

(An edited version of this paper appears in the *Routledge Companion to Philosophy of Law*, 2012, ed. *Andrei Marmor*)

ARE CONTRACTS PROMISES?

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Introduction: Some of what is at stake

Many, perhaps most, lawyers, theorists and laypeople in the United States consider contracts to be “legally enforceable promises” (Fried 1981; Markovits 2004; Markovits 2011: 314-18; Murphy 2007; Shiffrin 2007; Wilkinson-Ryan and Baron 2009: 420–23). That description seems initially confirmed by examples like the following. Suppose that I promise to paint your house if you promise to pay me \$3,000 for doing so. By exchanging these promises, we have formed a contract and each of us is both morally and legally obliged to perform. If one of us fails to perform, contract law empowers the other party to obtain a legal judgment and a remedy for the other’s failure to keep her promise.

Associated with this description of a contract as a legally binding promise is the theoretical ambition to use the moral, common-sense features of promises as starting material to fashion a plausible legal theory of contracts. The thought is that if contracts have, at their foundations, the same moral relations that we describe as promises in our everyday social relations, that fact might provide the seedlings both of a justification for contract law and of a guide to the principles it should follow.

For example, on the justification front, this description may encourage the view that contract law exists to buttress the moral institution of promising, whether by facilitating the social benefits we glean from that institution; by vindicating and protecting the rights promisors transfer to promisees; by providing support and recognition for a valuable social relationship; or, on

still other moral theories, by protecting promisees' reasonable expectations of legitimate public concern.

On the guidance front, such justifications may suggest that a contract's doctrinal principles should be designed in ways that support and enhance the moral practice of promising, that protect promisees' legitimate interests and/or, more weakly, in ways and for reasons that moral agents could accept while retaining their moral integrity and their stance of fidelity toward their promises (Shiffrin 2007: 713–18). From this perspective, lawyers, judges and scholars devising principles of contract law may have a great deal to gain by considering carefully what promises are, and why they are valuable to promisors, promisees and society at large. Of course, even on this view, the legal treatment of promises and the moral treatment of promises may vary substantially because our legitimate legal purposes may be both broader and narrower than our moral purposes. For instance, the law typically involves vindications of interests by outside parties (whereas that is rarer in moral life). But, while law's sweep is broader than morality's in that sense, it is narrower in another: in liberal societies at least, the law's interest in enforcing moral behavior *as such* is limited and has a circumference limited to what facilitates shared *social* and *political* life (Shiffrin 2007: 740–46). So, contract may be devoted to the enforcement of promises and that understanding may inform the proper design of contract doctrine, yet the distinctively *legal* interests at stake may, in some cases, entail that the legal enforcement of promises differ from the form taken by their moral enforcement and vindication.

The “promissory” characterization of contracts also suggests some challenges that contract theorists would need to confront, including how the legal and moral interests in promissory fidelity differ, whether and why *some* promises should be legally enforceable but not others, as well as what sorts of reasons might be offered to explain and justify why the legal treatment of

legally enforceable promises should differ, if at all, from the analogous moral treatment of promises.

But, although viewing contracts as types of promises might prove theoretically rewarding (Fried 1981 and 2011; Markovits 2004; Shiffrin 2007), some theorists regard this perspective as misguided (DeMoor 1987; Penner 1996; Schwartz and Scott 2003; Pratt 2007; Craswell 2011). They believe that some or all contracts are better described as legally binding agreements or commitments that need not be *promissory* agreements or commitments (Penner 1996; Pratt 2007: 532). On their view, some contracts are also promises, but not all contracts are promises.

Indeed, a redescription of our initial example might cast doubt upon the immediate plausibility of the idea that contracts involve promises. Suppose instead of *promising* to paint your house for \$3,000, I *agree* to paint your house if, in return, you *agree* to pay me \$3,000. “Agreement theorists” believe that in so doing, we would have created a contract, but without having *promised* to engage in these activities. For many agreement theorists, our agreements in this case would not necessarily carry with them the *moral* duties associated with promises, although we would be legally obliged to discharge them.

For these thinkers, the justifications for contract law and its particular doctrines need not bear any close relation to the moral structure of promises; nor is it evident for them that contract theorists should be attentive to questions about whether and how the institution of contract supports or detracts from moral agency or the moral practice of promising. Thus, although the separation of contracts from promises might deprive contract theory of what appears to be a natural resource to draw upon for justification and guidance, that separation may also be liberating. If contracts are not promises, then we may be freer to structure contract law in ways that allow us to achieve important purposes that we might not be empowered to if contracts were promises.

(Some critics take this stance only with respect to particular sorts of contracts or contracting parties, e.g., contracts between business firms or intimates (Schwartz and Scott 2003; Bagchi 2011).)

For example, if contracts are agreements but not inherently promises, then perhaps the law may *legitimately* authorize (and even encourage) contractors to break these agreements intentionally and pay their disappointed contractual partners a price (say the financial amount that performance would have been worth to the partner) if breaching the contract would allow one party to take advantage of a remarkable and more profitable opportunity that has unexpectedly arisen (Craswell 2001: 21–25; Craswell 2011: 11–20). Permitting such flexible arrangements might serve our overall economic welfare. It may encourage parties to make agreements (and thereby to make mutually advantageous exchanges) that they might otherwise be shy to forge if they thought they would be more inflexibly bound to perform.

On the other hand, if contracts are promises and contract law enforces promises in order to provide official recognition and support to the moral institution of promising, we may feel less comfortable with the idea of officially authorizing or encouraging parties to break their promises, at least not for the mere reason that it would be financially advantageous for them to do so. It is an important moral aspect of a promise that you commit to doing what you have promised, even when a better opportunity comes along, unless your promisee releases you from your commitment. Your promisee may, therefore, count on you to do what you said you would do; he may also count on you to be settled and focused on doing what you said you'd do, rather than scouting for better opportunities. Although being paid the financial value of the performance one expected might mitigate the sting of an intentional breach of a promise, most promisees will understandably not feel as though a promise was satisfied or taken seriously if they are paid a price by

a promisor who simply no longer feels like performing. Promises are valued in part for the commitment by the promisor not to reconsider; what was promised is no longer up for grabs, but rather is a settled matter. If the promisor wishes to change course, she should seek the promisee's permission. Indeed, if promises are conceived as transfers of decision-making power (Owens 2006: 71–75), then a promisee may still legitimately feel wronged if a promisor pays him money while breaking his promise. The promisee may feel as though a decision that was his to make, namely whether to require or to waive performance, has been wrested from him without consultation; the promisor unilaterally treating payment as an unexceptionally satisfactory alternative pays no heed to the disrespect done to the distribution of decision-making authority established by the promise (Shiffrin 2007 and 2008).

So, if that analysis is right (and, of course, not everyone agrees), you can see why it might matter whether a contract is a promise or not. If it is a promise, then that fact may help us see how contract law should be structured, but we may have to investigate what function(s) promises serve, what is required of a promisor once she has made a promise, as well as what sorts of rules support and what sorts of rules disrespect, undermine or are in tension with the institution of promising. If a contract is not a promise, then some of these constraints will not confine how we construct the rules of contract. On the downside, however, it may then be less clear why we should enforce contracts and we may have to turn elsewhere for guidance about what justifications contract doctrines should answer to.

Assuming it does matter whether a contract is a promise or not...is it? Both the answer and the methodology of arriving at an answer are contested.

How we characterize contracts and promises

Ordinary and legal language

A natural place to begin might be to characterize what promises are and then examine how we, and the law, characterize the relationship between contracts and promises. Unfortunately, it is difficult to identify a clear characterization of a promise around which a consensus has formed; indeed, some of the controversy about the relation between contracts and promises may well trace to disagreements about what is essential to promises. Still, to start somewhere, consider the rough, abbreviated idea that a promise is a voluntary commitment to perform (or to omit) an action the promisor has the authority to perform, a commitment qualified (sometimes explicitly) by apt conditions of performance, that works by transferring some form of the promisor's right to decide whether or not to perform that action to the promisee. In light of this transfer, the promisee has a right to expect (and often to demand) performance and has the concomitant power to use her transferred power or decision to waive or excuse the promisor's obligation of performance.

On this view of promise (and on many others), the idea that contracts are composed of promises seems, at first, like a plausible idea for a couple of reasons. First, legal authorities commonly describe contracts as "legally enforceable promises." The Restatement of Contracts, for example, defines a contract as "a promise or set of promises for the breach of which the law gives as a remedy, or the performance of which the law in some way recognizes as a duty" (American Law Institute 1981, § 1; see also § 75). Contract cases are saturated with references to promises that the parties made to one another and frequently refer to the parties as "promisors" and "promisees."

Second, making a promise (whether through the explicit language of "promise" or through other communicative means) is how contracts are fashioned. Of course, not all promises

are legally binding. Under U.S. law, a promise must either be supported by some offering by the other party in return (whether a promise or a performance or through the other party's active and reasonable reliance). But, interestingly, in the U.S., a promise need not be made with the specific, positive intention to be legally binding; just by promising, without an eye to the legal consequences, one may make a legally binding contract (ibid, § 21).

Third, upon making a promise, contracts have the same elemental features of promises. The recipient of a contractual commitment has a right to expect performance and if performance is not forthcoming (and no valid justification or excuse pertains), this suffices to show breach, just as it would with a promise. Further, just as with a promise, the recipient of a contractual commitment has the power to waive or excuse performance. These practices provide some support for the view that contracts are constituted by promises and for the working hypothesis that contract law is an institution meant to support promissory relationships and trust, to encourage promissory fidelity, to react to promissory infidelity and to protect those whose trust was induced by others' promises.

A challenge to the ordinary-language argument

One may object that this appeal to our linguistic practices and the law's own perspective on promises does not yield conclusive results. We and the law may *call* the sorts of commitments contract law recognizes "promises" but that semantic institutional practice may not settle the matter. It may just amount to convenient shorthand or the coining of a legal term of art, one that confusingly overlaps with, but is not identical to, a common lay term. (This is not unheard of. For example, the commonplace meaning of "assault" differs from its legal meaning. In common parlance, an assault involves unconsensual physical contact, and is usually understood to be vio-

lent. Whereas, in law, an assault need not involve physical contact but may be accomplished just through a *threat* that causes the victim to apprehend the possibility of violence. “Burglary” too has a technical legal meaning that resembles, but differs from, the common meaning; commonly, burglary is thought to just involve breaking and entering, but in legal contexts, burglary often requires a further intent to commit a felony.)

Indeed, with respect to “contract” and “promise,” other practices suggest that at least some legal contracts reasonably fail to carry with them the moral significance of promises; this may lend support to the hypothesis that the use of “promise” in legal contexts is more a term of art. As Michael Pratt has argued, one can make sense of the following question: “It’s a contract, sure. But is it also a promise?” Moreover, the following exchange (a variation on an example of Pratt’s) seems entirely sensible and possible: Meg asks Peter to build her a bookcase for \$1,000. Peter says, “I’ll happily *contract* with you to do so, but I only wish to be legally bound. I don’t care to be *morally* bound to a friend over a business matter. So, I won’t *promise* to build the bookcase but I will place myself legally on the hook.” The sensible possibility of a stance like Peter’s, Pratt concludes, shows that contracts need not be promises and that one could create a contract without thereby promising (Pratt 2008: 807–9).

To elaborate: Pratt’s interpretation is that a contract often involves a concomitant (morally tinged) promise but it does not do so necessarily. Peter’s distinction clarifies the separation between the two commitments. This distinction may seem reinforced by the fact that different remedies are available for breach of promise, morally, and for breach of contract, legally. The moral remedy for failing to perform a promise without excuse would generally be to perform; failing that, the moral consequences for breaching a moral promise may include others’ disapproval, reputational damage, guilt and other forms of recrimination, as well as some sort of com-

pensation to the promisee where appropriate. For unexcused breach of contract, the legal remedy is, typically, the (required) provision of expectation damages, that is, an amount of financial compensation meant to give the promisee the financial equivalent of the position she would have been in had the contract been performed. Punitive damages, the law's standard civil remedy that expresses disapprobation, are generally disallowed for garden variety breach of contract. When Peter denies he is making a promise but affirms that he is making a contract, he may be thought to be clarifying that, should he fail to perform, he would appropriately be susceptible to demands for expectation damages but not appropriately castigated, blamed or otherwise regarded as having acted wrongly from a moral point of view.

Answering Pratt's challenge

A different interpretation of this exchange is possible, however, that avoids the counterintuitive, even "oxymoronic" (Kimel 2010: 220), conclusion that a contract has been made without a promissory commitment or that a contract and some kind of commitment have been made, yet without moral significance. Instead of interpreting the example as Pratt does, we might instead think that, through his clarification, Peter does not successfully rebuff a promissory commitment so much as clarify and constrain the promissory terms to which he commits himself.

That is, one may insist that contracts are, in fact, promissory commitments, whatever protestations or silent reservations contractors may make to the contrary. Peter's effort to distinguish between a promise and a contract and to attest that he is making only the latter misdescribes what he achieves. Counter to his own description, he has specified the terms of his promise in a way that departs from the standard promissory terms that would be presumed absent ex-

plicit clarification; he has not evaded making a promise, but rather has altered (or clarified) the terms of the promise he makes when he forms the contract.

He may have clarified in one (or both) of two ways. First, in Pratt's example, the fact that the parties are friends about to enter into a business relationship may contribute significantly to the hypothetical's intelligibility. Peter may be clarifying that he regards this promissory commitment as more on the model of a promise between strangers than one between friends. The moral impact of most promises between friends encompasses more than just the promissory commitment as such to performance. The moral connotation of promising to perform a service for a friend usually involves a larger commitment to care for the underlying interests of one's friend that are promoted by that service (see also Shiffrin 2011: 170–72; Dannenberg 2010). The duty to promote those interests is less concrete and specific than the promissory core (namely to perform (or omit) a specified activity or activities); this subsidiary obligation is usually limited to reasonable efforts proportionate to the effort envisioned in the promised performance. But, still, between friends, although one needn't make a promise, once one does, one often implicitly assumes some obligation that ranges beyond the particular performance promised. In Kantian lingo, one assumes a perfect duty to perform what is promised and, also, alongside the promise, a more open-ended, imperfect obligation of care toward the friend's underlying interest. In less Kantian jargon, we might say that one *has* to do what one has committed to do through the promise, even when other tempting opportunities arise, but that the relation of friendship tends to add, on the occasion of the promise, a looser obligation to try to promote the underlying interest. For this secondary obligation, by contrast with the promissory obligation, the occasions of satisfaction may be more flexibly identified and may more readily give way if there are competing considerations to act otherwise.

For example, suppose you ask me to promise to take you to the airport. I know you ask not because you lack funds for a cab, but because you are nervous before a flight and want company so you are not alone mulling over your potentially imminent demise. Suppose after taking you, we discover that your flight is delayed for two hours. Then, if I am free, there may be a reasonable moral presumption that I will continue to keep you company because the underlying aim promoted by the promise has not been satisfied, even though the promised performance has been rendered. Or, if I promise to help you to build five bookshelves and we understand that the reason you want them is to tidy the unholy mess your office has become, then when we discover that five is not enough and you need six, then I may have a loose obligation to help with the sixth. This further duty is not part of the promise, per se, but may be a presumed concomitant responsibility between friends.

When friends do business with one another, however, it may be rather unclear whether the presumptions of friendship apply or whether the promise's penumbra extends strictly only to the specified performance. Peter's clarification may underscore that his promise to build does not carry with it the further duties often implicated through undertaking a project for a friend. By saying he "contracts but does not promise," he may be taken to convey that he is only promising to build the shelves but nothing more, that his promise covers only the moral territory typically associated with promises between strangers rather than that traversed through promises between friends.

Peter may also, or in the alternative, be clarifying the terms of his promise in another way. Typically, when one contracts to paint a house, one makes a promise *to paint a house*. But, in this case, Peter may be understood to clarify that all he is promising to do is either to perform or to pay the monetary equivalent of performance – expectation damages – which is typically all

that the law would enforce were he to fail to paint. That is, he is not promising to perform, in particular, but rather only promising to do exactly what the law would require him to do by virtue of making the contract, namely either to perform or to pay its monetary equivalent. Controversially, some theorists even take the view that this disjunctive is *always* the default, standard content of the promise between contractors, or at least between contracting businesspeople (Macaulay 1963: 61; Markovits and Schwartz 2011; but see Macaulay 1963: 63; Bernstein 2001: 1762–88; Wilkinson 2010: 637). Less controversially, most agree that it is *possible* to make such a disjunctive promise, especially if one’s eye is fixed upon the law’s reaction to failed performance, although some regard this as a rather shabby sort of promise, of a sort that should not be made a habit and preferably should not be articulated so opaquely.

Thus, Peter’s remarks might be understood to amount to the clarification that this is a business deal only, without the further benefits associated with promises between friends, or the even starker clarification that he is not committing to perform *per se* but only to “perform or pay.” Either way, he has not evaded promissory commitment, but merely shifted its terms from what they would otherwise naturally be assumed to be. Both of these interpretative possibilities emanate from the fact that, as a default, what morality expects of a promisor often exceeds what the law would expect or enforce of a promisor through the law of contract. Although morality presumes a more robust commitment than the law enforces, it is possible for a promisor, through explicit clarification, to rebut that presumption and to forge a more limited and defined moral commitment that more closely tracks the law’s minimal expectations.

Contract without promise or contract as promise?

Which interpretation is better? Pratt's interpretation that legal commitment may be hived off from promissory commitment or the alternative interpretation that recasts Peter's self-representation as an indirect way of clarifying the limits of his promissory commitment?

On one hand, Pratt's interpretation may seem more charitable because it represents Peter as having self-knowledge and as accurately reporting his status: legally but not morally bound. The alternative interpretation involves attributing some sort of inaccuracy to Peter. On the other hand, Pratt's interpretation also involves a reconfiguration of contract law's ubiquitous self-description that it enforces *promises* and the attribution to the contract law of a term of art that it does not treat as one. So, neither interpretation can avoid, it seems, some sort of attribution of error and consequent redescription. Principles of charitable interpretation will not settle the question.

One further consideration may speak on behalf of the "contracts are promises" interpretation, that is, the one that insists that Peter has, through contracting, promised *something*. At this point in the dialectic, both positions share as common ground that Peter's formation of a contract and his speech surrounding it may entail that he need not feel morally compelled to ensure Meg's study is neat and that her every book has found a home; and, further, that given his clarification, Peter need not even feel morally compelled to build the shelves, that he needn't feel guilty if he does not, and that Meg cannot legitimately form *moral* expectations that Peter will actually build them rather than compensate her if he does not. Okay. Now let's suppose he does not build the shelves simply because he does not feel like it and not because he has any strong reason or excuse for omitting carpentry. Isn't he *morally* bound without prompting to pay Meg expectation damages, i.e., compensation for his chosen failure to perform? If hiring another replacement carpenter would be more expensive, shouldn't Peter be (and feel) *morally* obliged to compensate

Meg for the extra expense she incurs due to Peter's agreement and subsequent breach? Wouldn't we find it *morally* outrageous if Peter did not pay and if, instead he declared, "All my agreement with you does is to render me legitimately legally vulnerable to a suit, so go ahead and sue me. I predict you will win"? If he doesn't make that thought explicit, but ducks his head and quietly acts on this rationale, it would seem morally objectionable all the same. Whether Peter was a friend or a stranger, such behavior would be morally wrong in light of Peter's commitment. This suggests that it is not true that Peter has made merely a *legal* commitment, but rather that he has also made a minimal *moral* commitment: to perform or pay damages. If that is true, then it seems we should conclude that he has made a promise (to build the shelves or pay damages) by making a contract, albeit one with unusual, disjunctive terms.

In response, Pratt might concede that, in this elaborated scenario, Peter behaves immorally, not because he breaks a promise but because he fails voluntarily to discharge a clear legal obligation and instead requires Meg to litigate and to deploy the coercive arm of the state. That is, Pratt may suggest that the moral wrong emanates from Peter's alienated, desultory posture to his legal duty to Meg rather than from his breach of a *promise* to her. Perhaps. Or, perhaps, Peter morally wrongs Meg *both* by breaking his promise and by shirking his legal duty. Imagine that after he was scheduled to build the shelves, the legal system changed its position and decided that expectation damages were no longer available in contract, but only restitution, or that contracts for relatively small amounts of money no longer gave rise to legal liability. If Peter then were to refuse to pay anything to Meg because his legal duty had altered, would it really seem that he did nothing at all that was morally untoward? That seems hard to swallow and suggests that the source of his moral commitment is not reducible to the content of his enforceable legal obligation. Even so, Pratt might challenge whether the residual moral commitment emanated

from a promise or, maybe, from the force of the expectations Peter cultivated in Meg at the time of contracting.

Although we might pursue the matter even further, perhaps we've wrung most of the heuristic value from this somewhat strange hypothetical example. Rather than further attempts to nail down which characterization of Peter's immoral behavior is more apt and whether there is a clear semantic answer to the question of whether a contract is a promise, we might instead switch gears and think more directly about what is normatively appropriate or preferable.

Do contract doctrines settle the question?

How else might we approach the question of whether contracts are promises? One approach, deployed by some critics, is to ask whether contract law consistently treats promises as contracts and whether contract law treats contracts the same way morality treats promises. Similarities are thought to support the thesis that contracts are promises and, more often, dissimilarities are thought to undermine that thesis. Penner, for instance, argues that contracts are not promises because under the consideration doctrine in Anglo-American law, unilateral promises, by which I mean promises offered without a reciprocal promise or performance in return, are true promises but do not suffice as contracts, which require some form of joint agreement (Penner 1996: 328–30). Promissory estoppel aside, that's true enough, but it only undermines the claim that all promises can be contracts, a stronger claim than the one under consideration. More generally, these points beg the question against those contract-as-promise theorists who claim that contract law has not fully faced the implications of contracts being promises. The consideration doctrine, for instance, what Penner cites as evidence of the nonidentity of contract and promise, is exactly what Charles Fried cites as the shortcoming of contract law and the suggested target of reform; to

Fried, the consideration doctrine does not disprove that contracts are promises but rather that contract law has not, so to speak, fully internalized the significance of contracts being promises (Fried 1981: 28–39; Fried 2011).

That chicken and egg problem is likely to recur with respect to other examples involving particular doctrines, e.g., contract law’s relative insensitivity to subjective intent in formation (Barnett forthcoming 2011) or to objective intent in performance or breach (Kimel 2010: 225–27). Critics of the contract-as-promise view will see divergent doctrines as counterexamples, whereas proponents of the claim will 1) dispute the critic’s underlying view of promise (e.g., thinking promises also involve objective intent in their formation); or 2) regard these doctrines as targets of criticism; or 3) take these divergent doctrines to be explained by reasons distinctive to features of legal enforcement or regulation that render it sensible for the legal treatment of such promises to differ from their moral treatment (Shiffrin 2007: 719–39). Mid-level doctrinal points, then, are unlikely to do much to resolve the dispute, because whether doctrinal similarity or dissimilarity is revealing depends ultimately on the underlying normative arguments about whether and how contract and promise should be strongly, if complexly, tied to one another.

Should contracts be built on promises?

It seems that we have to address the larger question of whether we should endorse a conception of contract built upon the foundation of promises or whether we should rather endorse a division, understanding contracts to bear only a loose connection to promises. An interlocutor might concede that contemporary institutions of contract (and ordinary language) correctly regard promises as foundational and necessary elements of contracts, but still question whether we *should* craft the legal institution in that way. Perhaps we *should* have a “law of agreements” understood to be

distinct from, though sometimes overlapping, the moral practice of promising. How exactly would these legally cognizable agreements differ from promises? The suggestion might be first, that they, in themselves, have no moral force directly, but only insofar as they generate legal duties, whereas moral promises have direct moral force. Second, the legal significance of these agreements, as we would construct it, need not be influenced by or predictably connected to the moral significance of their promissory counterparts.

A proponent of contract as promise might question whether this suggestion is truly conceivable, specifically whether there could be legitimate agreements (as opposed to illegitimate agreements, e.g., between criminals to rob a bank) that produced legal duties but no direct moral duties. Is it really possible to declare that one will make a commitment to another person (or organization) but – just by fiat – successfully declare that it will not have the moral power of a promise? That’s a valid concern, but for our purposes, let’s put it to the side. Supposing it were possible to create a legal institution that enforced “agreements,” and that by its own understanding, these agreements were distinct from promises and that promissory norms would have no influence, direct or indirect, on the legal treatment of these agreements. Would this division be wise?

As was canvassed at the outset, having parallel institutions of contract and promise may offer contract (and maybe promise) a source of justification and a source of guidance (perhaps only partial) about what shape its legal norms should take (Shiffrin 2007: 717–22; but see Craswell 1989: 490, 508–16). It may also render the institution more familiar and predictable to ordinary, non-lawyer citizens. On the other hand, a divisionist approach may permit innovation and flexibility in contract that the parallel approach does not.

Of course, in thinking about the normatively preferable institutional arrangement, our thinking should not be confined to the effect on contract law. We should also consider the impact on the moral relationships and on our moral culture of promising. (Shiffrin 2007; Murphy 2007).

Moral arguments for the division of contract and promise

Some argue that it behooves the moral culture of promising and contracting, and the norms associated with them, are kept distinct. On the one hand, some find the norms of promising too intimate and beneficent to extend to relations between strangers, mere business associates, or impersonal organizations; having a distinctive relation of contract supports the development of limited and constrained relations of trust between strangers without inappropriately forcing on them the closer relations and stronger duties associated with promissory partners (cf. Kimel 2003: 78–80).

Others worry that an overly tight connection between promise and contract threatens some of the values realized within the moral practice of promising. For example, if contract law were to enforce familial promises or promises without consideration, some worry that the background threat of enforcement might alter the meaning of such promises and their fulfillment; the motives for promissory compliance might become mixed or become perceived as mixed by recipients, and thereby deprive participants in such promises of the opportunity to use them and their fulfillment to express affection, voluntary beneficence and/or promissory fidelity clearly (cf. Eisenberg 1997: 847–49; Kimel 2003: 27–29; Bartrum 2011: 225, 234–35; Bagchi 2011).

Is contract as promise too morally demanding?

The first argument, that, in essence, contract as promise renders contracts too morally demanding and generates closer relationships than contractual parties reasonably seek seems misguided.

First, the treatment of contracts as promises need not involve imposing legal duties that would transform all contractual promises into the tighter bonds associated with promissory relations between intimates. Many of those tighter bonds of care and concern for the aims and goals of one's promissory partner, as I argued earlier, are closely associated with promising, but usually, strictly speaking, are not encompassed within the promissory commitment itself. True, taking contracts as promises seriously might entail some legal change that would be more demanding on promisors. Contract law might, in some cases of intentional and opportunistic breach, better reflect that contracts are promises by resorting, at least on some occasions, to stronger remedies than it does now, e.g., a more liberal use of specific performance, disgorgement or punitive damages. Even if it were to do so, however, that would not amount to creating fiduciary duties between contractual partners or requiring contractors to show care and concern for one another. Treating contract as promise consistently, even if it would amount to some legal reforms that render enforcement of contracts more rigorous, is not tantamount to requiring contractors to show deep care and concern, to form close relationships or otherwise to treat each other as intimates.

Moreover, it isn't morally obvious that we should promote the sort of extreme version of an arm's-length relation between contractors imagined by this objection. Why should the law *aim* to encourage parties to negotiate the distribution and exchange of socially important resources but to do so within relationships featuring only thin, almost alienated, (perceived) moral bonds to each other? Some proponents of this objection celebrate, for example, the efficient breach which, when performed opportunistically, involves unilaterally reneging on a commitment to one party merely in order to take advantage of a better, late-appearing opportunity with another. *That* sort of disdain for the reasonable and cultivated interests and expectations of one's

contractual partner in performance as such or even in participating in a decision to modify the arrangement in light of later-appearing opportunities and needs does not seem intrinsically worth protecting or encouraging; we need not protect that sort of relation of indifference to one contracting party's perspective on how the matter should be resolved in order to generate a contrast that will make the character of intimate relations meaningful. Cultivating an alienated stance toward others outside one's closest circle may fuel one sort of market efficiency, but does so at the risk of some troubling moral, relational and social costs. Some worry that it flirts with, and even spills over into, the sort of uninvolved, commodifying, exploitative and deeply self-interested stance towards one's neighbors that, in the long run, is incompatible with a fulfilling life and a sustainable community.

Even if that distant stance could be restricted or compartmentalized to mere business relations, that compartment is not discrete, small or insignificant. Business relations, in aggregate and often in the particular, involve transfers of important resources, major expenditures of time and large amounts of human contact and interaction (as in the employment market, for example). With respect to such significant interactions, it seems perverse to suggest as an ethical *ideal* that participants should proceed at the degree of arm's-length distance that suggests the other party smells. While, of course, the law is not the only important social and moral mechanism by which to resist the deterioration of social relations, at the same time, it is an important social institution whose pronouncements and reasons sometimes exert normative force, sociologically, and, independently, at least aspires to represent our joint collective reason. Hence, whether or not it legitimately falls within the law's sphere of responsibility to prevent drastically alienated relations or not, it seems appropriate to insist that the law not regard alienation as an end around which to design doctrines and decide cases.

Does contract-as-promise dilute the moral significance of promises?

Hence, the second argument, the one about dilution or adulteration of the moral practice, seems like the more serious one. Two related concerns may be at issue: first, that the background of contractual enforcement may alter the motives of promisors in undesirable ways and second, that the minimal requirements of contract may substitute for the norms of promising, transmogrifying what should be the legal floor into a moral ceiling – meeting minimal legal requirements may come to seem morally sufficient and thereby dilute (in perception) morality's richer demands. Whereas, if the two practices were kept conceptually distinct, the law's treatment of contract could not threaten to contaminate the moral practice of promising. Although there are real hazards here, I suspect these concerns are not dispositive.

These concerns about adulteration and dilution sometimes take an expressive cast and sometimes an empirical cast. We might worry that by creating a legal institution of contract, we are expressing or suggesting that contractors' motives for performance should be driven by the law's decrees and by the law's reactions to nonperformance (Bagchi forthcoming 2011). Consequently, we might then care to distinguish between contract and promise because it is important to the moral values of promise that they be achieved through voluntary performance, from some sort of respect for the promisee's rights or concern for his interests.

Or, in the (nonexclusive) alternative, we might worry that whether or not the existence of the legal institution of contract suggests that legal reasons should dominate the motives of contractors, that empirically, legal recognition and legal remedies have just that effect; they come to dominate contractors' motives and so, if contract and promise are identified with one another, legal motives for compliance will displace, or "crowd out," moral motives and thereby strip some important moral practices of their full meaning.

Floating somewhere in between the expressive claim and the empirical claim is the concern that the identification of contract with promise may give promisees some reason, whether or not it is a decisive or accurate reason, to suspect promisors of complying with their promissory commitments from fear of legal repercussions. Promisors who transact against the backdrop of the prospect of this anxiety, in turn, lose the opportunity to express their promissory fidelity purely, without the suspicion that their motives are more self-interested than other-regarding. Let's call that concern the worry that contract rules "cloud out" clear moral and affective forms of expression.

Does contract law aim to figure in promisors' motives for compliance?

The expressive version of this concern seems strained. It reflects an implausibly narrow view of what legal institutions express to the public about the activity they recognize and regulate. That is, the existence of a legal institution is not well interpreted to convey any collective desire that contractors' motives be dominated by responsiveness to the legal institution and its decrees. We might adopt an institution of contract as a form of recognition of and support for the value of promising: among other things, to provide blueprints to the parties for how to handle hard or unforeseen circumstances as well a way to render promises official and recognizable to third parties. Rather than communicating something about ideal motives for compliance to potential contractors, the legal institution may aim to empower promisors by providing them with the stamp of certification or even approval. It may be used to identify or qualify participants for other resources (like marital benefits, ownership upon dissolution of a partnership, creditor's rights in case of bankruptcy, etc.) or induce third parties to proffer other opportunities (e.g., other contracts such as loans) to one party given that s/he has already secured other recognized contractual

partners. This is, for example, how many understand the legal institution of marriage, a particular form of legal recognition for both a relationship and particular promises within it; scant few, not even the critics of marriage, believe that the expressive point of the legal institution of marriage is to convey that marital partners should participate in marital activities in deference to the legal institution's recognition and interest in marriage. Quite the contrary.

In the case of marriage and in the case of other contracts, we might also adopt a legal institution of contract to provide a backstop of security and assurance of protection for contractors in case standard practices of compliance falter or encounter obstacles; providing a backstop in no way conveys that we hope or aim for contractors to substitute legal-regarding motives for performance for the correct relational and moral motives. This backstop function should also be familiar from the case of torts and criminal law. Although the aim of a backstop may be to provide additional and failsafe reasons for compliance for the tempted or the improperly motivated, no one believes that civil and criminal prohibitions on assault and remedies for noncompliance are intended to *substitute* among generally compliant citizens for the more powerful reasons for respecting others' rights to security and bodily autonomy. So, why take it that the expressive aim of contract law, in particular, is to displace the foundational moral motives for making and keeping contracts?

To be sure, legal institutions do often aim to generate reasons for action even for compliant citizens, whether through the mechanism of direct regulation or through mechanisms like subsidies. Where, prior to the law, citizens (whether as a collective or as individuals) do not otherwise have a reason or a decisive reason to perform an action, the law may provide such reasons. Laws identifying what side of the road to drive on, what form to use to fill out one's tax return, where to mail one's return, where to dispose of recyclables, or laws subsidizing particular

modes of environmentally sustainable transport, etc., aim to give citizens a reason to do something on the very grounds that that action is legally specified or encouraged; the prior moral reasons to act either did not decisively point in that direction or would direct otherwise unless there were official direction or security that others would have a decisive reason to act in coordination. But although the law does, on occasion, aim to provide leading reasons for actions, there is little reason to suppose that the case of contract has *that* expressive meaning with respect to promissory fidelity, given that there is already sufficient moral reason to perform.

Could contract as promise exert a poor influence on promisors' motives?

Even if the expressive concern can be answered, is there more cause for alarm that, empirically, the institution of contract as promise will encourage people to substitute legal-regarding motives for moral motives? Or, that in worrying that others will do so, important forms of moral expression will be sufficiently ambiguated or eclipsed? These possibilities are, in principle, important ones, but without further evidence, it isn't clear that they represent significant threats. To merit serious concern, it seems that at least three further things would have to be shown. First, that crowding out and clouding out are more serious risks for contract than for tort or criminal law, serious enough to suggest a conceptual division between contract and promise. In the case of tort, there is little serious concern that legal regulations on bodily contact have come to dominate the motives of citizens or that citizens believe their safe passage across the streets is generally a matter attributable to law and not to basic civic decency. Why should we worry more about the case of contract law's infiltrating and tainting moral citizens' primary motives of promissory fidelity and trustworthiness, rather than its working as a form of official recognition and source of backstop assurance? Second, it would need to be shown that to the extent that these concerns are

serious, they resist effective management through institutional design, clarification and public communication. To avoid crowding out moral motives, it may be important that the purpose and rationale for legal regulations and reactions be clarified – that they be presented as guidance measures, backstop measures and as the community’s remedial reaction to wrongdoing, rather than their presentation remaining open to the interpretation that they are prices for the alternative behavior of breach or enforcement measures reflecting distrust in citizens’ moral virtue or fidelity. It is unclear that the law would crowd out moral motives where the law’s purpose was clearly designed and explained as aiming to express, supplement and buttress a normative expectation, rather than as aiming to replace the moral culture with a pricing scheme or with legal-regarding motives (Bowles and Polania Reyes 2009: 20–21; Bowles 2011: 57–65, 72–74). Further, in many of the documented cases of external incentives or regulations crowding out self-regulation or self-regulatory moral motives, specifically delineated fines, quotas or financial incentives were presented as reactions to particular choices (Gneezy and Rustichini 2000; Bowles 2008); this specificity may encourage the view that they are prices for behavior, suggesting that the behavior was discretionary if the agent were willing to pay. This may provide a further argument for remedial design based on standards of proportionality and fairness, which are both explicitly normative in content but somewhat uncertain in application, rather than upon remedial design measures emphasizing precise and predictable rules, formulas, multipliers or caps (Shiffrin 2010: 1240–45).

Might divisionist approaches dilute moral expectations?

Indeed, the empirical concern about contract diluting moral culture may run in the other direction, operating as a criticism of divisionist approaches. Even if we could conceive of contracts as

entirely distinct from (and not building upon the foundation of) promises, we might worry. Given the similarities between agreements that are contracts and agreements that are promises, an official division between the two domains (manifested by an authorized practice of looser fidelity with respect to contract, for instance) might yield potential inadvertent seepage from contract to promise. Because the law often establishes (and deliberately expresses) a baseline of *minimally* morally permissible behavior, a posture of encouraging an instrumental approach to fidelity with respect to agreements that are contracts might transmit misleading blueprints and potentially corrosive habits toward agreements as a general matter, that could, in turn, infect our moral habits and intuitions about agreements that are promises. We might try to clarify that contracts and promises are distinct entities to thereby enable people to make a moral distinction between their appropriate treatments. But an effective and tight compartmentalization between the two may not take root in the soil of a basically artificial, contrived distinction. Unless we can point to larger, more fundamental differences between the agreements that make up contracts and the agreements that make up promises other than just that a division instrumentally suits our convenience, the strong similarities between them may encourage interchangeable treatment. If we begin to rely on what passes as minimal respect for one sort of agreement, that practice and habit may risk that, operationally, we will lower the felt baseline for what is expected and counts as minimal respect for the other. Of course, this empirical counter-concern, like the other empirical claims so far discussed, would require further investigation and evidence to merit any strong conclusions.

Does contract's proximity to promise affect the meaning of promissory practices?

Finally, turning to the “clouding out” concern, to regard it as serious, we would want a reason to think that individual and social efforts at clarification could not succeed to disambiguate individ-

ual motives (as they seem to in the case of most people's observable reasons for refraining from intentional torts). In the case of gift promises, for example, if they were legally enforceable even absent detrimental reliance, their serving as expressions of personal care (rather than as legal duties) might be ascertainable from the fact that they were voluntarily offered and from the evident spirit with which they were carried out – whether from a continuing spirit of affection or from the compulsion of duty. Promisees truly anxious about the meaning of the performance could also generate clarification by explicitly waiving the legal duty to perform and then observing whether the promisor acts nonetheless.

Two further points might be made about the clouding-out concern. Although the backdrop of legal enforcement may risk ambiguating the expressive meaning of voluntary performance, it also provides a distinctive expressive opportunity. It allows a gift promisor, for example, to indicate that her desire to make a gift is serious enough that she is willing to express it in ways that render her legally accountable; although, if the concern bears out that the prospect of legal enforcement eclipses the clarity and transparency of moral action, that expressive opportunity probably pales in comparison. More important, if the institution of contract does ambiguat moral performance in certain pockets of promissory life like those involving gift promises, the contract-as-promise approach has the resources to acknowledge this. If the purpose of legal enforcement of promises is to buttress the moral culture of promising, but if with respect to certain promises, legal enforcement overly complicates, confuses or contaminates the moral culture, then that provides a legally distinctive reason for abstaining from enforcement in that domain; the contract-as-promise approach need not treat all promises as contracts. Its exemption of some promises from contractual enforcement on grounds relating to the purposes of law (e.g., enforc-

ing only those promises that are demonstrable to third parties) or to the health of the moral culture resonate consistently with a general approach that aims to take promises seriously.

Thus, I doubt whether concerns about the effects of (a well-designed) contract law on our moral culture provide substantial reasons to treat contract and promise as entirely distinct domains (assuming it is possible to do so) and I believe the contrary conclusion is more apt.

A final moral argument for contract as promise

A concluding consideration both about the meaning of the divisionist proposal and its fairness: although the expressive meaning of the law is not always simple to divine, as I have explored, one might worry about the expressive significance of the divisionist proposal. It would intentionally and deliberately hive contract from promise and, thereby, deliberately endorse a legal regime that provides no legal enforcement and no direct and general public recognition of promises as such. We often intend the law and our legal practices to convey, and they often are understood to convey, messages and patterns of what constitutes morally minimally acceptable (if not, as discussed above, optimal) activity. Against the backdrop of a legal system that includes a system of tort, a system of property recognition and enforcement, and a system of recognition of enforcement of individual rights, this omission might seem to convey that promises, bonds of trust and their breach matter less than these other goods and wrongs the system does recognize. On its face, it is hard to justify that hierarchy from a political point of view, given the tremendous significance of practices of fidelity and trust to a flourishing social system (Bowles 2011: 47; Shiffrin 2007: 714). Why should we think that suffering breach of trust does not rate public concern but that minor property damage or injury to reputation does? It would be hard for a moral

agent to accept this hierarchy as a reasonable public rationale, even if its implementation might provide greater economic benefits in the aggregate and for particular promisors and promisees.

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Further reading

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