck affects the moral valence of the choice to contract on certain terms. This Part suggests four ways that the choice of contract terms can be understood as fraught with moral risk. It then turns to the ways in which luck operates on the choices presented in the course of performance. In the keeping of agreements, too, luck may determine how well or poorly parties treat their contracting partners.

A. *Moral Luck in Contract Formation*

Moral luck at the stage of contract formation turns on whether the terms one negotiates with (or imposes on) one's contracting partner turn out to have been morally acceptable or morally dubious. In principle, of course, one might think that the moral significance of those terms is no less determinate *ex ante* than their rationality from a self-interested point

91. See *supra* note 49 and accompanying text (discussing dearth of literature on moral luck in contract law).

of view. One does not say that parties were irrational for taking bets that turn out badly for themselves where those bets were justified by the odds perceptible at the time they were made. Similarly, one might reason, we should not blame individuals for contract terms that end up very badly for the other party, unless the terms were so obviously and inevitably injurious that the alleged victim herself would have rejected them. The asymmetry arises because the rationality of an act depends on only information available at the time the decision was made, while, if we take moral luck as our premise, the morality of an act turns on outcomes unknown at the time the act is undertaken. Thus, it is possible for terms to be definitively rational or irrational notwithstanding uncertain consequences from the perspective of a given contracting agent, but of uncertain moral import because of its uncertain consequences for the other party.

The presence of moral risk at the *ex ante* stage of contract will nevertheless strike some as unintuitive on the grounds that contractual terms are agreed upon (largely) in the absence of particularized background duties. If we have no obligation to look out for the economic interests of those with whom we contract, why should one be constrained in our negotiation of mutually agreed-upon terms? General objections against the moral valence of contracting that center on the role of consent by the other party were addressed separately in Part II. This Part lays out affirmatively the kinds of wrongs that one might commit, or the kinds of moral responsibility one might incur, through choice of contract terms. It suggests four distinct ways, sometimes overlapping and sometimes incompatible, in which one might understand the choice of terms to involve moral risk. The argument does not turn on the merits of any one of these pictures of contracting, nor, really, does it require the success of any. There may be other accounts of how morality enters choice of contract terms. The argument here requires only that the reader perceive some moral risk present in the choice of terms, and that moral risk for one contracting party be ameliorated by institutions that prevent the most disastrous outcomes for the other party. Finally, it is worth noting that this Essay's claims in connection with contract formation are nicely symmetrical with, but ultimately separable from, its claims regarding moral risk in contract performance.

1. *Background Distributive Claims in Contract.* — That contract terms can be immoral should be less controversial than the claim that contract terms represent moral choices. After all, established doctrines like unconscionability refer to substantive unconscionability, which effectively labels the terms of a contract immoral.⁹² But the claim that a contract can be

92. See, e.g., *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82 (Ch.) 100, 2 Ves. Sen. 125, 155 (defining unconscionable agreement as one that “no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice”); see also *Zoneff v. Elcom Credit Union Ltd.* (1990) 94 ALR 445, 463 (Austl.) (“[C]onduct will be unconscionable where the conduct

immoral implies that the choice of terms is always a moral one. Because while a legal rule such as unconscionability may be binary in its application, it is implausible that the moral condition it tracks is similarly binary.⁹³ We can find a term more shocking than another though neither reaches the threshold for substantive unconscionability.⁹⁴ Similarly we can find one term more outrageous than another though both are so exploitive as to be unenforceable.⁹⁵

Thus, while a term may be substantively unconscionable or not because its moral flaws either hit a requisite threshold or do not, the moral flaws themselves fall along a spectrum. We can use the legal concept of substantive unconscionability to locate the relevant moral intuition without carrying over the binary property of the rule to the moral dimension of contract terms.

What exactly makes a term unconscionable or immoral? I have argued elsewhere that terms that exploit and exacerbate background distributive injustice breach background imperfect duties we each have toward others and should be regarded as unconscionable.⁹⁶ Distributive justice is a property of social institutions, and while collective institutions may be the best mechanisms by which to realize distributive justice, where background institutions fail to achieve distributive justice, residual rights

can be seen in accordance with the ordinary concepts of mankind to be so against conscience that a court should intervene"); *Harry v. Kreuziger* (1978), 95 D.L.R. 3d 231, 241 (Can. B.C. C.A.) (finding conduct unconscionable where "sufficiently divergent from community standards of commercial morality").

93. This Essay is not making a general claim that moral conditions are never binary, only that unconscionable terms are not equally unconscionable and terms which do not rise to the level of unconscionability are not equally meritorious from a moral standpoint. The concept of a "hard case" illustrates the point.

94. Cf. *Austl. Competition & Consumer Comm'n v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 320 (Austl.) (finding behavior must be "toward the extreme end of the scale" to be unconscionable).

95. For example, we may find an arbitration clause in a computer purchase agreement that does not rise to the level of an adhesive contract substantively unconscionable and unenforceable. E.g., *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1217–22 (N.M. 2008) (finding class action prohibition in contract unconscionable). But, we may find an arbitration clause in an employment contract that waives judicial remedy for violations of civil rights laws even more unconscionable when it is both substantively oppressive and adhesive. E.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689–99 (Cal. 2000) ("[E]ssentially a sliding scale is invoked' [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required." (quoting 15 Walter H.E. Jaeger, *Wililston on Contracts* § 1763A, at 226–27 (3d ed. 1972))).

96. See Aditi Bagchi, *Distributive Injustice and Private Law*, 60 *Hastings L.J.* 105, 135 (2008) [hereinafter Bagchi, *Distributive Injustice*] (arguing for existence of background imperfect duties between private citizens); cf. Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 *Iowa L. Rev.* 427, 432 (1992) [hereinafter Coleman, *Mixed Conception*] (noting distributive justice "requires a certain state of the world be brought about, but no one in particular has a special reason in justice for bringing it about," i.e., distributive justice does not give rise to any perfect duties).

and duties flow directly between individuals.⁹⁷ Those residual duties are not like most duties expressed in private law; they are positive and imperfect, in that individuals have a general duty toward many individuals who meet certain socioeconomic criteria but no specific duty to perform any particular acts toward, or for the benefit of, any particular other individual.⁹⁸ But those imperfect positive duties give rise to more limited negative duties which do find expression in law.⁹⁹

The upshot of that discussion is that we do have background duties toward other individuals in our society and those duties constrain the terms on which we may transact. The idea is not that we have to aim toward distributive justice through our contracting, but that we may not exploit and exacerbate distributive injustice.¹⁰⁰ Such a principle does not arbitrarily burden defendants in civil suits that may be favored by the prevailing maldistribution of resources because the constraints apply universally; it does not allocate or shift the burdens of redistribution.¹⁰¹ Nor does the principle require more of any contracting party as a result of other citizens' noncompliance with their duties to support distributive justice through ordinary politics. Were compliance universal, there would be no opportunity for the kind of exploitation the principle precludes.¹⁰²

Nevertheless, the principle does constrain contracting behavior and can help identify blameworthy choices with respect to contract terms. For example, imagine a labor market in which widget polishers require three weeks of employer-specific training, the prevailing wage is \$12 per hour, standard paid sick leave is ten days per year, and health insurance bene-

97. See Bagchi, *Distributive Injustice*, *supra* note 96, at 131–35 (“[W]here the state has not achieved distributive justice, individuals have imperfect social duties and rights.”).

98. *Id.*

99. *Id.*

100. *Id.* at 117.

101. For the argument that taking matters of distributive justice into account in private law arbitrarily burdens wealthy defendants who happen to injure poor plaintiffs, see Coleman & Ripstein, *Mischief and Misfortune*, *supra* note 53, at 93 (“The duties imposed by distributive justice are . . . agent-general—everyone has a duty to create and sustain just distributions.”); Melvin A. Eisenberg, *The Theory of Contracts*, in *The Theory of Contract Law: New Essays* 206, 257–58 (Peter Benson ed., 2001) (considering rules for contracts between parties of disparate wealth); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence*, *supra* note 50, at 237, 238–39 (comparing corrective and distributive justice); see also Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 *J. Legal Stud.* 283, 284 (1995) (offering defense of unconscionability doctrine that does not turn on its distributive effects, in light of various objections raised against distributive defenses of unconscionability, including charge of arbitrariness).

102. For this reason, the principle prohibiting exploitation or exacerbation of distributive injustice is compliant with Liam Murphy’s “Compliance Condition,” should the suggested principle fall within the domain of the latter condition. Liam B. Murphy, *The Demands of Beneficence*, 22 *Phil. & Pub. Aff.* 267, 278 (1993) (“[A] principle of beneficence should not increase its demands on agents as expected compliance with the principle by other agents decreases.”).

fits are available only after six months. Employers are unable to differentiate workers within a wide range and prospective employees on the labor market are unable to distinguish employers except with respect to the hourly rate and sick leave policy. The market is sufficiently small that, at any given time, usually only one employer is hiring; new positions become available only once every several months. One employer offers an employee \$10 per hour and allows five paid sick days per year, knowing that it will not be possible for the employee to pursue or hold out for a better option and that she cannot afford to purchase private insurance for six months in order to switch employers at a later date. If the background state of affairs that frames the employee's preferences and capacities are unjust, then the employer unduly exploits those facts to his advantage. If the market would consolidate in the employer's absence such that the other firms would likely employ the workers which this employer now employs, the employer may be worsening the economic position of the prospective employee. The resulting contract should be enforced, but the employer can be blamed for its terms, and in particular, for his departure from market norms. Should the low wages or limited sick leave turn out to have especially grave consequences for a particular employee due to personal but not wholly idiosyncratic characteristics, the employer will be more blameworthy because his conduct has given rise to greater (foreseeable) harm.

Even if one is persuaded that a party's choice of contract terms is constrained in light of the background injustice which it exploits and exacerbates, the reality is that in our ordinary experience of contract, we rarely pause to contemplate the distributive consequences of our agreements. There are exceptions, as where the disparity between our own situation and that of an individual employee or employer is especially remarkable. But for the most part, we do not stop to think about whether we are ameliorating or worsening social inequality through our transactions—and do not feel obligated to do so.

We should not treat our lack of consideration of distributive issues in contracting as evidence of their absence. The patchwork of means-tested programs that comprise the social safety net should instead be appreciated as institutions that limit the severity of distributive injustice for individuals, and thereby manage the moral risk individuals face in contract. Parties do not usually know what the consequences of their contracting behavior will be for many of their contracting partners because they do not know much about them and because the consequences depend on uncertain future events. But they do not have to investigate or even think about the distributive impact of most transactions because they rely on those institutions to blunt any negative impact they may have, and therefore, the scope of any harm they unintentionally inflict.

One should not mistake the low salience of distributive factors in ordinary decisionmaking as inevitable. Many individuals experience them as salient in ordinary transactions when in environments where one can-

not count on background institutions to manage distributive-related moral risk. In a developing country with a high incidence of absolute poverty and high levels of social inequality, one is likely to feel constrained by the consequences of one's transactional behavior on those with whom one transacts.¹⁰³ Moreover, one is likely to feel more responsibility for how one's dealings with the people one encounters affect them than one does for the situation of others with whom one has no economic interaction. The fact that one is able to proceed in the ordinary American transaction without taking into account the economic status of the other party is a function of background social policy. It is not that contract formation is amoral: We experience contract formation as amoral because the potential moral element is largely managed by external institutions.

2. *Equivalence of Exchange*. — An alternative picture of moral risk in contract formation relies on the principle of equivalency in exchange. Studies have shown that individuals expect divisions of jointly produced gains to be evenly divided,¹⁰⁴ and transactional surpluses are an instance of such gains, effectively divided by contract terms. Some scholars have also argued that equivalence of exchange is essential to fair contracting, drawing on Aristotelian theory of fair exchange.¹⁰⁵ One might interpret the principle of equivalency in exchange to require that transactional surplus be more or less evenly divided. When one party, as the result of greater bargaining power, is able to extract more than her fair share, she is behaving in a blameworthy manner.

There is deep ambiguity in this view. Equivalence of exchange would appear to require equivalence of the value that each party could expect from the contract at the time of contract.¹⁰⁶ In that case, there is no moral risk in entering the contract; one either behaves morally by sharing the expected transactional surplus, or one does not. But equivalence of exchange might also be held to require some proportionality in the distri-

103. Of course, not everyone feels so constrained, nor would everyone regret a transaction that turned out very badly for their partner. But they should. See Gardner, *Wrongs and Faults*, supra note 44, at 125 (“[N]ot everyone actually experiences the relevant regrets. My point was that experiencing them is rationally appropriate. Our lives should be blemished subjectively because and to the extent that they are blemished objectively.”).

104. See Martin A. Nowak, Karen M. Page & Karl Sigmund, *Fairness Versus Reason in the Ultimatum Game*, 289 *Science* 1773, 1773–74 (2000) (describing experiments in which most individuals prefer to walk away empty handed rather than permit highly asymmetrical division of fixed amount between themselves and another person).

105. See, e.g., James Gordley, *Equality in Exchange*, 69 *Calif. L. Rev.* 1587, 1625 (1981) (“If there are reasons why a party should be free to exchange but should not be free to redistribute wealth in his own favor, then the law should insist that he exchange without redistributing. To put it another way, exchange should require equality.”).

106. *Id.* at 1612 (noting while “a society wishing to avoid redistributions of wealth would prefer that contracts be equal in outcome and not merely actuarially,” it might tolerate “actuarial equality” and enforce contracts that discount for market risk so long as exchange occurs at market price).

bution of the contract's ultimate value. The requirement would not be as stringent (in that small discrepancies would not be regarded as inconsistent with the principle), but gross inequality of actual transactional surplus *ex post* might also render the transaction wrongful on the part of the luckier party.¹⁰⁷ In that case, by agreeing to rules which temper the possibility of such disparity in outcome, such as rules that permit good faith modification or which excuse one party from performance under very new circumstances, one effectively moderates the risk that one will find oneself in a morally problematic position due to unexpected bad luck on the part of the other party.

There are problems with this view. Intuitions regarding the fairness of exchange cannot be generalized; people do not seem guilty about extracting most of the transactional surplus in ordinary consumer purchases in competitive markets (where prices are forced toward marginal cost). More generally, the disparity in bargaining power that drives imbalances in transactional surplus is characteristic of many commercial contracts about which people have little moral reservation.¹⁰⁸ And though the principle of equivalence of exchange may have a storied intellectual history,¹⁰⁹ it ultimately seems no more compelling than the *ex ante* distribution it would preserve. Where the background distribution on which it operates is itself the product of a series of market transactions, each of which was uncertain at the time entered, there is little ground to privilege their cumulative results over those of a single prospective transaction with uncertainty of its own. For this reason, the principle of equivalency of exchange seems incapable of discriminating between *ex ante* and *ex post* equivalency.¹¹⁰ However, for those who are prepared to assess the moral quality of terms by whether they divide transactional surplus fairly, moral risk arises in the choice of terms inasmuch as there is uncertainty over how that surplus will be distributed *ex post* and *ex post* results reflect on the moral character of the initial terms.¹¹¹

107. In fact, this could be one way of understanding the doctrine of mutual mistake: Courts are reluctant to allow a bargain to stand in which the result is overly lopsided, even where the bargain was fair based on facts known to the parties at the time of contract. Consider the classic case of *Sherwood v. Walker*, 33 N.W. 919, 923–24 (Mich. 1887) (determining sale of cow was voided after seller learned cow was not infertile, as previously believed).

108. See Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 Mich. St. L. Rev. 579, 585 (“[T]he bare fact that one contracting party is more powerful than the other, and, therefore, able to extract forms favorable to it, tells us little about the fairness of the transaction, let alone the need for legal treatment favorable to the weaker party.”).

109. See Nicholas Theocarakis, *Antipeponthos* and Reciprocity: The Concept of Equivalent Exchange from Aristotle to Turgot, 55 Int'l Rev. Econ. 29, 32–34 (2008) (describing early intellectual history of concept).

110. Cf. Matt Adler & Chris Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. Pa. L. Rev. 279, 279–80 (2006) (discussing “*ex ante/ex post* problem” in context of macro questions of distribution).

111. A weaker version of the requirement of equal exchange might claim just that receipt of something of value generates an obligation to confer something of value, quite

3. *Choice of Terms as Exercise in Agency.* — A third account of moral risk in contract might deny the existence of moral duties on the part of individual contracting parties, either stemming from distributive injustice or from a principle of equivalency of exchange, but nevertheless acknowledge responsibility for the outcomes associated with contractual acts.¹¹² One might reject the idea that contracting parties can be blamed for their choice of terms but still accept responsibility for certain outcomes that flow from those terms. The choice of terms represents an act of agency; the terms are within the parties' control and a range of outcomes for either party is foreseeable.¹¹³ Whether because one party has no default duty to the other party or because of the fact of consent by that other party, there may be no culpability associated with the choice of contract terms; the terms may not be blameworthy. But the parties may still be responsible for the outcomes that ultimately flow from the arrangements they have made.¹¹⁴ Moral judgments can be about either responsibility or culpability; moral luck in contract formation, on this view, is a problem only with respect to responsibility. Moral risk, then, can arise when a party faces the prospect of being responsible for their contracting partner's misfortune, even when they are not to be blamed for it.

One might resist this line of reasoning by arguing that consent by each party to a contract does more than immunize each party from blame in connection with resulting harms to the other party; rather, consent has the effect of confining responsibility for ill fortune under the contract to the unlucky party alone. The significance of consent was discussed at great length above.¹¹⁵ This Essay observes that responsibility can be shared. Negligence by a victim may render her responsible for her own loss, but it does not necessarily absolve the other party.¹¹⁶ Of course, it is relevant to any obligation by the other party to compensate. But moral risk is not about liability risk; it may be present even where there is no threat of even a moral remedial obligation, let alone a legal one.¹¹⁷ A

apart from whether or what terms were agreed upon. The obligation to confer something of value might not be an obligation to confer something of equal value. This principle would appear to find support in doctrines like unjust enrichment. Even a weaker version of the principle of fair exchange would explain moral risk in contract formation, since there is a risk that the contract will be a losing transaction for the other party.

112. See Honoré, *supra* note 31, at 537–45 (introducing concept of outcome responsibility in absence of blameworthy conduct).

113. See generally Perry, *Responsibility for Outcomes*, *supra* note 31 (developing and defending concept of outcome responsibility to encompass outcomes that are foreseeable and one could have taken steps to avoid).

114. See Coleman, *Mixed Conception*, *supra* note 96, at 442 (“The duty to correct the losses derives not from the agent’s having done wrong as such, but from the losses being in an appropriate sense the agent’s responsibility. They are the consequences of agency: the agent’s causal power.”).

115. See *supra* Part II.

116. See *supra* Part II.D.

117. See Athanassoulis, *supra* note 13, at 275 (“Responsibility, blameworthiness and a desire to make reparations do not always go hand in hand.”).

contracting party faces moral risk inasmuch as she may be the agent of the other party's misfortune, even where the other party is a fully-functioning agent who has primary responsibility for her own fate.

It is worth noting the expansive character of responsibility on this view. Responsibility for events that are foreseeable and within the control of the contracting parties is far more sweeping than legal liability under a contract. Although contract is often regarded as an institution of strict liability because breaching parties are liable for breach irrespective of why they breached,¹¹⁸ contract law does not impose liability for all the harms that flow from individual actions; only those which result from breach of a duty of a particular kind: the duty to fulfill contractual promises. By transacting with someone, one may be the causal agent by which a range of unfortunate events befall the other party, but one is liable only where one's breach is the mediating event. While a legal regime that would operate differently has little to commend itself, it is not obvious that moral responsibility tracks legal liability in this respect. That is, while a party cannot be held morally accountable for all the ills that befall her contracting partners as a result of their dealings with her, some subset of harms which are foreseeable and could have been avoided through different terms may indeed be her responsibility in some nonlegal sense. Because they set in motion a series of events that create new risks, one tempts fate in a choice of contract terms. Because the actualization of those risks turns on events outside one's control, one's decision to run those risks is subject to moral luck.

This third account of moral risk in contract formation is compatible with the first view. One might see the risk of moral wrong (blameworthy conduct) in some subset of contracting in which distributive issues are implicated but see the more benign risk of moral responsibility for loss in other cases. The distinction could be analogous to the role of moral luck in criminal law and tort law, respectively. When criminals are punished, criminal conduct is condemned. But when a defendant is held liable in tort, even for intentional conduct, she is not necessarily faulted for her action; the law only requires that she compensate her victim for harm she has inflicted, even if that conduct was justified or excused.¹¹⁹

The distinction between blameworthy conduct and merely wrongful conduct carries over to the contract context. The materialization of the risk that one's transactional activity exacerbates distributive injustice may

118. See Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 *Fordham L. Rev.* 3013, 3017 (2007) ("Under our strict liability regime, a breach alone suffices for liability regardless of whether the breaching party was justified—morally or otherwise—in breaching.").

119. For elaboration of this distinction, see Gardner, *Wrongs and Faults*, *supra* note 44, at 100 (discussing famous case of *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910), in which defendant justifiably used property to weather storm but was still liable for resulting damage to property); see also *id.* at 120–21 (explaining "[p]rivate law cares about wrongdoing" but fault principle governs criminal punishment).

render the antecedent contractual choices blameworthy. But the risk that one's choice of terms will be blameworthy is more limited than the larger risk that, in even ordinary contract settings, a jointly produced contract will result in harm to one's contracting partner. Although the choice of terms in even a hard-driven bargain is not condemnable in itself, it still leaves each side vulnerable to responsibility of a sort for subsequent losses suffered by the other, which may or may not be reflected in liability. One does not wish, through contract, to be either the engineer or the engine of another's misfortune.

4. *Involuntary Relational Duties Toward Contractual Partners.* — Finally, one might perceive moral risk in contract formation while conceding that prior to entering contract, one is not morally responsible for the economic fortunes of one's potential contractual partners. One might even concede that one does not usually assume responsibility for their fortunes through contract. It might nevertheless be the case that contract results in a new position vis-à-vis one's partners, which creates new reasons for responding to or at least taking into account their fortunes ex post, even where not required by contract. It may be among the unintended (in the sense of not sought out) but consistently foreseeable consequences of entering into a relationship of exchange that the quality of that exchange from the perspective of the other party becomes a matter of concern to oneself. Such concern may be a moral dimension of promising that is not easily or even possibly shed through articulated attempts to avoid it. Such attempts may be as ineffectual as an attempt to discount the moral effect of a promise: If the promise is successful, the moral obligation is unavoidable.¹²⁰

The idea is that contract may create not only perfect, voluntary obligations, but also involuntary, imperfect duties arising out of the relationship that sometimes accompanies contract. While this Essay does not defend this view, it is one way of understanding the state of the contract world as depicted in the relational theories of contract developed by Ian Macneil, as well as other contract theories that emphasize the relational values of contracting.¹²¹

If contracting has this dual effect, then there may exist some moral obligation to anticipate and accommodate the moral duties one will later

120. See Michael G. Pratt, *Contract: Not Promise*, 35 Fla. St. U. L. Rev. 801, 813 (2008) ("My plea that in doing some act, P, I manifestly did not intend to attract a moral obligation to do X, cannot justify or excuse my not doing X if doing P is otherwise sufficient to obligate me to do X.").

121. See generally Ian R. Macneil, *The Relational Theory of Contract* (David Campbell ed., 2001) (covering Macneil's various works on the subject); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978) (discussing how economic and contractual relations plan for, and respond to, change); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963) (explaining that transactional planning and legal sanctions occur when beneficial to parties involved).

face—even if those duties do not presently apply.¹²² This intuition, with its ambiguities, is similar to the intuition that people have that they ought not to do things now that will make life more unattractive for a future child.¹²³ While they may not acknowledge any present duty to the nonexistent child, it is part of being a morally responsible, continuous person that one take into account how what one does now affects both the duties one will later have and the probability that one will (in the future) fulfill them. Just as people act on obligations that were created by their former selves, though they may disassociate and perhaps only dimly recollect the values and circumstances under which those obligations were assumed, they should also act on obligations that they anticipate in the future. Although one cannot now anticipate the subjective experience of future values and circumstances, if one can predict the resulting future obligations, they may make demands on one's present agency. The phenomenon may be present in contract, in which case the moral risk in contract formation refers not to the risk of wrongful present choices but the risk that present choices will result in a future wrong within the context of the new relationship engendered by contract.

These four pictures of moral risk at the stage of contract formation are not all compatible with each other, though they need not be full-fledged alternatives to each other either. Contract choices may have moral salience for a combination of reasons. The point is that more than one understanding of contract supports the proposition that the choice of contract terms is accompanied by moral risk.

122. See Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 *Phil. & Pub. Aff.* 101, 113–14 (1989) (“[W]e both presuppose and construct a continuity of identity and of agency. . . . [Y]ou need to identify with your future in order to be *what you are even now*. When the person is viewed as an agent, no clear content can be given to the idea of a merely present self.”); see also Thomas Nagel, *The Possibility of Altruism* 28 (1970) (arguing from interest of self in future self to interest of self in others); Susan Wolf, *Self-Interest and Interest in Selves*, 96 *Ethics* 704, 708–09 (1986) (defending person over time as appropriate locus of moral interest, as compared to slice of experience). The relevant legal literature tends to focus on what obligations we have directly to future persons (whose lives may or may not temporally overlap with our own) rather than on our duty to anticipate obligations that we will later have. See I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 *Hastings L.J.* 347, 348 (2008) (discussing potential tort liability for conceiving a disabled fetus); Aaron-Andrew P. Bruhl, *Note, Justice Unconceived: How Posterity Has Rights*, 14 *Yale J.L. & Human.* 393, 397 (2002) (“Recognizing future people’s rights is not a radical proposition requiring revolutionary changes to current moral categories and legal practices . . .”).

123. Cf. Carter J. Dillard, *Rethinking the Procreative Right*, 10 *Yale Hum. Rts. & Dev. L.J.* 1, 32–34 (2007) (discussing balance between basic right of couples and individuals to choose procreation freely and needs and rights of both living and future children); Philip G. Peters, Jr., *Harming Future Persons: Obligations to the Children of Reproductive Technology*, 8 *S. Cal. Interdisc. L.J.* 375, 386 (1999) (noting “prima facie duty to minimize suffering” of future children).

B. *Moral Luck in Contract Performance*

Decisions made after the conclusion of a contract are also subject to moral luck. However, these decisions are subject to a different variety of moral luck. Rather than turning on the unpredictable outcomes that flow from the choice of terms, they turn on the moral choices parties face. In the terminology introduced by Nagel, they are subject to circumstantial luck.¹²⁴ An individual who does not have to make morally difficult choices, who is not “tested,” enjoys positive moral luck of this sort. An individual who is given an unusual opportunity to commit moral wrong, or who can perform her duties only at great cost to herself, has bad moral luck. The classic example of circumstantial luck is the contrast between two morally comparable individuals, one of whom ends up committing evil and thereby becoming evil in the context of a corrupt society, while the other, equally capable of evil, lives out a benign and unremarkable life.¹²⁵ Fortunately, the moral risks of contract are not so dramatic as that.

Nor are postcontract moral risks “tragic” in the sense that circumstances may make it impossible for individuals to escape wrongdoing.¹²⁶ Temptations to breach are just that. In some cases, one may be obligated to breach in order to fulfill some duty to a third party (for example, performance of another obligation makes performance of a certain contractual obligation impossible, or breach of a contractual obligation makes it possible to acquire the resources to fulfill some other obligation). But in the usual case, opportunities for breach are merely attractive. They make breach more likely, but wrongdoing is not inevitable.

Nevertheless, a number of ex post events do create moral tests, or at least potential moral responsibilities, that not all contracting parties face. First, new opportunities or costs arise, which make breach of a contractual promise desirable. Second, new costs to the other party present us with requests for modification.

1. *Breach of Contract.* — The notion that breach of contract constitutes a wrong to the nonbreaching party is familiar. Empirical studies sug-

124. But see Norvin Richards, *Luck and Desert*, 95 *Mind* 198, 206 (1986) (positing moral luck should affect moral verdicts); Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 *Ethics* 374, 374–75 (1987) (arguing against proposition of moral luck). Both are prepared to condemn equally those who would commit an immoral act but are not placed in circumstances in which it is a possible course of action.

125. Most examples of circumstantial luck revolve around the bad moral luck of being present in Nazi Germany. An exception, not specifically oriented toward the more general problem of moral luck, is Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 *Phil. & Pub. Aff.* 95, 129 (2004) (discussing moral risk of growing up in racist society and arguing “for liberal institutions . . . relying upon . . . the commitment to ameliorating the moral and prudential risks to which we are all liable by virtue of our social epistemic dependency”).

126. See Todd Bernard Weber, *Tragic Dilemmas and the Priority of the Moral*, 4 *J. Ethics* 191, 192 (2000) (describing tragic dilemmas).

gest that most people view breach in moral terms.¹²⁷ Seana Shiffrin has argued expressly that breach of contract may constitute a wrong,¹²⁸ and other contract scholars, like Daniel Markovits, have offered theories of contract that imply that breach is a wrong to the nonbreaching party.¹²⁹

But the idea of breach of contract as immoral has also been challenged by legal economists, whose account of breach and of contract itself in utilitarian terms casts the former in a positive light.¹³⁰ The theory of efficient breach would seem to condone breach under certain circumstances. Economic theories of contract explain how breach with only expectation damages incentivizes parties to breach when it is a good thing to do so—good not only for the breaching party but for everyone, including possibly the nonbreaching party, who paid a lower price due to the other party's anticipation of the possibility of a lucrative breach.¹³¹ If breach is sometimes socially productive, and if the law is intended to encourage breach under the right circumstances, then the opportunity to breach at a profit hardly seems like a moral disaster that befalls breachers and compromises their sense of control over their moral destinies. Breach triggered by an increase of costs that renders performance unprofitable may be a minor disaster of sorts, but on this view the disaster has no moral dimension.

This section presents the argument that first, behavior that is socially productive may nevertheless constitute a wrong to a particular other individual; and second, although breach is not blameworthy, it renders a breaching party morally responsible for the losses of the nonbreaching party. Whether one views breach as a culpable wrong or as an act that renders an agent morally responsible for subsequent losses to the other party, the prospect of a situational change that makes breach tempting (that is to say, makes breach rational) creates moral risk.

Steve Shavell has argued that breach does not constitute a wrong because the breaching party is obligated to compensate.¹³² Specifically,

127. See, e.g., Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. Empirical Legal Stud. 405, 423 (2009) (concluding “the connection between law and morality is not a philosophical abstraction; for most people, it is an entrenched component of their intuitions about legal decision making”).

128. Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 Mich. L. Rev. 1551, 1552 (2009) [hereinafter Shiffrin, *Could Breach*].

129. Daniel Markovits, *Contract and Collaboration*, 113 Yale L.J. 1417, 1446–74 (2004).

130. See Steven Shavell, *Is Breach of Contract Immoral?*, 56 Emory L.J. 439, 442–58 (2006) [hereinafter Shavell, *Immoral*] (“[W]hen efficient breach does occur, it coincides with the terms of completely detailed contractual promises and thus should not be seen as immoral [This] conclusion flows from the logic explaining the nature of the contract that the parties themselves would want”).

131. See *supra* note 7 and accompanying text (describing theory of efficient breach).

132. See Shavell, *Immoral*, *supra* note 130, at 441 (“[W]e can deduce from the fact that the party in breach was willing to pay the expectation measure of damages that the breach was probably not immoral because the parties likely would not have stipulated performance had they addressed the contingency that arose.”).

he argues that at the time of contract both parties would have agreed to allow the other party to breach the contractual promise under certain circumstances because it would lower the price of each potential breacher's performance. Shavell could be arguing that each party should be treated as having in fact agreed to a "perform or pay" type promise, but this would be at odds with how many (but not all) contractual promises are in fact structured, as well as the self-understanding of many (but not all) parties.¹³³

Shavell seems instead to hinge the force of his argument on the hypothetical consent of the parties to breach under certain circumstances. But then one is faced with the problem of accounting for why express obligations assumed by a party should be revised in light of what the other party might, perhaps *should*, agree to when they have not in fact agreed to it.¹³⁴ After all, there are usually many combinations of terms to which a party might have agreed, but the other party is not regarded as entitled to unilaterally substitute any of those alternative agreements for the contract actually concluded.¹³⁵ They are not permitted to do so even where it is plausible that the parties would have contracted along the lines envisioned in the alternative had they been privy to information now available.¹³⁶ Were one party to pursue a privately conceived, alternative vision of her contract, she would likely breach or claim breach where the court would not recognize breach by the other party. Hypothetical consent does not justify conduct under a contract, nor does it create obligation where the existing contract does not appear to create it. Thus, hypothetical consent is not enough to explain why damages are a coequal alternative to performance where the initial contract is not structured as perform-or-pay. Damages are best understood as the law itself treats them: remedial obligations that stem from the underlying obligation to perform. They are not usually equivalent to performance and, where breach is otherwise blameworthy, do not render the breacher blameless.

If the availability of damages does not excuse breach of contractual promises, the fact that it may be socially useful is not enough to make it

133. See Aditi Bagchi, *Unequal Promises*, 72 U. Pitt. L. Rev. 467, 482 (2011) (discussing both legal and subjective understandings of contractual promises and describing possible deviations from "perform or pay" promise).

134. See Shiffrin, *Could Breach*, supra note 128, at 1567 (criticizing Shavell's view on morality of breach).

135. For example, if one contracts to have a driveway cleared of snow on Monday for \$100, it would constitute breach to arrive on Tuesday, even if one charges only \$50 and even if the homeowner would have preferred delayed service for a lower price.

136. The previous example holds even if it turns out that the street is not plowed until Tuesday, such that clearing the driveway in accordance with the contract would have delivered no additional gain to the homeowner. Of course, the consequences to the homeowner of breach are relevant to the calculation of damages, but whether the homeowner would have agreed to different terms with information the parties acquire *ex post* does not speak to the preliminary question of breach, unless the original contract is actually modified by mutual consent.

right, either.¹³⁷ Consider that the role of damages in efficient breach theory is limited to incentivizing efficient behavior; damages do not make efficient breaches efficient.¹³⁸ That is, were a party to breach where her resources were valued more highly outside of an existing contract, that breach would be efficient even if she did not compensate the nonbreaching party; the marginal effect on the future practice of contract would usually be offset by the allocative efficiency furthered by breach. If the fact that a particular breach is socially productive is enough to make it “not wrong,” then it must not be a wrong even in the absence of compensation. That result is intuitively implausible.

The intuition stems from the recognition that reasons that apply to a promisor are prototypically agent-relative—they are reasons that apply specifically to the promisor to fulfill obligations that she has created specifically to the promisee.¹³⁹ While the reasons applicable to a contractual promisor may differ from the reasons that apply to promisors in other contexts, both types of reasons differ from those relevant to the adoption of a legal rule awarding expectation damages, which may incentivize efficient breach. It is beyond the scope of this Essay to defend the existence or coherence of agent-relative reasons. Assuming that such reasons indeed bind individuals in ways that do not generalize to all agents, what are the specific reasons that a contracting party has to fulfill a contractual promise? Individuals have reasons not to use others, through contract and subsequent breach, in a way that impedes others’ plans and projects.

Contracting parties are often aware of the purposes for which their contractual partners have entered into contract.¹⁴⁰ From such knowledge

137. For a more general philosophical argument that individual moral obligations are not reducible to an obligation to maximize an overall state of affairs, see Paul Hurley, *Agent-Centered Restrictions: Clearing the Air of Paradox*, 108 *Ethics* 120, 122 (1997).

138. In contrast to the more rigorous requirements of Pareto efficiency, Kaldor-Hicks efficiency is obtained so long as one party gains enough to offset the losses of the other party, without requiring transfers. See J.R. Hicks, *The Foundations of Welfare Economics*, 49 *Econ. J.* 696, 701, 711 (1939) (discussing welfare movements that would be Pareto-superior if accompanied by compensation for losers, but noting likely disagreement about conditions under which compensation should be offered); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *Econ. J.* 549, 550 (1939) (arguing economist need not defend proposed policy on grounds that “nobody in the community is going to suffer,” but need only demonstrate it would be possible to compensate losers and still improve welfare of others).

139. See *supra* note 82 and accompanying text (discussing agent-relative reasons and corresponding academic literature).

140. Consider cases that refuse to restrict damages under a *Hadley* rule (limiting damages to those were foreseeable to breaching party at time of contract) on the grounds that the business purpose of a transaction was self-evident, *Victoria Laundry (Windsor), Ltd. v. Newman Indus., Ltd.*, [1949] 2 K.B. 528 (C.A.) at 540 (Eng.), or which excuse performance on the grounds that the obvious purpose of the contract has been frustrated, *Chandler v. Webster*, [1904] 1 K.B. 493 (C.A.) at 493 (Eng.); *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.) at 740 (Eng.) (discussing frustration in context of contracts to rent space to view coronation procession of King Edward VII when king became ill and coronation was rescheduled); *Griffith v. Brymer*, (1903) 19 T.L.R. 434 (K.B.) at 434 (Eng.) (same).

follows an understanding that their breach will impair another person's project. It does not require any special sentiment either for the project or the person; in this regard, it differs from ordinary promising, in which a promisor may adopt certain reasons of the promisee as her own. The value of a contracting party's project to the other party is more akin to the value everyone must recognize in the preferences and plans of fellow citizens in a liberal democratic society; respect for fellow citizens as persons means assigning value to "things" that have value to others for reasons one does not share (they may be idiosyncratic, religious, or conscientious) even when one does not attach value to them directly. People have reason to accommodate practices they find bizarre, preserve structures they find appalling, and enable lifestyles they find distasteful, merely because they are valued by others. Many of these reasons apply at the level of politics. But such reasons also operate at the interpersonal level, in that not only a state but a person may be liberal. Liberal persons may be useful, if not necessary, to sustain a liberal polity, but this Essay uses the term here just to describe the respectful attitude of a person toward the projects of others. The attitude is familiar because it is the attitude adopted in liberal politics.

Breach after contract usually does inflict harm on others by impeding their projects. The passage of time between contract formation and breach, in the usual case, implies that the state of the world in which a party elected to contract with a particular other party on specified terms has passed, and the particular constellation of opportunities of that world have vanished with it. Fuller and Perdue noted long ago that expectation damages may be nothing more than a more accurate account of reliance damages than reliance damages based on direct evidence of reliance.¹⁴¹ The economic version of this account of expectation damages emphasizes that, in a competitive market, the terms available from one seller are identical to the terms available from any number of other sellers of like goods or services.¹⁴² As such, the opportunity cost dimension of reliance is equal to the expected benefit from the contract actually concluded. But the point extends outside of competitive markets, where the claim is not

141. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 1, 46 *Yale L.J.* 52, 55 (1936) ("[T]hrough reliance ordinarily results in 'losses' of an affirmative nature . . . it is also true that opportunities for gain may be foregone in reliance on a promise. Hence the reliance interest must be interpreted as at least potentially covering 'gains prevented' as well as 'losses caused.'").

142. See Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, 43 *U.C. Davis L. Rev.* 1235, 1256 (2010) (noting in "perfectly operating competitive market . . . all purchasers would pay the same price for any given product"); James F. Nieberding & Robin A. Cantor, *Price Dispersion and Class Certification in Antitrust Cases: An Economic Analysis*, 14 *J. Legal Econ.* 61, 73–74 (2007) ("The law-of-one price . . . states that in competitive markets comprised of many buyers and sellers, identical goods and services ought to sell in a given market at identical prices . . . under conditions of product homogeneity, zero transaction costs, zero search costs, no informational asymmetries, and no market imperfections.").

that expectation damages represent full reliance, but just the lesser claim that breach usually represents a loss to the nonbreaching party. Such losses occur, in some sense, at the moment of contract, but at the time of formation, are presumably worthwhile to the party that consciously foregoes other opportunities in favor of a given contract. In fact, the value of foregone opportunities is often limited in light of the contract that took their place. But when the other party to the contract later breaches, the loss is realized; lost opportunities are once again valuable but no longer available. Again, because these losses jeopardize the plans and projects of those who bear them, there is reason not to inflict such losses and impede those plans.

The state has a reason to favor legal rules that will limit losses, but this reason must be balanced with a number of related reasons in electing the best legal rule. Those calculations and considerations differ from those applicable to a particular contracting party, who appropriately assigns special weight both to his private reasons in favor of breach as well as the obligation not to inflict harms on others. More generally, the state has reason to facilitate everyone's plans and projects (with exceptions), and a general rule that promotes that end at the expense of certain individuals at certain times cannot be said to affirmatively use those individuals in the same way that a single contracting party uses a person with whom she contracts only to later breach. The legal rule itself does not contemplate or inflict losses on any particular individual because it pre-dates any particular agreement, let alone any breach that gives rise to loss. The legal rule does not single out an individual as she who will bear the cost of the social rule; that selection is made by individual contracting parties—the individuals who chose to breach. While the background legal rule precedes the choice of contracting party and the subsequent decision to breach, the likely consequences for the breaching and non-breaching party under the present legal regime are background facts in the decision to breach.

Even if one denies agent-relative reasons for a contracting party not to breach a contract (the reasons suggested above and others), one can make sense of the prevailing intuition that the social utility of a given breach does not excuse the event as between the breaching and non-breaching parties so long as one allows for multiple perspectives of judgment. That is, even if one denies that agent-relative reasons bind individuals to perform acts that do not optimize a state of the world, one might concede that, outside the domain of moral reasons, different considerations apply to differently situated agents.

Civil recourse theories emphasize the particular perspective of the plaintiff-victim in the context of torts as distinct from that of society at large, and argue for the priority of that perspective within the private law

domain.¹⁴³ One of the many insights made by Williams in connection with his observations on moral luck was that the presence or absence of reasons justifying conduct from an external point of view does not preempt an analysis of whether conduct is regrettable from the standpoint of the agent in question.¹⁴⁴ While it may be commonplace to accept contractual breach as socially acceptable or even socially desirable under certain conditions, even if those considerations were taken to justify breach, it would not release contractual parties from appropriate regret with respect to their failure to perform their contractual promises.

One might deny that the moral reasons that bear on a potential breaching party are distinct from the moral reasons relevant to a legal rule that prefers or prevents breach under various scenarios, on the grounds that the reasons that appear to differ are not appropriately characterized as moral. But even then, one can agree that the totality of reasons—including amoral reasons—that apply to an individual deciding whether to breach are different from the totality of considerations relevant to a policymaker setting the relevant legal rule. While it may be commonplace to accept contractual breach as socially acceptable or even socially desirable under certain conditions, even if those considerations justified a legal rule that makes breach attractive, those reasons do not represent the universe of considerations relevant to a decision whether to perform one's own contractual promise.¹⁴⁵

The moral risk endemic in the possibility of breach (or more precisely in the possibility of circumstances that make breach attractive) does not depend on viewing breach as a culpable wrong. The agent-relative reasons that bear on the decision to breach are not necessarily of a type that make breach blameworthy. Consistent with intuitions that breach of contract is different from breach of ordinary promise,¹⁴⁶ one can avoid or concede the question of whether breach constitutes a wrong but insist that a breaching party bears a special responsibility for losses from breach. Even if breach can be regarded as justified in light of systemic considerations, a breaching party is responsible for resulting losses in the way a trespasser who has entered another's property on grounds of neces-

143. See Goldberg & Zipursky, *Tort Law*, supra note 3, at 1135 (noting tort law “empowers victims to respond to wrongdoers whose wrongs have injured”).

144. Williams, *Moral Luck*, supra note 1, at 27. Nagel and others have described Williams's conception of agent-regret as ultimately an amoral notion. See Nagel, *Mortal Questions* supra note 1, at 69 n.3 (“My disagreement with Williams is that his account fails to explain why such retrospective attitudes can be called moral.”). It may be an essential feature of morality that it be a source of universal reason and judgments. One cannot revise a moral concept to one as relativistic as agent-regret and have it retain its moral character. One cannot endorse the moral quality of an action but still condemn it as immoral from the particular point of view of a particular actor.

145. For further discussion of how the reasons relevant to a legal rule differ from the reasons relevant to moral judgment of individual action, see *infra* Part IV.

146. See Aditi Bagchi, *Separating Contract and Promise*, 38 *Fla. St. U. L. Rev.* (forthcoming 2011) (manuscript at 1) (on file with the *Columbia Law Review*) (distinguishing voluntary character of private promises from contractual promises).

sity is accountable to the property owner. The trespass was justified and cannot be condemned, but the trespasser should still feel responsible for her violation of the property owner's background right. In particular, the trespasser is still obligated to remedy the trespass by compensating the owner.¹⁴⁷ Similarly, payment of damages by a party breaching a contract is not just a means by which courts try to motivate people to breach if, and only if, it is efficient to do so; assignment of damages expresses responsibility to the breaching party for the nonbreaching party's losses, irrespective of whether the breach constituted a culpable wrong.

The circumstances that make breach rational are not unanticipated as a general matter but unpredictable in a specific case. Whether one sees breach as a culpable wrong or as an occasion for special moral responsibility, breach represents moral risk.

2. *Requests for Modification.* — The other moral choice to which post-contractual events may give rise is whether to acquiesce to a request for modification of contract terms. A request may be triggered by a rise in costs of performance by the other side, or simply by the availability of a more lucrative option for the other party. Presumably, a contracting party is not obligated to release the other party from performance on existing terms so that the other party might seek higher fortunes. The other party is free to breach and compensate, if worthwhile. But where misfortune makes a transaction especially burdensome for the other party, and modified terms would make the agreement mutually profitable, the party of whom modification is being requested has reason to prevent substantial loss to the other party by consenting to modified terms.¹⁴⁸

Again, a refusal to modify terms does not constitute a culpable wrong. But because the original terms represent choices as to the allocation of risk, and because those allocations are both under the control of the parties and have foreseeable (albeit uncertain) consequences, con-

147. See Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 *Law & Phil.* 5, 7–8 (1983) (“Sometimes the justifiable, i.e., nonwrongful, taking of what another has a well-established right to justifies a claim to rectification.”); Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *Phil. & Pub. Aff.* 93, 102 (1978) (stressing “almost everyone would agree that you owe compensation to the homeowner” for justified trespass).

148. This reason is not dispositive and may be overridden by other considerations, including self-interest. The point here is that there is shared responsibility for outcomes of a transaction—and that this justifies distinguishing between requests for modification prompted by unexpected opportunity and requests prompted by unexpected costs. Notably, this view is consistent with the asymmetry we see in the legal rule itself, which treats increased costs as a change in circumstance that may motivate good faith modification but treats demands for modification based on increased opportunity costs as bad faith, if not extortion. An economic perspective fails to account for this asymmetry, instead focusing on whether a threat to breach is credible. See Oren Bar-Gill & Omri Ben-Shahar, *Threatening an “Irrational” Breach of Contract*, 11 *Sup. Ct. Econ. Rev.* 143, 145 (2004) (“Economic analysis provides a standard tool to evaluate the issue of threat credibility It is only when the pecuniary loss from performance exceeds the pecuniary cost of breach that the threat is deemed credible.”).

tract places parties in a position where they are mutually responsible for the course of the transaction for both sides. In that case, while refusing a good faith modification is not blameworthy, some responsibility for the losses of the other party nevertheless attaches to an uncooperative party. Entering into contract, one is subject to the risk that one will later be called upon to “save” one’s contracting partner from such losses.

IV. LAW AS A TOOL FOR MANAGING MORAL RISK IN CONTRACT

Numerous scholars have grappled with the challenge of moral luck. If the concept rightly identifies a fundamental tension in our moral precepts—if it upends the Kantian orthodoxy that moral action is within the control of the moral agent and that the morality of action and agents is never arbitrary—then one cannot really “solve the problem.”¹⁴⁹ One can, however, live with it.

As discussed above, criminal law theory has grappled with moral luck primarily in the context of attempt. Scholars disagree on whether attempts should be punished less severely than completed crimes, but the debate has shed new light on potential competing grounds for criminal liability and on the very purposes of punishment.¹⁵⁰

Tort law has similarly come to terms with moral luck.¹⁵¹ Scholars of both corrective justice and civil recourse theory are committed to the idea of a tort as a kind of wrong.¹⁵² Both see the relevant question as whether the wrongdoer is responsible, not whether she is culpable and

149. See Andrew Latus, *Moral and Epistemic Luck*, 25 *J. Phil. Res.* 149, 166 (2000) (“Our attempts to solve the problem of moral luck have been misguided. Attempts to show that cases of moral luck do not occur are futile. The existence of moral luck is both inescapable and worrying.”).

150. For a summary of scholarship on either side of this debate, see *supra* notes 46–47.

151. But see Alexander, *Corrective Justice*, *supra* note 3, at 23 (rejecting tort system as indefensibly arbitrary); Christopher H. Schroeder, *Causation, Compensation and Moral Responsibility*, in *Philosophical Foundations of Tort Law*, *supra* note 3, at 347, 353 (same); Waldron, *Moments of Carelessness*, *supra* note 3, at 388 (same).

152. John Goldberg and Ben Zipursky expressly argue that torts should be viewed as wrongs, but deny that corrective justice theorists similarly account for torts as wrongs. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917, 918, 925 (2010) [hereinafter Goldberg & Zipursky, *Wrongs*]. However, numerous scholars associated with corrective justice theory understand themselves to be concerned with explaining torts as wrongs. See, e.g., Ernest J. Weinrib, *The Idea of Private Law* 11, 147 (1995) (“[A]n internal account . . . interprets . . . [a] right of action simply as what it purports to be: the assertion of a right by the plaintiff in response to a wrong suffered at the hands of the defendant.”); Arthur Ripstein, *As if It Had Never Happened*, 48 *Wm. & Mary L. Rev.* 1957, 1962 (2007) (distinguishing between harms and wrongs); John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice* 52 (University of Oxford Legal Research Paper No. 1/2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538342 (on file with the *Columbia Law Review*) (“Tort law is concerned with the wrongs one committed, one’s wrongful actions.”).

blameworthy.¹⁵³ More broadly than in the criminal context, it has been largely accepted that a wrong is not a simple function of culpability, and that responsibility (or at least some variant of responsibility) turns on outcomes as well as intent.¹⁵⁴ In some cases, the requirement of actual injury is seen as more fundamental to responsibility than the requirement of fault in a negligence regime.¹⁵⁵ Responsibility suffices to justify the imposition of civil liability in tort.

Does moral luck similarly illuminate some dimension of contract law? This Part suggests that one can understand background institutions as mitigating the moral risk inherent in contract formation while contract law itself attenuates the circumstantial risk that arises post-contract. The legal institutions that manage moral risk for contracting parties extend well beyond the domain of contract law and manage risk outside of contract as well. However, this Essay focuses on the way in which law attenuates moral risk in the contractual context.

A. *Safety Nets as Collective Tools of Moral Risk Management*

Ex ante, the primary way in which legal institutions make the practice of contract morally tolerable is to provide a safety net such that one can transact without fear that one will be the engine of calamity for one's contractual partners. That safety net is both the social safety net of the welfare state and other economic institutions such as tax write-offs and bankruptcy. Because the social safety net ensures that bargaining partners are not excessively vulnerable or needy in absolute terms, parties may proceed in ordinary transactions without inquiry into the situations of their contractual partners.

Once one observes this function of the safety net, one can see in another light the comparative weakness of existing safety nets and the comparative freedom of contracting parties in the common law to depart from standard terms. As contracts are usually formed at arms length between individuals who do not owe each other any special duties (as friends or family, for example), the perception of moral risk at the stage of contract formation will reflect on the perception of the breadth and depth of precontractual duty between persons. The common law has traditionally been reluctant to recognize any such duties, which has been

153. See Coleman, *Risks & Wrongs*, supra note 35, at 325 (distinguishing retributive justice from corrective justice and associating private law with latter); Goldberg & Zipursky, *Wrongs*, supra note 152, at 951 ("Liability is imposed even though the defendant has caused harm through conduct that the courts themselves are at pains to say is entirely permissible.").

154. For literature on outcome responsibility and tort, see supra note 31.

155. See Gardner, *Obligations and Outcomes*, supra note 31, at 121 (distinguishing between failing to take care not to injure and causing injury); Goldberg & Zipursky, *Tort Law*, supra note 3, at 1135 ("The reckless driver, when his recklessness ripens into the running down of a victim, is literally *re-sponse-able* by (and therefore to) the victim . . . in a way that the reckless driver who does not injure anyone is not.").

most directly challenged in the context of the (lack of) duty to rescue.¹⁵⁶ Common law countries, unlike civil law countries, lack a precontractual duty to bargain in good faith.¹⁵⁷ The perception of limited duty toward contracting partners—at least prior to contract—is consistent with a comparatively low level of perceived moral risk. If parties do not owe anything to those with whom they contract, that is, if there are no duties that constrain our negotiation of contract terms, then those terms cannot be wrongful acts. This, in turn, is consistent with low levels of insurance through collective institutions against the risk of harm resulting from wrongful acts.¹⁵⁸

Even a limited conception of background duties between persons in the contractual context would not eliminate moral risk altogether. The

156. A duty to rescue may be imposed either by tort or criminal law. For arguments challenging the prevailing rule in the United States that bystanders have no duty to aid, see Theodore M. Benditt, *Liability for Failing to Rescue*, 1 *Law & Phil.* 391, 396 (1982) (“[T]here can be a duty to rescue even though one’s failure to rescue does not cause the harm that befalls the victim.”); Alison McIntyre, *Guilty Bystanders?: On the Legitimacy of Duty to Rescue Statutes*, 23 *Phil. & Pub. Aff.* 157, 160 (1994) (“The duty to give emergency assistance is grounded . . . in the state’s duty to protect the general welfare and in the reasonableness of the burden imposed on citizens who are ‘deputized’ to report emergencies or to provide easily rendered assistance.”); Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 *Law & Phil.* 751, 751 (2000) (arguing for “a criminal penalty for certain failures to rescue”); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *Yale L.J.* 247, 251 (1980) (“[A] duty of easy rescue would strengthen an already-broad pattern of common-law principles and . . . such a duty can plausibly be justified within both of the ethical traditions that inform the common-law system.”).

157. See John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 *Hous. J. Int’l L.* 1, 16 (1994) (“A primary distinction between the civil and common law approaches to the duty of good faith is that the latter generally imposes no good faith obligation prior to the execution of the contract.”); Ralph B. Lake, *Letters of Intent: A Comparative Examination Under English, U.S., French, and West German Law*, 18 *Geo. Wash. J. Int’l L. & Econ.* 331, 346–48 (1984) (noting United States and England traditionally “did not recognize a contract to make a contract or an agreement to bargain”). However, Klein and Bachechi argue that other doctrines do impose precontractual liability for precontractual conduct. Klein & Bachechi, *supra*, at 16; see also Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv. L. Rev.* 401, 408 (1964) (arguing range of doctrines recreate precontractual duty of good faith in common law).

158. See Torben M. Andersen, *International Integration, Risk and the Welfare State*, 104 *Scandinavian J. Econ.* 343, 345 (2002) (“In a broad interpretation of the welfare state we can . . . include all public sector activities which affect the risk faced by society and its individuals as instruments for social risk diversification or insurance.”). The United States is the prototypical example of a state with low levels of social insurance. See Gøsta Esping-Andersen, *Social Foundations of Postindustrial Economies* 75 (1999) (discussing how United States uses “narrow conception of what risks should be considered ‘social’”); Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* 21, 53–54 (1990) (discussing continuously low “de-commodification” of individuals in United States, defined by lack of inviolable social rights “granted on basis of citizenship rather than performance”). See generally Agnar Sandmo, *Introduction: The Welfare Economics of the Welfare State*, 97 *Scandinavian J. Econ.* 469 (1995) (discussing costs and benefits of welfare state, including social insurance and redistribution).

risk of responsibility for harm resulting from contract remains, as it does not depend on the breach of either a background duty or a voluntary obligation. But it seems plausible that those who deny the existence of background duties between contractual partners are also less likely to be moved by the prospect of responsibility for contractual partners' losses, where those losses are not even traceable to breach of contract. Thus, some legal cultures can be expected to be more sensitive to moral risk in contract than others.

Indeed, the institutions that manage moral risk between strangers who are not yet parties to contract are just those which manage material risk. Means-tested welfare programs, large-scale social insurance programs, bankruptcy protections, regulations on insurance access and coverage, tax deductions for various losses—each of these practices reflect the degree to which a society is inclined to pool brute luck.¹⁵⁹ But they simultaneously (and relatedly) reflect on the extent to which society perceives robust duties flowing directly between individuals, duties that generate moral risks which, if they are not to overwhelm daily life, must themselves be collectively managed. By tempering market outcomes more broadly, social programs lower the stakes of contract for every contracting party and reduce the corresponding moral risk for their contracting partners.

B. *Contract Law as a Tool for Managing Ex Post Moral Risk*

Even in the common law, once parties enter a contract, they are thrust into a relationship in which they are concerned with the moral character of their conduct toward the other. Even if one operates under the myth of a blank slate prior to contract, one must recognize that contract creates dyadic obligations that run between individuals. *Ex post*, several doctrines in contract operate to manage moral risk.¹⁶⁰ They represent tools by which individuals manage their own moral risk because individuals opt into the contract law regime by making their promises legally enforceable.

First, contract law awards damages. The obligation to pay damages upon breach substantially limits the harm one can do through breach. Notably, in those promissory relations in which the wrong of breach does

159. Of course, there is a political economic story behind each of these programs, but I take these narratives to be the more detailed content of any claim about legal culture.

160. My argument that, by subjecting their promises to the regime of contract law, parties moderate the severity of their later choices (from the standpoint of their promisees) is similar in flavor to Melvin Eisenberg's argument that there is an implicit "duty to rescue" in contract law, as expressed through doctrines that require cooperative behavior between parties. Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 *Fordham L. Rev.* 647, 675 (2002). He points to the doctrines of mitigation and offer and acceptance, among others, as evidence that more is required of parties in a contractual setting than in tort or criminal law. *Id.* at 654. This Essay does not rely on these doctrines to illustrate its point; this Essay relies instead on doctrines that create rights in promisees through contract, which apply only after contract formation.

not primarily lie in any material harm inflicted on the promisee, contract law will often not apply and damages will not be available. But in those arms-length relations in which contract typically operates, the harm stems not from damage done to the relationship between the parties, but from the economic loss to the promisee—hence the appropriateness of economic damages.

The commitment to pay damages is useful in many respects, but one of the salutary effects of such a commitment is to reduce the chances that new opportunities will render breach attractive to oneself and damaging to the other party (that is, bad circumstantial luck). Should new facts make performance unappealing, one must weigh the losses that the other party would experience in one's own decision whether to respect the bargain made. Should one conclude that breach is nevertheless rational from a self-interested point of view, the prospect of damages makes compensation to the other party rational. Anticipating the possibility of a new interest in nonperformance and altering one's future self-interest in ways that are beneficial to the other party is a familiar story of credible commitment. It is also a less familiar means by which to align rational self-interest with moral obligation and thereby manage one's moral risk.

Contract law also manages postformation risk by limiting the consequences of a party's refusal to renegotiate in good faith. Existing doctrine permits good faith modifications that stem from a substantial increase in cost.¹⁶¹ It does not require such modifications, but should a party refuse a modification where the burden of performance would be too great, the court may void the contract altogether.¹⁶² Thus, a party who is faced with a request for modification, who is unlikely to have complete information with respect to the magnitude of the burden performance would entail for the other party, may "risk" that her refusal will result in serious loss to the other party knowing that, were this truly the case, the other party could simply fail to perform and invoke the defense of impracticability, impossibility, or frustration of purpose.¹⁶³ As with the doctrines governing remedy, the doctrines governing both modification and excuse combine to motivate a contracting party faced with a request for modification to take that request more seriously than she might otherwise be tempted to do. The bad material luck experienced by a contracting party can be bad circumstantial luck for her contract partner, but rules that effectively force the parties to share unusual burdens mitigate the material risk of each party and the corresponding moral risk of the other.

161. See Restatement (Second) of Contracts § 89 cmt. b (1981) (describing provision permitting modification of executory contract in event of circumstances not anticipated by contract).

162. See *id.* § 261 (permitting discharge from contract in event terms become impracticable); *id.* §§ 263 (permitting excuse from contract upon nonoccurrence of specific thing necessary for performance); *id.* §§ 265–268 (allowing discharge by supervening frustration, existing impracticability or frustration, and effect on other party's duties of prospective failure justified by impracticability or frustration).

163. See *id.* §§ 265–267 (defining the defenses).

There are many explanations for each of these doctrines and the aim of this Essay is not to explain these doctrines by reference to their role in managing moral risk. This Essay, rather, points out how, by choosing to enter into contract as opposed to simply promising, parties do more than avail themselves of the state as a substitute for social networks of trust. The state does more than assure the other party of our performance or compensation in the event of nonperformance. Through contract law, parties also opt into a kind of ready-made scheme by which they tie their hands in more subtle ways, and in ways that make more likely their compliance with the duty to keep promises. The idea is that credible commitment not only makes more probable performance of obligations by altering incentives, but also minimizes the moral repercussions of whatever choices parties ultimately make by limiting the consequences of those choices.

The claim that law makes parties more likely to act morally begs the question of whether they are still acting morally if it is just the law that is making them act morally. If the rules limiting the negative impact of choices are background, involuntary duties, those rules can be perceived as mechanisms by which we mitigate risk only in the most general sense in which the law is used collectively to address any range of moral challenges posed by the existence of other people with their own projects and beliefs.¹⁶⁴ But contract is unusual in that the rules managing risk, in effect hedging against the circumstantial facts which make breach more likely, are ones that parties have themselves opted into. That is why they are called voluntary obligations. It is the voluntary character of those mechanisms for managing moral risk that makes contract unique as a way in which parties engage directly in tradeoffs between their own interests and those of the promisee. This Essay does not mean to rely on a fiction that people make these commitments because they are motivated to manage moral risk. But individuals do not need to be motivated by a desire to manage moral risk in order to properly understand certain private actions and legal rules as fulfilling that function.

CONCLUSION

Managing moral risk up front is a way of preserving space for amoral decisionmaking in the future.¹⁶⁵ We make some choices in order to exercise moral agency, but not every choice we make is so laden with moral import—or at least we do not wish it to be the case. Sometimes we help make it possible to proceed amorally, relatively unburdened by moral luck. As we make our way through the world, we pad our elbows so that

164. See Jeremy Waldron, *Kant's Legal Positivism*, 109 *Harv. L. Rev.* 1535, 1537–40 (1996) [hereinafter Waldron, *Positivism*] (discussing how positive law helps solve normative challenge of living with others with their own values and viewpoints).

165. Cf. Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* 79 (2003) (stating contract facilitates personal detachment).

our incidental blows on others are softer. The result is that we can move more freely.

In Kant's political theory, the state is morally compulsory because justice is not possible outside of it.¹⁶⁶ Only a third-party like the state is capable of adjudicating disputes justly.¹⁶⁷ By assuming the task of mediating between the claims asserted by individuals, the state not only makes it possible for us to live justly, it also makes it possible for us to assert claims without overtaxing our faculty of impartiality. In a similar fashion, instruments of the law, which limit the harms we impose on others, facilitate justice directly, but they also deliver a secondary benefit. Because we can proceed in our ordinary transactions without burdensome attention to our potential responsibility for the losses of others, we can pursue our material interests without overtaxing our faculty of moral judgment.

We are, however, relieved of this burden only to the extent background institutions manage moral risk collectively and provide legal rules that empower us to manage residual moral risk individually.

166. Immanuel Kant, *The Metaphysics of Morals* 124 (Mary Gregor ed. & trans., 1996) (1785) [hereinafter Kant, *Metaphysics*]; see also Waldron, *Positivism*, *supra* note 164, at 1558 (discussing need for legislative will of state to ensure people uphold their obligations).

167. See Kant, *Metaphysics*, *supra* note 166, at 89–90 (“[H]owever well disposed and law-abiding men might be, it still lies . . . that before a public lawful condition is established individual human beings . . . can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* . . .”).

