

DUTY AND CONSEQUENCE:
A NON-CONFLATING THEORY OF PROMISE AND CONTRACT

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ABSTRACT

I argue that the debate between deontologists and consequentialists of contract law conflates and therefore unduly confuses the analysis of each of them. The debate is a reprise of the conflation of reason and knowledge. Present-day legal consequentialists see reason (pure or practical) as unhelpful or worse. Pragmatism, if anything, rules the day. But the present-day rationalists fare no better, seeking to make constitutive claims of knowledge on the basis of reason. Hence the concept of contract as promise has been subject to the criticism that it fails as an explanation of the law (versus an exposition of how our relationships ought to be ordered).

There is irony in the overwhelming interest of the consequentialist legal academy in trying to find a scientific answer to our most fundamental questions of duty and deontologists to defend morality consequentially. I argue that there are limits to each and that we operate consequentially and deontologically in the ordering of our private affairs, often simultaneously. The mistakes (typical of reason's drive to a single maximand) are assuming, on one hand, that contractual consequentialism defines our commercial relationships, or, on the other, that contracts are capable of containing our moral obligations. Put another way, there is nothing moral about the contract (versus the underlying promise), and the conflation of the two is the source of the confusion over the limits of the law of contract. The moral or transcendental aspect of the contract is the underlying promise - its soul, so to speak - but the law can only doctor its body, what shows in the contract.

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This essay proposes another view in the ongoing attempt to reconcile autonomy and efficiency theories of contract.¹ On one side of the debate stand the deontologists of contract, represented by Charles Fried, who find a philosophical justification for the law of contracts in the autonomous act of will that constitutes a binding promise.² On the other side stand consequentialists of contract, like Richard Craswell and a host of other law and economics scholars.³ Indeed, there are modern consequentialist theories of non-legal norms of agreement, such as those proposed by Eric Posner.⁴

Other attempts to reconcile autonomy and efficiency are insightful, but, I believe, in the end, unsatisfying, because they insist on finding a moral justification for contract law. My thesis separates the legal relationship of contract from the promise embedded within it. As much as my intuition (and years of experience in dealing with complex contracts) tells me there is sanctity in promise that cannot be satisfactorily addressed by consequentialist theories, I believe it is wrong to look for deontology inherent in the institution of contract law.

The problem is in conflating contract and promise. Promises, not contracts, are moral acts. Viewed deontologically, they are conscious acts of autonomous agents to

¹ See, e.g., Nathan Oman, *Unity and Pluralism in Contract*, forthcoming, ___ MICH. L. REV. ___ (2005), available at <http://ssrn.com/abstract=641442>; Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001).

² CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

³ Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

⁴ ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

create interpersonal duties. They invoke the Kantian antinomies of physical cause and transcendental freedom: by our choice we change the universe. But the philosophy underlying the binding nature of a promise over time is complex. Even where, for example, the promise is infused with a religious duty (e.g., marriage), many religions acknowledge that circumstances can obviate the promise, notwithstanding that it was made “until death do us part.” Or if we justify the morality of promises consequentially, keeping them may still not produce the greatest good.

Contracts, on the other hand, are constructs of a system of law, whereby the state agrees to enforce certain promises entered into in a certain form, subject to the limits of language in articulating the promise. I want to argue there is nothing moral about the contract (versus the underlying promise), and the conflation of the two is the source of the confusion over the limits of the law of contract. The moral or transcendental aspect of the contract is the underlying promise - its soul, so to speak - but the law can only doctor its body, what shows in the contract.⁵ That to me is the limit of the law.

Academic law, particularly in its explanatory and normative role for commercial relationships, aspires to science and, as such, abhors deontology. There are two primary reasons. First, consequences are measurable, at least in theory. There is no “methodological purchase” in deontology.⁶ Second, deontology is fraught with paradox. For every duty, there is a seemingly polar opposite consideration. Consideration of duty entails bright lines and gray areas, law and equity, fixed rules and intuitive application.

⁵ Or to put it in terms of a biblical axiom (even if it is not part of my personal tradition): “And Jesus said to them, ‘Whose likeness and inscription is this?’ They said, ‘Caesar’s.’ Then he said to them, ‘Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.’” MATTHEW 22:20-21.

⁶ POSNER, *supra* note 4, at 192.

Recognition of the paradox of deontology is as old as our thinking about right and wrong. The theology of the prophet Micah was based on the inability of human reason to reconcile justice and mercy. But Micah's resolution was bereft of philosophy or science, and left the untying of the knot to God.⁷ And the paradoxes of deontology (much less the paradox posed by our apparent inability to reconcile deontology and consequentialism) are particularly frustrating to anyone who wants to set forth a unified theory.⁸

The attempt to transform law into science, whether by the self-contained induction of the case method or by economic theory, butts up against the more general philosophical problem how we reconcile our explanatory and normative methodologies and judgments. Since Bayle observed, in connection with the presence of evil in the world, that God could be either all-powerful (in which case He is responsible for evil) or all-good (in which case He cannot be responsible for evil, and hence not all powerful), but not both, philosophers have struggled to reconcile why the world as it is (explanatory) often does not match up with the world as it should be (normative). On one extreme, you can deny, as did Hume, that there is any "ought" beyond the empirical world. On the other, you can hold, as did Hegel, history is a progression toward the uniting of world as it is and as it ought to be. Or, like Kant, you can resign yourself to the fact that we will never unite the two.⁹

⁷ Micah 6:8 (JPS, 1955) ("And what the LORD doth require of thee: Only to do justly, and to love mercy, and to walk humbly with thy God.")

⁸ Nathan Oman comments on the pluralistic theories offered in STEPHEN A. SMITH, *CONTRACT THEORY* (2004): "So long as philosophers of law focus on a quest for a single master value that explains all of contract law, their arguments are likely to run into the same problems that despite his ingenuity and subtlety affect Smith's theory." Oman, *supra* note 1, at 32.

⁹ *See, generally*, SUSAN NEIMAN, *EVIL IN MODERN THOUGHT* (2002).

In assessing the justifications for promise and contract, we can approach the conflict between deontology and consequentialism in something of a microcosm, where the duties we create and the consequences we desire are, at least by first blush, our own. It is one thing to contemplate duty and consequence when the question is how you would weigh your duty to tell the truth against the consequence of revealing to the inquiring Gestapo officer that a Jew is hiding in your barn. It is another to consider whether a dealer in New York's Diamond District will go back on an agreement sealed with *mazel v'broche*.¹⁰ I suspect in the former case, even the most committed consequentialist would pause to consider whether there is a duty beyond the measurement of utils. And the most committed deontologists have struggled with Kant's apparent pronouncement that the duty not to lie would trump the protection of the hidden Jew.¹¹

To me, it is more interesting, less wrenching and perhaps more useful in daily life to look at the competing frustrations of consequentialism and deontology where parties seek to order their private economic affairs in highly uncertain environments either with or without contract. Committed consequentialists are frustrated by their inability to model the highly contingent future.¹² Committed deontologists throw up their hands

¹⁰ Lisa Bernstein, *Opting Out of the Legal System: Extra-contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

¹¹ The source of this pronouncement was an essay written by Kant late in life entitled "On the Supposed Right to Lie from Altruistic Motives." For a short summary of the traditional and alternative interpretations of this essay, see NEIMAN, *supra* note 9, at 73-74.

¹² Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WISC. L. REV. 323 (2004).

when the contract is no longer amenable to resolution under a theory of contract as moral commitment.¹³

My central thesis is that the general debate between deontologists and consequentialists of law, played out in the microcosm of promise and contract, is a reprise of the conflation of reason and knowledge that Kant attempted to resolve in the *Critical Philosophy*. Like Hume, the present-day legal consequentialists see reason (pure or practical) “as inert, inactive, and even impotent.”¹⁴ Pragmatism, if anything, rules the day. But the present-day rationalists fare no better. Reason can make demands upon our experience and tell us how the world ought to be, but its claims cannot be constitutive. That is, reason cannot know that its order will be fulfilled by experience.¹⁵ Hence, Fried’s notion of contract as promise has been subject to the criticism that it fails as an explanation of the law (versus an exposition of how our relationships ought to be ordered).¹⁶

¹³ FRIED, *supra* note 2, at 89.

¹⁴ SUSAN NEIMAN, *THE UNITY OF REASON* (1994), at 11. See also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999), at 6 (“. . . if one wants to call these rudimentary principles [of social cooperation, such as don’t lie or kill indiscriminately] the universal moral law, that is fine with me. But they are too abstract to be criterial. Meaningful moral realism is therefore out, and a form (not every form) of moral relativism is in.”); RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989), at 4 (“[Kant and Hegel] persisted in seeing mind, spirit, the depths of the human self, as having an intrinsic nature – one which could be known by a kind of nonempirical super science called philosophy. This meant that only half of truth – the bottom, scientific half – was made. Higher truth, the truth about mind, the province of philosophy, was still a matter of discovery rather than creation. . . . What was needed, and what the idealists were unable to envisage, was a repudiation of the very idea of anything – mind or matter, self or world – having an intrinsic nature to be expressed or represented.”)

¹⁵ NEIMAN, *supra* note 14, at 11 (“The inadequacy of the rationalist conception of reason, though less apparent, is equally significant. While Kant often attacks the rationalist vision for having an overweening view of reason’s capacity for knowledge, his deeper critique involves the charge that the rationalist’s conception of reason as knowledge leaves reason powerless to perform its own function.”)

¹⁶ Kraus, *supra* note 1, at 431-36; Craswell, *supra* note 3, at 517-24.

The irony, to me, is the overwhelming interest of the consequentialist legal academy in trying to find a scientific answer to our most fundamental questions of duty,¹⁷ and deontologists like Fried trying to defend morality consequentially. There is an even greater irony when one considers that Kant's conception of the gap between reason's demands and the limits of knowledge are as equally applicable to science as to morality. As I have been taught my Kant (with whose very subtle deontology Kaplow and Shavell seem to struggle), he is equally skeptical of the power of reason, whether as a matter of science or philosophy, to bring us to that First Principle or Unconditioned.¹⁸ Hence, it is all well and good to dismiss (at least intellectually) the Shema, the Shahada, the Lord's Prayer or the categorical imperative, but by the very nature of our reason, one must ultimately also take the Pareto principle (or its most basic logical constituents) on some form of faith, if only that the universe is sufficiently ordered to be discoverable by the scientific method. I want to argue that there are limits to each and that we operate consequentially and deontologically in our private affairs, often simultaneously. The mistakes (typical of reason's drive to a single maximand) are assuming, on one hand, that contractual consequentialism defines our commercial relationships, or, on the other, that contracts are capable of containing our moral obligations.¹⁹

¹⁷ LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

¹⁸ NEIMAN, *supra* note 12, at 7.

¹⁹ Professor Markovits has recently offered one of the more interesting and sophisticated attempts to articulate the morality of contract. Daniel Markovits, *Contract and Collaboration*, 113 *YALE L. J.* 1417 (2004). His thesis, if I understand it correctly, justifies the morality both of promise and contract (and associated remedies and expectations) by the communal rather than individual nature of the undertaking. Hence, he rejects the usual justification for the legal institution of contract – promises made in individual acts of autonomy, prevention of harm by justified reliance, or social welfare maximization – in favor of the interpersonal bonds created by the contract. This calls upon Kant's formulation that persons ought never be used as means, and must be treated as ends in themselves.

I see the autonomy/efficiency as one going beyond how we justify the law of contract. I am interested in the way the legal academy seeks to a scientific answer to our most fundamental questions, and at the same time, acknowledge the limits of the search for fundamental principles when it comes to the real world of dispute resolution. If I am harsher on the consequentialists, it is because I believe neither science nor philosophy will ever lead us to that First Principle or Unconditioned; but only philosophy seems to be willing to delve into the nature of the scientist's inquiry²⁰ I think also this is a source

When persons make promises and contracts, they cease to be strangers and come to treat each other, affirmatively, as ends in themselves. When persons break promises and contracts, by contrast, they render the sharing of ends impossible, at least in respect of the promised performance, and in this way become not merely strangers, but actively estranged. The morality of promise and contract therefore engages one of the most basic values in our practical lives, and this value underwrites every element of promissory and contractual obligation.

Id., at 1514. Clearly, the thesis is worthy of further thought. I note, however, some preliminary reactions. First, as far as I can tell, the thesis does not account for the development of an institution called “the law of contract” as distinct from promise-keeping, even though the law of contract does not enforce all promises. Second, the thesis expressly disavows contracts between organizations, as opposed to natural persons. *Id.* at 1464-74. I want to slice this problem differently: only natural persons, and not organizations, can experience the sanctity (whether individual or collaborative) of promise-making and promise-keeping. But any person, natural or otherwise, may invoke the institution of contract, and that invocation is separate and apart from any moral aspect of promising that may be conflated with the contract itself.

²⁰ I approach this issue from a betwixt and between ontological perspective. Regardless whether I share the religious conviction, I admire the courage of one scholar (reflecting, I suspect, a not uncommon view outside the academy, or perhaps in the academy but not generally expressed) positing there is a knowable mind of God that speaks to us even on the subject of contracts. Val D. Ricks, *Contract Law and Christian Conscience*, 2003 BYU L. REV. 993. Other scholars are unabashed atheists, and feel able to address the law only in terms of its consequence. I am somewhere in the middle. I agree with the consequentialists who would only accept (i.e., we can only assess the truth value of) a synthetic proposition that is testable as a matter of experience or possible experience. But I find pure consequentialism to be deficient on the subject of what I ought to do (versus what I am capable of knowing). As a result, I do more thinking than praying. I am more interested in figuring out what the mind of God would want if there were a mind of God than accepting there is a mind of God and talking to it.

Indeed, at this point we approach the extremes of the metaphysics of practical reason, even according to Kant. To borrow from Professor Markovits, my references to Kant are instrumental, and I too do not worry if my views depart from his. Markovits, *supra* note 19, at 1424. In contemplating how it was that pure reason could be accessible (and, hence, practical) in the empirical world, Kant said “to explain this is beyond the power of human reason, and all the labour and pains of seeking an explanation of it are lost. . . [T]he idea of a pure world of understanding as a system of all intelligences, and to which we ourselves as rational beings belong (although we are likewise on the other side members of the sensible world), this remains always a useful and legitimate idea for purposes of rational belief, although all knowledge stops at its threshold. . . .” IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* (1785),

of the acknowledged gap between the academy and the practicing profession. When the world is so complex the exceptions to law and economics models subsume their predictive capability, we have to step back and ask what we are doing. What I often see in law and economics is the desire, notwithstanding disclaimers to the contrary, to find the last link that would unravel, a la Freud, the mystery of subjective choice (hence, Judge Posner's view it is an embarrassment that economics cannot model how a judge will decide).²¹ As we move from the objective to the subjective, and from the collective to the individual, from simple modelable decisions to those most normal humans would never permit to be resolved by a computer, the likelihood we will ever find a single predictive maximand, deontological or consequential, decreases. This is the overwhelming thrust of current scholarship (and most of the history of philosophy). In contrast, the real world is, at a minimum, dualistic, and always has been.²²

I am quite positive - there is no unified field theory equivalent of the objective and subjective, because despite the yearning for attainment of an Unconditioned First Principle of human behavior in science or economics, no algorithm will ever tell a judge how to temper justice with mercy. That is because in the moment of decision, when it is

in BASIC WRITINGS OF KANT, (Allen W. Wood, ed., 2001), at 219-20. To go back to the “lying to save a friend” example, even if Kant meant truth-telling to trump saving a life, by his own architectonic, his access to the rational is no more capable of proof than mine. And, as I will elaborate, I do not agree that either truth-telling or promise-keeping are the ultimate moral values.

²¹ Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993) (“At the heart of economic analysis of law is a mystery that is also an embarrassment: how to explain judicial behavior in economic terms. . .”).

²² See Oman, *supra* note 1. Like Mr. Oman, I struggle with unified and pluralistic theories, and I admire his passion to find an answer that is more than ad hoc. I may not be as sanguine, however. I believe it is the nature of reason to engage in an unrequited search for unified theories in an ad hoc world, or put another way, to unite the “is” and the “ought.” See NEIMAN, *supra* note 9; Jeffrey M. Lipshaw, *Contracts and Contingency: A Philosophy of Complex Business Transactions*, forthcoming, 54 DEPAUL L. REV. ____ (2005), available at <http://ssrn.com/abstract=651404>.

time to apply a rule to a circumstance, we are free. We can measure (in theory) how most of us react and decide in that moment, but the possibility that one of us dissents and says "aha, now I understand the principle to be something else" invokes something we will never be able to measure. That moment of choice, which is the same as the moment of freedom when I have a creative epiphany, is simply inconsistent with an objective model that, in its heart yearns to predict the subjective. Or to put it another way, to be a legal positivist (as was, it has been argued, Kant²³) does not mean the natural law or the moral law does not exist, or is inaccessible to reason. It simply means that the natural law is not accessible as a matter of knowledge.

On the other hand, the idea that a contract (as opposed to the underlying promise) establishes a moral obligation seems to me a gross overstatement of the case. The law of contract is a human institution, designed to select those promises the state will enforce. It is the promise itself that is morally transcendent (my word is no less my bond because I have failed to comply with the statute of frauds!). Trying to justify the utility of a principle of contract law on the basis of its moral worth is as futile as the attempt to prove God's existence as a matter of knowledge.²⁴ My separation of promise and contract is

²³ Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1546 (1996) ("The premise of Kant's account is that, in the absence of legal authority, we must expect that individuals will disagree about right and justice and that this disagreement will lead to violent conflict. The task of the legislator is to put an end to this conflict by replacing individual judgments with the authoritative determinations of positive law.")

²⁴ To paraphrase Professor Smith's explication of law's quandary, why do even committed consequentialists talk about the law as though it were the product of some real or hypothetical author? Although I may be reading too much into his speculations at the conclusion of the book, it seems clear to me he believes secular theorists are simply unwilling to posit the possibility that the law is in fact the product of some Author. Perhaps it is a fine distinction, but the positing of an Author allows reason to state constitutive principles of knowledge, something I believe is beyond its power. I do believe, however, that reason demands an ordering of law in accordance with regulative principles, and that is the source of the sense of authorship. Whether a divine Author is responsible for reason's demand that the world be intelligible (i.e., the teleological proof) is a religious question on which I remain agnostic, and on which reasonable people can disagree.

consistent with at least the New Institutional Economics (versus dyed in the wool rational actor theory) holds the law of private ordering to be a backup mechanism to other means and concepts by which we agree to interact, allocate resources, and resolve disputes.²⁵ It does not matter (to answer Professor Smith's question in *Law's Quandary*²⁶) that law is a self-contained game, an augury to the uninitiated, deciphered by its participants as though there were a pre-existing answer, even though all indication is that judges make it up as they go along. It is tolerated because it models resolutions to disputes that are, by and large, preferred to the next step after law, which is violence. That is not to say that a dispute resolved by law has been resolved well, or morally, or even justly, but it has been resolved in accordance with a process that, at least on the surface, is more humane, and arguably less random, than trial by ordeal or lots.

Even in a much longer article, I do not believe I could state the thesis more clearly than I already have, nor offer more compelling arguments for accepting it. What I propose to do is explore briefly the ironies that are at the source of the conflation, by synthesizing some very old and very new views on the subject of promise and contract.²⁷ First, the "science" of contract law – whether self-contained legal theory or based in law and economics – makes normative judgments that are as much based on a certain kind of

²⁵ Peter G. Klein, *New Institutional Economics* (1998), at 6, available at <http://ssrn.com/abstract=115811>.

²⁶ STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

²⁷ Jody Kraus has taken a similar tack in assessing deontological or autonomy based justifications for contract law versus those based on efficiency. Kraus, *supra* note 1. He makes a persuasive argument that proponents of efficiency theory, like Richard Posner, simply assume away the question whether there is an implicit moral principle. "[T]he instrumental nature of Posner's defense of wealth maximization actually undermined the claim that it should be viewed as a moral principle. An instrumental defense of wealth maximization presupposes the value of the ends it promotes. Thus, on his initial view, despite his claim that wealth maximization constituted a moral principle itself, the normative value of wealth maximization is derivative of some unspecified moral theory." *Id.*, at 429. On the other hand, autonomy or deontological theories of contract "are notoriously difficult to actual questions of institutional design." *Id.*, at 431.

faith (i.e., at the very extremes of the power of reason) as deontology.²⁸ Hence, contract science imputes a certain morality to the legal relationship, even when it expressly disclaims any such intention. Second, the philosophy of promising is far from being exclusively deontological. Indeed, the source of our feeling of obligation, whether it springs from *a priori* duty or utilitarianism notions of the good, has been a matter of intense debate. Hence, philosophers of promising have struggled with the same issues of morality and efficiency, apart from the legal consequences.

As a result, from these converging sources, it is not surprising that similar questions around duty and consequence have, as between the problems of promise and contract, been thrown together. I will conclude by suggesting they need to be pulled apart.

The Normative Underpinning of Legal and Economic Contract Theory

One of the more interesting recent theories of contract exemplifies the problem that arises when conflating the legal rights inherent in contract with notions of right and wrong. Omri Ben-Shahar has proposed the so-called “no-retraction principle”: that promises become enforceable contracts without mutual assent gradually over the period during which the parties begin to consider a transaction, and which culminates in a formal agreement.²⁹ I contend that the reactions to this proposal in fact reflect the issues

²⁸ Or, as Kraus observes in the case of Richard Posner, simply asserts that the desired end *is* the moral principle. *Id.*, at 429. In so doing, Posner is able to defend wealth maximization as a hybrid moral principle combined the virtues of both deontology and consequentialism. Kraus wryly observes that even Judge Posner may not have managed to solve the concept of paradox: “If this defense were successful, Posner would have provided not only a normative foundation for the economic analysis of law, but a breakthrough in the foundation of morality, and perhaps logic, as well.” *Id.*, at 430.

²⁹ Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829 (2004)

arising when one attempts, as does Professor Ben-Shahar (albeit cleverly), to force the square peg of a moral promise into the round hole of a legal contract.³⁰ It strikes me this has its source in concerns about opportunism, a concept I believe, at its source, springs more from notions of duty (going back on something already agreed to take advantage of changed circumstance is a repugnant human quality) than adverse consequence. Put another way, there is more deontology in the consequential assessment of contract law than we have either recognized or been willing to acknowledge. And that is one source of the conflation of promise and contract.

We need carefully to parse through the source of our normative judgments about things like opportunism. Modern philosophical consequentialism (of which utilitarianism and welfare economics are subsets) is properly traced back to Hume, who clearly would consider opportunism to be at the core of human nature, and not in the least surprised that moral notions had grown up around it. Indeed, according to Hume, the obligation of promising, apart from any legal consideration, is one “of those three laws [the others being the stability of possession, and its transference by consent], that the peace and security of human society entirely depend; nor is there any possibility of establishing a good correspondence among men, where they are neglected.”³¹ Hume’s view of the obligation of promise, much less contract, is wholly non-deontological. The obligation of promise is not natural (i.e., to will an obligation to another contravenes one’s natural self-

³⁰ See Daniel Markovits, *The No-Retractation Principle and the Morality of Negotiations*, 152 U. PA. L. REV. 1903 (2004); Jason Scott Johnston, *Investment, Information, Promissory Estoppel*, 152 U. PA. L. REV. 1923 (2004); Ronald J. Mann, *Contracts – Only with Consent*, 152 U. PA. L. REV. 1873 (2004). In fairness, Professor Ben-Shahar acknowledged much was unresolved by his proposal, and it appropriately stirred the theoretical pot. Omri Ben-Shahar, *Mutual Assent Versus Gradual Ascent: The Debate Over the Right to Retract*, 152 U. PA. L. REV. 1947 (2004).

³¹ DAVID HUME, A TREATISE ON HUMAN NATURE (Ernest C. Mossner, ed., 1985) (1739-40), at 578.

interest). But over time, it becomes apparent that mere stability of possession and its transference by consent is not enough to ensure harmony. Hence, “promises have no natural obligation, and are mere artificial contrivances for the convenience and advantage of society.”³² Hume demonstrates this by the example of a promise extracted by force or duress:

A man, dangerously wounded, who promises a competent sum to a surgeon to cure him, wou’d certainly be bound to performance; tho’ the case be not so much different from that of one, who promises a sum to a robber, as to produce so great a difference in our sentiments of morality, if these sentiments were not built entirely on public interest and convenience.³³

The acknowledged mutual benefit of the honoring of promises – a sort of ritual incantation of a particular set of words, or signs or symbols – produces a “sentiment of morals [that] concurs with interest, and becomes a new obligation upon mankind.”³⁴

Note, moreover, that this is apart from any legal consequence: “After these signs are instituted, whoever uses them is immediately bound by his interest to execute his engagements, and must never expect to be trusted any more, if he refuse to perform what he promis’d.”³⁵ Hence, opportunism is an issue that arises in connection with the moral issue of promise, before it ever becomes conflated with the legal act of contract.

It is therefore hardly a new insight that non-contractual (as well as contractual) obligations can be explained empirically and consequentially, and without resort to deontology. Eric Posner’s thesis of social norms, that reputation is a commodity to

³² *Id.*, at 577.

³³ *Id.*

³⁴ *Id.*, at 574-75.

³⁵ *Id.*

maximized in one's rational self-interest, is Hume's thesis merely restated in the modern lingo of law and economics. What Posner's work takes as a given (which Hume, to his credit, does not) is the source of his normative judgment about utility.³⁶

My point is that the purest form of consequentialism would hold contractual formalism to be entirely appropriate. Moral sentiments, like an aversion to opportunism, are the product of the transformation of our passions and desires in the pursuit of a congenial society. Indeed, the words that create the sentiment of obligation are arbitrary. (Hume's proof of this point is we use words to create a personal resolution, and though we feign something like a promise, nobody understands the resolution to be obligatory.³⁷) What then is wrong with leaving the pre-negotiation phase as non-binding and subject only to moral or social sanction, until some ritual act, like signing, dripping wax, or stitching with special string, changes its legal character?

What is more likely, as Jody Kraus has argued persuasively, is that efficiency is superior to deontology as a practical, applied theory, but deontology has superior normative credentials. Kraus takes from Thomas Scanlon a methodology for reconciling otherwise competing theories of contract

by assigning one the role of providing a *lexically prior* moral justification of contract law (e.g., setting out the grounds for its moral permissibility), and the other the role of providing a *lexically subordinate* justification of the choice to have a law of contracts, as well as the choice of specific

³⁶ For example, Posner says "[t]he traditional paradigm of contractual behavior generally assumes that people make contracts because only legal sanctions will deter a party from cheating on the contract when it is profitable to so." POSNER, *supra* note 4, at 151. This is the core of the anti-opportunism justification. But whence comes the judgment that cheating is bad? Is it deontological? Is it Humean – a statement in moral terms of the dictates of our passions and sentiments? Is it utilitarian? As discussed *supra* note 27 and accompanying text, it is clear that Posner *files* has, like Posner *pere*, simply assumed a moral theory of welfare maximization.

³⁷ *Id.*

contract rules. For example, one might justify the law of contracts on the ground that it is permitted by an autonomy-based moral theory, and yet hold that this justification leaves the selection among the many possible variants of contract law it would permit to be justified on the basis of other reasons.³⁸

He proposes a unified “vertical” integration of the theories by treating autonomy theories “as lexical prior, or normative foundational, to efficiency theories.”³⁹

Where I depart from Kraus is in the assumption that the positive law of contracts needs to be morally justified. This is not to say that we should fail to honor our promises as a matter of morality. But there is no reason, as far as I can tell, apart from the desire of legal scholars to find one, to import morality (either deontological or consequentially derived) into the contractual relationship. The morality of promise and the utility of contract are wholly capable of standing on their own.⁴⁰

The Philosophical Problem of the Obligations of Promise

I want to touch briefly on the philosophy of promising, and in particular, the sources and limits of the sanctity of promise apart from legal compulsion. I contend promising sits somewhere within the spectrum of complementary and competing values, and our highest ethical obligations may or may not be keeping our promises (or holding others to theirs), even in commercial situations. To put it another way, whether or not I

³⁸ Kraus, *supra* note 1, at 423.

³⁹ *Id.*, at 436.

⁴⁰ I have focused almost entirely on the aspect of promise that is embedded in the contract. I have not fully thought through moral issues around the institution of contract, such as unconscionability. For example, do we justify the doctrine of unconscionability on the theory that the underlying contract does not represent a promise at all? One could approach the issue of unconscionability either deontologically – to impose unconscionable terms is wrong apart from any outcome – or consequentially – we are better off (choose your methodology) if victims of unfair treatment are given the opportunity to argue they have been the victims of an unconscionable deal. That, to me, is not an issue of the conflation of promise and contract, but a political decision – informed by any manner of moral or economic basis – to shape the institution of the law of contracts in a particular way.

have a moral obligation to fulfill a promise is complex enough without superimposing the issue of legal enforcement.

Robert J. Fogelin's 1983 essay on the philosophy of promising is instructive.⁴¹ Philosophers seem to agree (beginning with Hume) that obligations cannot be brought into being merely by the action of agent (i.e., willing that there be an obligation). "To become obligated, we must do something else in virtue of which we are obligated."⁴² Fogelin offers a limited defense of Richard Price's derivation of the obligation of promising.⁴³ Price agreed that an obligation could be brought into being merely by an act of will. He contended, however, that there was an easy solution: fidelity to promises was a branch or instance of veracity.⁴⁴ Keeping a promise is simply a special case of telling the truth.⁴⁵ Fogelin observes:

At first sight, this theory may seem merely silly. Although it does not equate certain future tense statements with promises, it does have the consequence that a person who utters a future tense statement about his own actions falls under an obligation to make it come true. Suppose, however, that Allen says to Brandon, "Since today is a holy day, I shall stay my hand, but tomorrow I shall return and thrash you." Having said this, is Allen now under an obligation to return the next day and thrash Brandon? The answer seems to be no, but it is not immediately clear why. The most obvious (and plausible) explanation is that we read Allen's remark as the expression of a resolution or of an intention. In that case, no obligation rests on Allen to thrash Brandon.⁴⁶

⁴¹ Robert J. Fogelin, *Richard Price on Promising: A Limited Defense*, 21 J. HIST. PHIL. 289 (1983).

⁴² *Id.*, at 290.

⁴³ Price was an eighteenth century English philosopher, and a contemporary of Thomas Bayes, Mary Wollstonecraft, Adam Smith and others. His treatment of promising appeared in the influential *REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS*, published in 1787. Spartacus Educational, *available at* <http://www.spartacus.schoolnet.co.uk/PRprice.htm>.

⁴⁴ Fogelin, *supra* note 41, at 291.

⁴⁵ *Id.*, at 292.

⁴⁶ *Id.*

If this is not a promise, but we are nevertheless obliged not to lie, must Allen still thrash Brandon? The answer is no. “If a person asserts that he will do something – where he is not merely expressing a resolve – then he *eo ipso* falls under an obligation to do so, granting, of course, that this obligation may be overridden by others.”⁴⁷ In short, we are morally obliged to keep promises, as we are morally obliged to tell the truth, unless there is a very good reason not to.

Fogelin also assesses a more difficult criticism of Price’s veracity theory, which is that because in making a promise we are not saying anything that can correctly be considered true or false.⁴⁸ Fogelin defends the veracity theory by arguing promises are forms of “explicit performatives.” “Leave the room” is a primary utterance, but in context it could be a command, a request, or a piece of advice. Explicit performatives are the markers showing how the utterance is to be taken in context. “I command you to leave the room” contains the explicit performative “I command” which modifies the primary utterance “leave the room.” While Price’s critics would argue that a performative like “I promise to be there tomorrow” cannot assert a truth claim, Price’s defenders “would say that in using the explicit performatives “I promise etc,” which does not have the form of a truth claim, I *eo ipso* put forward the truth claim that underlies it as a primary utterance, i.e., the assertion “I shall be there.”⁴⁹

The final defense of Price’s veracity theory refutes the notion that a promise cannot be linked to truth-telling because it is merely a prediction of one’s future behavior.

⁴⁷ *Id.*, at 293.

⁴⁸ *Id.*

⁴⁹ *Id.*, at 294.

Fogelin responds that once I make a promising statement, “I am then expected to conform my conduct to what I have said. It is an assertion of this kind, where my future conduct is expected to *instance* my remark, that provides the best model for the assertions inherent in a promise.”⁵⁰

Finally, Fogelin reconciles the truth-telling obligation of promise with the separate obligation of contract:

Consider the exchange of a promise for a present benefit or an exchange of mutual promises, the standard contractual situations. On the contractarian account, it is the agreement that creates the mutual obligations. On Price’s account, it is the fact that agreement has been reached (typically through bargaining) that leads each party to say that he will do a certain thing. Here the agreement is not the source of the obligation, but the reason why each person is willing to accept an obligation through saying he will do a certain thing. Rather than taking contractual agreement as a primitive source of obligation, as so many have, Price tries to derive it from a deeper source: our obligation to do what we say.⁵¹

Having defended philosophically grounded the obligation of promise in the obligation to tell the truth,⁵² Fogelin is less willing to accept Price’s defense of our obligation to tell the truth. Price’s belief “there is an ‘*immediate rectitude in veracity*’”⁵³ is an *a priori* proposition. It is subject to attack by either act or rule utilitarians, on one hand, or by deontologists who might argue there are duties that supersede truth-telling.

⁵⁰ *Id.*, at 296.

⁵¹ *Id.*, at 297. Cf. Frank Menentrez, Consequentialism, Promissory Obligation, and the Theory of Efficient Breach, 47 UCLA L. Rev. 859 (2000) (arguing the contract embodies a promise, and because the promise is a moral act, the law should discourage efficient breach).

⁵² As does Professor Markovits, albeit relying on Kant’s “lying promise” example. Markovits, *supra* note 19, at 1422-35.

⁵³ Fogelin, *supra* note 41, at 301.

So if a promise is grounded in truth-telling, but truth-telling may not necessarily be the highest value (whether deontologically or consequentially derived) in all circumstances, we may find ourselves in circumstances in which holding ourselves or others to a promise is also not the highest good.⁵⁴

Here is a not-uncommon example. In the course of negotiating a deal under tight time frames, I promised the general counsel of the other party that my outside counsel would have a draft agreement in the hands of his outside counsel by ten o'clock the next morning. When I so informed my outside counsel, I learned in response that, while it was certainly possible for them to make good on the promise, the contract draft would not only contain a significant number of placeholders, but would also stand the chance of taking an incorrect and disadvantageous position on a critical issue. I felt the tug of my moral commitment, but recognized I had a competing obligation to my client to override the promise.

I contend circumstances of this kind arise over and over in the commercial world, and in far less *de minimis* circumstances. We do not serve the business community well by conflating this moral obligation, which may be overridden by others, with the potential that it may also be legally enforceable.

Conclusion: A Pluralistic Thesis

I conclude by restating my pluralistic thesis of contract as contract (i.e., an economic and social institution) and promise as promise (an ethical duty), and where and

⁵⁴ For example, to return to the “lying to save a friend” example, truth may not be the ultimate value. Truth matters, but peace or harmony or pragmatics may matter more. This is consistent with Jewish ethical tradition. See Jonathan Sacks, *Covenant and Conversation*, <http://www.chief Rabbi.org/thoughts/vayechi5765.pdf> (Dec. 25, 2004). As to whether holding oneself or others to promises or contracts (legally or morally) is the ultimate value, see Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, forthcoming, 78 TEMP. L. REV. ____, ____ (2005), available at <http://ssrn.com/abstract=657421>.

how legal remedies of breach and the institutional power of the state as an enforcement mechanism are appropriate. I propose to have my cake and eat it, in the end relying on intuition derived from years of real world experience: law is a construct, and one to be forced and manipulated, through a bit of prescient language and foresight, a good deal of *ex post* reconstruction, and a fair amount of arcane logic,⁵⁵ according to one's interest and to the anticipated consequences of the positions taken. But, at the same time, we operate in a moral sphere, quite apart from the law, except when the two are conflated by those who do not recognize or acknowledge their independent sources.

A respectable place to anchor my dualism is with Amartya Sen, who as much as anyone has tried to reconcile ethics and economics. He distinguishes *welfarism* ("requiring that the goodness of a state of affairs be a function only of the utility information regarding that state") from *consequentialism* ("requiring that every choice, whether of actions, institutions, motivations, rules, etc., be ultimately determined by the goodness of the consequent states of affairs").⁵⁶ Sen argues for an ethical/economic dualism:

⁵⁵ See, e.g., *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 Del. Ch. LEXIS 90 (July 11, 2002) (the certificate of incorporation precludes the authorization of a senior preferred stock without a vote by class of the junior preferred, but where the issuance is accomplished by merger rather than an amendment of the certificate, Delaware case law denies the junior shareholders the right to a class vote, because the certificate does not expressly provide for a class vote on a merger, even though the merger has exactly the same effect as an amendment to the certificate); *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1042; 1997 Del. Ch. LEXIS (Apr. 25, 1997) (junior preferred shareholders assert breach of duty claims against the directors based not on their status *qua* preferred shareholders, because the contract does not grant them rights, but *qua* common shareholders under a Revlon change in control theory; the court observed: "While from a realistic or finance perspective, the heart of the matter is the conflict between the interests of the institutional investors that own the preferred stock and the economic interests of the common stock, from a legal perspective, the case has been presented as one on behalf of the common stock, or more correctly on behalf of all holders of equity securities.").

⁵⁶ AMARTYA SEN, ON ETHICS AND ECONOMICS (1987), at 39.

It is, of course, true that consequential reasoning appeals to the economists' standard way of looking at prescriptive evaluation, and this can be, and has indeed often been, used rather mechanically. However, if consequential reasoning is used without the additional limitations imposed by the quite different requirements of welfarism, position independence, and the overlooking of possible intrinsic value of instrumentally important variables, then the consequential approach can provide a sensitive as well as robust structure for prescriptive thinking on such matters as rights and freedom. I have also argued that there are distinct advantages in following this route. It contrasts both with the narrow consequential welfarism used in standard welfare economics, and also with some deontological approaches used in moral philosophy, involving inadequate consequential accounting.⁵⁷

What is particularly appealing about this approach is its acknowledgment of the importance of consequence in the real world. We all have experienced instances in which following a principle of moral goodness to its logical end leads to an intuitively adverse consequence.⁵⁸ At the same time, Sen acknowledges our intuition that utility maximization is not the sole definition of goodness. I contend this dualism exists in the concrete circumstance of promises that may or may not be congruent with contractual obligations.⁵⁹

Promises are moral issues: the morality may be explained deontologically or in a Humean fashion, but they are nevertheless moral issues. Roy Kreitner has, I think, pointed this in the right direction in his recent article on contract formalism. He argues against the fear that the law might impose contractual liability without consent, by suggesting an institutional approach:

⁵⁷ *Id.*, at 78.

⁵⁸ See Sacks, *supra* note 54 (the Talmud says it is not morally wrong to tell a bride the white lie that she is beautiful even when she is not).

⁵⁹ There is marketing data, for example, suggesting that customer loyalty is greater when a vendor makes an error and cures it well than when there has been no problem at all. I want to juxtapose that with notions of justice and redemption – our intuitive sense of the correctness of second chances.

Contract law is an infrastructure: its most important societal role is to supply frameworks for cooperative activity. Like the proper functioning of say, a highway, contract depends not only on written rules of the road, but also on the reliability of contextual practices. Courts cannot ignore these practices any more than they can decide disputes without recourse to language. The heart of such a regime is the objective theory of contracts, applicable to precontractual representations and contractual interpretation.⁶⁰

Indeed, the institution of contract is far too rigid and incomplete to deal with all of the contingencies of business life. Our willingness to bend, forgive, renegotiate and take less than to which we might be entitled under the contract is a function not of law, but of the moral question whether holding oneself or others to a promise is the necessarily the highest of values.⁶¹

In the end, if my approach is subject to any criticism, it is that it is permanently and metaphysically indeterminate.⁶² In Jody Kraus' terms, it recognizes an institutional consequentialism (i.e., our institutions are based on whatever good we decide should shape them) as both the normative foundational and the operationally derivative bases of contract law. What may be (and I believe is) deontological is the promise embedded within the contract. As a good Kantian, this permanent gap does not bother me, but I acknowledge the frustration of those who hope for and strive to find a unified theory. This is also an answer to Professor Smith's quandary: why institutional models, like law or economics, presuppose a discoverable order or intelligibility to human interaction.

⁶⁰ Roy Kreitner, *Fear of Contract*, 2004 WISC. L. REV. 429, 430.

⁶¹ Lipshaw, *Contingency*, *supra* note 22, at .

⁶² "Metaphysical indeterminacy holds that a theory's answer to the question is in fact indeterminate. . . . But while epistemic indeterminacy [i.e., although there may be a precise answer, we currently lack the ability to determine it] is only potentially disabling (there is some hope of overcoming it), metaphysical indeterminacy, like incompleteness, is permanently disabling for a theory that takes an independently specified domain (e.g., an area of law) as its object of inquiry." Kraus, *supra* note 1, at 432.

The answer lies deep with human reason itself – we are hardwired to seek intelligibility whether or not we will ever find the scientific or theological answer. Hence, it is in our very nature to conflate duty and consequence.