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Contract: Not Promise

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CONTRACT: NOT PROMISE

MICHAEL G. PRATT*

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I. INTRODUCTION

In order to form a contract at least one of the parties to the bargain must give an undertaking or commitment of the appropriate kind to the other; that is, he or she must perform a commissive speech act of the right kind. It is widely held that the act in question is not a technical or distinctly legal speech act, but rather the same prosaic act of promising that is the subject of the everyday moral practice we learn about as children. Indeed, it is standard textbook fare that a contract is a promise (or an exchange of promises) that the law will enforce. In this Essay I argue that this orthodoxy is mistaken: the commissive speech act by means of which a contract is formed is not the same speech act as that by means of which we voluntarily undertake moral obligations to others.

My principal concern here is the descriptive claim that contracts comprise promises. I am not concerned in this Essay with the prescriptive claim of the so-called “contract-as-promise” theorists that contract law ought to enforce promises. These theorists hold that the proper purpose of the law of contract is to give direct legal effect to the morality of promise-keeping.¹ Except insofar as these theorists purport to draw support for their prescriptive claim from the proposition that contracts are in fact formed by promises, my argument here will leave their theories untouched.

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1. The classic work in this vein is CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981). For a more recent account of contract law in the contract-as-promise tradition, see STEPHEN A. SMITH, *CONTRACT THEORY* (2004).

The thesis that contracts are promises is frequently assumed and seldom argued in the literature. Textbook writers, concerned primarily with doctrine and impatient with close analysis of moral concepts, tend to refer to contractual undertakings as “promises” without much analysis of the nature and significance of promises outside of the law. From their pens, the proposition that “contracts are promises” often looks like mere stipulation. Nor do most contract theorists dwell long on the question of whether the constituents of contracts are promises; their primary concern vis-à-vis promising is the different question of whether and to what extent contract law ought to be in the business of enforcing promises.² Happily, however, there are exceptions. Indeed, one of the most important recent contributions to contract theory is an elegantly wrought paper by Seana Shiffrin in which she argues for and lays heavy emphasis on the claim that contracts are promises.³

I have chosen to use Shiffrin’s paper as the specific target of my general argument that contracts are not promises. Shiffrin’s central claims are that contracts are promises, that contract law diverges from the morality of promising, and that this divergence stands in need of justification.⁴ After outlining this aspect of her paper, I argue that the law of contract is not concerned with promises as such and that, therefore, contract and promise do not diverge in a way that calls for justification. In the process of making this argument I draw certain significant philosophical conclusions about the nature of promises and promissory obligations.

II. SHIFFRIN ON THE DIVERGENCE OF CONTRACT AND PROMISE

Shiffrin’s paper is remarkable for the significance she attaches to the proposition that contracts are promises. She argues not merely that the proposition is true, but moreover that it has important implications for the content of the central default rules of contract law.⁵ This is an uncommon claim. Contracts scholars typically hold that the putative fact that contracts are promises may be relevant to the rules of contract formation, but that it has little or no bearing on the content of postformation default rules, such as those relating to performance, excuse, and remedies.⁶ The reason for this is that the proposition that contracts are promises does not imply anything in

2. See, e.g., Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417, 1422 (2004).

3. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 709 (2007).

4. See *id.* at 709.

5. *Id.*

6. See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489 (1989).

particular about the function or purpose of contract law.⁷ The claim that contracts are promises does not, for example, imply that the law of contract is animated by a concern with the moral bindingness of promises. That the law invokes promises as the exclusive means of contract formation does not necessarily bespeak a concern with their moral significance. The familiar commissive speech act of promising is, after all, a salient and convenient choice as the vehicle for contractual commitment. Thus one can coherently adopt the position that contracts are promises but that the moral bindingness of promises is irrelevant to the justification of contract law. Such is the position of most utilitarian theories of contract, including those within the law and economics tradition.⁸

Shiffrin does not dispute any of this: she does not claim that the fact that contracts are promises points to a particular purpose for the law of contract.⁹ Despite this, Shiffrin insists that this fact places certain important constraints on the content of the central default rules of contract law.¹⁰ These constraints are the product of a theoretical framework that Shiffrin proposes for assessing the legitimacy of any divergence between legal and moral norms governing the same activity, including those legal and moral norms that govern the activity of promising.

Shiffrin's approach to the relationship between legal and moral norms steers a subtle course between two much more established veins of thought. On the one hand are those approaches Shiffrin calls "separatist," which hold that the law occupies an independent normative domain with purposes distinct from those that animate the norms of interpersonal morality.¹¹ Separatists insist that these moral norms are not themselves a proper concern of the law and therefore the law need not be especially concerned about diverging from morality in its treatment of a given activity.¹² In particular, a divergence

7. The status of the claim that contracts are promises as largely unchallenged orthodoxy doubtlessly owes something to its compatibility with widely divergent accounts of the purposes of contract law.

8. It is also the position of those who subscribe to both the (Millian) thesis that the state may interfere with liberty only insofar as doing so protects against harm, and to the view that the moral obligation of a promise is not reducible to a duty to avoid doing harm. See, e.g., Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 934-38 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)). These theorists hold that contractual obligations are triggered by promises in their capacity as reliance-inducing instruments of potential harm, but they are not promissory since they are justified by (harm-based) reasons that are independent of those that support the moral obligation of promises. See *id.* at 923-27.

9. Indeed, Shiffrin commits to no particular view of the function of contract law in her paper. See Shiffrin, *supra* note 3, at 720-21.

10. See *id.* at 722-27.

11. *Id.* at 713.

12. *Id.*

between the legal and moral treatment of promises raises no special concerns for the separatist.¹³

On the other hand are those approaches to the relationship between law and morality that Shiffrin labels “reflective.”¹⁴ Reflectivists hold that the proper function of the law is to “reflect everyday moral judgments whenever possible, whether because this is the nature of law or because, as a matter of political philosophy, it is what law should aim to do.”¹⁵ Reflective theories of contract hold that the purpose of the law of contract is to enforce the morality of promise-keeping; contract law is and ought to be the positive morality of promising, with rules and doctrines that closely reflect the norms that govern the everyday moral practice of promising.¹⁶

Shiffrin rejects both of these approaches in favor of one that borrows insights from each.¹⁷ She shares the separatists’ distrust of morality as a template for the content of legal rules, since these must be shaped at least in part by goals and purposes that are peculiar to the law as a distinct normative enterprise.¹⁸ But she shares the reflectivists’ view that in working out the rules governing a particular activity, the law ought to be sensitive to the norms of interpersonal morality that apply to that activity.¹⁹ This sensitivity is called for not by an imperative to replicate the content of morality, but by a recognition that those who are bound to obey legal rules pertaining to a particular activity are often also subject to norms of morality that govern the very same activity.²⁰ This overlap creates a site of potential divergence between two sets of norms, and thus a potential impediment to the ability of a moral agent “to lead a full and coherently structured moral life.”²¹ In these contexts the law must ensure that the moral agency of its subjects can flourish. “Especially because there are moral duties to obey the law,” writes Shiffrin, “legal rules should be sensitive to the demands placed on moral agents so that law-abiding moral agents do not, as a regular matter, face substantial burdens on the development and expression of moral agency.”²² Shiffrin expresses this constraint on the law in the form of a basic principle: “[W]hen a legal practice is pervasive and involves simultaneous participation in a moral relationship or practice, the content

13. *Id.*

14. *Id.*

15. *Id.*

16. See FRIED, *supra* note 1, at 17. Fried argues that “since a contract is first of all a promise, the contract must be kept because a promise must be kept.” *Id.*

17. See Shiffrin, *supra* note 3, at 713-14.

18. *See id.*

19. *See id.* at 714.

20. *Id.* at 714-15.

21. *Id.* at 717.

22. *Id.* at 715.

and normative justification for the legal practice must be acceptable to a reasonable moral agent with a coherent, stable, and unified personality.”²³

From this basic principle Shiffrin derives three more specific constraints on the content and justification of divergent legal rules, legal rules that govern morally-infused relationships and practices but which depart from the relevant moral norms.²⁴ Only one of these constraints is relevant for my purposes, namely, that which requires that divergent legal rules and their rationales be transparent and accessible to the moral agent and that they be “compatible with her developing and maintaining moral virtue.”²⁵ The agent must be able to accept some justification (the best one, if not the official one) for the divergence between the legal and moral requirements without compromising her moral convictions. I call this the “transparency” constraint.

Having established the transparency constraint, Shiffrin proceeds to argue that contract law diverges from the morality of promising and that this divergence falls foul of that constraint.²⁶ Shiffrin cites several examples of divergence between contract and promise, the primary one being the failure of contract law to require parties to perform their contracts.²⁷ By favoring damages over specific performance as the primary remedy for breach, by measuring those damages in terms of lost expectancy, and by denying punitive damages for wilful breach, “[t]he law thereby fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price.”²⁸ This failure amounts to a divergence from morality, for “[i]f contract law ran parallel to morality, then contract law would—as the norms of promises do—

23. *Id.* at 717.

24. *See id.* at 718-19.

25. *Id.* at 718. The first of the other two constraints requires that divergent legal rules permit a moral agent to lead “a life of at least minimal moral virtue.” *Id.* The upshot of this relatively weak requirement is that a divergent legal rule must not require an agent to behave in a way that is flatly inconsistent with the dictates of morality. The second constraint arises not because of the direct effects on moral agency of a divergence between legal and moral rules (and the justifications for it), but rather because of the potentially deleterious effects of this divergence (and its attendant justifications) on a culture that supports morally virtuous character. *Id.* The law governing a particular activity must permit moral agents to partake in that activity “without running the risk that their participation will corrode the habits and expectations associated with moral practice.” *Id.* at 740. Call this the “cultural” constraint. Much could be said about this constraint, which Shiffrin deals with at length in her paper. For my purposes, however, Shiffrin’s arguments are of interest only insofar as they depend on or seek to substantiate the thesis that contracts are promises. Shiffrin’s central claim, and the one tied most tightly to the proposition that contracts are promises, is that contract diverges from promise in failing to compel promisors to keep their promises and that this divergence must be justified. *Id.* at 709.

26. *Id.* at 722.

27. *Id.* at 722-24.

28. *Id.* at 724.

require that promisors keep their promises as opposed merely to paying off their promisees. The only difference is that it would require this as a legal, and not merely a moral, matter.”²⁹

Shiffrin argues that this divergence between contract and promise violates the transparency constraint since it cannot be justified to a virtuous moral agent. Consider an efficiency-based justification of the divergence, for example. It is often argued that the goal of contract law ought to be efficiency, and that this goal is served by prohibiting punitive damages and by establishing damages in the expectation measure as the primary remedy for breach.³⁰ But the virtuous agent must reject any appeal to the idea of efficient breach in justifying the relevant divergence, since efficient breach theory encourages agents to breach when it would be efficient to do so. This directive places the moral agent in a position of acute conflict. “How,” Shiffrin asks, “could a moral agent think both that breach of promise is, all things considered, wrong and also that it makes sense for us, as a community of moral agents, to create a system in which we attempt to encourage, however mildly, breach of promise . . . ?”³¹

Shiffrin’s argument that the law’s permissive stance toward contractual breach is incapable of being justified to a virtuous moral agent need not detain us any longer here.³² My quarrel is with her view that the law’s permissive attitude toward breach stands in need of justification in the first place. I argue that, in permitting contractual breach (subject to payment of damages), the law does not actually diverge from the morality of promising: there is no divergence between contract and promise to be justified.

Notice that the fact that the law adopts a permissive stance towards contractual breach does not by itself imply that it diverges from the morality of promising. Even if it is established that morality requires promises to be strictly performed, the conclusion that contract diverges from the morality of promising follows only on the back of the crucial premise that *contracts are promises*. If this premise is false, and the law of contract is not devoted to enforcing promises as such, then its permissive stance toward contractual breach presents the virtuous moral agent with no conflict at all, because the law adopts no stance toward promise-breaking. If the law does not

29. *Id.* at 722.

30. *See, e.g., id.* at 730.

31. *Id.* at 732-33.

32. If the law’s permissive attitude toward breach is to be acceptable to a virtuous moral agent then it must be justified in a particular way. Specifically, it must be justified by reference to limits on the ability of the law to require contractual performance that are due to the nature and function of the law and its institutions, rather than by reference to norms (like efficiency) that argue in favor of a permissive stance toward breach by individuals and institutions generally. Shiffrin argues that no such justification is available. *Id.* at 732.

enforce promises, if its concern is not with promises as such, then the law cannot be accused of permitting promises to be broken.³³

The law attaches a contractual obligation to the act of giving a particular kind of undertaking to another under certain conditions. Like many textbook writers, Shiffrin thinks that the undertaking in question is not a technical or peculiarly legal speech act, but just the ordinary commissive known as “promising,” the subject of a pervasive moral practice and certain familiar moral rules. “Contracts do not merely resemble promises,” she writes, they “are embedded within contracts and form their basis.”³⁴ I argue in the remainder of the Essay that this view is mistaken; the law of contract is not devoted to enforcing promises, and therefore, it does not diverge from the morality of promising.³⁵

III. MAKING CONTRACTS WITHOUT PROMISES

Consider Rudy, a self-employed electrician, and Eliza, a homeowner who recently hired Rudy to do some work for her. A wiring fault in Eliza’s home had been causing periodic electrical power surges for some weeks, resulting in the destruction of several electronic devices. An attempt by another electrician to find the fault had failed, so Eliza, wary of pouring good money after bad, asked Rudy before he began the work if he would promise to fix the problem. Rudy, an eccentric, earnest, solitary sort who takes pains to minimize the moral claims others have on him, told Eliza that he was uncomfortable making promises to his customers and that he preferred to make his business commitments by contract alone, leaving the morality of promising entirely out of the picture. He said that he would fully guarantee his work by contract but that his contractual

33. This is not to deny that the law’s permissive stance toward breach may have a corrosive effect on the culture of promise-keeping, in violation of the cultural constraint. See discussion *supra* note 25.

34. Shiffrin, *supra* note 3, at 721.

35. Shiffrin does not actually address the question of whether contracts are promises directly, preferring to focus instead on “contract law’s explicit self-representation of its relationship to promising.” *Id.* at 721. She believes contract law, saturated with “[t]he language of promises, promisees, and promisors,” represents “contracts as resting upon promises per se.” *Id.* at 721-22. Despite her emphasis on contract law’s own description of contracts as promises, however, Shiffrin presumably means to imply that this description is accurate. Indeed at the outset of her paper she states that “[i]n U.S. law, a contract is described as a legally enforceable promise. So to make a contract, one must make a promise.” *Id.* at 709. Her principal thesis is that a virtuous moral agent could not accept any justification for the divergence between contract law and the morality of promising. But the claim that the law describes contracts as promises can only support the lesser thesis that “a virtuous agent could not accept this self-description as accurate while also accepting the justification and structure of some of the divergence of contract from morality.” *Id.* at 722. This thesis is far less robust than the one that Shiffrin sets out to demonstrate, for it leaves open the question of why a moral agent should take the law’s description of contracts as promises as accurate.

commitment should not be construed as a promise. Eliza (who was confident that Rudy was not judgment-proof) told Rudy that she would be satisfied with an exclusively legal commitment made in writing.

Rudy drafted an agreement in which he undertook to “locate and repair the wiring fault(s) responsible for the recent power surges in the customer’s home,” and Eliza undertook to pay Rudy five hundred dollars “upon completion of the repairs.” The agreement also contained the following clause: “the commitments expressed herein are exclusively contractual. We intend hereby to bind ourselves contractually to make the payments and to perform the acts specified, but we do not intend to bind ourselves morally to do so: these are contractual undertakings, not promises.” Both Rudy and Eliza signed the agreement.

It is clear that Rudy gave an undertaking to Eliza and that in doing so he made a contract with her.³⁶ Less clear is whether Rudy’s undertaking was a promise. I suspect that Rudy made no promise to Eliza. Whatever may be involved in its performance, the garden-variety speech act known as “promising” is not performed by a speaker who manifestly denies promising and who disclaims any moral obligation to perform his undertaking. If I am right about this, then not all contractual undertakings are promises and contracts are not properly defined as promises that the law will enforce.

Am I correct that Rudy made no promise to Eliza? It is not obvious that I am. One might, after all, preserve the orthodoxy that contracts are promises by stipulating a definition of ‘promise’ broad enough to capture cases like Rudy’s. Consider the definition offered by the Restatement: “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”³⁷ According to this capacious definition of promise, Rudy did indeed make a promise

36. Daniel Markovits objected that the example of Rudy’s agreement with Eliza provides no independent support for my thesis that contracts do not require promises. His rationale is that a person who holds the view that contracts *do* require promises will simply conclude that, by disclaiming an intention to make a promise, Rudy disclaimed an intention to make a contract, thereby precluding the formation of a contract. But it is too rough a gloss on Rudy’s words to say simply that he disclaimed an intention to make a promise. Rudy purported to avoid making a promise *by disavowing an intention to become morally bound by his undertaking*. I take it to be clear that Rudy entered a contract despite this disavowal; it seems implausible that the law would require a party to intend to assume a moral obligation in order to undertake a contractual obligation. The example is intended to bring this intuition into relief (though I concede that I offer no substantive account of contractual obligation of the sort that would be required to convince one who does not share this intuition). Of course one might share the intuition but still maintain that contracts are promises on the basis that Rudy made a promise *despite* his disavowal. I argue at length below, however, that if “promise” refers to a morally salient species of undertaking, then Rudy made no promise.

37. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

to Eliza. How then shall we determine whether Rudy's contractual undertaking is a promise or whether it is a counterexample to the claim that contracts are promises?

Notice that the issue here is not whether Rudy's undertaking is properly characterized as a promise under some widely accepted definition of that term. Whether a particular act is or is not a promise is in many contexts a question of substantive morality, not semantics. To assert that so-and-so made a promise is typically to claim that so-and-so owes it to another to do what she said she would do. Similarly, those who assert that contracts are promises often mean to make a claim about the moral significance of the kind of undertakings involved in making contracts. This is certainly true of Shiffrin. Her claim that contracts are promises is shorthand for the claim that contracts are formed by a species of undertakings that are governed by certain definite moral norms, including a norm that requires the promisor to "keep her promise through performance."³⁸ By asserting that contractual undertakings are promises, Shiffrin means to underscore their moral salience, and specifically their moral bindingness, which is crucial to her thesis that the directives of contract law govern an activity that is the specific subject of certain moral norms.

But if promises are undertakings to which certain definite moral norms attach, including a requirement that they be performed, *then contracts are not promises* for Rudy's undertaking does not place him under a moral requirement to resolve Eliza's electrical problem. Rudy is not subject to the kind of moral obligation that he would have assumed had he given Eliza a morally binding undertaking. This is not to deny that Rudy may be subject to certain *non-promissory* moral obligations owing to his having entered a contract with Eliza. Thus morality may require Rudy to take reasonable steps to prevent her from relying to her detriment on a false belief that he will complete the repairs. Should Rudy decide not to do the work, for example, he may be morally required to inform Eliza of this in a timely manner so as to avoid unnecessary prejudice to her position. But Rudy is under no moral obligation to complete the repairs (or even to attempt to do so) just in virtue of his having undertaken to complete them. And this is the crucial point, for if he had made a promise (in the sense intended by Shiffrin), then Rudy would have acquired a moral obligation to effect the repairs (or to endeavour to do so) simply by virtue of having issued the promise.

The objection to the claim that contracts are promises, which I have been pressing, exploits the fact that at least some contractual undertakings generate nothing like the moral obligation to perform

38. Shiffrin, *supra* note 3, at 722.

that attaches to the making of a binding promise. Now, one might argue that this fact does *not* refute the claim that contracts are promises since the moral norms of promise-keeping allow for exceptions such that a promise made under certain circumstances, such as Rudy's, will generate no moral requirement to perform. On this view promises *normally* entail a moral obligation to perform, but under certain exceptional circumstances, like that of Rudy, they are not morally binding.

Does this argument from exception rescue the claim that contracts are promises? The substantive moral content of that claim, recall, is that the law of contract is concerned with a morally salient class of undertakings called promises. So the argument from exception can succeed only if it can explain how a class of undertakings that includes some (like Rudy's) that leave the agent morally free to choose not to perform is nevertheless a morally salient class of undertakings. I argue that no such explanation can succeed, but it is useful in making this argument to consider how such an explanation might proceed.

The argument from exception might proceed by claiming that, despite the fact that not all promises are morally binding, those that are binding attract obligations of a distinctive kind, and this distinctiveness explains the moral salience of promises generally. In particular, the moral obligations created by promises are voluntary or self-imposed. They seem, indeed, to be "created by the deliberate choice of the individual,"³⁹ and to "arise[] from our mere will and pleasure."⁴⁰ This suggests that promises are governed by a distinct set of moral norms, the purpose of which is to empower individuals to create voluntary, self-defined obligations toward others by means of a simple speech act. Promising is the act of attempting to exercise this normative power: to promise is to communicate one's intention to undertake, by that very act of communication, an obligation to adhere to the promised course of conduct.⁴¹ Making a promise brings the relevant power-conferring moral norms into play even if some exceptional promises (such as Rudy's) do not succeed in binding the promisor to perform.

According to this argument from exception, there exists a distinctive morality of voluntary obligations, a set of moral norms pertaining to those who make promises, that is, to those who communicate their intention to assume an obligation. If this argument is sound

39. H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 103 (A. I. Melden ed., 1958).

40. DAVID HUME, *A TREATISE OF HUMAN NATURE* 332 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000).

41. See J. Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 218-19 (P.M.S. Hacker & J. Raz eds., 1977).

then it might explain how Rudy's promise is morally salient, that is, how it is subject to certain special moral norms *despite* that it leaves Rudy morally free to choose not to perform.

But that argument cannot succeed. The problem is not that its animating premise about the voluntary character of the moral obligations created by promises is mistaken; to the contrary, the trouble is that it does not take this premise seriously enough. The moral obligations that promises generate are indeed distinguished by the fact that they are self-imposed or voluntary. That is what makes them special. But what is it exactly that distinguishes an obligation as voluntary? Intuition suggests the following answer: a voluntary obligation is one that would not obtain but for the intention of the obligor to acquire it. Voluntary obligations are those that depend on the intention of the obligor to take them on.⁴² Notice what this idea of voluntariness entails. An obligation O_x that is capable of obtaining even if the obligor intends to acquire some obligation O_y that is meaningfully distinct from O_x is *not* a voluntary obligation. In particular, a *moral* obligation (to do thus-and-so) that is capable of binding an obligor who intends to acquire a *legal* obligation (to do thus-and-so), is not in any meaningful sense a *voluntary* obligation.

The upshot of this intuition is that a voluntary moral obligation can be created only by acting with the intention to create it. So an undertaking like Rudy's that seeks to bind the agent only in law (or some other non-moral normative regime) cannot give rise to a voluntary moral obligation, regardless of the circumstances under which it is made. The argument from exception must therefore be false, for if Rudy's undertaking cannot generate a voluntary moral obligation then it has *no moral significance whatsoever* as an undertaking. Morality does not have anything in particular to say about undertakings *simpliciter*; there is no such thing as a morality of undertakings, distinct from the morality of promises. I conclude that not all undertakings by means of which contracts are created are the subject of special moral rules, and the substantive moral content of the claim that contracts are promises is therefore false.

Am I correct that morality has nothing in particular to say about undertakings *simpliciter*, and that it is concerned only with *promissory* undertakings, that is, with undertakings that communicate the intention of the speaker to assume a moral obligation? Beyond an appeal to intuition, I have provided no support for this claim. I turn now to that task.

42. I discuss this conception of voluntary obligations in more detail in Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 26 L. & PHIL. 531 (2007).

IV. PROMISSORY INTENTIONS

The claim I want to establish is that an undertaking cannot generate a moral obligation of the promissory variety unless it is given with the manifest intention of creating a moral obligation. I call this the “voluntariness” thesis. This thesis implies that the morality of promising is concerned not with undertakings generally, but only with undertakings that communicate the speaker’s intention to assume a moral obligation. Call these “m-undertakings.” If the voluntariness thesis is true, then the claim that contracts are promises must be false. The substance of that claim, recall, is that the law of contract is concerned exclusively with (some subset of) a morally salient class of undertakings called “promises.” But, if the voluntariness thesis is true, then the only morally salient undertakings are m-undertakings, and since contracts need not involve m-undertakings (as Rudy’s case illustrates), contracts are therefore not promises.

I claim that the voluntariness thesis must be true because it provides the only plausible account of why Rudy is not morally obligated by his undertaking, namely: one cannot undertake a moral obligation of the promissory variety without communicating one’s intention to acquire a moral obligation; Rudy manifestly had no such intention; therefore, he did not assume a promissory obligation. What other explanation is available as to why Rudy is not morally obligated by the guarantee he gave to Eliza?

One such explanation is suggested by an analogy with the law relating to disclaimers of contractual liability. Consider section 21 of the Restatement which provides: “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”⁴³

According to this provision, contractual liability does not depend on a manifest intention to acquire it, though it may depend on the *absence* of a manifest intention to *avoid* it. This suggests that it is Rudy’s manifest intention to avoid becoming morally bound by his undertaking that prevents him from becoming morally obligated and *not* the fact that he did not communicate an intention to morally obligate himself. I call this the “no-disclaimer” thesis, and I will argue that it is not plausible.⁴⁴

43. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

44. It is noteworthy that, like the voluntariness thesis, the no-disclaimer thesis also amounts to a refutation of the claim that contracts are promises. For if “promises” refers to the class of morally significant undertakings, and if morality attaches no force to undertakings that are given with the manifest intention of *not* creating a moral obligation, then Rudy’s undertaking was not a promise; therefore, contracts are not promises.

According to the no-disclaimer thesis, Rudy could have become morally bound to perform his undertaking had he not qualified it with a disclaimer of moral responsibility, despite that he did not communicate an intention to become morally bound by it. The trouble with the thesis surfaces when we ask how the fact that Rudy disclaimed moral responsibility for his undertaking implies that he is not required to perform it. The fact that Rudy made explicit his intent to avoid becoming morally bound by his undertaking cannot be a sufficient reason not to require him to perform it if his undertaking otherwise would have bound him to perform. 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. The concept of an obligation entails that such a plea must be irrelevant. For a requirement that I do X to be an *obligation* on me to do X it must be the case that my aversion to doing or being required to do X is irrelevant to the question whether I *should* do X.⁴⁵

Rudy's disclaimer does not extinguish a promissory obligation that his undertaking would otherwise have attracted; rather, it establishes that Rudy's undertaking is not an m-undertaking and was therefore morally inert to begin with.

V. OSTENSIVE PROMISES

It might be objected that if the voluntariness thesis is true then Rudy's disclaimer is superfluous, and yet it is clearly not superfluous. Notice that if the voluntariness thesis is true, then the fact that Rudy did not intend to undertake a voluntary moral obligation is sufficient to ensure that he did not undertake one, and his explicit disavowal was therefore unnecessary. And yet it seems sensible, indeed important, that Rudy issued a disclaimer given his intention to avoid a moral obligation. For surely what matters is not whether he intended to assume such an obligation but whether he *appeared* to intend to do so.⁴⁶

Like the objection based on the no-disclaimer thesis, this objection too has a contractual analogue. In England and elsewhere in the Commonwealth, the intention to become legally bound is a precondition of contractual liability. It is often argued, however, that since the law employs an objective test of intention this requirement does

45. See Kenneth Einar Himma, *The Ties that Bind: An Analysis of the Concept of Obligation* 4-7 (Aug. 6, 2007) (unpublished essay), available at <http://ssrn.com/abstract=924106>.

46. I am indebted to Curtis Bridgeman for putting this objection to me.

not ensure the voluntariness of contractual obligations.⁴⁷ Scholars like Patrick Atiyah, who reject that contractual liability is self-imposed, cite the objective test as evidence that liability in contract, like that in tort, is grounded in the conduct of the wrongdoer and not in her intention to bind herself.⁴⁸ “Every law student is taught from his earliest days that contractual intent is not really what it seems,” writes Atiyah, “actual subjective intent is normally irrelevant. It is the appearance, the manifestation of intent that matters.”⁴⁹

Does the obligation of a promise, like that of a contract, depend only on the apparent intention of the obligor to acquire it? I do not think so. It is true that if I have no intention of assuming a moral obligation to do X but I behave in a way that I know or ought to know will lead another to reasonably take me to have such an intention, then I may be subject to moral and legal censure if I fail to do X. However, I would not be guilty of the wrong of *breaking a promise*. Suppose that I am participating in a psychological study of the effect of unkept promises on interpersonal trust and my task is to appear to make a promise to a friend and then to fail to keep that ostensive promise. I utter the words of a promise to my friend in a suitably convincing way but without any actual intention of becoming morally bound by them (I am merely playing a role in a study).⁵⁰ It seems clear that if I wrong my friend under these circumstances it is not because I broke a promise to her, but because I led her to believe that I made a promise to her. Upon being debriefed about the context of my utterance, she may rebuke me for being deceitful, for abusing her trust, or for causing her harm (if she relied to her prejudice on my apparent promise), but an accusation of promise-breaking would ring false.

47. Justice Blackburn put the classic English statement of the objective test in *Smith v. Hughes*:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

Smith v. Hughes, (1870-71) 6 L.R.Q.B. 597, 607.

48. See generally P.S. ATIYAH, *ESSAYS ON CONTRACT* (1986); see also Brian Coote, *The Essence of Contract* (pt. 2), 1 J. CONT. L. 183, 195-201 (1989); Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 187-97 (2005); Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD J. LEGAL STUD. 205, 209-10 (2000). Recall the well-known comment by Learned Hand that “[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.” *Hotchkiss v. Nat'l City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911).

49. ATIYAH, *supra* note 48, at 21.

50. This example was inspired by David Owens who suggested a similar scenario in e-mail correspondence.

Still, the intuition that ostensive promises are, morally speaking, no different than genuine promises is a sturdy one. I suspect that it results from a failure to distinguish between the content of the obligations that attach to merely ostensive promises and the *grounds* of those obligations. It may be that, having conveyed to you an intention to obligate myself to do X without actually possessing that intention, I become subject to the same moral requirement (to do X, say) as if I had in fact made a promise. It may be appropriate, in other words, that I be treated *as if* I promised despite the fact that I did not do so. An important function of the practice of promising is to provide an easy solution to small coordination problems by enabling people to provide others with reliable assurances about the future. To serve this purpose, the practice must permit one to rely on what, by *outward appearances*, is a promise. Excusing those who act as if they intend to make a promise without actually so intending would furnish "Hippolytus with a let-out, the bigamist with an excuse for his 'I do' and the welsher with a defence for his 'I bet.'"⁵¹ It would render the practice ineffective. Reasons of this sort might plausibly provide moral grounds for requiring of me precisely what morality would require of me had I actually made a promise.

These reasons for binding me as if I promised merely because I uttered promissory words, and regardless of my intention in uttering them, do not undercut the voluntariness thesis. Indeed, they affirm it. According to these reasons, my words bind me not because they constitute a promise but because they are reasonably *mistaken* for one. I am obligated only if I appeared to do something that would have obligated me, *had* I done it. Moreover, since I am obligated as if I had promised only if I appeared to intend to obligate myself by my words, it follows that I assume a genuine promissory obligation only if I actually intend to obligate myself by my words.

VI. CONCLUSION

In order to form a contract, at least one of the parties to the agreement must give an undertaking of the appropriate kind to the other. The requisite undertaking is almost always referred to in the literature and in the cases as a "promise," and the view that contracts are promises is widely held. If "promise" is intended in the broad Restatement sense to mean *any* undertaking or commitment then this view is unexceptionable. However, the claim that contracts are promises frequently presupposes a more restrictive conception of "promise" that renders the claim false. Those (like Shiffrin) who assert that contracts are promises often mean to advance a particular

51. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 10 (1962).

claim about the relation between contract law and the morality of promising, namely, that both are concerned with the same kind of undertakings. I have argued that morality is only concerned with a particular subset of undertakings (m-undertakings) and that the law of contract attaches obligations to some undertakings that do not belong to that subset. As a claim about the moral significance of the undertakings that the law of contract is concerned with, therefore, the claim that contracts are promises is false.

It might be objected that even if some contractual undertakings are not m-undertakings, most are, and so it is at least *generally* true that contracts are promises. This objection is not to the point, however. It may be possible to form a contract by means of an m-undertaking, and it may even be the case that most contracts are formed this way. But even if this is true, the law does not bind a promisor to her m-undertaking as such. It is not in virtue of the morally significant feature of an undertaking that the law regards that undertaking as contractual. As far as the law is concerned, it is irrelevant that a party intends to undertake a specifically moral obligation. And this is the critical point, for it belies Shiffrin's claim that the law of contract diverges from the morality of promising in its permissive stance toward breach.

If the morally significant feature of my undertaking is irrelevant to the law's decision to make me liable in contract, then that feature is also irrelevant to its decision to permit me to breach my contract. That the law allows me to breach subject to payment of damages does not, therefore, imply that it takes the view that breaking promises as such is permissible. In refusing to compel performance of my contractual undertaking, the law does not give me permission to break my promise any more than it gives me permission to negligently cause you harm, if that is what I undertook by contract not to do. The content of the remedial doctrines of contract law reflect the law's assessment of the permissibility of breaching a contract, and that is all.