The Morality of Promises and Contracts

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To my family

<u>Abstract</u>: This thesis explores the morality of promises, and the relationship between promises and contracts. It offers an account of the grounds of promissory and contractual powers, duties, and rights, and of the relationship between these powers, duties, and rights and the law. The first part is devoted to exploring aspects of the morality of promising (Chapters 1 and 2). The second part (Chapters 3-5), draws on the conclusions reached in previous chapters and defends a thesis about the relationship between the morality of promising and the law of contracts.

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Introduction

This thesis concerns the morality of promises and contracts. Distinguishing both domains, however, should be taken to have a purely expository purpose. Particularly in contemporary moral philosophy and legal scholarship, the serious study of promising and contracts often takes place in different venues and with different audiences. This is why it makes sense to begin by stating that this is a thesis both about the morality of promises *and* contracts. However, it aims precisely at showing that we ought to treat the study of promising and the study of the complexities of contract law as targeted at the same problem or, at least, as fundamentally connected to each other. If I had to choose only one aim for this work, it would be to convince its reader that answers to questions such us 'why contracts *bind*?' 'Or how are contracts *formed*?' 'Or how should contracts be *interpreted*? depend, to a significant extent, on a theory of promising; and that any comprehensive account of promissory morality must account for some features of our contractual practices. For example, it must explain why only some promises seem to be legally enforceable. Here, of course, I aim to provide convincing answers to these questions. Yet the sole fact of convincing the reader of the serious interconnectedness between the puzzles regarding promissory morality and those pertaining contractual morality would be in itself sufficient.

The question regarding the binding force of a promise is old and persistent. Many of those who have proposed general accounts of the nature of morality or practical reason, such as Thomas Aquinas or David Hume—and more recently John Rawls, Joseph Raz, or T.M. Scanlon—give promises an important place in their theories.[1] Arguably, it is the fact that promises seem to enable us to create our own obligations and rights at will, which appears to contradict the basic idea that morality is not simply 'optional', that places these writers under the need for an answer to the question of how, if so, promises bind.[2] A similar problem face those who offer general accounts of the nature of law, with regards to the making of contracts, or other acts such as the making of a will or a property transfer. By making contracts, private individuals seem to be able to create valid legal norms. Yet, is it not the case that individual agents are bound to *obey* the law and are not its creators? Is it not only the sovereign who determines what the law *is*? Writers, mainly in the so-called 'positivist' tradition, such as Hans Kelsen, or H.L.A. Hart, purport to solve this puzzle by simply assuming that our power to make contracts is a kind of private-legal power, a power to create law that the law *confers* on individuals.[3] It is the law, however, that ultimately grounds individuals' powers to make contracts (and wills, property transfers, etc.,). Thus, the problem of the bindingness of contracts constitutes for legal theorists, or at least to some of them, a puzzle that is similar to the one of the bindingness of promises for those

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[1] Thomas Aquinas, *The Summa Theologiae* (First published 1465, Fr. Laurence Shapcote, O.P., The Aquinas Institute for the Study of Sacred Doctrine 2012) Q 88 2nd II, 805 ff.; David Hume, *A Treatise of Human Nature* (First published 1739, Oxford University Press 2001) B 3 II V, 331 ff.; John Rawls, *A Theory of Justice* (First published 1971, rev. ed, Harvard University Press 1999) 97-98, 303-308; Joseph Raz, *Practical Reason and Norms* (First published 1975, 1999 ed, Oxford University Press 2002) 69-73; T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) Chap. 7.

[2] This worry was at first most fiercely formulated by Hume, who famously maintained that '[…] every new promise imposes a new obligation of morality on the person who promises, and since this new obligation arises from his will; 'tis one of the most mysterious and incomprehensible operations that can possibly be imagin'd, and may even be compar'd to *transubstantiation*, or *holy orders*, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature.' *See* Hume, *A Treatise of Human Nature*, 336.

[3] *See* Hans Kelsen, *General Theory of Law and State* (First published 1949, Routledge 2017) 136-142; and H.L.A Hart, *The Concept of Law* (First published 1961, Oxford University Press 1994) 27-28. Their accounts of the structure of such powers significantly differ from each other. Yet they both argue that our power to make contracts (or wills, etc.,) is conferred or granted by the law on to individuals. These powers are *legal* in nature; they are created by the law.

interested in accounting for the nature of morality. Both promising and contracting seem to involve exercises of what we may call normative or *deontic powers*, that is, powers by which agents shape respectively their moral and legal obligations at will. Yet what if the question regarding the binding force of contracts and the one about the bindingness of promises are not really two different questions?

What if an account of promises' bindingness is also an account of the bindingness of contracts? What if the law, by recognising the bindingness of contracts is simply recognising the bindingness of promises? In this thesis, I maintain that promises and contract bind in virtue of the same facts. I shall argue that, in the sense that they share the same normative grounds, contracts *are* promises. The idea that contracts are promises, of course, is not a new idea. Writers from the late scholastic period such as Leonardo Lessius or Luis de Molina, or early modern authors such as Samuel Pufendorf or Hugo Grotius, treated the question of the binding force and structure of promising in conjunction with the one regarding the binding force and structure of contracts.[4] And more recently, the 'contract as promise' idea experienced a notable revival due to the influential work of Charles Fried.[5] Nevertheless, in the current scholarship, and despite some notable attempts to defend it,[6] it has significantly lost its strength.

[4] *See* Hugo Grotius, *The Rights of War and Peace* (First published 1625, Liberty Fund 2005) 703-705; Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (First published 1691, Cambridge University Press 1991) 69-70, 106; and Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca.1500-1650)* (Martinus Nijhoff 2013).
[5] Charles Fried, *Contract as Promise* (Harvard University Press 1981).
[6] *See* e.g., Seana V. Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708.

Some writers question the contract as promise idea's capacity to explain some fundamental aspects of contractual phenomenology. Some, for example, have maintained that the law is not concerned at all with recognising and enforcing promissory obligations and rights, but exclusively with responding to the harmful consequences that may arise for those who rely on promises.[7] Others have argued that although promising may help to explain why we ought to keep our contracts, it cannot make sense of important aspects of the practice of contract, such as the remedial rights and duties that arise in case of breach.[8] And others have argued that contracts are a product of an act of exchange of rights between the contracting parties, and thus have an inherently bilateral nature—while promises, in their view, are unilateral in nature.[9] Yet, in my view, the main threat to the contract as promise idea does not come from its adversaries. The real problem is that the contract as promise idea is treated precisely by some of its advocates as having very limited explanatory power. Even if it is still the dominant theory of contractual obligations and rights, it has become a mere commonplace among contract law scholars; a simple truism that has no bearing on their account of any of the fundamental aspects of contract law.

Many writers simply endorse the idea that contracts are some kind of promise, yet often fail to explain why the fact that contracts are promises matters at all in their account of different aspects of the contractual phenomenon. For instance, they fail to note that the account of promising they explicitly or implicitly

[7] *See* e.g., Lon Fuller & William Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 N°1 *Yale Law Journal* 52; Neil MacCormick, 'Voluntary Obligations and Normative Powers' (1972) 46 *Proceedings of the Aristotelian Society* 59, 62-73.
[8] Richard Craswell, 'Contract law, Default Rules, and the Philosophy of Promising' (1989) 88 N°3 *Michigan Law Review* 489.
[9] Peter Benson, *Justice in Transactions* (Harvard University Press 2019) 35-39.

adopt determines their answers to questions regarding what constitutes the content of a contract (e.g., is the content of a contract fixed by the actual intentions of the parties, or by their communications, or both?; and what are the kinds of intentions that fix such content?) Of course, they often offer answers to such questions. Yet they seem to ignore that these answers, at least to a very large extent, will depend on their view of the nature of promising.[10] This thesis aims to convince the reader that the critiques of the contract as promise idea are unfounded, and that those who endorse such an idea make a serious mistake in failing to acknowledge its explanatory power. As I shall argue, once we admit that contracts are promises, we must also realise that our views on crucial aspects of the contractual domain, such as our account of contractual formation and interpretation, or our view on the nature of remedial rights and duties, are also inherent in our views on the nature of promising. Once we endorse and take seriously the contract as promise idea, we realise that a theory of promissory obligations and rights *is* essentially a theory of contractual obligations and rights, or at least that the former is an inevitable prolegomenon to the later. In line with this thought, the first part of this thesis defends a view on some aspects of promising and 'voluntary undertakings' that I shall take to play a crucial role in our understanding of contracts. In the second part, I draw upon the conclusions

[10] In order to detect this problem, one may simply take a look at the main contract law treatises and textbooks in any common law jurisdiction. They often acknowledge contracts' promissory nature, and then they explore to great detail all the complicated intricacies of contract formation, interpretation, and of contractual remedies. And often defend strong positions on these matters. Yet they seem not aware of the fact that *if* contracts are promises or something like promises, their account on how contracts are formed, and on how the content of contractual rights and duties is determined, is responsible to an account of promising. Yet still, they fully omit even discussing questions regarding the nature of promising.

established in earlier chapters regarding promissory morality, and proceed to defend an account of contracts.

Let us now begin setting the ground for our exploration of promises and contracts.

My topic is the normativity of promises and contracts. I am concerned with the *values* that make the case that promises and contracts *bind*—and with the values that justify the law of contracts.[11] During the second half of the twentieth century, some philosophers thought that we could learn about promising—amongst other things—simply through carefully grasping the concept of a promise and its characteristics qua linguistic acts.[12] And some applied a similar approach when inquiring about the nature of contracts.[13] In this thesis, I adopt a different strategy of inquiry. I side with the view that it is only by exploring promises' normativity (i.e., the values or considerations that make the case that promises bind) that we can provide a full account of promising's nature or structure. Thus, it is only after understanding promising's normativity, that we can answer structural questions about promising, such as whether communication is necessary for promising or not, or whether promises require acceptance in order to bind or not. And if, as I shall argue, contracts are promises,

[11] There are aspects of promising' normativity that arguably differ from the question of promises' bindingness. To be more specific, my main concern in this thesis is the *deontic impact* of promises, that is, promising's capacity to create obligations and rights. It concerns the normativity of promises (i.e., of our power to make promises) qua determinant of promises' deontic impact. Throughout this thesis I will use the notions of obligation and duty as synonyms.

[12] *See* e.g., J.L. Austin, *How to Do Things with Words* (J. O. Urmson and Marina Sbisà eds., 2nd ed, Oxford University Press 1975); or John Searle, 'How to Derive 'Ought' from 'Is', (1964) 73 N°1 *The Philosophical Review* 43.

[13] *See* e.g., Robert A. Samek, 'Performative Utterances and the Concept of a Contract' (1965) 43N°2 *Australasian Journal of Philosophy* 196. *See* also Reinach, 'The A Priori Foundations of the Civil Law' (first published 1913) (1983) 3 *Aletheia* 1.

the same applies to contracts. Our account of the nature of contracts—our answers to questions such as how are contracts formed—is responsible to an account of the normativity of contracts. Indeed, perhaps the conceptual structure and phenomenology of promises and contract is the starting point—the raw data—for our normative theorising about promising and contracts. Yet I maintain that solely exploring their phenomenology or conceptual structure will not get us far in our understanding of their nature.

As I hinted above, I shall start from the idea that the binding force of promises and contracts, that is, the fact that they are genuinely capable of generating obligations and rights, is grounded in values, and values are aspects of our well-being or depend on these aspects. Values derive from *our interests*. Thus, promises and contracts bind only if there is value in promises and in contracts having the capacity to generate obligations and rights: promises are genuinely binding only if we have an interest in being able to make binding promises. Thus an account of promissory or contractual duties and rights is an account of these duties' and rights' *normative grounds*, that is, of the values or aspects of our well-being that make the case we have such duties or rights.[14] When we look closely at the recent history of the discussion of the normative grounds of promissory duties and rights, we notice that there have been roughly two lines of thought, which I

[14] It was arguably Hume who first realised that we cannot fully explain the binding force of a promise without reference to the point, interest, or value that promising serves. According to Hume, promises are 'human inventions, founded on the necessities and interests of society'. *See* Hume, *A Treatise of Human Nature*, 333. Yet perhaps the clearest formulation of this idea is Raz's. In Raz's view, one possesses the power to promise or any other normative power only if it is all things considered valuable or desirable that one possesses such power. Joseph Raz. 'Normative Powers (revised)', MS; and Raz, *Practical Reason and Norms*, 69-73. More on Raz's account in Chapter 2.

shall characterise as the *non-deontic* view and the *deontic* view of the grounds of promises.

Some believe that the grounds of promissory obligations and rights are to be found in human interests or values that are not constituted by deontic or normative properties—interests that, though of course normatively significant or impactful, are not *as such* deontic or normative in nature. For example, Hume or Rawls argue that our interest in possessing the power to make binding promises is grounded in our interest in different forms of *social coordination*.[15] Similarly, Scanlon argues that promises' bindingness is grounded in what he calls the value of *assurance*, that is, our interest in being able to know others' future behaviour.[16] For these writers, values or interests that are not deontic in kind (e.g., social coordination, assurance) make the case for our power to make binding promises. Though their accounts of promises' normative grounds diverge, these authors all share the view that non-deontic values can explain the deontic impact of promising (i.e., the fact that promises are capable of producing obligations and rights). Those who defend the deontic view would disagree.

Such authors believe that the kind of interest that grounds promissory rights and duties is deontic *in kind*. Promises are binding not because we need them for social coordination or as a useful tool for providing assurance. Our power to make binding promises, of course, may also serve these non-deontic interests or values. Yet the ground of promissory duties and rights is our interest in being able to choose to be *bound* to others; it is a deontic interest. It is the value of being

[15] Hume, *A treatise of Human Nature*, 334-335; Rawls, *A Theory of Justice*, 97-98, 303-308. *See* also John Rawls, 'Two Concepts of Rules' (1955) 64 N°1 *The Philosophical Review* 3, 15-18.
[16] Scanlon, *What We Owe to Each Other,* 296.

able to choose our obligations and rights towards others, that gives us the power to make binding promises. Versions of this view have been suggested by Raz, and developed in depth lately by David Owens.[17] In this thesis, particularly in Chapters 1-2, I endorse and develop the deontic view.

It may be worth revealing a further commitment that motivates this thesis; one regarding the relationship between the enterprises of exploring the nature of legal institutions and practices, on the one hand, and the exploration of the different kinds of human values that shape our lives, on the other. As I have already maintained for the case of the nature of promises and contracts, I am convinced that it is only by understanding the values that underlie our legal world that we can fully grasp its nature. A purely, let us call it, 'behavioural' approach to enquiring the structure of legal institutions will not get us very far.[18] Perhaps we can achieve *some* degrees of intelligibility by approaching questions pertaining, for example, the nature of legislative acts or of customary law, or about the nature of tort or criminal law, without making reference to the values that underlie such legal practices. Employing such approach, one might learn, for example, how a

[17] *See*, Joseph Raz, 'Promises and Obligations' in P. M. S. Hacker and Joseph Raz (eds), *Law, Morality, and Society* (Oxford University Press 1977) 227-228; Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 173; and David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012) esp. Chaps. 4-6. Though Raz endorses the deontic view, he does not develop it in much detail. I discuss some of the problems of Raz's version of the deontic view in Crescente Molina, 'Is There Value in Keeping a Promise? A Response to Joseph Raz' (2019) 15 N°1 *Journal of Ethics and Social Philosophy* 85. To be clear, authors such as Raz or Owens developed the idea that our well-being comprises genuinely deontic or normative interests, and that these interests ground some of our duties, rights, or powers (e.g., promissory duties, rights, and powers). Yet surely the idea that promising is a tool by which we can genuinely shape our own deontic world (i.e., our obligations, rights, etc.,) was the standard view already at least since the late scholastic and early modern writers. *See supra* note 4. For a recent formulation of the deontic view *see* Danielle Bruno, 'Trust-Based Theories of Promising' (2020) 70 N°280 *The Philosophical Quarterly* 443.

[18] Making a similar point *see* Hart, *The Concept of Law*, 89-91.

system of fault liability in tort law impacts the insurance market, or how property law impacts the class structure in a given community, or how contract law serves as a tool for the accumulation of capital. However, we cannot *fully grasp* the nature of such legal practices without exploring their value. Perhaps examining the raw social structure of these practices must constitute the departing point for any inquiry into their nature. But the law is a human enterprise, and as such, its nature is fully intelligible to us only as far *we* understand how, if so, it is connected to aspects of our own well-being.[19] This approach to legal theory motivates this thesis.[20] My aim is to advance our understanding of the nature of contracts by exploring the values that uphold the contractual phenomenon.

In making the central claims in the thesis about the normativity of promises and contracts, I will sometimes say that I have established, defended, or argued for a conclusion when my discussion of the point relies on asserting a controversial premise or presupposing a controversial claim for the sake of argument. For example, although the thesis relies on the deontic view of the grounds of promissory duties and rights and has as its central thesis that contractual obligations are promissory obligations, I am aware that there is more to say about these matters than what I offer here. At many points in the thesis, there are competitor views which I set aside, and when I do engage with them, sometimes I will argue from my own preferred theoretical viewpoint. My

[19] This, of course, does not mean that in at least in some cases a fully revisionist or debunking theory of a certain legal practice is indeed the best possible theory of that practice.

[20] In itself, the basic idea that the intelligibility of legal practices and institutions presupposes an inquiry into at least the putative values that shape these practices and institutions does not commit us to any substantive jurisprudential view. Thus, it should not be mistaken to have any direct bearing on more substantive jurisprudential disputes such as the one between so-called positivists and non-positivists accounts of the nature of law.

overall aim, however, is not to build my view about the relation between contracts and promises brick by brick but to present a broad, and I hope interesting, view about the relation between several aspects of promissory and contractual morality by adopting and developing what I take to be sound views on many fundamental questions regarding the structure of our moral world. It is, of course, for the reader to ultimately judge if the foundations of the building I have tried to construct are as solid as I take them to be.

Let us now briefly introduce each chapter. As I mention above, the first part (Chapters 1-2) deals with some central aspects of the normativity of promises. The second part (Chapters 3-5) extends these conclusions to contracts, and defends an account of the roles of contract law.

In Chapter 1, I contend that the notion of a promissory right captures a central feature of the morality of promising which cannot be explained by the notion of promissory obligation alone: the fact that the promisee acquires a full range of *control* over the promisor's obligation. I defend two main claims. First, I argue that promissory rights are distinctively grounded in our interest in possessing voluntary forms of authority over others (our 'authority interest'). Second, I defend a version of the 'interest theory' of rights that considers our authority interest among the various human interests which ground our rights. Furthermore, I provide a critical examination of Scanlon's account of the normativity of promissory rights. Chapter 1 sets an important foundation for our discussion of contractual enforcement in Chapter 5. As we will see, contract law enforces promissory *rights* and not promissory obligations as such. It is distinctively concerned with promises that grant exclusive deontic control (i.e., authority) to the promisee.

In Chapter 2, I explore the normativity of ‘voluntary undertakings’, that is, of those deontic entities (i.e., rights, obligations, powers, etc.) that exist only if agents choose to bring them about. I defend the view that at least some of our voluntary undertakings, and thus some of our powers to bring them about (‘deontic powers’), are grounded in our basic interests in being able to shape our own deontic world at will. The main goal of this chapter is to distinguish between two of our basic deontic interests. First, exploring in more detail some of the ideas developed in Chapter 1, I defend the claim that we have an authority interest, namely an interest in being able to form relationships of voluntary authority with others. As I will characterise it, the authority interest is an interest in being able to imbue others not only with a claim against us, but also with an exclusive power to release us from our duty. Second, I argue that we have what I will call an ‘allegiance interest’, namely an interest in being able to assume, at will, an obligation which is owed to another person whilst sharing over it equal control with the moral creditor (i.e., sharing an equal power to release us from our obligation). Agents have the power to make what I call ‘commitments’, that is, voluntary bonds over which the obligor *and* the moral creditor have control.

In Chapter 3, I explore the grounds of contractual obligations and rights. I argue against the view that these obligations and rights, and our power to make contracts, are a product of the law. I defend the view that they are grounded in our basic deontic interests. Thus, I argue that they share the same normative grounds as promissory obligations and rights. In this sense, I contend that contracts are promises. In order to defend this claim, I provide an account of legal duties and rights. I maintain that these duties and rights are the product of what I shall call *legal deontic power*. I contend that our power to contract is not legal in kind since it does not hold as a result of an exercise of legal deontic power. After characterising legal duties and rights, I will argue that all the central aspects of contracts, namely, how are they formed and interpreted, and the remedial duties and rights that arise out of their breach, can be explained by exclusive reference to our authority interest.

Chapter 4 continues to develop some of Chapter 3's ideas, and defends an account of the value of contract *law*. I begin by defending the claim that the law generally refrains from impacting contracting parties' duties and rights. And I argue that this is a valuable thing. I will argue that there is at least pro tanto value in the law refraining from extending its authority over the contracting parties in the matters of their contracts. Then I move onto arguing that one of contract law's fundamental tasks is to direct the practice of promise-making. By regulating the enforcement of promises, the law gives us reasons to enter certain types of promissory arrangements and reasons to refrain from entering others. It gives us reasons to exercise *our* power to promise in certain directions, yet it generally does not aim at directly impacting or controlling our contractual rights and duties. Finally, I provide an account of some of the central aspects of our contractual enforcement practices, such as the fact that the law tends to enforce bargains and not gratuitous promises, or that it refrains from enforcing promises that it deems socially undesirable.

Chapter 5 invokes the distinction developed in Chapter 2 between relationships of voluntary authority and commitments to argue that only authority-creating promises and not commitments (i.e., voluntary obligations over which the obligor and the obligee have equal control) are enforceable. I argue that both the fact that a promise grants the promisee a *right* to performance (and not merely a revocable claim to performance as in the case of commitments), *and* the fact that the promisor, by breaching his promise, has *harmed* the promisee, determine a promise's enforceability. Thus, I argue that enforcement mechanisms such as damages awards or specific performance must not be understood as merely vindicating promissory rights or wrongs, but at executing the promisor's liability to repair the harm or loss caused by his violation of the promisee's right. They are justified as *indemnification* measures. Furthermore, I conclude by offering a reinterpretation of the so-called 'transfer theory' of contracts. I suggest we understand the transfer theory precisely as concerned with distinguishing authority-creating promises from commitments.

Finally, I conclude this thesis by examining two supposed alternatives to a promissory theory of contracts. First I explore the view that aims to reduce the morality of contracts to the morality of reparation (what I shall call the 'tort approach'). Second, I discuss the view that maintains that contract law should incorporate the network of duties and claims that are grounded in the contracting parties' relationships beyond the parties' purely promissory arrangement (the so-called 'relational approach'). I shall argue that both accounts capture important truths about the morality of contracts, but that by no means they are genuine alternatives to the promissory theory I will offer.

Before moving onto Chapter 1, let me introduce some final remarks regarding the scope of this thesis. As I state above, my topic is the normativity of promising. More specifically, I am concerned with its *deonticity*, that is, its capacity to impact our obligations and rights. I shall not say much on other philosophical puzzles that promising may raise, such as its significance to our understanding of the epistemology of testimony.[21] And, as I said, my account of contracts is also confined to their normative or deontic impact, and to the value of contract law. I aim to provide a normative account of contracts that is capable of making sense of what I take to be the central features of the contractual phenomenon in western legal systems.[22] I do not, of course, pretend to provide an account of all the complexities that contractual practice gives rise to. Some of them are not determined in any fundamental sense by our account of the normativity of contract, and thus there is no reason to discuss them here. Others are indeed determined by an account of contractual normativity, yet I simply cannot discuss them with due care this time. These include, for example, the role of coercion as an invalidating factor of contractual validity; the normative significance of justified or excusable breaches of contract; or the nature of different forms of

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[21] For a helpful overview, *see* e.g., Fredrick Schmitt, 'The Assurance View of Testimony' in A. Haddock, A. Millar, and D. Pritchard (eds), *Social Epistemology* (Oxford University Press 2010) 216–241; and Philip J. Nickel, 'Trust and Testimony' (2012) 93 N°3 *Pacific Philosophical Quarterly* 301. Section II b of Chapter 2, however, may be of interest for those working on the epistemological significance of promising.

[22] I believe that there is enough structural convergence between the law of contracts of the most representative legal systems in both the civil and common law traditions for there to be a successful supranational or inter-systemic normative theory of contracts. Defending this claim, and pointing out some of the explanatory deficiencies of purely local theories of contracts *see* Felipe Jimenez, 'Against Parochialism in Contract Theory: A Response to Brian Bix' (2019) 32 N°2 *Ratio Juris* 233.

contractual termination. I shall leave these topics for another occasion. Let us begin.

1st Part

1. Promissory Rights

The questions regarding the nature and justification of the rights to performance that promisees acquire over their promisors ('promissory rights') have received significantly less philosophical attention than similar questions regarding promissory obligations. Perhaps this neglect of promissory rights is based on the assumption that they are mere mirror images of promissory obligations, with the latter considered as the primary explanandum for an account of promising. I maintain that this assumption may lead us to miss a crucial aspect of the normative structure of promising. Under the account I will defend in this chapter, the notion of a promissory right captures a central feature of promissory morality. A promise may not only put the promisor under an obligation to perform the promised act. It constitutes a tool by which agents (promisors) grant others (promisees) exclusive *control* over their obligations (i.e., authority) on a certain matter. It can give the promisee a claim to performance, and an *exclusive power to release* the promisor from his promissory obligation.[23] It is in this aspect of the normativity of promising where the notion of promissory rights finds its distinctive significance. Or so I will argue.

After some general remarks about the complexities associated with offering a successful account of the grounds of promissory rights, Section I provides a critique of T.M. Scanlon's influential theory of promising and its treatment of promisees' rights. This critical section on Scanlon's account lays the

[23] Hereinafter, I shall refer to the fact of a person having a claim to the performance of a given act, and the exclusive power to release the obligor from her obligation as her having 'exclusive deontic control' or 'authority' over the obligor in such matter. I explore the structure of relationships of exclusive deontic control in detail in Chapter 2.

groundwork for the positive contribution this chapter makes. As I will argue, the central flaw in Scanlon's account resides precisely in its incapacity to account for the significance of deontic control in promissory morality. In Section II, I provide an account of the grounds of promissory rights. I shall argue that promissory rights are grounded in our interest in being able to assume exclusive control over others' obligations; an interest which is distinct from any other interest we may have in our promisors keeping their promises, such as our interest in the promised act itself (i.e., in the content of the promise), or in being able to receive assurance about its occurrence.

If successful, my account of promissory rights contributes to solving a long-standing problem of the so-called interest theory of rights; that is, its incapacity to account for right-holders' control. I shall contend that the interest theory can overcome this difficulty if it is taken to comprise our interest in purely deontic forms of control among the various human interests which ground our rights. If reformulated into what I will call the 'deontic interest theory', the interest theory becomes able to provide a sound account of the grounds of all those rights which seem to give right-holders exclusive control over others' obligations—such as promissory and property rights.

The account of promissory rights I defend in this chapter purports to illuminate a fundamental aspect of promissory morality, namely promises' capacity to serve as tools by which promisors offer voluntary authority to their promisees. In Chapter 2, however, we shall see that not all promises are meant to serve this purpose. By making a promise, the promisor may not grant exclusive deontic control to the promisee but retain and thus share *equal* deontic control over her promissory obligation with the promisee. Furthermore, I will later contend (Chapter 5) that only those promises that create a *right* to performance, that is, those that give authority to the promisee in the matter of the promise, are legally enforceable.

I. Promissory Rights and the Value of Assurance

It seems natural to hold that promises give a right to performance to the promisee. As Joel Feinberg put it, 'it always follows necessarily from the fact that a person is a promisee that he has a right to what is promised.'[24] However, difficulties arise when trying to determine what the ground is for such a right. According to Joseph Raz's well-known version of the interest theory of rights:

'"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's wellbeing (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[25]

Thus, according to the interest theory, the promisee would have a right to performance if, and only if, an aspect of her wellbeing (her interest) is a sufficient reason to hold the promisor under the duty to perform the promise. Here is where we begin to realise that identifying the normative grounds of promissory rights is not an easy task. An interest of the promisee in the promised *act* alone (i.e., in the content of the promissory duty), cannot justify the duty to perform our promises. Even if my φing is in your interest—even if your well-being significantly benefits from my φing—I am never under a *promissory* obligation to φ if I have not

[24] Joel Feinberg, 'Duties, Rights, and Claims' (1966) 3 N°2 *American Philosophical Quarterly* 137, 138.
[25] Raz, *The Morality of Freedom*, 166.

promised it to you. Promissory obligations are, in this sense, content-independent obligations.[26] What matters is just that the validity conditions of the making of a promise (i.e., that it was not made under duress, etc.) have been fulfilled for promissory obligations to obtain, and the nature or quality of the promised act (besides it being promised), at least to a significant extent, does not figure as one of these validity conditions. Thus, from all this follows that the interest which would justify the right to the performance of a promise—an interest which would be enough to justify promissory obligations—cannot be an interest in the promised act alone, but an interest which promisees have in the performance of the promises made to them regardless of their content, solely because it was *promised* to them.[27] But what can that interest be?

T.M. Scanlon has suggested that the promisee's interest that is sufficient to justify the promisor's obligation is an interest in receiving assurance regarding the promisor's future behaviour. He maintains that the obligations and rights that promises generate are explained in terms of 'what we owe to other people when we have led them to form expectations about our future conduct'.[28] In Scanlon's view, there is a general principle of fidelity ('principle F'), which demands that, in absence of justification, an agent A who, with the aim of providing assurance to another person B, voluntarily and intentionally causes B to expect that he will perform or omit a certain action, and B wants to be assured of this (and both

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[26] *See* H.L.A Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982) 254.

[27] An additional challenge for an account of the grounds promissory rights is presented by their *voluntary* character, that is, by the fact that they only obtain if agents (i.e., the promisor and promise) *choose* to bring them about. I discuss this aspect of promissory rights *infra* in Section II, and in detail in Chapter 2.

[28] Scanlon, *What We Owe to Each Other*, 296.

parties know about the other's relevant beliefs and intentions), A should act as he said he would unless B consents otherwise. The standard case of promising triggers principle F, since it fulfils the conditions stated by it, making the case that: 1) in absence of justification, the promisor has an obligation to fulfil the expectations of performance she has created in the promisee by performing her promise; and 2) the promisee has a '"right to rely" on this performance: that is to say, [she] has grounds for insisting that the [promisor] fulfil the expectation he or she has created'.[29] Many writers have pointed out that Scanlon's account fails to adequately explain the nature of promissory obligations.[30] Here I maintain that it also fails to account for promissory rights.

Scanlon argues that the promisee's right to performance consists in a right that the promisor fulfils the expectations of performance she created in the promisee. But which interest of promisees justifies such right? Imagine that Guido promises Aldo that he will pick up Aldo's daughter Carla from school tomorrow. Let us assume that all the conditions of principle F are fulfilled and thus Aldo acquires a right that Guido keeps his promise by picking up Carla. What makes principle F a sound foundation for Guido's right to performance? Scanlon argues that the interest of the promisee that justifies his right to performance is what he

[29] Id., at 305.

[30] For different critiques of Scanlon's account *see* e.g., N. Kolodny and R. Jay Wallace, 'Promises and Practices Revisited' (2004) 31 N°2 *Philosophy & Public Affairs* 119; Daniel Markovits, 'Making and Keeping Contracts' (2006) 92 *Virginia Law Review* 1325, 1358 ff.; Seana V. Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117 N°4 *Philosophical Review* 481, 486 ff.; Owens, *Shaping the Normative Landscape*, Chap.9; and Michael Pratt, 'Some Features of Promises and Their Obligations' (2014) 53 N°3 *The Southern Journal of Philosophy* 382, 390 ff.

calls the 'value of assurance'.[31] However, Scanlon is not entirely clear about what this value is and how it provides the grounds for the promisee's right.

Perhaps Scanlon understands the value of assurance to be something like the value of being able to know how others will or are likely to act in the future.[32] It would be what we may call a purely 'predictive interest'. We can have, one may assume, some kind of knowledge regarding future state of affairs. If I take the bus every day at the same bus stop at 9 AM, it makes sense for me to say that, other things remaining equal, the bus will be there at 9 AM and to claim that I know this. Similarly, when someone makes a promise to us, our experience of the phenomenon of promising plus our knowledge of the promisor's individual character may justify maintaining that we know that it is at least likely that the promisor will act as promised—we may say that we acquire at least 'probabilistic' knowledge regarding the promisor's performance. And, one may argue, being able to acquire this knowledge through promises is a valuable thing. But is the promisee's interest in knowing that their promisor is likely to act as promised sufficient to justify the promisor's obligation to act as promised (and thus to serve as a ground for promissory rights)?

One could argue that promises operate as a behaviour-predicting-mechanism precisely *because* they impose an obligation on the promisor to act as promised: promisors tend to act as promised because they are under an obligation to do so (i.e., the fact that they are obliged to act as promised sets the motivational

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[31] Scanlon, *What We Owe to Each Other*, 303. *See* also T. M. Scanlon, 'Rights and What We Owe to Each Other: Reply to Leif Wenar' (2013) 10 *Journal of Moral Philosophy* 400.

[32] He maintains that the value of assurance consists in '[…] being able to be reasonably certain that a thing will happen unless one consents to its not happening.' *See* Scanlon, *What We Owe to Each Other*, 316.

grounds for their acting as promised). Thus, if the predictive function of promises holds only because promisors are under an obligation to act as promised, our predictive interest would be what justifies the promisor's obligation and thus the promisee's right. Writers have, I believe correctly, pointed out that Scanlon's account runs into a bootstrapping or circularity problem here, since what he takes to be the grounding value of promissory obligations (i.e., the value of assurance) would hold or be realised only if we presuppose the bindingness of promises. Promises would generate assurance only if they are capable of producing obligations, yet it is precisely their capacity to produce obligations that we are trying to account for.[33] But even if Scanlon could respond to this objection, his account would still fail to provide a plausible account of the grounds of promissory rights, as I will show in the following.

First of all, promises are often not enough to satisfy our interest in predicting others' behaviour, since people frequently breach their promises. The fact that someone promised us that they will φ is not always sufficient for us to acquire predictive power regarding the fact of them φing. Second, and more importantly, promising is not necessary to satisfy our predictive interest. We can acquire knowledge about others' future behaviour by, for example, them declaring to us their firm intention to act in a certain way, by us carefully observing their habits and patterns of behaviour, etc. Thus, alluding to our predictive interest alone does not tell us anything on what is distinctive about promising when compared to other behaviour-predicting-mechanisms. And it provides no explanation regarding why promises impact our obligations and rights while

[33] *See* e.g., Kolodny & Wallace, 'Promises and Practices Revisited', 131 ff.; and Markovits, 'Making and Keeping Contracts', 1358 ff.

other of these mechanisms do not. For example, *it* cannot explain why I acquire a right that you perform your promise to φ while, even if I have an interest in receiving assurance about you φing, the fact that you have declared to me your firm and serious intention to φ is not sufficient to make it the case that I acquire a right that you φ. Arguably in both cases I acquire knowledge about your future behaviour but only the promising scenario gives me a right that you φ.

One might argue that what is distinctive of the promising case is that by promising the promisor declares not only that she will act as promised but also that *she cannot change her mind* about it. However, it is still not clear to me why this feature of promising would be necessary to justify promissory rights *if* the value which grounds these rights is just our predictive interest. Again, there are surely cases in which others' firm declarations of intention to act in a certain way would provide better grounds than promising for us to know how they will behave in the future. For example, suppose that your most diligent friend declares her firm and serious intention to go to your party, and also that your flakiest friend promises that she will go. It could be the case that your interest in predicting your friends' behaviour is better satisfied by your diligent friend's declaration than by your flaky friend's promise. If this is correct, I cannot see why—if the interest which justifies promissory rights is our predictive interest—only the promising case seems to give you a *right* to rely on your friends' declarations.

Perhaps Aldo's interest is not merely in knowing how Guido will or is likely to act, but in avoiding the harmful consequences or losses that could follow from

Aldo *relying* on this knowledge.[34] Because of Guido's promise, Aldo will not show up to pick up Carla. And if Guido does not pick her up, nobody will—and this is likely to cause harmful consequences for both Aldo and Carla. On this view, the promisee's right is a right that the promisor undertakes the actions necessary to avoid the harmful consequences of his breach. But Scanlon wants to deny this. He rightly argues that if the ground of promissory obligations and rights consists only in our interest in avoiding the harmful consequences that may follow from relying on other's words, promissory duties would be most of the time dischargeable by actions different from *performing* the promise (e.g., by timely warning the promisee that one will not perform).[35] Thus, a harm-prevention view of the value of assurance cannot provide the grounds for the promisee's right to performance.[36]

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[34] A view along these lines was defended by MacCormick, 'Voluntary Obligations and Normative Powers', 70 ff.; and, arguably, by Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990) 307-310.

[35] Scanlon, *What We Owe to Each Other*, 301. Moreover, Scanlon denies that the value of assurance is merely 'experiential', that means, it does not consist in the psychological relief that the promisee may experience by knowing that a certain act will or is likely to take place. Id., at 303.

[36] Some writers would agree with Scanlon that the interest that grounds promissory rights and duties is akin to what I have called the predictive interest, that is, an interest in being able to know the promisor's future behaviour. However, unlike Scanlon, they maintain that our predictive interest is not sufficient to make the case that we have promissory rights and duties. In their view, there must be a *practice*—a social rule—that grants us such rights and puts us under such duties. The practice of promising is thus justified by reference to our interest in being able to predict others' behaviour, and thus enter different forms of cooperative arrangements (the value of 'social coordination'). Yet we have a duty to keep our promises and a right to performance only because there is a (beneficial) practice of promise-making and keeping in first place (i.e., one that fosters the value of social coordination). Although different in some regards, famous versions of this idea have been proposed by Hume, *A treatise of Human Nature*, 331-337, and Rawls, *A Theory of Justice*, 97-98*,* 303-308. As Scanlon's, Hume's and Rawls' accounts also face significant difficulties. A first group of difficulties are equivalent to the ones that apply to Scanlon's account. Our interest in social coordination, as our predictive interest, cannot explain why promising seems to have distinctive deontic impact when compared to other coordination-enhancing mechanisms. As I have argued in the text, we may satisfy our predictive interest, and thus promote the value of social coordination, through mechanisms different than promising. A second group of difficulties arise from the fact that this account fails to explain the 'directed' nature of the promisee's right. It is an

But even if Scanlon is capable of accommodating all these objections, his account of promising reveals its most important deficiency as an account of the normativity of promissory rights once we realise that it fails to provide an explanation of what I will show in Section II to be a crucial aspect of promissory morality: that promisees may acquire exclusive *control* over promisors' obligations. Consider the following example.

Suppose that Aldo works as a waiter in Guido's pizzeria. Aldo is in a difficult financial situation and asks Guido for a pay raise. Guido responds that the restaurant's finances are not great at this time, but promises to give Aldo a raise in two months. Assume that Guido's promise fulfils all the conditions of principle F. But imagine also that Aldo is not the only one to want a raise. Octavio, another waiter at the restaurant, does, too. Assume furthermore that there is a labour regulation which prescribes that there cannot be differences in salaries for workers who perform the same job at the same company. Assume also that Octavio is aware of Aldo's request for a pay raise, and that Guido knows that Octavio is aware of Aldo's request (there is a well-established gossip culture at the

important feature of the phenomenology of promising that the promisee has a rightful claim to performance only against *the promisor*. By contrast, practice-based accounts tend to argue that promisors are bound to keep their promises because they have a duty to maintain the practice of promising, or to refrain from exploiting it (*see* e.g., Rawls, *A Theory of Justice*, 303-308). But if the promisee's right is merely a right to the protection or non-exploitation of the social practice of promising, such right would not only be a right against the person that made the promise to her, but against *all* the individuals that participate in the practice of promise-making, even if they have never, or will never, interact with the promisee. Therefore, the promisee's right to performance would not be a directed, *inter partes* right between the promisee and the promisor but a non-directed, *erga omnes* right. Thus this view fails to account for an important aspect of promissory morality. Offering different angles of criticism of Hume's and Rawls' accounts *see* e.g., Scanlon, *What We Owe to Each Other*, 316; Owens, *Shaping the Normative Landscape*, 135-136; and Shiffrin, 'Promising, Intimate Relationships, and Conventionalism', 519 ff. For a hybrid account that aims at solving some of the deficiencies of Scanlon's account by combining it with a practice-based account like Rawls' *see* Kolodny & Wallace, 'Promises and Practices Revisited', 148 ff.

restaurant). Octavio does not request a promise from Guido but is interested in receiving assurance about any pay raise that would result from Aldo's request. Octavio knows only too well that even if Guido made the promise *only to Aldo*, Guido would be providing assurance to him as well, since the restaurant has adopted a very strict policy of complying with labour regulations. Aware of all this, that is, knowing that his promise to Aldo involves providing some assurance to Octavio as well, Guido goes ahead and makes the promise to Aldo. Under principle F, not only Aldo but also Octavio would now have a right to demand performance from Guido. If principle F provides the grounds for promissory obligations and rights, the fact that Guido makes the promise only to Aldo is normatively trivial. Both Octavio and Aldo have a right to Guido's keeping his word, and these rights have exactly the same ground (i.e., the value of assurance).[37] Yet, I shall argue later, the example reveals that principle F fails to capture a very fundamental aspect of the normativity of promising. Aldo, *qua* promisee, may acquire a power that Octavio lacks, namely, the exclusive control over Guido's obligation. It is only Aldo who can *release* Guido from his promissory obligation, and, if exercised, this release extinguishes *any* obligation generated by the promise.

It seems to me that if one day before performance is due Aldo informs Guido that he does not need the raise any longer and that he liberates Guido from his promissory obligation, Octavio would have no right to Guido's performance. By contrast, if it were Octavio who approached Guido and told him that he is aware

[37] Perhaps one might argue that the promise makes principle F more *stringent* for the case of Aldo. However, still both Aldo's and Octavio's claims would be of the same nature; grounded in exactly the same value (i.e., the value of assurance). And, in any case, it is not clear at all why promising cases would necessarily trigger principle F in a more stringent way than other non-promissory cases.

of his promise to Aldo but that he (Octavio) no longer required the raise and thus waived his potential complaint under principle F, this clearly would *not* liberate Guido from his promissory duty. On Scanlon's account, principle F would be indeed cancelled if the person who received the assurance consented to the assurer acting otherwise.[38] However, such consent or waiver, exercised by Octavio, would not have the same obligation-cancelling effects as the promisee's (Aldo's) release.[39] True, both Octavio and Aldo may have an interest in receiving assurance from Guido, and this interest, under principle F, may justify holding that both of them have standing to request that Guido keeps his promise, and to rebuke him in the case of breach. Yet, principle F cannot explain why only Aldo acquires exclusive control over Guido's duty.[40]

To be clear, in determining the scope of a promise there may arise interpretative issues regarding the parties involved in the promise. A promise which is in principle thought to be between A (promisor) and B (promisee) may in fact include C (promisor 2) or D (promisee 2), and so on. Also, there may be promises between multiple parties which are interconnected in complex ways (e.g., A's promissory obligation towards B may be conditional on C's keeping of his promise to A, etc.). Moreover, as was the case for Octavio, the breach of a promise

[38] Scanlon, *What We Owe to Each Other*, 301-304.

[39] Helpfully distinguishing waivers from obligation-cancelling acts *see* Nicolas Cornell, 'The possibility of Preemptive Forgiving' (2017) 124 N°2 *The Philosophical Review* 241, 267 ff.

[40] Margaret Gilbert argues that Scanlon's theory fails to explain the promisee's power to release *and* his power to rebuke the promisor in case of breach. Margaret Gilbert, 'Scanlon on Promissory Obligation: The Problem of Promisees' Rights' (2004) 101 N°2 *The Journal of Philosophy* 83, 94 ff. I disagree with Gilbert on this point. I believe that principle F does make the case that Octavio has standing to rebuke Guido for his breach. What he lacks is the power to *release* Guido from his promissory duty, that is, a power to cancel or terminate Guido's promissory duty. I maintain that, when pretending to release Guido, Octavio is just waiving a potential future complaint but *not* liberating Guido from the obligatory force of his promise. More on the distinctive effects of the power to release in Chapter 2.

may, under certain circumstances, have a normative impact on people who are not parties of the promise (e.g., because they formed reasonable expectations about the promisor's performance, because they detrimentally relied on it, etc.).[41] The point I am making here is that promisees are capable of acquiring a power to terminate the promisor's obligation; a power that third parties to the promise lack even if they have standing to request performance, and to rebuke the promisor for his breach.

Scanlon's difficulty to explain the control that promisees may acquire over promisors' obligations is a serious problem for his account of promising. This is because, as I will argue in the next section, the exclusive deontic control acquired by promisees over promisors constitutes a fundamental aspect of the normativity of promising. It is precisely agents' interest in possessing this form of control over others that constitutes the ground of promissory rights.

II. Promissory Rights and the Authority Interest

Promises impact our normative world. In principle, promisees have a claim to demand that promisors act as promised, and to blame them in case of breach. And it is appropriate for promisors to constrain their practical deliberation towards the matter of the promise, and, in principle, to feel guilty for their failure to perform. I believe that all these phenomena are accurately captured by the idea that promisors are under an *obligation* to perform their promises; an obligation which is directed towards the promisee. But there is still a crucial explanatory role for the idea of promissory *rights* in accounting for the morality of promising. We

[41] Contract lawyers usually have to deal with such difficult cases when considering the claims of third parties to a contract.

learned from the Guido/Aldo/Octavio example that both promisees and third parties like Octavio, under certain circumstances, may have standing to demand performance, and, in case of breach, to rebuke the promisor. Yet, we saw that, unlike third parties, promisees may gain *exclusive control* over the promisor's obligation. The promisee may be imbued with an exclusive power to, before either the performance or the breach of the promise takes place, *release* the promisor from his promissory obligation.[42] Moreover, the promisee may not only acquire the power to release the promisor from her duty before the breach or performance of the promise has taken place. In case the promisor harmfully breaches the promise, the promisee may be entitled to demand compensation or other remedial actions. And she may be also exclusively entitled to release the promisor from these compensatory and reparatory obligations.[43] I shall maintain that this set of exclusive deontic powers that the promisee may acquire over the

[42] Two further clarifications regarding the power to release are needed. First, the promisee's power to release the promisor may be morally regulated by varied considerations (e.g., by the fact of the promisor's relying on the execution of her promise, by the fact that performance has become overly burdensome for the promisor, etc.,). These considerations may constitute strong reasons for the promisor for exercising her power to release the promisee, or for refraining from doing so. Second, I am not arguing that every promise necessarily gives the promisee exclusive control over the promisor's obligation. As we will see in detail in Chapters 2 and 5, some promisors *retain* control over their promissory obligation, and thus share with the promisee, a power to release themselves from their obligation. I am just arguing that *one* of promising's central functions is to grant authority to the promisee (i.e., a power to be in exclusive control of the promisor's promissory duty). What I aim to provide here is a theory of promissory rights that is able to account for the normativity of *this* aspect of the promising phenomenon.

[43] Hart makes a similar claim regarding private law rights. He argues that the fullest measure of control involved in private law rights includes: 1) the power to waive or extinguish someone's duty; 2) the power to enforce those duties by suing for compensation and, in some cases, for injunction; and 3) the power to cancel or extinguish the defendant's duty to pay compensation. *See* Hart, *Essays on Bentham: Jurisprudence and Political Theory*, 183-184. I explore remedial rights, and the right to reparation for the losses caused by a promissory breach, in detail in Chapters 3 and 5.

promisor regarding the matter of the promise indeed constitute her *right* to the promisor's performance.[44]

Now, can this characterisation of the promisee's right be accommodated by the interest theory?

Under the interest theory, the promisee would have a right to performance—understood as an exclusive power to control the promisor's obligation—if and only if she has an interest in possessing such control over the promisor's obligation that would be *sufficient to justify* the promisor's promissory obligation. Thus, we would need to find a human interest in the kind of deontic control that the promisee acquires which would be enough, on its own, to justify the promisor's duty to keep his promise. Here I endorse and defend the view that we have such an interest. We have what David Owens calls the 'authority interest', that is, an interest in possessing exclusive control over what others owe to us.[45] I shall maintain that it is the authority interest, that grounds promissory rights. As I will argue in detail in Chapter 2, human beings have a *basic* (i.e., non-derivative, non-reducible) interest in being able to acquire exclusive control over others'

[44] In conceptualising promissory rights, I have avoided W.N. Hohfeld's typology of rights. W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press 1919). Under Hohfeld's account, powers are always correlative to liabilities. If what the promisee acquires is a Hohfeldian power over the promisor's obligation, this entails affirming that the promisor is under the liability to his duty being abolished by the promisee. And that seems to me a rather odd formulation. Can we say instead that the promisee has a Hohfeldian claim-right which she can waive but not strictly a power to cancel the promisor's obligation? We may do so, but I believe this description of the promisee's right obscures the idea that it is precisely the fact that the promisee is exclusively entitled to abolish her claim-right what gives its distinctive moral salience to promissory rights. I believe that describing this right as a power to exclusively control the promisor's obligation better grasps its normative significance.

[45] *See* Owens, *Shaping the Normative Landscape*, Chaps. 4-6; and David Owens, 'A Simple Theory of Promising' (2006) 115 N°1 *The Philosophical Review* 51, 67 ff. As we will see in Chapter 2, my account of the authority interest is different from Owens' in some important regards.

duties. A constitutive aspect of our well-being depends on us being able to form relationships of personal authority with others on a given matter. By making and accepting promises, agents serve their authority interest.[46] I believe the basic phenomenology of promising gives us important hints regarding the existence of this interest.

Promisees often care about the fact that the promisor keeps his promise (i.e., they care about him acting as promised). And they may care about being able to predict the occurrence of the promised act. But even if they do not care about these things, it would still be reasonable for them to value a promise *simply* because the promise gives them exclusive deontic control over the promisor with respect to the promised act. I may value my friend's promise to come to my party even if I do not really care whether he shows up or not. In fact, I might even prefer that he does not show up, because he tends to be quite embarrassing at social events. Here I do not value the performance of the promised act itself, nor receiving assurance about it happening. However, my valuing his promise may still be perfectly reasonable. I value it because it serves my interest in being *the one* who has the power to determine that he *owes me* to come to my party. In fact, promisees may care about the promised act (and about being able to predict its occurrence) precisely because it has been promised to them: they care about the occurrence of the promised act *because they have a right over it*, namely because they have exclusive control over its deontic significance. I believe it is precisely

[46] As we will see in Chapter 2, the authority interest is not the only interest that the parties of a promise may serve when making and accepting their promise.

this interest in possessing a *purely* deontic form of exclusive control over others that constitutes the distinctive ground of promissory rights.[47]

Let us now see how this account of the interest that underlies promissory rights would fit within the framework provided by the interest theory. In what follows, I propose a version of the interest theory, which I call the deontic interest theory, that accommodates our authority interest among the list of interests that serve as grounds for our rights.

a. The Deontic Interest Theory

As stated before, according to the interest theory, X has a right that Y performs or abstains from an action φ if and only if X has an interest sufficient to justify Y's duty to perform or abstain from φing. This formulation may suggest that, under the interest theory, the relationship that is capable of justifying our rights is always between someone's interest (some aspect of their well-being) and the actions or omissions of others that directly affect that interest, for example, by harming or benefiting it. For instance, my interest in maintaining my body's healthy functioning is sufficient to justify your duty to not stab me. And you have the duty not to stab me because this action itself (stabbing me) undermines or harms my body's functioning. However, if the interest that is sufficient to justify

[47] The explanatory priority that I am giving to our authority interest in the justification of promissory rights may worry someone like R.J. Wallace, who, when discussing the possibility of normative interests as grounds of rights, argues that alluding to this kind of interest seems to 'reverse the order of priority between our normative and our nonnormative concerns'. R. Jay Wallace, *The Moral Nexus* (Princeton University Press 2019) 168-169. Yet, it seems to me that just postulating an absolute explanatory priority of the non-normative in accounting for the deontic does not constitute as such any challenge to the idea that we have an authority interest. It consists just in ruling out the possibility of an authority interest *ab initio*, and not an argument against it. What I am arguing is precisely that *some* rights (e.g., promissory rights) are grounded in our interest in possessing exclusive control over deontic phenomena.

promissory obligations is an interest in exclusive deontic control as such, things would look a bit different for the interest theory. The relevant justificatory link would not be between our interest and the way in which others' actions or omissions undermine or benefit this interest, since the promisee's authority interest is not undermined or harmed by the promisor's breach nor benefited by his performance. After the breach, the promisee may preserve the exclusive deontic control she has over the promisor, with the only difference being that now, instead of having control over the promisor's primary promissory obligation, she has the same kind of power over the remedial obligations that arise from the breach. And the fact of the promisor performing his promise does not necessarily benefit or uphold the promisee's authority interest—indeed, the promisee's authority over the promisor terminates when the promisor performs his promise. Thus, the interpretation of the interest theory that I am suggesting, one that would be able to accommodate the authority interest among the interests which serve as moral grounds of our rights, would read roughly as follows:

Deontic Interest theory (*DIT*)*:* X has a right that Y φ if and only if X has an interest adequate to justify Y's duty to φ; either because X's interest is sufficiently affected (undermined or benefited) by Y φing; *or* because X's interest justifies her possessing exclusive control over Y's duty to φ.

I believe *DIT* provides a justificatory framework not only for promissory rights but, in principle, for all rights that give right-holders exclusive control over others' duties. For instance, this is the case of property rights. What is distinctive of property rights is that they involve granting the property holder not only physical control over objects, but exclusive control over others' obligations.[48] Having a property right over my bicycle gives me a power to control whether you wrong me if you undertake certain actions regarding my bicycle (e.g., you wrong me if you use it without my permission). By taking the interest theory to incorporate our authority interest as part of the list of interests which serve as grounds of our rights, we will have a better framework to account for the normativity of all the rights, such as promissory and property rights, that constitute powers to exclusively control others' duties.[49] Yet, there is still one fundamental point that a complete defense of *DIT* must address.

When compared to other rights, there is an additional step needed in order to determine the obtaining of rights that are grounded in our authority interest like promissory rights. If X has a right that Y φ because X's interest is sufficiently affected (undermined or benefited) by Y φing, X *has* this right regardless of any other conditions holding. For instance, my interest in preserving my bodily functions and avoiding pain is sufficient on its own to justify your (pro tanto) duty to not punch me in the face, and thus to justify my (pro tanto) right that you do not punch me. Yet this interest not only *justifies* my right, but it is enough to make

[48] For different accounts highlighting deontic control as a constitutive feature of property rights *see* e.g., Morris R. Cohen, 'Property and Sovereignty' (1927) 13 N°1 *Cornell Law Review* 8, 12-15; Christopher Essert, 'Property and Homelessness' (2016) 44 N°4 *Philosophy and Public Affairs* 266, 271 ff.; Hanoch Dagan & Avihay Dorfman, 'The Human Right to Private Property' (2017) 18 N°2 *Theoretical Inquiries in Law* 391, 398 ff.; David Owens, 'Property and Authority' (2019) 0 N°0 *The Journal of Political Philosophy* 1, 13 ff. I discuss the relationship between authority and property rights in Crescente Molina, 'The Authority in Property' (2019) 19 N°1 *Jerusalem Review of Legal Studies* 14. I say more on proprietorial authority in Chapters 2, 4, and 5.

[49] Raz himself argues that the interest theory should make room for rights that are grounded in people's 'interest in freedom'. If by that he means people's interest in being able to choose their own obligations (or to choose, for example, the permissions and powers they grant to others), he is fully on board with *DIT*. *See* Joseph Raz, 'Rights and Individual Well-being' in his *Ethics in the Public Domain* (Oxford University Press 1994) 48-49.

it the case that I *have* this right. The same does not seem true in the case of rights like promissory ones. I may have an interest in you being under a promissory duty to help me move houses, and in possessing exclusive control over your duty. However, you are not under a promissory duty to help me, nor have I a promissory right that you do so (not even a pro tanto one)—unless you actually promised it.[50] What explains this feature of promissory rights?

As I will characterise it later in Chapter 2, the authority interest is a choice-dependent interest. It is an interest in being able to form a relationship of *voluntary* authority with another person. Thus, the rights that are grounded in our authority interest are always *voluntary undertakings*, that is, deontic entities that exist only if agents choose to bring them about. This explains why promissory rights and duties hold only if the promisor makes a promise in first place and the promisee accepts the promisor's promissory offer.[51] Promissory and other rights such as property rights are voluntary rights.[52]

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[50] Similarly, I may have interest in having proprietorial control over *O*, over which you have property rights. However, my interest in having proprietorial control over *O* does still not make the case for my *having* a property right over *O*. I must first *acquire* those rights over *O*. A worry along these lines regarding the possibility of grounding rights in deontic interests is raised by Wallace, *The Moral Nexus*, 167.

[51] In Chapter 2, I will argue that voluntary undertakings have a bilateral structure, they obtain as a result of *both* the obligor's and moral creditor's choices to bring these obligations (or rights, powers, etc.,) about.

[52] I believe that it is the fact that promissory rights are conditional upon the existence of a previous right-granting act, namely the making of a promise, that has led some writers to endorse the doctrine that holds that promissory rights come from an act of rights *transfer* from the promisor. There is a grain of truth in this view. It appropriately captures the idea that the existence of promissory rights always depends on the promisor's granting of these rights. Yet, maintaining that by making a promise the promisor transfers a right that she previously had to the promisee obscures rather than illuminates the nature of promissory rights. In all its versions, the right transfer doctrine fails to identify what exactly the right is that promisors are transferring to promisees by the making of a promise. None of them is capable of building a continuity of identity between the right that the promisor is supposed to be transferring and the one that the promisee acquires. For different versions of the transfer doctrine *see* e.g., Grotius, *The Rights of War and Peace*, 704 ff.; Peter Vallentyne, 'Natural Rights and Two Conceptions of Promising' (2005) 81 N°1

A final clarification regarding the nature of the authority interest is needed. As suggested above and as I will argue in more detail in Chapter 2, the authority interest is an interest in being able to form a *relationship* of voluntary authority with others on a certain matter. Thus, it is not, in the case of a promise, an interest exclusive to *the promisee*. On this point my account of the authority interest diverges from Owens'. According to his view, the authority interest is an interest of promisees rather than an interest of promisors: the promisee's right is grounded in the promisee's authority interest which the promisor merely satisfies or serves by making a promissory offer.[53] In my view, since the authority interest is *relational* in nature, the promisee's right is grounded in *both* the promisor's and promisee's authority interest.

b. Promissory Rights and the Will Theory

Let me conclude this chapter by discussing what the reader might have considered an elephant in the room so far. Why do we need *DIT* at all to account for promissory rights? Why not just adopt the so-called 'will theory' of rights instead? According to the will theory, the defining feature of rights is precisely that they give right-holders exclusive control over others' duties. Along these lines, H.L.A Hart argued that:

'Y [the right-holder] is […] morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not

Chicago Kent Law Review 9, 12-13; Shiffrin, 'Promising, Intimate Relationships, and Conventionalism', 501 ff. For discussion and criticism *see* Thomas Pink, 'Promising and Obligation' (2009) 23 *Philosophical Perspectives, Ethics,* 389, 404-406; and David Owens, 'Does a Promise Transfer a Right?' in Gregory Klass et al. (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 84-89. I will offer a partial defence of the transfer theory of contracts in Chapter 5.

[53] Owens, *Shaping the Normative Landscape*, 146-147.

the fact that he stands to benefit, that makes it appropriate to say that he has a right.'[54]

Hart's will theory is right in highlighting deontic control's important role in accounting for the normativity of rights. However, there are problems with the will theory, or at least with Hart's version of it. The will theory holds that exclusive deontic control ought *always* to be present for us to appropriately deem someone's entitlement as a right.[55] *DIT* is more plausible in that it admits the possibility that agents can possess some rights even if they do not have an interest in controlling others' obligations. For example, infants, the mentally disabled, and some non-human animals may not have an authority interest but still possess some rights (e.g., the right not to be tortured). And even some of the rights of fully capable agents may not be grounded in their authority interest at all, like the so-called 'inalienable rights' (e.g., the right not to be enslaved). Moreover, *DIT* is capable of accommodating rights that have a more complex, hybrid justificatory structure. The complete justification of some rights rests both in how others' actions and omissions directly affect our well-being (by sufficiently undermining or benefiting it) *and* in our interest in having exclusive deontic control over those actions or omissions. For example, I have a right that you do not chop my legs off because I have an interest in preserving my bodily integrity (and your chopping my legs off undermines that interest), but I also have an interest in being able to grant you a permission to chop my legs off—that is, I have an interest in

[54] H.L.A Hart, 'Are There Any Natural Rights?' (1955) 64 N°2 *The Philosophical Review* 175, 180.
[55] In his later work on legal rights Hart became open to the possibility that some legal rights require a different justification. *See* his *Essays on Bentham: Jurisprudence and Political Theory*, 189. Defending a view labelled by its author as a hybrid theory of the nature of rights (which I believe is compatible with *DIT*) *see* Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 N°2 *Oxford Journal of Legal Studies* 257, 267 ff.

possessing some control over your duty to avoid chopping my legs off. *DIT* provides a framework to account for these cases.[56]

As I mentioned at the beginning of this chapter, promissory rights have not been considered a relevant explanandum for an account of promissory morality. It is the notion of promissory *obligation* what we must account for; promissory rights are only their mirroring image. If there is a promissory obligation, most writers assume, there must be a promissory right to performance. In the following chapter, I contend that such thought constitutes a mistaken characterisation of the promising phenomenon. I have offered an account of the normativity of promissory rights. Promissory rights, I argued, should be understood as exclusive powers to control others' deontic world. However, not all promises create rights. Promisors may *not* grant exclusive deontic control (i.e., authority) to their promisees. Some promises may put the promisor under an obligation to perform whilst preserving control over such an obligation. As I will argue in Chapter 5, it is only by distinguishing these two kinds of promises that we can fully understand the relationship between the morality of promising and the law of contracts.

As I have briefly mentioned above, promissory rights and obligations are voluntary in nature. They obtain only if agents choose to bring them about. I turn now to explore the grounds and structure of voluntary undertakings.

[56] Hart's will theory merges the claim that rights are powers to control others' obligations with the idea that rights are powers to interfere or limit others' freedom of choice, and, furthermore, argues that all our rights are grounded in a natural right to be free. Though it is not exactly clear what Hart meant when making these claims, in Chapter 5 I indeed partially vindicate (what I take to be) Hart's fundamental point regarding the relationship between rights and freedom. *See* Hart, 'Are There Any Natural Rights?', 190-191.

2. <u>Two Forms of Deontic Power</u>

Our choices do not count among the reasons or considerations that make the case that we have certain obligations, rights, powers, etc., that is, among the normative grounds of such obligations, rights, powers, etc. For instance, if I physically injure you with the aim of incurring obligations to apologise, and pay compensation for the losses caused, I may incur such obligations. Yet, the obtaining of these obligations does not depend at all on my having aimed at bringing these obligations about. To be sure, I may only have these obligations if I *intentionally injure you*. But that I *intended to bring about these obligations*—that incurring them was part of my aim when injuring you—does not play any role in explaining why I *have* these obligations. By contrast, someone's choice to incur an obligation or create a right or power may constitute a ground for such an obligation, right, or power in the first place. As we saw in Chapter 1, this is often thought to be the case with promissory obligations and rights. The promisor is bound by her promise, and the promisee acquires a right to performance at least in part *because* the promisor *chose to bring about such an obligation and right*. I will call a deontic entity (i.e., a moral obligation, right, power, etc.) that exists at least partially in virtue of the fact that an agent chose to bring it about a 'voluntary undertaking'. And I will call the power to bring about a voluntary undertaking a *deontic power*. Deontic powers are capacities to impact (i.e., create, modify, or extinguish) our obligations, rights, powers, etc., *at will*.

My central contribution in this chapter consists in drawing a thus-far neglected distinction between two fundamentally different grounds of our deontic powers: the *authority interest* and the *allegiance interest.* As we saw

(Chapter 1), our authority interest is an interest in being able to form relationships of voluntary *authority* (i.e., of exclusive deontic control[57]) with and over others on a certain matter. By contrast, our allegiance interest is an interest in being able to assume, at will, an obligation which is owed to another person whilst precisely *not* granting the moral creditor exclusive control over this obligation. Over obligations and claims grounded in our allegiance interest, obligors *and* moral creditors share *equal* control.

I contend that both interests illuminate different crucial aspects of the normativity of voluntary undertakings.

In Section I, I briefly sketch a view of the grounds of deontic powers in general, favouring what I call a *basic theory* of deontic powers. According to the view I propose, at least some of our deontic powers are grounded in *basic* or fundamental deontic interests. In Section II, I develop in more detail some of the claims I defended in Chapter 1, and explore the structure of our authority interest. Our authority interest, I shall argue, accounts for an important part of the normativity of promising and property transfers. I then develop an account of the structure of our powers to give and accept authority at will.

Section III develops the argument that we have what I call an allegiance interest. Agents have a deontic power to make what I will call 'commitments'; namely, obligations and claims over which the obligor and the moral creditor have equal control. As I will show, our allegiance interest illuminates not only part of

[57] As declared in Chapter 1, unless stated otherwise, I use the terms 'authority' and 'exclusive deontic control' interchangeably. A relationship of authority or exclusive deontic control gives the authority-holder (i.e., right-holder, power-holder, etc.,) a *claim* to the performance of a given act, and an *exclusive* power to *release* the obligee from his obligation.

the normativity of our promissory practices but also of important social institutions such as romantic partnerships and several forms of associative duties.

As will be recalled, I argued in Chapter 1 that promissory *rights* are grounded in our authority interest. But as we will see in this chapter, the authority interest cannot fully account for the normativity of promissory *obligations*. This is because we have an interest in being able to assume obligations towards others at will, but without granting them exclusive control over it. Our allegiance interest accounts for promises that I will argue do *not* grant authority to the promisee over the promised matter. In Chapter 5, I will make the case that we should only understand promises that grant the promisee exclusive control over the promissory obligation as conferring the promisee a *right to performance*. As we will see there, only if we distinguish the promises that serve our authority interest (i.e., those aimed at creating rights) from those that serve our allegiance interest we are able to further our understanding of the relationship between the law of contracts and the morality of promising.

I. Deontic Powers: A Basic Account

We have deontic powers only if is valuable or good for us to possess such powers. These powers are grounded in our interests, that is, in aspects of our well-being.[58] This value-based explanation of deontic powers has been proposed by Joseph Raz, who maintains that:

[58] As I have stated in the Introduction, throughout this thesis I am using the notion of 'interest' or 'value' to denote aspects of our well-being. What is in our interest or what has value *is* that that constitutes or generally fosters human well-being. As I also mentioned before, I shall use the notions of obligation and duty as synonyms.

‘a person's act is an exercise of a normative power if it brings about or prevents a normative change because it is, all things considered, desirable that that person should be able to bring the change about or prevent it by performing that act. Those who can exercise a normative power have a normative power to do so.’[59]

Raz’s explanatory model has clear advantages. For instance, it allows us to distinguish *genuine* deontic powers from merely *putative* or alleged ones. Joseph Stalin may have truly believed he had a large-scale deontic power to control the obligations of the Soviet people, and his subjects may have shared this belief and acted accordingly (e.g., obeyed him as if he had such authority over them). Yet precisely *because* his having such a power is clearly not all things considered desirable, he did not really have this power. Many writers adopt this or similar value-based explanatory strategies to account for our deontic powers. However, they adopt different substantive accounts on the grounds of deontic powers. As I remarked in the Introduction, I propose that we distinguish between two dominant views of the normative grounds of deontic powers. I will call them the *non-deontic* and the *deontic-view*.

Under the non-deontic view, deontic powers are always grounded in values or interests that are *non*-deontic in kind. As we saw, writers such as Scanlon, Hume, or Rawls find the ground of our power to promise in our interest in being able to provide assurance to others about our future behaviour, and in our interest in thereby being able to achieve different forms of social

[59]Joseph Raz, ‘Normative Powers (revised)’, MS. For a previous, slightly different formulation *see* Raz, *Practical Reasons and Norms*, 98-104.

coordination.[60] For these authors, these interests are of course *deontically significant*. The values of assurance or of social coordination are capable of justifying some of our obligations, powers, and rights. However, they are not interests *in* obligations, powers, and rights *as such*. As we saw in Chapter 1, one may provide assurance to others, and thus achieve all sorts of social coordination, through different means than by having certain obligations, rights, or deontic powers.

By contrast, according to the deontic view, deontic powers are grounded in values or interests that are *deontic* in kind. They are grounded in our interests in obligations, rights, and powers, etc., as such. Although different in some important regards, versions of the deontic view have been defended by Raz and, in greater detail, by David Owens. According to Raz's and Owens' views, our obligations, rights, etc., as such often constitute valuable aspects of our lives.[61] And, since autonomous beings like us typically have an interest in being able to choose the instantiation of some of the valuable aspects of our lives (e.g., to choose our projects, some of our relationships, etc.,), we must also have the power to choose some of our obligations, rights, powers, etc.[62]

I side here with the deontic view, or at least with a version of it. I defend the thesis that at least some of our deontic powers are, in an important sense, *basic.* They are grounded in individual human interests whose most direct and

[60] *See supra* our discussion of these views. Scanlon, *What We Owe to Each Other*, 303; Hume, *A treatise of Human Nature*, 331-337, and Rawls, *A Theory of Justice*, 97-98, 303-308.
[61] For different versions of this idea *see* Joseph Raz, 'Liberating Duties', (1989) 8 N°1 *Law and Philosophy* 3, 18-21; and David Owens, 'The Value of Duty' (2012) Sup. Vol. XXXVI *Proceedings of the Aristotelian Society* 199.
[62] *See* e.g., Raz, 'Promises and Obligations', 227-228; Raz, *The Morality of Freedom*, 173; Owens, *Shaping the Normative Landscape,* 3-21.

basic normative impact is precisely the very existence of a deontic power, that is, a capacity to mould at least some of our obligations (rights, powers, etc.,) *at will*.[63] I maintain that at least some of our deontic powers are constitutive aspects of our well-being: they are basic capacities of a developed human form of life.[64] They are in this sense not different from other basic capacities we have, such as our capacities to acquire a language, to love, or to engage in aesthetical experiences. I propose that our basic deontic powers constitute aspects of our individual *well*-being in the sense that they are capacities that flourishing human beings typically possess. Moreover, this entails that—as any aspect of our well-being—our deontic powers are also capable of being diminished or undermined. A terrible accident may leave a person without being able to form firm intentions, or to think prospectively, or to apprehend others' intentions, and thus diminish, among other things, some of the faculties that are necessary for her to exercise basic deontic

[63] Recently, Ruth Chang and Victor Tadros, have defended insightful accounts of normative or deontic powers with which I share some important points. *See* Ruth Chang 'Do We Have Normative Powers?' and Victor Tadros, 'Appropriate Normative Powers' (2020) *Proceedings of the Aristotelian Society* (forthcoming). I agree with both in that deontic or normative powers are capacities to directly impact our deontic or normative situation *at will*, and that these powers are basic in nature. Yet my view is different to theirs in some respects. Tadros, perhaps too rapidly, rejects the idea that deontic powers are grounded in our interests (i.e., in aspects of our well-being). He does not consider (or not with enough attention) the possibility that we have basic interests in being able to shape our deontic world at will, and that such interests constitute the grounds of our deontic powers. Chang offers a metaphysical explanation as to how *normative reasons* can be genuinely created by our will. I am interested in a different phenomenon, namely *deontic* powers, that is, powers to impact our deontic world at will (our rights, obligations, and so on). Some might think that an account of deontic powers must also necessarily be an account of normative powers (i.e., of a power to create normative reasons at will). According to this view, having a power to create a duty or a right to Φ at will, must also be a power to create a normative reason to Φ at will. I am not entirely convinced by this idea, but I shall not argue against it here. I will simply remain agnostic as to whether the fact of us possessing deontic powers necessarily entails that we must also possess some form of normative power (i.e., a power to create normative reasons at will). I have offer some doubts regarding one well-known 'rationalist' picture of our power to create promissory obligations and rights in Molina, 'Is There Value in Keeping a Promise?'. For a general critique of the rationalist picture of obligation *see* Owens, *Shaping the Normative Landscape*, Chap. 3.
[64] I of course do not wish to deny here that other non-human animals may have deontic powers.

powers.[65] They are thus not merely some kind of abstract, *a priori* immutable capacities essential to the human form,[66] but constitutive elements of what is good *for* a human life.

This basic theory of deontic powers, as we might call it, is not meant to be an explanation of *all* of our (genuine) deontic powers. Instead, it only serves to explain our *basic* deontic powers, that is, those that are grounded in our basic interests in *possessing such deontic powers*. Hence, we may need other explanations for other non-basic kinds of deontic power. For instance, parents arguably have a genuine deontic power to control some of the obligations of their children (e.g., their domestic duties to clean their room, brush their teeth, do their homework, and so on). This power, however, may not be basic. It is grounded in the fact that the child's well-being (her non-deontic interests) benefits from being under a duty to obey the parents' commands. Once it stops being all things considered desirable that the parents have such deontic power and thus that the child has a duty to obey his parents' commands (e.g., because the child is mature enough, or because the parents' commands are too often mistaken), the parents lack such deontic power. The view I propose maintains that some of our deontic powers are not justified in this 'instrumentalist' fashion. They are basic, meaning that they are sufficiently justified by reference to our basic interest in having such power in itself. For this reason, we simply possess them if we have such an interest.[67]

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[65] *See* Raz, *The Morality of Freedom*, 174-5, making a similar point.

[66] *See* e.g., Hegel's notion of the *free will* as the ground of deontic powers and rights in general. G.W.F Hegel, *Elements of the Philosophy of Right* (First published 1820, Cambridge University Press 1991) § 4, 35-37.

[67] As we saw in Chapter 1, Hume famously argued that it is necessary that there is a *practice* of treating exercises of deontic power as binding for them to be indeed binding (i.e., it is necessary

There may be more to be said for the existence of basic deontic powers as constituent elements of human well-being. However, I will leave that task for another occasion and explore the structure of what I take to be two of our basic deontic powers, grounded in two of our basic deontic interests: our *authority interest* and our *allegiance interest*. Our authority interest grounds our basic deontic powers to give and accept authority (i.e., exclusive deontic control). And our allegiance interest grounds our basic powers to make and accept commitments.

Our authority-giving and authority-accepting powers are powers that allow us to form with others a relationship of voluntary authority on a certain matter. By giving others authority, we assume a voluntary obligation and give them a voluntary claim to the performance of a given act, and *an exclusive power to release* us from our duty.

By contrast, our commitment-making and commitment-accepting powers are powers that allow us to form what I call relationships of commitment. When entering a commitment relationship with someone we grant them a voluntary

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that we believe that we have such powers, and treat their exercises as having deontic impact). These powers are not, using Hume's term, 'naturally' intelligible until we develop the social conventions that recognise such powers. *See* Hume, *A Treatise of Human Nature*, 331-7. Also arguing for the necessity of social recognition for the existence of our deontic powers (though for reasons different than Hume's) *see* Owens, *Shaping the Normative Landscape*, 150-163; and his *Bound by Convention*, MS. I resist this conventionalist picture of deontic powers. It may be true that some of our genuine deontic powers require social recognition in order to obtain (e.g., political authority, and some forms of property rights). Yet social recognition is not constitutive of what I take to be our *basic* deontic powers. There are of course many practices through which we may exercise these powers (among them language itself). And therefore, these practices may be valuable at least in part precisely because they serve our deontic powers. Yet I do not see why we should favour the view that these practices are in any relevant sense constitutive of basic deontic powers. For views similar to the one I propose in this respect *see* e.g., Joseph Raz, 'Promises and Obligations', 227; and Gary Watson, 'Promises, reasons, and normative powers' in David Sobel and Steven Wall (eds), *Reasons for Action* (paperback ed., Cambridge University Press 2011) 155.

claim and assume a voluntary obligation towards them whilst preserving deontic control, and thus sharing with the moral creditor *equal power to release* ourselves from our duty. I believe that by carefully grasping the structure of these basic deontic powers we can render intelligible central aspects of the normativity of promising and of other important social institutions.

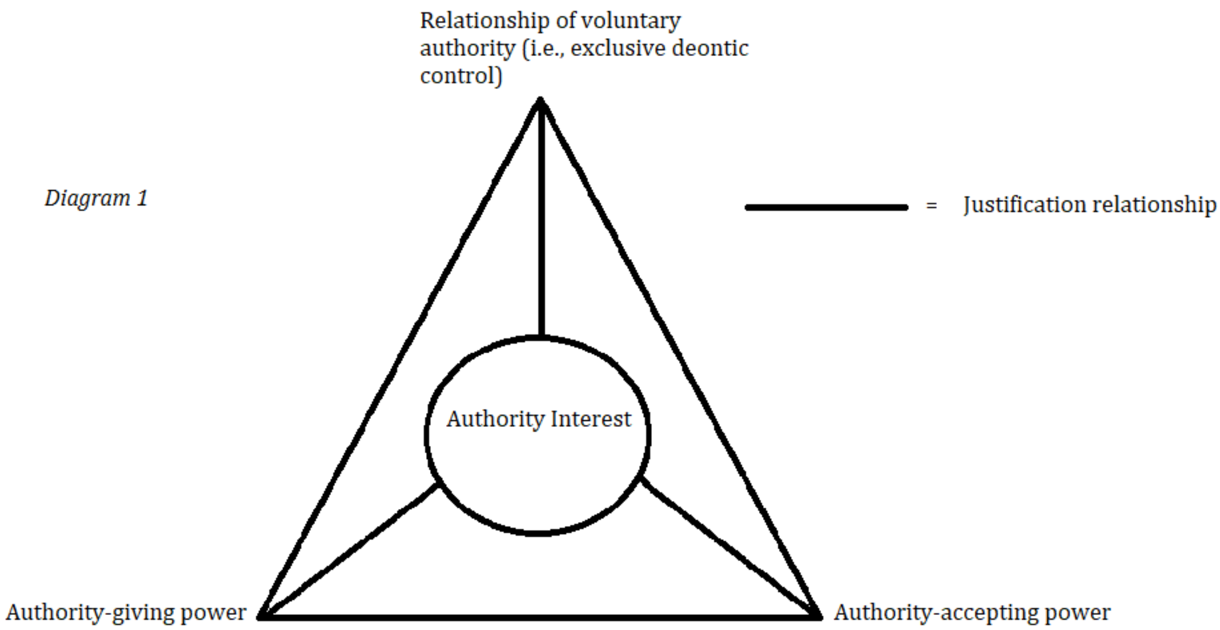
II. The Authority Interest

The authority interest is an interest in being able to form relationships of authority with others. This interest is not *just* an interest in possessing personal authority over another person over a certain matter. As I characterise it, it is an interest in being able to give and acquire a *voluntary* form of authority. For this reason, the rights or powers that the authority interest grounds (e.g., as we saw in Chapter 1, promissory rights), are always voluntary undertakings: they obtain only if agents choose to bring them about. Contrast these rights or powers with other cases of personal authority: as I suggested in the previous section, parents arguably have some form of personal authority over their children in certain matters. They have such authority even if their child (or anyone else) never voluntarily conferred such authority on them, and even if they never accepted it. I will argue that the authority interest does not ground parental authority or any other non-voluntary form of authority.

The form of authority that satisfies agents' authority interest is one that has been chosen by the person subjected to such authority (the 'authority-giver'), *and* by the authority holder (the 'authority-recipient'). By making an authority-giving offer, the giver expands the recipient's range of possible choices regarding her own deontic world. She gives the recipient an opportunity to acquire authority over her. But the recipient must always be able to determine whether she embraces such an opportunity or not. In this sense, the formation of a relationship of voluntary authority must always be a *bilateral* process: it starts with an authority-offer and culminates with the offeree's acceptance. It necessarily involves *two* exercises of basic deontic power: an exercise of our authority-giving power, and of our authority-accepting power. Thus the entitlements (rights, powers, etc.,) that are grounded in the authority interest are always voluntary undertakings, that is, they are grounded in agents' deontic choices.

The authority interest provides the justification or ground of at least three different deontic phenomena: 1) our basic authority-giving power (e.g., our power to make promises); 2) our basic authority-accepting power (e.g., our power to accept or reject a promise); and 3) the voluntary undertaking created as a result of the successful exercising of 1 and 2 (e.g., a promissory obligation and right). The authority interest creates what we may call a *transitive* form of justification between these three elements. (1) counts as a necessary condition or element for the justification of (2) and (3); (3) counts as a necessary condition or element for the justification for (1) and (2), and so on (*see* Diagram 1). They are *all* grounded in the authority interest, yet each of them is a condition for the authority interest to display its justificatory force.

Diagram 1



My account of the structure of the authority interest diverges on this point from Owens', for whom the authority interest is not by nature a choice-dependent interest. In his view, the authority interest appears to be simply an interest in possessing personal authority over others, voluntary or not in its source. The way in which he justifies some of our deontic powers (e.g., the power to make promises) is by reference to a *derivative* or *second-order* interest in being able to serve *others'* authority interest.[68] Thus, in Owens' view, our authority-giving power does not in itself constitute an element of the authority interest.[69] By contrast, under the account I offer, one's authority interest can *only* be satisfied by voluntary relationships of personal authority. The authority interest is choice-dependent in nature, and thus constitutes the ground for our power to give and

[68] Accordingly, as we briefly saw in Chapter 1, Owens holds that promissory obligations and rights are grounded in the *promisee's* authority interest. By contrast, I think that the voluntary undertakings (i.e., rights, obligations, etc.,) that obtain as a result of exercises of our powers to give and accept voluntary authority are grounded in *both* parties' authority interest (i.e., in the promisor's and the promisee's authority interests).
[69] Owens, *Shaping the Normative Landscape*, 146-147.

accept voluntary authority, and of the voluntary undertaking (e.g., right, obligation, etc.,) that emerges out of the parties' voluntary authority-creating arrangement.

To be sure, some forms of non-voluntary authority are valuable and therefore constitute a reason for us to seek to acquire such authority, and to help others to possess it. However, unlike Owens, I doubt that we have a *basic* interest in being under non-voluntary relationships of personal authority. As I suggested above, non-voluntary relationships of authority such as paternal authority are justified by exclusive reference to the fact that the subject's (e.g., the child's) well-being (her non-deontic interests) benefits from being under a duty to obey the authority's commands. By contrast, I maintain that we do have a basic interest in being able to form a distinctively *voluntary* relationship of personal authority with others; one that the authority giver and authority recipient can form *only* by choosing to bring it about. Thus, as I characterise it here, the authority interest is a basic interest in being able to choose our deontic world *at will*. I believe it is this distinctively voluntary form of personal authority and not a different form of personal authority that renders normatively intelligible practices such us the practice of promising and property transfers.

There are different social practices and institutions that agents may invoke to exercise their basic authority-giving and accepting powers. For example, as we saw in Chapter 1, those who make promises may aim to give their promisees a claim to performance of the promised act and an exclusive power to release the promisor from his duty (i.e., authority over the promised matter). Similarly, with an agent's transfer of property over *O* to another, the transferor may aim to give the recipient a claim to exclude others from engaging with *O* and an exclusive power to liberate others from this bond (i.e., authority to grant permissions to others to engage with *O*). Promissory and property rights may thus constitute relationships of voluntary authority.[70]

Consider finally the practice of consenting. I may consent to you touching my arm. This may simply entail that I am granting you a permission to touch my arm. Whilst granting you such permission, I may retain the power to revoke it. However, by consenting we may also aim at granting each other exclusive control over some of our duties. I may consent to you using my bicycle tomorrow and thereby aim to grant you voluntary authority over my right to use my bike tomorrow. In this case, I am not entitled to simply revoke my consent at will. I have indeed lost this power. Your right is therefore grounded in our authority interest.

The account of our powers to give and accept voluntary authority which I defend in this section should not be understood as an account of promising, property transfers, or consent *simpliciter*. Instead, it should be interpreted as an account of the normative structure of promising, property, consenting, or other social institutions *when* they are used by agents to form relationships of voluntary

[70] Therefore, insofar our promissory and property rights are grounded in our authority interest, these rights must have been accepted by the right-holder in order to come into existence. That property transfers must be accepted by the recipient in order to produce property rights seems to be widely accepted. The acceptance requirement in the case of promising is more controversial. For an illuminating historical account of this discussion *see* Decock, *Theologians and Contract Law*, 187 ff.; and T. B. Smith, '*Pollicitatio* - Promise and Offer' (1958) *Acta Juridica* 141. For some contemporary defences of the acceptance requirement in promising *see* e.g., Fried, *Contract as Promise*, 43 ff.; and Owens, *Shaping the Normative Landscape*, 223-226. Against it *see* Joseph Raz, 'Is There a Reason to Keep a Promise?' in Klass, *Philosophical Foundations of Contract*, 72; James Penner, 'Voluntary Obligations and the Scope of the Law of Contracts' (1996) 2 *Legal Theory* 325, 328-329; and Shiffrin, 'Promising, Intimate Relationships, and Conventionalism', 491.

authority with others.[71] It is an account of one of the basic deontic powers that informs *parts* of promising's, property's, and other social institutions' normativity.[72] In fact, as I will argue in Section III, we are making a mistake if we aim to account for the normativity of our promissory practices, and of other important social institutions, by exclusively referring to our authority interest. Later, in Chapter 5, we will see that it is only by distinguishing promises that constitute relationships of voluntary authority from those which do not (commitments) that we can fully understand the relationship between the morality of promising and contracts.

Let us now explore in more detail the structural aspects of our powers to give and accept voluntary authority. It is a commonplace in contemporary analytic philosophy to hold that exercises of our deontic powers, such as making a

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[71] As we saw, the view that promising distinctively serves our authority interest has been proposed by Owens, 'A Simple Theory of Promising', 67 ff; and Owens, *Shaping the Normative Landscape*, Chaps. 4-6. However, as I maintained in the Introduction, we should understand Owens' deontic view as following a tradition of thought that characterises promising as an act by which an agent voluntarily grants some form of authority to another. Comprising this tradition, *see* e.g., Grotius, *The Rights of War and Peace*, 703-705; Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, 69-70; 106; and also Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press 1996) 91-93; 97. These writers do not refer to promising as an authority-giving act, but to *rights* transfers from one person to another. Yet, their notion of a right is equivalent to what I refer as exclusive deontic control or authority. For them, a right necessarily involves a valid claim to demand the performance or omission of a given act, and an exclusive power to release the obligor from his obligation. I defended an account of promissory rights along these lines in Chapter 1 and will further develop it in Chapter 5. For different accounts highlighting deontic control as a constitutive feature of property rights *see supra* note 48.

[72] Moreover, I am not arguing that authority-creating acts that are done through property transfers, promising, or by consenting all share the exact same features. For example, property transfers often grant a permanent from of authority over a certain object to the recipient, whereas the promisee's authority is extinguished after the promisor has discharged his promissory duty. Moreover, property rights entail powers that are binding *erga omnes*, that is, which bind not only the power-grantor (i.e., the transferor) but all those who do not have property rights over *O*. By contrast, promises only bind *inter partes* (i.e., they give authority to the promisee *only* over the promisor). I say more on these matters in Chapter 5, when I examine the transfer theory of contracts.

promise, are speech acts or at least communicative acts.[73] The claim I will be defending in the following is that this does not hold true for authority-giving and accepting acts.

a. The Creation of Voluntary Authority: Choice or Communication?

I have argued that the process by which we create relationships of voluntary authority is bilateral in nature. These relationships are created by the authority-giver's choice to offer authority to the recipient over a certain matter, and the recipient's choice to assume such authority. From this naturally follows that the recipient, in order to acquire the authority offered by the grantor, must in first place know the content of the giver's offer. Thus, both the authority giver and recipient must have what we may call a *shared understanding* of the content and scope of the authority created by their authority-giving and accepting acts (i.e., a shared understanding of the rights, duties, or powers created by these acts).

Under the view I have defended, in order to acquire the knowledge that someone has granted us voluntary authority over a certain matter, we must know an agent's *intention or choice* (i.e., her choice to give us exclusive deontic control on a certain matter). I will call this view about the creation of voluntary authority the 'actual choice' view. Contrast the actual choice view with what we may call the 'communicative act' view. Under this view, authority-giving and accepting acts are not constituted by the giver's and recipient's intentions, but by what we might call a public act, that is, one different from the offeror's, or recipient's (or anyone else's) mental states. Under the communicative act view, this public act is the

[73] The idea that promises are speech acts or 'performatives' was popularised by the works of writers such as J. L. Austin and John Searle. *See supra* note 13.

giver's and recipient's intentional *declaration* or *communication* to the other party that they thereby give or receive authority over a certain matter. Thus, by knowing the obtaining and content of such a communicative act one knows the obtaining and content of a relationship of voluntary authority.

I maintain we should favour the actual choice view over the communicative act view.[74] As suggested before, the actual choice view captures the idea that authority-giving and accepting acts are grounded in agents' authority interest, that is, in their interest in being able to offer and acquire personal authority *at will*. It is the giver's and recipient's *actual* choices, and not merely their declared choices, that constitute the normative foundation of relationships of voluntary authority, and of voluntary undertakings in general. By contrast, the communicative act view assigns a constitutive role to communication.[75] Only if I communicate to you my choice to grant you authority, and you communicate your acceptance I have granted you such authority. I believe we should reject the communicative act view. Again, if our authority-giving and accepting powers are

[74] Views that resemble these two positions have been defended within the debate about the ontology of consent. Some writers hold that consent is constituted by a mental act or state of the consentor. Although different in some important regards, *see* e.g., Heidi Hurd, 'The Moral Magic of Consent (I)' (1996) 2 N°2 *Legal Theory* 121; Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' (2016) 13 °2 *Ohio State Journal of Criminal Law* 397; and Massimo Renzo, 'Two Kinds of Consent', MS. And others hold that consent is constituted by a communicative act. *See* e.g., David Owens, 'The Possibility of Consent' (2011) 24°4 *Ratio* 402; and Tom Dougherty, '*Yes means Yes*: Consent as Communication' (2015) 43 N°3 *Philosophy and Public Affairs* 224. In the contemporary discussion on promising, all writers I am aware of maintain that communication is constitutive of promising (*see* e.g., *supra* note 13, and Owens, *Shaping the Normative Landscape*, 190-196). Interestingly, this was not the standard view some centuries ago. Theologians and jurists from the late scholastic period such as Lessius seem to adhere to what I call the actual choice view. They assign communication a purely evidentiary, and not a constitutive role in determining the content of promissory obligations and rights. *See* Decock, *Theologians and Contract* Law, 192-195.

[75] The communicative act view may claim that communication is necessary *and* sufficient for authority-giving and accepting acts (i.e., exclusively constitutive of relationships of voluntary authority), or only necessary (i.e., partially constitutive of relationships of voluntary authority). I shall reject both possibilities.

grounded in our authority interest (i.e., in our interest in being able to create relationships of authority *at will*) I see no reason to assign communication any essential role in the formation of relationships of voluntary authority. True, communication is perhaps the paradigmatic way by which agents learn about others' intentions, and this, as we will see below, has normative significance. But it is perfectly possible that an agent knows about another's choice to give them authority or to accept it without communication mediating.

Imagine you and your friend know each other extremely well, and thus you are both very good at reading each other's intentions. Suppose now that she had a terrible accident and that, though perfectly conscious, her ability to communicate has been seriously impaired. It may still be possible that she knows, for instance, that you have an intention to grant her authority over you going to visit her at the hospital (i.e., she knows of your intention to assume an obligation to visit her, and to grant her an exclusive power to release you from this obligation); and you know that she is aware of this. Or suppose that your ill mother writes in her diary—one that she takes extremely seriously—that she has made the decision to grant you a power to determine the fate of her goods in case she is incapacitated. She was going to communicate this to you, but before she could, she went into a coma. Afterwards, you discover her diary, which (let us assume) constitutes sufficient evidence of her serious intention to grant you such a power. Yet she never communicated this to you.

It seems to me that cases of this sort are capable of constituting genuine relationships of voluntary authority. Under the communicative act view, however, they would never do. Since communication is not present in these examples, your authority-giving act towards your friend, or your mother's towards you, do not hold, that is, they are not capable of producing deontic effects. I maintain that we should not favour the communicative act view. As I have argued, relationships of voluntary authority are grounded in agents' *choices*; in their interest in being able to mould their deontic world *at will*. And, by giving constitutive character to communication, the communicative act view fails to recognise this. Thus, I maintain that agents exercise their deontic powers to offer and accept voluntary authority *if and only if* they choose to offer and accept such authority over a certain matter.[76]

b. *Insincere* Authority-Giving and Accepting Acts

One possible objection to the actual choice view concerns the bindingness of what we may call *insincere* authority-giving or accepting acts. An insincere authority-giving or accepting act is one in which an agent declares or communicates that she has thereby chosen to give or acquire authority whilst actually refraining from making such a choice *in foro interno*. It seems clear, the objection holds, that at least some insincere authority-giving or accepting acts are binding. If I promise you to Φ, and thus declare or communicate to you that I thereby choose to grant you a right to Φ which you accept, it seems that I am bound to Φ even if I did not really choose to be bound to Φ. Similarly, I may have offered you my property rights over *O*, which you happily accepted, without really having had an intention to grant you such rights. If in these cases, the objection maintains, you have indeed acquired such rights even if I did not actually choose to grant them to you, the

[76] On top of this basic constitutive structure, one may of course add additional conditions to the *success* of our authority-giving and accepting powers (e.g., that they are not obtained through duress, etc.,). I will leave these additional conditions aside for now.

actual choice view falls apart. I share these intuitions regarding the normative force of insincere authority-giving and accepting acts. However, I think we can explain the binding force of such acts without abandoning the actual choice view. I shall elaborate the argument by mainly focussing on a particular kind of insincere authority-giving act, namely insincere promises.[77]

Sincere promisors communicate their *actual* intention or choice to assume an obligation to perform and to grant a right to performance to the promisee. As we saw, the actual choice view accounts for the deontic impact of sincere promises. It is explained by reference to our authority interest. Naturally, the binding force of insincere promises cannot be explained by direct reference to such interest since the insincere promisor does not really choose to bring about his promissory obligation and the promisee's right. She just declares or communicates *a* choice without it being *her* choice. One way of explaining the binding force of insincere promises invokes the insincere promisor's *truth-telling* and *harm-avoidance* duties. On this view, the insincere promisor's obligation to perform his promise is some kind of reparative obligation.[78] Since she has wronged the promisee by lying to her she must perform her promise in order to make up for her insincerity. Or, since her insincere promise may lead the promisee to harmfully rely on it, the promisor must perform in order to avoid the harmful effects of the promisee's reliance. Yet even if one agrees that these sorts of

[77] To be sure, we are discussing the bindingness of promises in which the promisor has no real intention to be *bound* even if she declares or communicates such an intention by making a promise. Her not having an intention *to perform* does not as such render her promise insincere. On this point *see* Owens, *Shaping the Normative Landscape*, 195 ff.

[78] Some of the late scholastics endorsed this idea. Lead by Tomás Sánchez, they argued that what they called 'fictitious' promises (i.e., insincere promises) were not binding qua promises, but that the (putative) promisor may still be bound to perform or compensate the (putative) promisee under the law of torts. Decock, *Theologians and Contract Law*, 192-195.

considerations may explain part of the binding force of insincere promises, they cannot be the full picture. The promisor may often successfully repair or make up for her insincerity and for the harmful consequences she caused in ways that are different than performing her promise, such as by apologising, or by warning the promisee of her insincerity in a timely manner. What we need is an explanation of the insincere promisor's obligation *to perform* her promise.[79] I will offer one.

I argued that the recipient acquires the authority that the authority-giver has chosen to give her, and that she accepts acquiring. As we saw, this presupposes that giver and recipient have a shared understanding of the content of the relationship of voluntary authority created by their deontic powers. And, according to the actual choice view, this shared knowledge is achieved only when they both know each other's authority-granting and accepting intentions. Moreover, we saw that we may know others' intentions without communication mediating. Communication is thus not constitutive of authority-giving and accepting acts. However, communication is the typical or paradigmatic way by which we let others know about our intentions. And this fact has some normative significance. If communication is the ordinary way by which we acquire knowledge of others' intentions, then the satisfaction of our authority interest (i.e., our capacity to form genuine relationships of voluntary authority) depends at least to a large extent on the sincerity of our authority-giving and accepting communications. A world with *no* insincere authority-giving and accepting acts is one in which *all* authority-giving and accepting communications constitute actual

[79] Recall that we reached similar conclusions in Chapter 1 when discussing the difficulties that reliance-based theories face in trying to account for the grounds of the promisee's right to performance.

authority-giving and accepting choices, and thus are always capable of forming genuine relationships of voluntary authority. This scenario of complete sincerity, where the possibility of insincere authority-giving and accepting acts is fully ruled out, is of course not available to us (and perhaps it is not even desirable[80]). However, we may achieve a state where authority-giving and accepting communications are *generally* sincere precisely by establishing the bindingness of insincere authority-giving and accepting acts.

If we treat insincere authority-giving and accepting communications as binding, we make these communications more likely to be sincere. By putting insincere promisors under a duty to perform their insincere promises, we give promisors a reason for sincerity or, perhaps more accurately, we remove one of their reasons for insincerity. The promisor's reason to make an insincere promise may be precisely that she will not be under a duty to perform when making her promise. By making insincere promises binding we rule out at least *that* consideration from the promisor's reasons for promissory insincerity, and thus we direct our authority-giving and accepting communications towards sincerity. Thus, the bindingness of insincere promises *fosters the possibility of acquiring knowledge* of others' actual authority-giving and accepting intentions. If this argument is sound, insincere authority-giving and accepting acts bind even if their

[80] It may be valuable for us to be able to deceive others regarding our authority-giving and accepting choices under some circumstances. A thief may threaten to kill you if you do not sign a contract whereby you grant him a property right over your house. It is good for you to have the power to sign the contract (and thus safely avoid the thief's menace) without actually intending to give him a right to your house. It is precisely the justified nature of your *insincerity* that renders the contract voidable (i.e., the contract is voidable precisely because you *did not really* choose to enter the contract, that is, because you did not really have an intention to transfer your property right to the thief). One may plausibly hold that the voidability of contracts under these circumstances holds only when the promisor did not *really* choose to be bound, and this is only possible if she *can* be insincere in the first place.

bindingness is not directly grounded in the promisor and promisee authority interest. They are *indirectly* or *derivatively* grounded in such an interest: by making insincere authority-giving and accepting communications binding, we give agents reasons to avoid insincerity, and thus make our authority-giving and accepting communications more likely to provide knowledge of others' authority-giving and accepting intentions. We therefore give agents some *assurance* that others authority-giving or accepting communications reflect their genuine authority-giving and accepting choices, and thus foster their authority interest, that is, their interest in being able to form genuine and not merely apparent relationships of voluntary authority.

Let us sum up. Authority-giving offers and acceptances are constituted by the giver's and recipient's choices to form a given relationship of voluntary authority on a given matter, and this presupposes their shared knowledge or understanding of the content of this relationship (i.e., of the content of the rights and powers the giver has offered to the recipient, and the recipient accepted). But, as we saw, an agent's communication that she chooses to give or accept authority may still bind her even if she is being insincere. To be sure, authority-giving and accepting communications only bind those who *intentionally* communicate or declare that they thereby choose to grant or accept authority. Inadvertent or unintentional authority-giving or accepting declarations do not bind the giver or confer any power to the recipient. It may be that by simply clicking on one of your hidden online adds I inadvertently thereby declared to be choosing to grant you a right to charge me $10 for your products. I have indeed declared such a choice.

Yet I have done so unintentionally, and thus I am not bound to perform.[81] The point is that if I *intentionally* declared a choice to grant you a right to the $10 by clicking your add, I cannot escape the bindingness of my declaration by alleging that I did not really choose to grant you such a right.

One might argue that if insincere authority-giving acts are binding, agents may be bound simultaneously and in divergent ways by *both* their communicated authority-giving and accepting intentions, and their actual non-communicated authority-giving and accepting intentions. It may indeed seem that my communicated or declared will to be bound to φ could conflict with my actual will to either not be bound at all or to be bound to something different than φing. However, the possibility of a deontic conflict between an agent's communicated and her actual will is only apparent. We must recall that according to the view that I propose, effective authority-giving and accepting acts always require shared knowledge by the giver and recipient of the content of the authority created by these acts. Thus, the supposed possibility of two agents being bound in divergent ways by their actual and declared authority-giving or accepting acts on the same matter will arise only if the recipient is aware of the giver's insincerity (or vice versa). However, I maintain that in such cases authority-giving and accepting communications are not binding, and the parties' actual will prevails. To see this, consider the following example.

[81] One could argue that we must still legally enforce this type of inadvertent 'contract' (for example, when the promisor has been negligent in making his unintentional declaration) even if the promisor is under no promissory duty to perform. I doubt this is the case, yet I will leave this problem aside here (I discuss the normativity of contractual enforcement later in Chapters 4-5).

You insincerely promise to me that you will water my plants tomorrow—a promise which I accept. Let us now assume, however, that your real intention was to grant me a right that you water my plants *next week* and not tomorrow. Here your declared will clashes with your actual will. However, if I am *not* aware of your actual will there is no genuine conflict: only if I know and accept your actual choice, are you bound by it. Hence, since I do not know your actual choice, you are only bound by your insincere promise. Things change if I know that your actual will is to be bound to water my plants next week. In this case, when the recipient knows the actual will of the insincere promisor, authority-giving communications will not bind, and the actual intention of the giver prevails. Thus, in our example, if I am aware of your actual will, you have only offered me a right to water my plants next week and not tomorrow. For the same reason, if I know that you actually did not have *any* real intention to grant me a right that you water my plants, you are not at all bound by your declaration.[82]

As I have argued, the deontic impact of insincere authority-giving acts derives from our need to provide recipients with the assurance that agents authority-giving and accepting communications reflect their actual choice (and thus that they are capable of satisfying our authority interest). This purpose is defeated when the recipient knows of the giver's insincerity or vice versa, that is, when they know each other's actual will. For this reason, authority-giving and accepting communications should be considered as binding only *prima facie*, that is, only if there *is* epistemic asymmetry between giver and recipient, that is, if they

[82] Of course, the insincere authority-giver may still be under certain duties in virtue of her insincerity (e.g., to apologise, etc.,) even if her insincere authority-giving act is not *as such* binding.

do not know each other's actual deontic intentions.[83] Once their will is known to both, their actual will and not their declared one should prevail. This solution is indeed adopted by the German Civil Code, which states that:

'A declaration of intent is not void by virtue of the fact that the person declaring has made a mental reservation that he does not want the declaration made. The declaration is void if it is to be made to another person who knows of the reservation.'[84]

I will say more about this later (Chapter 3) when I examine the problem of contractual interpretation, where the alleged tensions between the declared and the actual will of the parties of a contract has been an object of intense debate.

To recapitulate: we have explored the structure of one of our basic interests in being able to mould our deontic world at will, the authority interest. By exercising our powers to create a voluntary relationship of authority on a certain matter (our authority-giving and accepting powers) one agent grants another authority over a certain matter. She assumes an obligation and grants her a claim to the performance of a given act, and the *exclusive power to release* her from her obligation. In the next section I explore another basic deontic interest, our allegiance interest. Our allegiance interest grounds our basic deontic power to make commitments, that is, a power to assume voluntary obligations and claims over which we preserve and thus share equal control with the moral creditor. Our commitments are thus *not* relationships of personal authority.

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[83] As we will see in Chapter 3, the parties of a certain promissory transaction may fail to achieve a shared understanding of the scope of their promissory duties and rights. As a consequence, their transaction will be to that extent deontically ineffective.
[84] § 116. *See* also § 117.

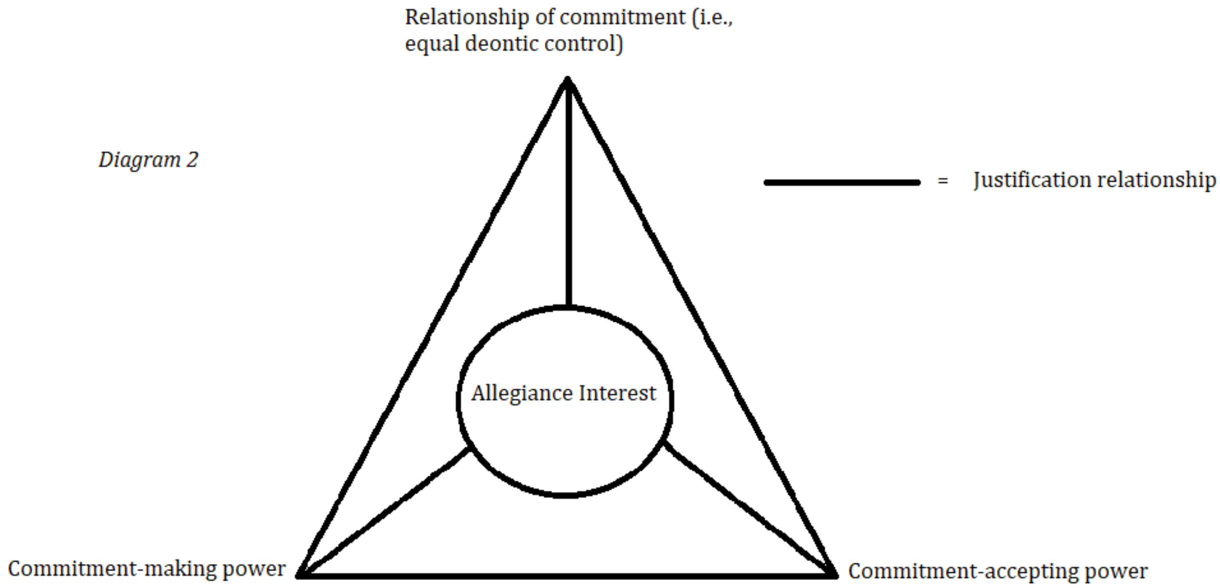
III. The Allegiance Interest

By making a commitment, an agent chooses to assume an obligation towards another. In doing so, however, the agent does *not* offer the moral creditor an *exclusive* power to release him from his obligation (i.e., authority). He chooses to assume an obligation towards another, whilst not relinquishing but rather sharing control over it with the moral creditor or obligee. Those who accept the offer of a commitment accept *this* deontic arrangement. By making or accepting a commitment, we therefore do not voluntarily enter a relationship of authority or deontic subordination with someone else. Instead, we enter a voluntary bond over which both obligor and moral creditor/obligee have equal control.

Commitment relationships have a bilateral deontic structure, that is, they obtain if and only if the obligor and the moral creditor or obligee choose to assume them.[85] They are the result of the exercise of two of our basic deontic powers: our powers to make *and* accept commitments. Our allegiance interest thus has a similar justificatory structure to our authority interest. It serves as the ground of 1) our basic commitment-making power; 2) our basic commitment-accepting power; and 3) the deontic entities (i.e., obligations and claims; and equal powers to release) that are created from a successful exercise of these powers. As with the authority interest, each of these elements of the allegiance interest stands in a transitive relationship of justification. As Diagram 2 illustrates, they are all constitutive elements of the ground of commitments.

[85] Contrast my notion of commitment with the notion of a vow or a promise to the self. *See* e.g., Connie Rosati, 'The Importance of 'Self-Promises' in Hanoch Scheinman (ed), *Promises and Agreements: Philosophical Essays* (Oxford University Press 2011) 124, 136-145. Or with our (unilateral) power to give ourselves normative reasons by willing. *See* Ruth Chang, 'Commitment, Reasons, and the Will' in Russ Shafer-Landau (ed), (2013) 8 *Oxford Studies in Metaethics* 74, 76-79.

Diagram 2



The view I defended about the ontology of relationships of voluntary authority—the actual choice view—also applies to commitments. Commitments are constituted by the obligor's and obligee's actual *choices* to be bound to each other. Yet, as in the case of authority-giving and accepting acts, insincere commitments can also bind us. Since we have an interest in our commitment-creating communications being sincere (and thus typically capable of constituting a reliable source of knowledge of our intentions to commit), we are prima facie bound by our insincere commitments. Like insincere authority-giving and accepting acts, insincere commitments do not bind as voluntary undertakings (i.e., they are not directly grounded in the obligor's and obligee's choices to be bound by them). Instead, their binding force derives from our interest in being able to know others' actual commitment-making choices.

In Chapter 1, we saw that some promises are relationships of voluntary authority. Promissory rights, I argued, are best understood as entitlements to exclusive deontic control over the promisor's situation on a given matter. This is not a full account of the normative grounds of promissory morality, however, for some promises may be commitments.[86] Take the example of sexual promises.

Philosophers have struggled to make sense of this kind of promise.[87] On the one hand, they do not wish to endorse the view that promises to have sex are fully binding: it cannot be the case that the promisee acquires the exclusive power to control the promisor's obligation to have sex. It seems that the promisor must have the deontic power to refuse such an obligation. On the other, they do not wish to commit to the overly moralistic view that we simply do not have the power to make binding sexual promises. After all, this type of promise is frequent in social life, and it often takes place in the context of healthy personal romantic relationships, and not only in vicious relationships of power imbalance. By identifying our allegiance interest, we can make perfect sense of sexual promises. Some of these promises may be commitments: the promisor may be assuming an obligation towards the promisee, and the promisee accepting a claim to performance, while both grant each other control over the deontic force of their promise (i.e., both acquiring a power to release themselves from the promise). For instance, Paula may promise her boyfriend Joe that she will have sex with him tomorrow. By making this promise, however, she may not aim at giving Joe exclusive control (i.e., authority) over the matter of her promise (i.e., her having sex with him tomorrow). Her point in making the promise may be precisely to be

[86] Although it is not entirely clear to me what he had in mind, the distinction between promises that I call commitments and those which are authority-creating promises was noted by Pufendorf. He wrote that 'promises may be divided into imperfect and perfect. It is the former when we who promise do indeed intend to be obligated, but do not give a right to the other party to require performance […]'; and that 'it is a perfect promise, however, when I not only intend in fact to be obligated, but also confer a right upon another to demand what I promised as quite simply owed to him'. *See* Pufendorf, *On the Duty of Man and Citizen*, 69-70.

[87] *See* e.g., Hallie Liberto, 'The Problem with Sexual Promises' (2017)127 N°2 *Ethics* 383.

bound to have sex with Joe, yet still share with him equal control over Joe's promissory claim and over her promissory obligation. Hence, even if obliged to perform, she is still *entitled* to release herself from her promissory duty. By making the promise, she is assuming a special sexual obligation towards Joe. Yet, she is not granting Joe any authority over her sexual life.

I believe that this type of promise is not only perfectly coherent, but also normatively intelligible once we realise that promises may not only aim to serve our authority interest, but also the promisor's and promisee's allegiance interest. Most accounts of the normativity of promising ignore the importance of this distinction. For instance, most (if not all) theorists seem to hold that it is in the nature of promises to invest promisees with the exclusive power to release promisors from their obligations.[88] This view fails to capture a fundamental aspect of the normativity of promising, namely that when making a promise we may not be aiming at relinquishing or transferring authority to the promisee, but at serving our and the promisee's allegiance interest. Whether we make a promise in order to serve our allegiance interest or our authority interest (or for other purposes such as providing assurance to the promisee regarding a certain state of affairs) will depend on the varied reasons promisors and promisees have for

[88] *See* e.g., Grotius, *The Rights of War and Peace*, 703-705; Hart, 'Are there Any Natural Rights?', 190; Scanlon, *What We Owe to Each Other*, 304; Raz, 'Is There a Reason to Keep a Promise?',71-72; Owens, *Shaping the Normative Landscape*, 174-75; 220-222; Shiffrin, 'Promising, Intimate Relationships, and Conventionalism', 507; Watson, 'Promises, reasons and normative powers', 159. True, some authors admit that the promisee's power to release the promisor can be regulated by varied considerations (e.g., by the fact of the promisor's relying on the execution of her promise, by the fact that performance has become overly burdensome for the promisor, etc.,). *See* e.g., Dori Kimel, 'Personal Autonomy and Change of Mind in Promise and in Contract' in Klass, *Philosophical Foundations of Contract Law*, 109 ff. These considerations may often constitute strong reasons for the promisor to exercise her power to release the promisee, or to refrain from doing so. However, all these writers maintain that, in principle, promisees always have the exclusive power to release promisors. In their view, promises are always authority-creating devices.

making and accepting a given promise. The practice of promise-making may be used as a tool to grant others authority over a certain matter; as a way by which one assumes a bond towards them without relinquishing control; or for other purposes. What is important is that we acknowledge that a promise can serve all these different interests. Our basic deontic interests and thus our basic deontic powers are not reduced to our interest in forming voluntary relationships of authority. Agents have an interest in being able to shape their deontic world without thereby transferring exclusive deontic control to others.

Distinguishing voluntary relationships of authority from commitments enables us not only to provide a more comprehensive account of the normativity of promising, but also of other important social institutions. Consider the following examples.

Romantic partnerships are at least partially constituted by the special obligations and claims that partners owe each other *qua* partners (e.g., mutual support and loyalty and often sexual fidelity obligations). These special obligations are part of what makes romantic partnerships valuable. Not all the obligations that constitute these relationships are voluntary in nature; some of them cannot be created or terminated at will. Other forms of partnership loyalties (e.g., sexual loyalty), by contrast, are voluntary undertakings. They are at least partially grounded in our interest in being able to mould our deontic world at will. However, at least in cultures that value personal-relational autonomy, those who enter a partnership may not intend to grant exclusive deontic control (i.e., authority) to their partner over their partnership obligations and claims. They may be interested in granting their partner certain claims and to assume certain bonds towards them whilst not being subject to their exclusive deontic control, that is, without granting them an exclusive power to decide whether to maintain or terminate these bonds. Instead, *both* partners may reasonably aim at *retaining* control over such bonds. By forming partnerships, agents may inter alia be concerned about satisfying their allegiance interest rather than transferring personal authority to each other. One may be obliged to all sorts of loyalties towards one's partner but still have the power to opt out of at least some of these loyalties by exercising one's power to self-release. Among other things, it is *this* deontic power that we typically exercise when we 'terminate' our romantic relationships.[89] One cannot explain this aspect of romantic partnership obligations and claims, including those that constitute modern marriages (in which spouses acquire the unilateral power to divorce), by exclusive reference to our authority interest.

Take the similar case of membership bonds that arise out of voluntary associations. We value belonging to certain associations. At least partially, the value that these associations have for us is established by the fact that they constitute special loyalties and claims between their members. Some of these associations, such as political parties and organizations, collegial associations, etc., are, at least in part, voluntary in nature. Their value depends on their members having chosen to form part and remain in them. And at least some of the bonds and claims that arise for the members of these voluntary associations obtain only if they choose to assume them. They are voluntary undertakings.

[89] I am of course not claiming that we can terminate *all* the obligations that we have with our romantic partners by exercising our deontic power to self-release. My point is that we at least preserve control over *some* of these obligations (e.g., over our duties to sexual and other forms of personal loyalty). *See* also *infra* note 90.

However, it is perfectly intelligible for those who enter voluntary associations to aim at creating a claim or assume an obligation towards their associates without aiming to grant them an exclusive power to terminate or maintain their membership obligations and claims against their will. As in the case of romantic partnerships, those who undertake associative loyalties may not intend to form voluntary relationships of authority, but to assume special obligations and claims over which they retain control. At least some of our associative loyalties are commitments, and not relationships of personal authority.[90]

Finally, take the case of contracts. It is usually stated that the law of contracts is the law of enforceable promises. Yet, accounts of the morality of contracts disagree about which types of promises must be enforced by the law. As I will argue in detail in Chapter 5, distinguishing commitments from voluntary relationships of authority helps us identify a basic condition for promises' enforceability.

As several writers have pointed out, a fundamental role of contractual enforcement is to vindicate the promisee's *right to performance*.[91] Along the same

[90] Of course, *part* of the normativity of voluntary associations and of romantic partnerships could be explained by reference to our authority interest. By entering a partnership, partners often aim at giving each other authority over certain matters (e.g., a right to manage some of each other's property, etc.). Moreover, some of the obligations and claims that the participants of relationships like marriage and voluntary associations owe to each other may be based on other grounds. For example, spouses and members of voluntary associations are often also friends, and will therefore have friendship obligations and claims towards each other. Still, I believe that we cannot explain the normativity of an important part of the bonds that typically constitute romantic partnerships and voluntary associations by reducing them either to friendship obligations and claims, or to relationships of voluntary authority. I maintain that those who choose to enter romantic partnerships, and those who enter voluntary associations, may do so at least in part by serving their allegiance interest. This interest may thus be the ground of some of the obligations and claims that often constitute romantic partnerships and voluntary associations.

[91] *See* e.g., Fried, *Contract as Promise*, 17; arguing that if 'I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent

lines, some have argued that the 'remedial' rights that arise in case of breach of contract (e.g., the right to some forms of compensation), are essentially a normative equivalent of the parties' first-order promissory duties and rights. They constitute a next-best way by which the promisor can conform to her original promissory duty in case of breach.[92] I shall discuss these views later in detail (Chapters 3 and 5). For now, however, we can simply note that the soundness of all these views presupposes that it is the *promisee* who has *exclusive* control over the promisor's duty. Otherwise, if the promisor had control over her promissory duty (as in the case of commitments), then the promisor could simply terminate his duty to perform and thus, after his breach, also terminate the promisee's remedial rights. Hence, there will simply be *no promissory duties and rights left for the law to enforce*. As I argue in Chapter 4, there are all sorts of reasons that legal actors may have for and against enforcing certain types of promises (e.g., they may have reasons not to enforce exploitative promissory arrangements). However, as I argue in Chapter 5, only promises that create relationships of authority and not commitments are legally enforceable.[93]

The fact that the law of contracts is fundamentally concerned with relationships of exclusive deontic control may explain why commitments such as

of the promised performance.' *See* also, e.g., Shiffrin, 'The Divergence of Contract and Promise', 723-724.

[92] For different versions of this idea, *see* e.g., Hart, *Essays on Bentham: Jurisprudence and Political Philosophy*, 183-184; Arthur Ripstein, 'As If it Had Never Happened' (2007) 48 N°5 *William & Mary Law Review* 1957, 1971-1974; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 N°1 *Law and Philosophy* 1, 28 ff.

[93] As we will see in Chapter 5, this idea may explain the appeal of the transfer theory of contracts, which states that by making a contract, the parties transfer a right to each other. The claim of the transfer theorists may be well reformulated as maintaining that what is relevant for contractual enforcement is that the parties have granted authority to each other in the matter of their contract, and not merely assumed an obligation towards each other as in the case of commitments.

the intimate loyalty obligations involved in romantic partnerships tend not to be legally enforced. In such cases, the claim of the moral creditor—either in its primary or remedial form—may be cancelled by the obligor, and, if this is the case, the disappointed promisee will lack grounds to demand performance. As we will see in Chapter 5, only promises that create a right to performance in the promisee (i.e., those which grant the promisee authority over the matter of the promise) are enforceable.

To sum up, I have argued in this section that we have an allegiance interest and that we can therefore enter commitments, that is, voluntary obligations and claims over which both obligors *and* obligees have control. I called our interest in being able to assume voluntary claims and obligations towards others whilst retaining control over these bonds the *allegiance* interest. When we declare allegiance to a certain cause, person, or institution, we declare our loyalty towards them without thereby rendering the addressee of our allegiance exclusively in charge of determining its permanence. We may want to retain the power to either preserve or terminate our loyalty bonds towards others. We have an interest in being able to give others allegiance without thereby granting them authority. Commitments may take many forms. In some cases, agents jointly assume an obligation and a claim against each other: for instance, by jointly committing, Joe and Paula may assume certain reciprocal sexual-fidelity obligations and claims. In others, an agent assumes an obligation towards another person who does not commit to anything in return and only assumes a claim to performance (e.g., Paula may commit to have sex with Joe tomorrow, and he may not commit to anything in return). Yet in all forms of commitments, the parties have equal control over their obligations and claims. Let us complete our exploration of commitments by considering a possible objection.

a. Hobbes' challenge

One could object that the notion of commitment that I have defended contradicts the basic notion of an obligation. As Hobbes argued:

'[…] *promises* therefore […] are Tokens of the Will; that is, […] of the *last act* of deliberating, whereby the liberty of non-performance *is abolisht*, and by consequence are *obligatory*; for *where Liberty ceaseth, there beginneth Obligation*.'[94]

In Hobbes's view, being under an obligation to φ necessarily entails that it cannot be up to one's own choice to determine whether one should φ or not. In other words, when obliged to φ, one always loses one's freedom to choose not to φ.[95] Hence, since an obligation's existence cannot exclusively depend on the *unilateral will of the obligor*, commitments cannot constitute genuine obligations.

I believe the Hobbesian conception of obligation is simply too narrow. It is certainly true that some obligations perform their role in our normative world only if the obligor has no control over them. Your interest in receiving truthful information and being able to rely on it puts me under an obligation not to lie to you without justification, and the whole point of this obligation (i.e., protecting

[94] Thomas Hobbes, *Philosophical rudiments concerning government and society* (first published 1642, London 1651) II. 10 (emphasis added). I am attributing this view of obligation to Hobbes, yet it was already widespread among most early modern writers; and it is still the standard picture.
[95] The problem of 'self-release' arises also as a possible objection to the alleged obligatoriness of vows or promises to the self. Arguing against this objection *see* Rosati, 'The Importance of Self-Promises', 127 ff. As I argued *supra*, commitment are not vows or self-promises. Unlike the latter, commitments bilateral in nature.

your interest in truthful information) would be defeated if *I* could release myself from this obligation. Similarly, as we saw, the role of the obligations that arise from voluntary relationships of authority will not be fulfilled if the obligor had a power to release herself from her duty. They are grounded in our authority interest, that is, in our interest in being able to create relationships of exclusive deontic control at will. But, I have argued, the point of some of the most important obligations of our lives is different. These obligations fulfil their role precisely if we, as obligors, have the power to release ourselves from them: part of the value of some of our obligations (e.g., sexual-fidelity obligations, associative duties, etc.,) may be to a large extent conditional upon us preserving control over them. The Hobbesian conception of obligation captures the structure of some of our obligations, but not of all of them.[96]

There are two features of the structure of commitments, however, that may help dispel the Hobbesian's concerns.

First, we must recall that the obligor's power to terminate her commitment does not have its source only in her unilateral will. It is a deontic power which has its source *both* in the will of the obligor *and* the will of the obligee or moral creditor (i.e., in their commitment-making and accepting powers). Like property rights and promissory rights, which are not in themselves basic deontic powers but are created by our basic authority-giving and accepting powers, the obligor's power to release herself from her commitment is *created* by the obligor's and obligee's commitment-making and accepting powers. Thus, the obligee or moral

[96] In Chapter 5, we shall see that the Hobbesian picture of obligation only accurately describes obligations that correlate to *rights*, and not all obligations (e.g., commitments).

creditor in a commitment assumes *a liability* to her bond being extinguishable by the obligor's choice. For this reason, if the Hobbesian objection is solely that one cannot have non-conferred (basic) powers to terminate one's obligations at will, the objections does not apply to commitments. The obligor's power to release herself from her commitment has been created by her *and* the obligee's will; it is thus a product of our basic deontic powers even though it is not a basic deontic power itself.

Second, the Hobbesian worry may disappear once we make clear that commitments do *not* give the obligor control over all the *normative consequences* of her commitment, but only over what I shall call its *demandingness* or *deontic force*. The deontic force of a commitment manifests in two of its features. While the obligor remains committed, her *practical deliberation* is constrained towards performance. She ought to exclude from her practical deliberation at least some of the considerations that militate against performance. And, while the obligor remains committed, the obligee is entitled to *demand* performance; she has the *standing* to claim performance of the committed act. These two features (i.e., their capacity to constrain the obligor's practical deliberation towards performance, and to grant the promisee the standing to demand performance) constitute the deontic force or demandingness of a commitment. By releasing herself from her commitment, the obligor terminates her commitment's demandingness. She terminates her commitment's performance-directing force, and deprives the obligee of the standing to demand performance. Thus, if Paula exercises her power to release herself from her sexual-loyalty obligations towards Joe, her commitment no longer imposes on her any practical constraints towards performance. Of course, she may have reasons to refrain from having sex with other people right after her release (e.g., out of respect for Joe's feelings). But, she is under no obligation to refrain from doing so (i.e., her commitment has no deontic force any longer). Similarly, after Paula's termination, Joe has no standing to demand performance. Paula has terminated his *claim* to performance.

One may think that, after the obligor's self-release, the moral creditor's claim to performance does not really terminate, but that he simply *ought not exercise it* because doing so undermines his relationship with the obligor or deprives performance from all its distinctive value. By insisting thus in demanding performance of Paula's sexual-fidelity obligations, Joe would further undermine their relationship and deprive sexual fidelity of its value. This explanation strikes me as clearly mistaken. It seems evident to me that after Paula releases herself from her commitment, Joe is not even pro tanto entitled to demand her sexual fidelity. Her release completely terminates Joe's claim to performance even if performance were still capable of bringing some good to their relationship.

The fact that the obligor's release terminates the demandingness of her commitment, however, should not be taken to mean that all the normative consequences of her failure to perform are thereby extinguished. By releasing herself and thus failing to perform, the obligor may indeed still *wrong* the moral creditor even if she thereby terminates her commitment's deontic force.[97] Even if

[97] Helpfully distinguishing between having standing to be wronged by someone and having a right against them *see* Nicolas Cornell, 'Rights, Wrongs, and Third Parties' (2015) 43 N°2 *Philosophy & Public Affairs* 109, 115 ff. *See* also Nicolas Cornell, 'Rights and Action-Guidance', MS. Cornell, however, assigns only to *rights* the capacity of constraining the obligor's practical deliberation towards performance, and the capacity to give the moral creditor the standing to demand performance. I disagree with him on this point. As we saw, while standing, commitments indeed limit the obligor's practical deliberation and grant the moral creditor a claim to performance. As I have argued, they create obligations to perform. However, as I will argue in Chapter 5, they do *not* give the moral creditor a right to performance.

the obligor released herself from her commitment, it may still be fitting for the obligee to *resent* and *rebuke* the obligor for her failure to act as committed, and for the obligor to offer an *explanation* and an *apology* for her breach. The obligor therefore retains control *only* over the deontic force or demandingness of her commitment, but *not* over the wrongfulness of her breach.[98] It may thus be fitting that Joe resents Paula's termination. And your comrades may appropriately resent you if you quit the party and join their political adversaries. Yet, after Paula's and your releases, you both have terminated the demandingness or deontic force of your commitments, thereby depriving your moral creditors of their standing to demand performance and terminating your commitments' performance-directing force.

Conclusion

For the reasons discussed in this chapter, distinguishing the authority interest from the allegiance interest, and the basic deontic powers they ground, is key to understanding the different ways in which we relate to our own deontic worlds. Obligations are constitutive aspects of our well-being. Some of the most important things in our lives are precisely the special bonds we have with others. And, as autonomous beings, we have powers to shape some of our special obligations at will. It is not the case, however, that our interest in being able to shape our deontic world at will is reducible to our interest in being able to form voluntary relationships of authority. As I have argued, we also have an interest in being able

[98] Are commitments as such enough to give the moral creditor standing to be wronged by the obligor's breach? I believe so, but the *degree* of the wrongfulness of the obligor's breach will depend on the range and quality of the interests of the moral creditor affected by the breach, as well as on the obligor's reasons for the breach (including her reasons for exercising her deontic power to self-release).

to voluntarily assume bonds whilst retaining and thus sharing equal deontic control with our moral creditors. I hope to have shown that the value of some of our voluntary bonds precisely depends on us being able to voluntarily maintain them. These bonds are commitments.

Further exploration of the forms in which we may control our deontic world could shed light on basic deontic interests that differ from *both* our allegiance and authority interest. For example, it may be the case that some of our bonds are such that they hold only if we voluntarily assume them, but that once we have assumed them, neither the obligor *nor* the obligee have control over them. Perhaps the normative structure of traditional marriages, where none of the spouses have the power to release themselves or the other from their marital bonds, is informed by such an interest. Similarly, deontic powers such as citizenship by naturalisation may be grounded in this interest. Once naturalised, one normally assumes certain duties and claims towards the state that neither oneself *nor* the state have the power to terminate at will. We could have an interest in being able to voluntarily assume such *enduring bonds*, as we might call them. I cannot explore these cases here. What the identification of our allegiance interest shows us, however, is that our basic needs for powers to craft our deontic world at will goes way beyond our interest in being able to grant exclusive deontic control to others (i.e., authority). By identifying the allegiance interest, we thus open up inquiries into all the other different forms that our basic deontic powers and voluntary undertakings can take.

In Chapters 1 and 2, I have explored aspects of the normativity of promising, and of voluntary undertakings in general. In the next chapters, I turn to contracts. This does not mean, however, that we are changing subject. As I will argue, at least to a large extent, the normativity of contracts *is* the normativity of voluntary undertakings and in particular the normativity of promises. We shall also see that the insights we have gained in Chapters 1 and 2 regarding the nature and normativity of promissory rights and voluntary undertakings enable us to achieve a better understanding of some crucial aspects of the contractual phenomenon.

2nd Part

3. The Normativity of Contracts and The Limits of Legal Authority, Part I: Contracts and Promises

In this chapter, I maintain that legal norms do not figure among the normative grounds of the obligations and rights that agents acquire from contracts. Of course, the phenomenology of contracts refers to legal institutions, rules, and practices, and the notion or concept of a contract is closely tied to the idea of legal enforcement. It would be a mistake to argue against such truisms. My claim here is one about the considerations that make the case that contracts *bind*. I shall argue that contractual obligations and rights are the result of the parties' basic deontic powers, and thus are not a product of the law. In this sense, I claim that the normativity of contracts is not legal in kind.

In Section I, I distinguish between different ways by which the law may shape or determine our obligations and rights. I distinguish what I call the law's purely *extrinsic* normative effects from its *intrinsic* normative effects, that is, those obligations and rights that are the result of what I shall call *legal deontic power*. I maintain that, although legal directives regulating contracts perform an important role by having extrinsic normative impact in the contracting parties, contractual duties and rights are not intrinsic normative effects of the law. Section II provides an account of the normative structure of contracts. I argue that contractual obligations and rights have the same normative grounds and structure of voluntary undertakings such as the obligations and rights that arise from promises. I aim to demonstrate the equivalence of contracts and voluntary undertakings by showing that the fundamental norms of contractual formation are simply the norms of promising formation, that the process of interpreting a contract is best understood as the process of discovering promissory duties and rights, and that the duties and rights that contracts give rise to, including the so-called 'remedial' duties and rights that contracting parties have in case of breach, have promissory grounds (i.e., the very same normative grounds as promissory obligations and rights). Thus, Section II may well be understood as a defence of the *promissory theory of contracts*.

I will continue exploring some of the themes of this chapter in Chapter 4, where I defend a claim about contract *law's* distinctive character. The law of contracts, I will argue, has mainly what I call a 'steering' role rather than an authoritative role. It shapes and directs the practice of contracting whilst generally refraining from exercising deontic power over the contracting parties. As we shall see, it is the law's steering role that accounts for the main characteristics of our contractual enforcement practices.

I. Legal Norms and Contracts

Judges often order people to perform their contracts, and statutes and civil codes establish *pacta sunt servanda* ('agreements must be kept') type rules. For instance, the French Civil Code provides that 'contracts which are lawfully formed have the binding force of legislation for those who have made them'.[99] This type of legal provision is not exclusive to civil law systems. Similarly, the English 'Contracts (Rights of Third Parties) Act of 1999' appears to establish that promisees have a legal right to enforce any term of a contract.[100] From these facts of legal phenomenology, some may be tempted to conclude that legal systems generally

[99] Art. 1103.
[100] S. 4.

establish or create a *legal* obligation to keep our contracts, and a *legal* right to contractual performance.[101] These pieces of legal raw material, may make it seem that the law constitutes *the source* of contractual obligations and rights. The force of this conclusion, however, ought to be qualified. We shall begin by asking what *is* to have a legal obligation or right in first place.

Under one plausible view, stating that S has a legal obligation or right to φ should be simply taken to mean that the law (i.e., a given legal directive) *claims* or *asserts* that S has a (*moral*)[102] obligation or right to φ.[103] Therefore, when the law declares that there is an obligation to keep our contracts or a right to performance, it is just claiming that there *is* an obligation to perform, and a right to performance.[104] Thus, following this view, it may be helpful to distinguish two different senses in which one may state that S is under a legal obligation to φ or has a legal right to φ. First, in perhaps a trivial sense, one may simply mean that

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[101] This interpretation of the contractual phenomenon seems to have wider support in civil law legal cultures than in the common law world, were perhaps the most widespread view is the one that holds that contract law just puts the parties under a liability to pay damages in case of breach, and not under a duty to perform their contract. This point, however, has no bearing on the argument I make in this chapter, namely that contractual duties, rights, and powers are not a product of the law's deontic power. In Chapter 5, where I provide an account of contractual remedies, I say more on the liability vs duty to pay damages discussion. *See infra* note 229.

[102] It has become common place in legal philosophy to contrast alleged or putative obligations with genuine obligations by characterising the later as 'moral'. From now on, however, I will refer to genuine obligations and rights (and powers, etc,) simply as obligations and rights (and powers, etc.,), thus omitting the label 'moral'. Such additional label does not add anything else to the notion of obligation, hence I do not see a reason to replicate it here. As I will argue *infra*, what I call legal obligations and rights are genuine obligations and rights (yes, if you wish, a particular type of moral obligation and right).

[103] For views along these lines *see* Joseph Raz, 'The Claims of Law', in his *The Authority of Law* (First published 1979, 2nd ed, Oxford University Press 2009); and John Gardner, 'How Law Claims, What Law Claims' in his *Law as a Leap of Faith* (Oxford University Press 2012). As I understand their views, both Raz and Gardner maintain that legal directives not only assert the existence of obligations or rights, but that legal directives claim that subjects have such obligations or rights *in virtue of* the law.

[104] I have also defended this view in 'El Valor de la Obligación Contractual' in Esteban Pereira (ed), *Fundamentos Filosóficos del Derecho Civil Chileno* (Rubicón 2019) 168 ff.

the law just *says or declares* that S has an obligation or right to φ. Second, one may mean that the law is *correct* in asserting that S has an obligation or right to φ, namely, that S *really* has an obligation or right to φ. Thus, under the first sense, S has a legal obligation to keep her contract or a right to performance simply if the law declares so, and we determine whether this is the case or not just by looking at the relevant legal sources (i.e., whether there is a court order, a statute, etc., saying so). Here I wish not, of course, to dispute that there is a legal obligation to keep our contracts or legal right to performance in this first sense. I am interested in exploring the second sense in which there may or may not be a legal obligation or right to contractual performance—namely, whether the law is correct in maintaining that there is an obligation and right to performance. Yet, in order to assess this question, we must make further distinctions.

It may be the case that the law is correct in asserting or claiming that S has an obligation or right to φ. However, *the law* itself may not *make it the case* that S has such an obligation or right, that is, it may not figure among the grounds of such obligations or rights. The thesis I shall defend is the following one: whilst the law is correct in holding that we have an obligation and a right to contractual performance, legal norms (as I shall conceptualise them below) do *not* make the case that we have such an obligation or right. Thus, it may be true that the law claims or declares that there is an obligation and a right to contractual performance, *and* that it is correct in making these claims or declarations. Yet I contend that legal directives do not ground our contractual obligations and rights; legal norms are neither necessary nor sufficient for us to be able to create contractual obligations and rights.[105] It is in this sense that I will argue that there is no legal obligation to keep our contracts or a legal right to contractual performance.

a. The Law's Deontic Power

The law may impact or affect (i.e., create, modify, terminate) our obligations and rights. In normal circumstances, it seems natural to hold that if the traffic authority says that we are obliged to drive on the left, we have such an obligation. Similarly, if the tax authority orders that we pay a given sum in taxes, we are under an obligation to do so. Now, it only makes sense to hold that *the law* is here changing our deontic profile if we can identify *it* as the source of this change. Then the relevant question is *how* does a legal directive as such impact our rights and obligations? I hold that the law has normative effect in at least two ways which I will call 'intrinsic' and 'extrinsic'.

First, the law intrinsically affects our duties and rights by performing an act of what I will call 'legal deontic power'.

Legal deontic power is the capacity of legal institutions (e.g., judges, parliaments, regulators, etc.,) to create, modify, and extinguish certain duties or rights of their subjects, by choosing—or by declaring an intention—to thereby provoke such a normative change (i.e., to create a certain right or duty). Legal actors indeed possess such capacity, and not only claim to possess it, *only* if it is all things considered valuable that they possess it. Accordingly, I shall maintain

[105] Furthermore, I hold that the law generally does not even *claim* to make it the case that we have certain contractual obligations and rights. In Chapter 4, I will argue that the law typically *refrains* from extending its deontic power to agents' contracts.

that a certain right or duty is an intrinsic normative effect of the law only if such a right or duty (i.e., its existence or bindingness) is grounded in an exercise of deontic power by legal institutions; and a right or duty is grounded in an exercise of legal deontic power only if it exists or binds in virtue of the same considerations that ground or justify the law's deontic power.[106]

I shall not provide here a complete account of the grounds of legal deontic power, that is, of the considerations (i.e., values or interests) that make the case that legal actors have such power (*see infra* I b). The main point I am making in this section is one about the *justificatory structure* of legal rights and duties. I contend that legal rights and duties are the ones that are grounded in the *same* considerations that justify legal deontic power. Thus the considerations that ground the *possession* of legal deontic power by legal institutions are the ones that constitute the grounds of legal rights and duties. It is in this normative or evaluative sense, as we shall see in more detail below, that legal rights and duties are a product of the law.

Let us contrast now the intrinsic normative effect of the law (i.e., the normative results of exercises of legal deontic power) with its *extrinsic* one. I shall argue that a legal directive has extrinsic normative effect if, as a consequence of an exercise of legal deontic power, it impacts certain normatively salient facts, thus affecting the subjects' normative profile. Yet, the normative reasons or duties

[106] I am here broadly adopting a Razian account of the justificatory structure of deontic powers. As we saw in Chapter 2, under Raz's view, an agent's act is an exercise of normative or deontic power if 1) it possesses certain structural features (i.e., if the agent aims at provoking a deontic change *by* choosing or intending to provoke such a change); *and* 2) it provokes such a deontic change because it is all things considered valuable that the agent has the power to provoke such a deontic change by choosing to provoke it so. *See* Raz, Normative Powers (revised), MS; Raz, *Practical Reasons and Norms*, 98-104; Raz, 'Promises and Obligations', 215 ff.

impacted by an extrinsic normative effect of the law are *not* grounded in the law's directives. Though they may be activated or rendered operative by the law's directives, they do not exist or bind in virtue of the same considerations that justify the law's legal deontic power.[107] An example may illustrate the distinction between the intrinsic and extrinsic normative effects of the law.

Suppose a court orders a monetary sanction and also the cancellation of a manufacturer's commercial licence because of their breach of environmental standards. The order aims at changing some rights and duties intrinsically, by an exercise of legal deontic power. It puts law enforcement officials under a duty to execute the sanction (e.g., under a duty to proceed with the seizure of some of the goods of the defendant) and extinguishes the defendant's right to legally commercialise their products. It is plausible to hold that the duty of the law enforcement officials to execute the sanction and the extinguishing of the manufacturer's legal right to commercialise his products are grounded in the

[107] To be sure, the distinction between intrinsic and extrinsic normative effects of legal directives consists not *only* in holding that the duties or rights that are a result of an exercise of legal deontic power (i.e., intrinsic normative effects of the law) are *constitutively linked* to such exercise of legal deontic power, whereas those that are extrinsic normative effects are not. Such an idea seems to underlie Anthony Kenny's distinction between the 'results' of a legal act and the 'consequences' of it. Anthony Kenny, 'Intention and Purpose in the Law' in Robert S. Summers (ed), *Essays in Legal Philosophy* (Oxford University Press 1968)150. Under my view, a duty or right is an intrinsic effect of an exercise of legal deontic power if it is grounded in the same considerations that justify the legal deontic power that brought about such a duty or right. Thus, the dependency of the intrinsic effects of legal deontic power to the power itself is not only metaphysical but also *normative*. More similar to my distinction between intrinsic and extrinsic normative effects of a deontic power is, perhaps, David Enoch's distinction between acts of 'robust reason-giving', and cases of 'reason-triggering'. David Enoch, 'Giving Practical Reasons' (2011) 11 N°4 *Philosophers' Imprint* (2011) 1, 3 ff. However, it seems that Enoch's distinction between robust reason-giving and cases of reason-triggering concerns mainly whether an act creates an *ex novo* complete normative reason or just activates or triggers a pre-existing one. Thus, it seems that his distinction has more to do with the *individuation* of normative reasons than with the relationship between the grounds of the reasons produced by reason-giving acts and the grounds of the power or capacity to bring these normative reasons about.

court's directive. The reasons or values that make the case for such deontic changes are the *same* reasons that ground or justify the court's deontic power to bring about such deontic changes. Let us now take the same example to illustrate the notion of an extrinsic effect of the law. It is plausible to maintain that the fact that courts impose sanctions in case of breach of environmental standards may constitute a reason for manufacturers in general to avoid the acts that would make them liable to such sanctions. Thus, the very same court ruling may constitute a reason for other manufacturers (third parties to the case) to conform with the environmental standards. Yet, one may plausibly hold that these third-party manufacturers' reasons to avoid legal sanctions are *not* grounded in the same values that ground the court's deontic power. Arguably, third-party manufacturers have such a reason simply because they ought to avoid the states of affairs that harm them or cause a setback in their interests, and legal sanctions may do so. Their reasons (or duties) to avoid such sanctions are not, in this sense, grounded in the court's directive. They are just an extrinsic normative effect of it.

In line with these remarks regarding the different ways that the law may shape our deontic profile, I shall characterise legal obligations and rights as those obligations and rights that are the product exclusively of an *intrinsic* normative effect of the law. Legal obligations and rights are the obligations and rights that are grounded in an exercise of legal deontic power. Therefore, now coming back to contractual duties and rights, the question I shall pursue is whether or not contractual obligations and rights are legal obligations and rights. I defend the thesis that they are not: contractual duties and rights are not the product of an exercise of legal deontic power. As we will see below, the law of contracts establishes rules that facilitate the identification of contractual rights and duties, and—as I shall argue in Chapter 4—performs a crucial role by directing the practice of contract-making through the mechanism of legal enforcement. Yet contractual rights and duties are only created (and modified, and terminated) by the parties *themselves*. They are an exclusive product of the parties' *basic deontic powers*, and thus are not legal in kind.[108]

In order to defend the claim that contractual obligations and rights do not obtain as a result of an exercise of legal deontic power, my argumentative strategy consists in showing that the structural features of contractual obligations and rights are simply those of promissory obligations and rights. Both promissory and contractual obligations and rights are product of our basic deontic powers. However, in order to defend this claim, I must first say a few things about the grounds of legal deontic power and the sense in which they diverge from the grounds of contractual obligations and rights.

b. Communal Interests and Legal Deontic Power

When we inquire about the grounds of legal deontic power, we are aiming at identifying the value or values that would make the case that legal institutions have the power to intrinsically affect their subjects' duties and rights. We are not, at least in principle, in search for values that would, for example, justify legal institutions' use of coercion or force. We are looking for a value capable of justifying legal actors' power to create, modify, or terminate our duties and rights,

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[108] What about all the rich set of default contractual rules that the law often utilises to regulate the parties' contracts? The reader may wonder. I discuss the role of this type of legal instrument in several instances along this and the following chapters. For now, just a preliminary answer. What we often refer to as default contractual rules are usually proxies or rules of thumb the law establishes in order to facilitate the discovery of the parties' contractual duties and rights (*see infra* II b, and c). In any case, I contend that, by employing them, the law does not purport to extend its deontic power over the parties' contract.

and not necessarily one that justifies these institutions' power to use force to vindicate these rights and duties.[109] Following the distinction made in Chapter 2 regarding the grounds of deontic powers in general, we may recognise two views of the grounds of legal deontic powers: the non-deontic, and the deontic view.

According to the non-deontic view, the law's deontic power is grounded in values or interests that are not deontic in kind. The law's deontic power is grounded in the fact that legal institutions' possessing and exercising such power enables its subjects to better conform to different values or reasons they have *independently* from the law.[110] Along these lines, some have argued that legal institutions' deontic power is grounded in, for example, the law's capacity to make possible or increase the likelihood of different valuable forms of large-scale social coordination.[111] By contrast, others may hold the view that legal deontic power is grounded in deontic interests. According to this view, unlike the value of social coordination or other non-deontic values, the values or interests that ground legal deontic power are not normatively independent from our power to make law but constitutively linked to it. Thus, it is not that the law instrumentally serves or promotes such value, but that the *only way* we can realise this value is by having institutions (e.g., parliaments) that possess what I have called legal deontic power.

[109] True, it might be that only if legal institutions have some coercive powers, their legal deontic power will be treated as binding by the subjects, and thus be effective. I believe that there are good reasons to defend such a view. However, defending this idea does not entail holding that legal actors' coercive power constitutes the normative ground of legal deontic power. For views that seem to hold that the normative significance of state coercion figures among the grounds of the law's deontic power *see* e.g., Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 110-111. *See* also Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22 N°3 *Ratio Juris* 339.
[110] Raz, *The Morality of Freedom*, 47.
[111] Raz, *Practical Reason and Norms*, 64; 159; Gerald Postema, 'Coordination and convention at the foundation of law' (1982) 11 N°1 *Journal of Legal Studies* 165; John Finnis, *Natural Law and Natural Rights* (First published 1980, 2nd ed, Oxford University Press 2011) 147-150.

I believe that the deontic view of the grounds of legal deontic power is often (implicitly) defended by those who hold that the law's normativity derives at least in part from values such as popular sovereignty or democratic expression.[112]

I neither aim to adjudicate between these views here, nor will explore them in more detail. Instead, I shall maintain that, if successful as accounts of legal deontic power, these views must endorse a further claim regarding the *bearers* of the interests that ground legal deontic power.

A legal deontic power is a power to control the deontic landscape of a collective. At least in principle, the law claims authority over all the members of a given *community*. I believe that this feature of the law's deontic power puts it under a justificatory constraint: its justification must lie in the interests of those subjected to the law's deontic power, that is, in the interests of the community over which it extends. Accordingly, I shall maintain that legal actors have deontic legal power only if the community as a whole benefit from them having such power. Legal deontic power can *only* be grounded in what I will call *communal interests*, that is, in the individual interests of a *sufficient portion* of the members of the community over which it purports to apply.[113] Neither the interests of those legal officials who hold legal deontic power, nor the interests of an insufficient portion of the subjects, are in themselves capable of justifying legal deontic power. In this sense, the law and the power to create it, are inherently communal or public goods. The legal deontic power of the British Parliament, the German Bundestag,

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[112] For a recent view along these lines *see* Seana Shiffrin, Lecture 1: Democratic Law, in Mark Matheson (ed), *The Tanner Lectures on Human Values 37* (University of Utah Press 2018).

[113] Making a similar point regarding the grounds of collective rights. *See* Raz, *The Morality of Freedom,* 208-209. *See* also Owens, 'Property and Authority', 18-19. I will leave aside the issue regarding what constitutes a 'sufficient portion' of the community's members.

or of the President of the United States cannot be justified by exclusive reference to the interests of the legal officials who claim such power, or to the non-communal interests of some of its subjects. To be sure, it may be that our own individual interest (e.g., one's interest in not being harmed, or one's interest in some particular forms of coordinated social behaviour) constitutes sufficient reasons to obey these officials' commands. Yet, a person or an institution possesses what I have called legal deontic power, that is, a general power to intrinsically impact the rights, duties, etc., of a given community *only* if the members of such community as a whole (i.e., a sufficient portion of the community's members) have an interest in such person or institution possessing this power. And, accordingly, the rights and duties that obtain as a result of an exercise of legal deontic power are also justified by communal interests. In other words, insofar as they are *legal* in nature, rights and obligations must be grounded in communal interests: legal rights and obligations exist or bind *only* if it is in the community's interest that they exist or bind.

There are many questions to be answered regarding the structure and grounds of legal deontic power. I will leave them for another occasion. The only point that I believe is important to stress here is that, *if* there is such thing as legal deontic power, it must be grounded in communal interests—either if non-deontic or deontic in kind. I contend this is not the case of our power to contract. Unlike legal duties and rights, I wish to argue that the contracting parties' individual interests are sufficient to justify their contractual duties and rights. These rights and duties are the result of what in Chapter 2 I have characterised as our basic *deontic powers*. It is in this sense that contractual duties and rights, unlike legal rights and duties, are *private* in nature. Their private nature consists in the fact that we do not need to refer to the law's deontic power, and thus to our communal interests, in order to explain the bindingness of contracts. The binding force of contracts, like the binding force of promises, can be sufficiently explained by reference to *the parties'* authority interest. This, of course, should not be taken to mean that the law does not play a crucial role in the contractual realm. As I argue below, the law creates rules that aim at facilitating the discovery of contractual duties and rights, and also accommodates several policy considerations that are relevant in the contractual context. Furthermore, as I will argue later, contractual enforcement has a crucial role in directing our promissory practices (Chapter 4), and in securing promisees' reparation for the losses caused by the promisor's breach (Chapter 5). My claim here is that, despite these important roles, the law's deontic power does not figure among the grounds of contracts' binding force.

Before moving on to exploring the normative structure of contracts, let me conclude this section by briefly discussing another important way some might consider that legal norms may constitute the grounds of our contractual duties and rights.

c. Conferred Legal Powers

The parties to a contract are the ones that have the power to create, modify, or terminate their contractual duties and rights. Yet, one could argue that the parties' *power* to affect their contractual duties and rights may still be grounded in legal directives. The parties' power may be just *conferred* by the law. Along these lines, writers have argued that the law establishes 'power-conferring rules', that is, legal directives that grant agents a power to affect or determine their legal rights and duties. The power to make contracts would find its source in such type of legal norm.[114] I believe, however, that in order to evaluate this claim we have to further refine our characterisation of conferred legal powers.

I shall argue that for a deontic power to be conferred by law (as in the case of legal rights and duties), such a power must be the result of the intrinsic normative effect of a legal directive. To be clear; it must not only be brought about by the exercise of legal deontic power, but *grounded* in such power, that is, in the same considerations that make the case for the legal deontic power that creates the conferred power in first place. For instance, the police may have the power to issue authoritative commands in certain matters (e.g., a power to put subjects under an obligation to stop on the highway by declaring their intention to thereby create such an obligation). The police's deontic power would be conferred by the law only insofar as it is grounded in a legal directive. In this sense, conferred legal powers are always chained to other law-making acts.[115] Again, the dependency of conferred deontic powers on the law is not solely causal but evaluative. Consider the following example. Imagine that a court ruling abolishes a rule stating that only white people may buy land in a certain region. Because of the court's ruling, one could argue, now non-white citizens have the deontic power to purchase land in such region. Yet, their power might not be strictly a conferred legal deontic power. It may not be grounded in the same considerations that serve as the

[114] *See* e.g., Hart, *The Concept of Law*, 27-28; and Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie. L. Paulson and Stanley L. Paulson trad, Oxford University Press 1992) 92-96. For detailed discussion and defence *see* Gregory Klass, 'Three Pictures of Contract Law: Duty, Power, and Compound Rule' (2008) 83 *N.Y.U Law Review* 1726, 1743 ff. *See* also Aditi Bagchi, 'Interpreting Contracts in a Regulatory State' (2020) 54 N°1 *University San Francisco Law Review* 35, 55 ff., recently arguing that our power to contract is a product of a 'conditional delegation of authority' by the law.

[115] Making a similar point *see* Raz, Normative Powers (revised), MS, and Maris Köpcke, *Legal Validity: The Fabric of Justice* (Hart Publishing 2019) Chap. 6.

ground of legal deontic power (i.e., communal interests). Plausibly, their power to purchase property is sufficiently justified by their basic deontic interest in possessing such a power. In other words, they possess such power in virtue of their *humanity*, and *not* in virtue of the law.[116] On the contrary, it seems way more plausible that the police officer's power to put subjects under duties to stop in the highway is exclusively grounded in a legal directive. References to his own or anyone's merely individual interest cannot grant him a legal power to put subjects under a duty to stop in the highway. Communal interests in him having such a power must come into play. In this sense, one may hold that the police officer's deontic power is exclusively legal in nature: he has such a power only in virtue of the law.

After these remarks on legally conferred powers, I shall extend my claim to maintaining that as the law does not create, modify, or terminate contractual duties and rights, it also does not confer on agents their power to do so. Agents' power to make contracts is not conferred by the law because it is not grounded in the same considerations required to justify legal deontic power (i.e., either deontic or non-deontic communal interests). Our power to create, modify, and terminate contractual obligations and rights is a basic deontic power. Contractual powers, duties, and rights are grounded in our *authority interest*. The normative

[116] Perhaps, what the law does in this case is just to *remove* reasons against them exercising such power (e.g., it makes the case that they will no longer suffer sanctions if they acquire land in such region). To be clear, I am not denying that both individual interests *and* legal norms may be necessary to provide a complete normative account of the entirety of the proprietorial phenomenon. For instance, one may argue that although our power to acquire personal property may be grounded in our individual authority interest, all the rules that specify the contours of such power require legal determination (e.g., specific rules of property acquisition and transfer, etc.,). Moreover, I am not denying that some property rights may be *exclusively* legal in nature (e.g., corporate property rights).

structure of contracts, I shall now argue, is explained by reference to such an interest.

II. The Morality in Contracting: Contracting as Promising

If the law (i.e., an exercise of legal deontic power) does not make the case that we have an obligation and right to contractual performance or constitutes the ground of our power to contract, what does so? The thesis I defend is that contracts create or constitute obligations and rights to performance because of the very same reasons that promises do. Like promissory obligations and rights, contractual obligations and rights are voluntary undertakings; they are a product of our basic deontic powers. In Chapter 2, we explored two of the grounds of our basic deontic powers, the authority interest and the allegiance interest. Later (Chapter 5), I will argue in detail that contractual obligations and rights are grounded in our authority interest and *not* in our allegiance interest. I will then argue that only promises that grant authority to the promisee are contracts. For now, however, I will leave this point aside and focus on the convergence of the normativity of contracts and promises at a more general level.

First, I will argue against a view that holds that *contract formation* differs from promising formation. Against such view, I maintain that the norms of contract formation are just the norms of promising formation. Second, I argue that the legal rules and standards of *contractual interpretation* should be understood as aiming at ascertaining the existence of promissory rights and duties for a given case. Third, I maintain that the so-called *remedial rights* for breach of contract are also promissory in kind. I shall argue that promissory rights and contractual rights (even remedial rights) share the same normative grounds.[117]

a. Contracts and Promises Formation: Offer and Acceptance

Contractual obligations are created as the result of a process constituted by at least two acts between the contracting parties: offer and acceptance.[118] In rough terms, a contractual offer is an act by which an agent (the offeror) communicates to another (the offeree) an intention to assume an obligation to perform or omit an act, and to grant a right to performance to the offeree. And a contractual acceptance is the act by which the offeree communicates to the offeror an intention to acquire the offered right to performance. Both offer and acceptance are necessary for contractual rights and duties to come to existence. Yet, some writers hold that in order for promissory rights and obligations to obtain it suffices that an offer takes place.[119] Unlike contracting parties, this view holds, by

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[117] I believe that it is along these lines (i.e., as maintaining that contractual obligations and rights have the same normative grounds and structure as promissory obligations and rights) that we ought to understand the so-called 'contract as promise' tradition. For some prominent contemporary defences of this idea *see* e.g., Fried, *Contract as Promise*; and Shiffrin, 'The Divergence of Contract and Promise,' 709. I will refine my version of the promissory theory of contracts in Chapter 5, when I defend the claim that *only* promises that grant authority (i.e., a right to performance) to the promisee are contracts.

[118] For a genealogy of the offer and acceptance requirements in contract formation both in civil and common law systems *see* Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 559 ff.; and Michael Lobban, 'The Formation of Contract: Offer and Acceptance' in W. Cornish et al. (eds), *The Oxford History of the Laws of England: Volume XII* (Oxford University Press 2010) Chap. 2. Some authors seem to consider the offer and acceptance requirement as the general rule of contract formation, yet subjected to some exceptions. This qualification, however, stems from an overly narrow conception of what offer, and acceptance are. It assumes, for example, than offer and acceptance cannot take place simultaneously, and thus maintains that contracts formed by simultaneous signature by the parties are not formed through the process of offer and acceptance. *See* e.g., Andrew Burrows, *A Restatement of the English Law of Contracts* (Oxford University Press 2016) 52-53.

[119] *See* e.g., Raz, 'Is There a Reason to Keep a Promise?', 72.; Penner, 'Voluntary Obligations and the Scope of the Law of Contracts', 328-329; and Shiffrin, 'Promising, Intimate Relationships, and Conventionalism', 491.

making a promise, promisors unilaterally bind themselves to the promisee in the matter of the promise. Following this idea, some have argued that the formation of a contract differs from the formation of a promise.[120] We should reject this claim.

As it is the case for contracts, the choices of both promisors and promisees are needed for promises to create obligations and rights. As we saw in Chapter 2, promissory obligations and rights are voluntary undertakings. They obtain only if the promisor *and* the promisee choose to bring them about. Promisors have only a power to offer the undertaking of a promissory bond to the promisee, but it is finally up to the promisee to decide whether or not any promissory relationship between promisor and promisee is formed.[121] I believe that the same considerations that justify the structure of promising formation (i.e., the voluntary or choice-dependent nature of our authority interest) are also the ones that account for the distinctive features of contractual formation. The law's commitment with the offer and acceptance requirements as the distinctive way by which contracts are formed just reveals its commitment to recognising the basic requirements for promising formation. Of course, the law may have reasons to enforce promissory offers that have not been yet accepted. For instance, it might have been justified that in nineteen-century England offers for rewards were considered as binding by the law even if not accepted, since, lacking centralised public police, rewards played a central role in the control of crime.[122]

[120] *See* e.g., Samek, 'Performative Utterances and the Concept of a Contract', 204-205; Peter Benson, *Justice in Transactions*, 35-39.
[121] For authors who favour and reject the acceptance requirement in promising formation *see supra* note 70.
[122] *See* e.g., *England* v. *Davidson* [1840] Ad. & El. 856.

And, under certain circumstances, the law may be justified in holding manufacturers liable for their public offers and assurances regarding their products in order to protect a reliable commerce.[123] Yet it is only exceptionally that the law declares the bindingness of unaccepted promissory offers. Policy considerations or the protection of those relying on such offers are sufficient to account for these exceptional cases.

Often our contractual practices are so deeply incorporated in our social life, adopting their own distinctive social significance and linguistic forms (e.g., sales, leases, donations, etc.) that we fail to notice that they are just *types* of promissory arrangements. Take the example of a sales contract. On the surface, we can describe a given transaction as a sale without referring to promising. Yet once we analyse its structure, we see that it is not more than a complex exchange of promises. To ascertain that 'A is under a sales contract with B regarding item *O*' there must have been an offer to buy or to sell by A or B followed by an acceptance by A or B. And an offer to sell is just a conditional promissory offer, in which the seller declares an intention to assume an obligation to transfer *O* to the buyer if and only if the buyer assumes an obligation to pay an agreed price. The acceptance of an offer to sell is, on the one hand the acceptance of the seller's promise itself, *plus* the fulfilment of the condition distinctive of offers to sell, namely that the buyer assumes an obligation to pay the price.[124] The equivalent, mutatis mutandi, applies to the offer to buy and its acceptance. The result is that at the moment that

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[123] *See* e.g., *Carlill* v. *Carbolic Smoke Ball Co* [1893] I QB 256 at 270, 262–3.

[124] The promise contained in the buyer's acceptance does not need to be accepted by the seller (the promisee), since it has been *requested* by him (the seller), and thus pre-emptively accepted when making his offer. As a result, the contract is formed by the *buyer's* acceptance. *See* Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, 74; correctly noting that requested promises may act as a form of pre-emptive acceptance.

the buyer accepts the seller's offer, the seller assumes a promissory obligation to transfer *O* to the buyer and acquires a promissory right to the price; and the buyer assumes a promissory obligation to pay the price; and acquires a promissory right to the transfer of *O*. Yet again, despite its complicated structure, the elementary particles of a sales contract are just those of an ordinary promissory arrangement.

Let us now consider a possible objection to the idea that the formation of contractual obligations and rights just mirrors the formation of promissory obligations and rights. Some writers argue, and legal systems such as the English one seem to establish, that in order for contractual obligations and rights to be created in first place, the parties must have or declare an *intention to create legal relations*. Thus, it would be this distinctive kind of intention that differentiates contract formation from promising formation.[125] Under this view, that the parties to a contract possess or declare an intention to become "morally"[126] bound to each other is irrelevant: they must aim at creating legal bonds towards each other. I believe we should reject this view.

We ought to start by asking: if contracting parties must have, or must communicate, an intention to create legal relations in order for contracts to bind, what would the content of such an intention be? I believe there are two ways one

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[125] *See* e.g., Dori Kimel, *From Promise to Contract: Towards a liberal Theory of* Contract (Oxford University Press 2002) 136 ff; and Michael Pratt, 'Contract: Not Promise' (2008) 35 N°4 *Florida State University Law Review* 801, 807 ff. On the intention to create legal relations as a requirement for the bindingness of contracts in English law *see* Gunther Treitel, *The Law of Contracts* (15th ed, Sweet & Maxwell 2015) IV, 87. By contrast *see* s. 21 of the American Restatement (Second) of Contracts (1981), which holds that: '[n]either real nor apparent intention that a promise be legally binding is essential to the formation of a contract'.

[126] Aiming at differentiating an intention to become *morally* obliged with one to become *legally* obliged is, for starters, confused. As we saw, the notion of 'legal' obligation refers to either alleged genuine (moral) obligations or to, as I have argued, a particular class of genuine (moral) obligations. *See supra* note 102.

might characterise this intention. First, the parties' intention to create legal relations may be understood as an intention that legal institutions create in the parties an obligation to keep their contract. On this view, when assuming a contractual obligation to φ, the parties declare an intention to be ordered to φ *by the law*. In other words, the making of a contract would require that contracting parties declare an intention to being subjected to the law's deontic power: an intention that legal institutions create in them an obligation and a right to performance. Yet this seems to me a clearly distorted description of the contracting phenomenon.

Contracting parties see themselves as the creators and shapers of their contractual duties and rights, and not merely as requesting the law to create and shape these duties and rights. The parties *create* their contractual duties and rights, and have the exclusive power to *cancel* or *terminate* these duties and rights. By contrast, if their contractual duties and rights were legal in nature, it would be the legal authorities who have created these rights and duties who would have control over them, and not the parties. Legal duties, rights, powers, etc., are always chained to the deontic power of the law. This not only means, as I have argued, that legal deontic entities' (legal duties, rights, powers, etc.,) are brought about or *created* by an exercise of legal deontic power. It also entails that such deontic entities are under the exclusive, ultimate control of the law: they cannot be *modified* or *terminated* but by an act of legal deontic power. The law always preserves ultimate control over its intrinsic normative effects.[127] Thus, if

[127] The law may, of course, delegate or confer legal powers on to individuals for them to be able to create and abolish some of their legal rights and duties. Yet, such conferred legal powers (i.e., their existence and scope, and the circumstances that extinguish them) will be always under the ultimate control of the law.

contractual duties and rights are intrinsic normative effects of the law, the law—and not the parties—will always preserve final control over the parties' contractual duties and rights. But this seems clearly mistaken to me. It appears that *the parties* to a contract, like promisors and promisees, have the final, exclusive power to create, modify, and terminate their contractual rights and duties.[128]

Under a different conception of the intention to create legal relations requirement, the intentions that contracting parties must have or declare are both an intention to create a promissory bond between them (i.e., to create promissory obligations and rights), *and* an intention to grant legal institutions the authority *to enforce* their promise, that is, to grant these institutions a power to adjudicate on disputes regarding their promise and to use some force to vindicate their promissory rights.[129] Thus, the parties are under contractual duties and rights only if they possess or declare these intentions. This claim seems implausible to me. Contracting parties who are familiar with the contractual enforcement practices of a given legal system (e.g., if they are aware that courts typically enforce sales contracts but not promises to make gifts, etc.), might well intend to be subjected to the law's enforcement mechanisms when entering into certain contracts. Indeed, the parties might have entered these contracts precisely because they are legally enforceable. Yet it seems clear to me that it is not

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[128] To be clear, third parties to a contract (including legal officials) may have valid claims towards the contracting parties in the matter of their contract. The point I am stressing is that the creation, modification, and termination of contractual duties and rights rests exclusively on the parties' will. Later (Chapter 4), I discuss cases in the which legal deontic power purports to determine the content of some contracts (e.g., consumer contracts). I shall argue, however, that these cases are a deviation from the typical way in which the law interacts with agents' contracts.

[129] Arguably defending this view *see* e.g., Randy Barnett, 'Contract is not Promise; Contract is Consent' in Klass et al. (eds), *Philosophical Foundations of Contract law*, 55 ff.

necessary that they possess or declare an intention to grant a power to legal institutions to enforce their promissory rights for their contractual obligations and rights to obtain in first place. One may enter contracts of all sorts (e.g., sales, leases, etc.,) by solely performing what I have described as the acts of offer and acceptance, and the duties and rights that arise from these contracts hold without the need of the parties having or declaring an additional intention to render these contracts legally enforceable.

Furthermore, it is hard to see why courts' power to enforce promissory rights and duties (i.e., their authority to identify promissory duties and to solve disputes between promisors and promisees, and to use some force to vindicate promissory rights) would only be justified if the parties declared an intention to become subjected to the courts' authority. One may endorse the thesis that the authority of legal adjudicators and of legal actors in general rests on agents' consenting to such authority, that is, in them declaring an intention to become subjected to their authority. Yet, if we agree with this (controversial) claim as a condition for the authority of legal institutions in general, I cannot see why *only* for the case of contractual adjudication judges' authority shall be conditional upon the involved parties' permission. A consistent defence of a consent-theory of legal authority, entails that the authority of legal and adjudicative organs in *all* matters (e.g., in property, torts, and even criminal disputes) ultimately rests on the subjects' consent to such an authority. Thus, this view must explain why only contractual obligations and rights would be conditional upon such permission. Courts' authority to adjudicate disputes and to order the use of force in order to protect people's rights is certainly subjected to justificatory constrains. However, I fail to see why an *ex-ante* permission given by the parties to a contract shall be a necessary condition for the legitimacy of courts' and other legal agents' interventions in contractual disputes.

To be sure, it may well be the case that the parties intend their promissory rights and duties *not* to be enforceable by the law. If this is the case, I believe we should deem these promissory arrangements to be non-enforceable. Take, for example, the so-called 'honour clause' added by the parties to their contract in *Rose & Frank Co v JR Crompton & Bros Ltd*:

'This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts…but is only a definite expression and record of the purpose and intention of the parties concerned, to which they each honourably pledge themselves'.[130]

In contracts such as this one, what the parties do is simply to impose limits to the *scope* of their promissory rights and duties.[131] However, we should not mistake this possibility with the necessity that the parties have or declare an intention to create legal relations as a requirement for contractual rights and obligations to be created in first place.

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[130] *Rose & Frank Co v JR Crompton & Bros Ltd* A.C. [1925] AC 445 (HL).

[131] When making their contract, the parties become obliged *not* to enforce the rights and duties that arise from their contract. Defending another interpretation, some may argue that in these cases the parties pre-emptively waive the *complaints* they have in case of violation of their contractual rights and duties, yet may not limit the scope of these rights and duties. *See* Nicolas Cornell, 'The possibility of Preemptive Forgiving' (2017) 124 N°2 *Philosophical Review* 241, 267 ff. I disagree with this view. As we shall see in Chapter 4-5, the enforceability of a promise depends on their being promissory *rights* to enforce, and on the consequences of the breach, namely the *harm* caused by it. The parties' having standing to complain upon the breach does not determine the enforceability of a promise. Thus, the fact that they, at the time of making the promise or later on, have waived their potential complaints in case of breach, does not necessarily render their promise unenforceable.

Perhaps some may argue that promises that create no legally enforceable rights such as the one in *Rose* shall not be considered to fall under the concept of a contract. I believe this is mistaken, since there are several cases in which the law itself deems a contract to be binding but not enforceable.[132] However, even if correct, the point I am interested in defending is one about the normativity of contracts and not about the appropriate use of the term contract, namely, that the parties' intention to grant legal officials a permission to enforce their promises is not a requirement for contractual duties and rights to be created in first place. Indeed, the fact that promisors and promisees can, out of their own deontic power, opt out of legal enforcement precisely proves that they have exclusive control over the scope and features of their contractual rights and duties. Only in this sense, it may be correct to maintain that the parties' intention to make their promissory rights and duties legally *un*enforceable is just a negative condition for the legal enforceability of promises. Yet, again, an intention to render their promise legally enforceable is not a positive condition for the obtaining of their contractual rights and duties.[133]

The role that enforcement practices play in the realm of contracts relates to broader questions regarding the way in which the law may affect contractual duties and rights that I will analyse later in Chapter 4. Legal norms, and legal-

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[132] For some examples *see* Seana V. Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation', (2000) 29 N°3 *Philosophy & Public Affairs* 205, 228.

[133] Kimel argues that the rationale behind the intention to create legal relations requirement is grounded in agents' interest in being able to enter promissory transactions that are not legally enforceable, that is, in what he calls the value of 'freedom from contract'. Kimel, *From Promise to Contract*, 139. However, Kimel fails to show why the parties' intention to create legal relations should be a *necessary* condition for contracts' *bindingness*, or even a necessary (positive) condition for the permissibility of enforcement. For, as we saw, the parties always have the power to render their promise unenforceable. Thus, in Kimel's sense, they are always free from contracting.

enforcement practices, may indeed constitute reasons for us to *make and accept* certain promises, and thus to shape our promissory duties and rights in certain ways (i.e., we may have reasons to make legally enforceable promises, and thus avoid legally unenforceable ones, and vice versa). For instance, the fact that judges generally declare different forms of exploitative clauses or terms unenforceable may constitute a reason for us to refrain from making promissory arrangements that contain such terms if we aim at the enforceability of our promissory rights and duties. In this sense, I will argue later, the law may provoke an *extrinsic* normative effect in the contracting parties, that is, it may impact the parties' reasons for making and accepting certain types of promissory transactions, without the law constituting the ground of contractual duties and rights. Moreover, in deciding which promises to enforce, the law may establish all sorts of requirements in order to distinguish enforceable promissory arrangements from non-enforceable ones. Thus, devices such as the doctrine of consideration or the doctrine of unconscionability in common law jurisdictions, may just simply constitute tokens which reveal a given legal system's commitment towards the development of certain types of promissory transactions (e.g., promises given in exchange), and towards the discouragement of others (e.g., exploitative promises).[134] This, however, does not mean that the enforcement practices of a legal system figure among the grounds of our contractual duties and rights. Again, they may figure in agents' reasons for making and accepting certain types of

[134] For a useful survey of some of the policy commitments regarding the enforcement of promises that legal systems usually make *see* e.g., Gregory Klass, 'Intent to Contract' (2009) 95 N°6 *Virginia Law Review* (2009) 1437, 1461 ff. *See* also Steve Hedley, 'Keeping Contracts in Its Place—*Balfour v Balfour* and the Enforceability of Informal Agreements' (1985) 5 N°3 *Oxford Journal of Legal Studies* 391, 399 ff.

promissory arrangements whilst not constituting the grounds or reasons why our promissory arrangements *bind* (I explore all these points in detail in Chapter 4).

I have claimed that contractual rights and obligations are created by the same process by which promissory rights and obligations are created: offer and acceptance. Besides offer and acceptance, as in the case of promissory bonds, no additional acts or intentions are needed to bring about contractual duties and rights. Now I shall argue for the equivalence of contracting and promising by showing that, what is usually labelled as the problem of *contractual interpretation* should be understood just as the process of ascertaining the existence of promissory obligations and rights on a certain matter.

b. Contractual Interpretation: Ascertaining the Content of a Promise

Let us start by considering a typical interpretative problem that may arise from a promise.

Suppose Guido promises his friend Carla to go with her to the river tomorrow at 12.30 pm. Carla, happily accepts Guido's promise. Yet, when the meeting time comes, Carla is waiting for Guido at a local pub, one that they have visited together in the past, called The River. Meanwhile, Guido is waiting for Carla at the usual spot in which they go for a swim at their town's river. Suppose we know that Guido's intention was to undertake an obligation to go with Carla to the river for a swim, and not an obligation to meet her at The River. And we also know that Carla accepted Guido's promise under the understanding that he was promising to go with her to The River. What did Guido promise to Carla?

In similar cases in the realm of contracts, contract lawyers typically begin by asking questions such as 'what did Guido mean by using the term river?' Or 'what would have a reasonable person understood by the term river in the context that the promise was made?'; and they side with different approaches in tackling these questions (e.g., 'textualists' vs. 'intentionalists'). However, they often fail to notice that the appropriateness of our contractual interpretative judgements, is firstly determined by a theory of the nature of contracts. The merits of a method or account of contractual interpretation are always responsible to a theory of the nature of contractual obligations and rights. If contractual interpretation is just ascertaining the existence of a certain contractual right or duty on a certain matter, we can only do this if we know what is that thing that we are trying to ascertain, namely, if we know what a contractual right or duty *is*. I will call the subordination of an account of contractual interpretation to an account of the nature of contract the *dependency thesis*.[135] Thus, if the dependency thesis is sound, and if, as I have argued, contractual rights and duties have a promissory nature, interpreting a contract is just determining the existence of promissory rights and duties over a certain matter. And, if contractual rights and duties have a promissory nature, the view we adopt on the nature and normativity of promising will in turn determine our answers to interpretative questions.

Take the view of promising that understands it as an act by which promisors grant voluntary authority to promisees over the matter of the promise. According to this view, a promise is an act by which one person, the promisor,

[135] Making the same point regarding the nature of legal interpretation *see* Mark Greenberg, 'What Makes a Method of Legal Interpretation Correct: Legal Standards vs. Fundamental Determinants' (2017) 130 N°4 *Harvard Law Review Forum* 105, 110 ff.

gives exclusive deontic control to another, the promisee, in the matter of the promise. As we saw in the previous chapters, this granting of authority from the promisor to the promisee holds only if the promisor chooses or intends to grant authority to the promisee over a *certain matter* (i.e., he makes a promissory offer), and the promisee chooses or intends to acquire authority over the promisor on *such matter* (i.e., he accepts the promisor's promissory offer).[136] In our example, Guido intended to grant Carla authority over him going to the river with her. Yet, Carla accepted Guido's offer with the understanding that she was acquiring authority over a *different* thing, namely over Guido's going with her to The River. Is there a promise here? And if so, what is its content? If we give priority to what we may call Guido's purely 'personal' meaning (i.e., what he intended to communicate to Carla) in determining the content of the promise, we may conclude that he was under a promissory obligation to go to the river with Carla, since it is that what he intended. We reach the opposite conclusion, namely that Guido has a promissory duty to go with Carla to The River, if we give priority to Carla's personal meaning when accepting the promise. However, if we adopt the view I have defended in Chapter 2, indeed *no* binding promise is formed between Carla and Guido.

I have argued that promises create rights and obligations *qua* voluntary undertakings only if the promisor *and* the promisee chose to assume the obligations and rights created by the promise. This presupposes, we saw, that both have a *shared understanding* of the content of their promises, that is, of the promissory rights and duties that the promisor is offering and the promisee

[136] *See supra* Chapters 1-2.

accepting. Thus, the promisee must accept the very *same* duties and rights that the promisor has offered her, in order for these rights and duties to obtain. Guido and Carla fail to achieve this shared understanding, and thus no promissory duties and rights have been created by them. True, both Guido and Carla may owe explanations and apologies to each other for their misunderstanding. The point is that a successful shared understanding regarding the matter of the promise is of the essence for *promissory* rights and duties to hold. To be clear, for the promissory relation to be formed, it is only necessary that promisors and promisees have a shared understanding of the content of the obligations and rights that the promisor is offering to the promisee, and not necessarily of the parties' motives and reasons for the making and accepting of a promise. For example, suppose Guido promised to take Carla to The River, and he did so because he thought Carla would pay their bill. Yet, even if this was a crucial reason or motive for Guido's making his promissory offer, *only* if he intends this fact as a constitutive condition of his promissory offer (i.e., as part of the rights and duties he aims to bring about by making the promise), and Carla, knowing about this condition, accepts Guido's offer, Guido's promissory obligation is conditional upon Carla's paying the bill. The content of promissory rights and duties is fixed by the parties' shared understanding of the obligations and rights that they aim at creating by making the promise. Their shared understanding of other matters such as their motives for making and accepting the promise is not relevant for promising formation.[137]

[137] I believe that the traditional distinction between mistakes in the 'motives' of a contract and in its 'substance' should be understood as corresponding to the one I make in the text: only the parties' credible mistakes in the *rights and duties* they intended to generate through the promise (i.e., in its substance), and not in the reasons they had for making the promise (i.e., in their motives)

As we saw in Chapter 2, insincere promises, that is, promises in which the promisor communicates an intention to be bound to perform yet does not have such an intention may still bind the parties. It suffices that the parties intentionally *communicated* to thereby offer and accept certain rights and duties towards each other, for them to be bound by their promise.[138] To this point, as we saw, some may object that the fact that both actual *and* communicated promissory intentions are capable of binding promisors and promisees leaves open the possibility that the rights and duties created by the parties' actual intentions may conflict with the rights and duties created by the parties' communications. Yet, as I argued in Chapter 2, the parties' declared or communicated intentions bind them *only prima facie*. If known to them, the parties' actual intentions should always prevail. In the contractual realm, some writers have argued that contracting parties are only bound by their communicated intentions,[139] whilst others that only their actual intentions really bind them.[140] I maintain, however, that there is a middle ground: the parties' declared intentions bind them unless their known actual intentions

can invalidate a promise. A mistake in the motive can only vitiate the validity of a contract when the motive was intended by the parties to constitute a limit of the scope of the parties' promissory rights and duties (i.e., when it was actually part of the substance of the promise). For an illuminating historical account on the efforts made in order to establish criteria to distinguish one type of mistake from the other *see* James Gordley, 'Mistakes in Contract Formation' (2004) 52 N°2 *American Journal of Comparative Law* 433, 456 ff.

[138] Recall that, as I argued in Chapter 2, the prima facie bindingness of insincere voluntary undertakings is not *directly* grounded in agents' authority or allegiance interests, but in our interest in constraining our authority and allegiance-creating communications towards sincerity.

[139] *See* e.g., Timothy Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (4th series, Oxford University Press 2000). *See* also Brian Langille and Arthur Ripstein, 'Strictly Speaking—It Went Without Saying' (1996) 2 N°1 *Legal Theory* 63, 75 ff.

[140] *See* e.g., Treitel, *The Law of Contracts*, IV, 187-188. In the modern civil law tradition, the canonical proponent of this view was Jean Domat, *The civil law in its natural order* (first published 1689, Fred B. Rothman 1980) Vol. 2, 168.

state otherwise.[141] Indeed, this account is fully consistent with the phenomenology of contractual interpretation, where contractual interpreters often debate over the content of contractual arrangements by reference to *both* the parties' declared *and* actual intentions. The account I propose gives priority to the parties' actual over their declared will as a determinant of their contractual duties and rights, whilst explaining why their declared will also matters: the parties are prima facie bound by it.

True, legal systems often appear as giving priority to the parties' declared over their actual will.[142] Yet we should be careful in trying to reach substantive conclusions about contract formation and interpretation from raw facts of legal phenomenology. The law's supposed prioritising of the declared over the actual will of the parties in some cases constitutes just the adoption of certain heuristic techniques, or of certain policies that regulate the process of contractual interpretation, and thus should not be too quickly understood as reflecting the law's substantive commitments regarding contractual formation and interpretation. For instance, Guido may protest claiming that he had an intention to create a right and an obligation to go with Carla to the river and not to The River. But perhaps he did have the intention to the latter, and he is just trying to get away with the breach. The same, mutatis mutandi, may apply to Carla's acceptance. In order to determine these intentions, the law may adopt different sorts of heuristics. For example, it often utilises what lawyers call an 'objective

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[141] As we saw in Chapter 2, adopting this view *see* § 116-117 of the German Civil Code. To be clear, the parties' actual promissory intentions must be known to *the parties*. *Their* shared understanding is what determines the content of their voluntary undertakings. Thus, whether other people know the parties' actual intentions or not is irrelevant in this respect.

[142] *See* e.g., *Riverlate Properties Ltd. v. Paul* [1975] 1 Ch. 133 (C.A.).

test', where a hypothetical reasonable person is the one used as a model to ascribe these intentions to the parties.[143] However, the problem of *how* to discover the parties' promissory intentions is a purely epistemic and institutional one that has no bearing on the substantive position the law takes regarding the nature of contractual formation and interpretation. Furthermore, it is a matter of legal policy how far a legal system is willing to go in the process of discovering the parties' actual intentions. For example, time constraints, and the privacy of the parties are considerations that may restrict this enquiry process. Yet, even if facilitated or regulated by legal rules and doctrines, I maintain that it is the enterprise of discovering the parties' *actual* intentions that constitutes the central task for contractual interpreters. The parties' actual intentions are what ultimately determine the parties' contractual duties and rights, and thus contractual interpreters must, at least in principle, aim at finding these intentions. Hereinafter I will use the term 'promissory intentions' to refer to the *actual* deontic intentions of promisors and promisees (i.e., to the rights and duties they intended to create by entering the promise).

[143] Again, as I argue in the text, we should not rush in maintaining that a certain legal system gives prevalence to the parties' declared over their actual intentions or the other way around just by pointing out to its adherence to an objective test as a mode of inquiring about these intentions. For example, in systems like the French one, in which actual intentions are clearly given primacy over declared intentions, courts are obliged to use something akin to the objective test as a means to investigate the parties' intentions (i.e., they must aim at discovering the parties' intentions by reference to their public behaviour, and by contrasting their behaviour with a reasonableness standard). *See* art. 1188 of the French Civil Code, providing that 'a contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it'. Making a similar point *see* Catherine Valcke, 'Convergence and Divergence between the English, French, and German Conceptions of Contract', (2008) 16 N°2 *European Review of Private Law* 29.

In this subsection I have defended three different claims. First, I argued for what I called the dependency thesis, namely for the thesis that the soundness of an account of contractual interpretation is parasitic on the soundness of a theory of the nature of contractual obligations and rights. Second, I argued that, since contractual obligations and rights are promissory in nature, interpreting a contract consists in ascertaining promissory rights and obligations for a given case. Third, I defended a view of contractual interpretation in the light of my own account of the nature and normativity of promising. Though I believe that the account I defend is capable of making sense of the phenomenology and practice of contractual interpretation (e.g., it makes sense of the relevance of the parties' shared understanding of the content of a contract), one may adopt an alternative theory of promising and still agree with the thesis that contractual rights and duties are promissory in nature, and that interpreting a contract is the process of ascertaining promissory rights and duties. For example, one may endorse a theory of promising that finds the grounds of promissory obligations exclusively in the *promisor's* interest in being able to shape his obligations at will, and not, for example, also in the *promisee's* interest in assuming voluntary authority over the promisor. Endorsing this view of the nature of promising will determine our account of contractual interpretation. It may lead us to hold that it is only the promisor's personal meaning what determines the existence and scope of promissory duties and rights. The point I wish to stress is that, if contracts have a promissory nature, our disagreements about the nature of promising formation determine our views on contractual interpretation.[144]

[144] For instance, if one follows Scanlon in holding that the relevant type of intention that is capable of triggering Principle F (which according to him constitutes the ground of promissory obligations

In the rest of this section, I argue that the equivalence of promissory and contractual rights and duties extends to the 'remedial' rights and duties that hold in case of breach of contract. Against what some writers hold, I maintain that we need not refer to legal norms in order to account for the grounds of contractual remedial rights. These rights, as all contractual rights, are grounded in the parties' promissory intentions.

c. Promises and Remedial Rights

Put in rough, preliminary terms, contractual 'remedial' rights and obligations are those which arise from contractual breach. They may include, for example, the promisee's right to demand a substitute for the original performance, which, due to the breach, the promisor can no longer deliver. Against the thesis that contractual rights and duties have promissory grounds, some writers argue that even if the primary obligation to perform our contracts and the primary right to performance are promissory in nature, what I have called remedial rights and obligations (or at least some of them) are not. Under this view, remedial contractual rights are grounded in legal norms, and thus are *legal* and not promissory in nature (i.e., they are a result of an exercise of legal deontic power).[145] Though these rights may be conditional upon the breach of a promise, they are not grounded in the same considerations that justify the parties'

and rights) is the promisor's intention to provide assurance to the promisee regarding his future behaviour, it makes sense that it is *such* an intention that we ought to look for when aiming at discovering promissory rights and duties, and not necessarily, for instance, the parties' *deontic intentions* (i.e., their intentions to bring about certain rights and duties). *See* Scanlon, *What We Owe to Each Other*, Chap. 7.

[145] *See* e.g., Craswell, 'Contract law, Default Rules, and the Philosophy of Promising', 489; and, partially, Stephen A. Smith 'Remedies for Breach of Contract: One Principle or Two?' in Klass et al., *Philosophical Foundations of Contract law*, 341.

promissory rights and duties: they are a distinctively legal reaction to contractual breach. Against this view, I defend the thesis that contractual remedial rights are basically a normative continuation of promissory rights.[146] We thus do not need to resort to legal deontic powers in order to account for the grounds of remedial rights in the contractual realm.

Before moving onto exploring the grounds of remedial rights, a preliminary clarification is required. We should distinguish remedial rights from *legal remedies*. As we shall see later (Chapter 5), remedies constitute the distinctive mechanism by which courts assist promisees in obtaining reparation for the promisor's violation of the promisee's promissory right. They are legal *enforcement* mechanisms. I am focussing here on *remedial rights and duties*, and not in legal remedies. As I contend later, the appropriateness of legal remedies such as judicial damages orders or specific performance presupposes the existence of remedial rights and duties. Yet remedies do not merely mirror or vindicate contractual remedial rights or duties. They are legal tools aimed at assisting the disappointed promisee in her execution of the promisor's liability to repair the *harm* caused to her by the promisor's breach. For now, my focus is on the grounds of remedial rights and duties, and not on the appropriateness of judicial remedies.[147]

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[146] Maintaining that the reasons that justify *primary* duties and rights may still exert their normative force after the breach and justify some *remedial* rights and duties *see* Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann & Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press 2004) 189-193.

[147] In the common law tradition, lawyers tend to conflate contractual remedial rights with judicial remedies. They consider contractual remedial rights to be directed towards *courts* for them to order the promisor to act in a certain way (e.g., to perform or pay compensation), and not towards the breaching promisor directly. As I argue in the text, I wish to resist this characterisation. Contractual remedial rights and duties are just promissory rights and duties, and thus owed

My thesis is that contractual remedial rights and duties are just promissory rights and duties. In order to defend this claim, we must begin by recalling the way in which we determine the existence of promissory rights and duties. As we saw, the existence and scope of promissory rights and duties is exclusively fixed by the parties' promissory intentions. And, furthermore, I argued that the parties' declared or communicated intentions prima facie bind them. Yet in determining the content of promissory rights and duties, we must not mistake what we may call the 'words' of a promise (e.g., what the parties merely *said* to each other), with the parties' actual *or* even communicated intentions.[148] The words of a promise are simply just *one* relevant piece of evidence in determining the content and scope of promissory rights and duties.

Suppose Guido borrows $100 from Aldo, and promises him that he will pay the money back next Monday. If in determining the content of Aldo's promissory right we focus exclusively on the promise's words, we may conclude that Aldo has a right that *Guido gives him $100 next Monday*. Thus, if it is Tuesday and Guido has

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between the parties and not directed towards courts. Of course, as we shall see in Chapter 5, under certain circumstances the disappointed promisee may have a right to judicial enforcement: she may have a right directed to courts to enforce her contract (i.e., a right to a judicial remedy). My point is that we should distinguish such a right from remedial rights, that is, from the promisee's promissory right to what below I call original or substitutive performance. As I argue in Chapter 5, whether promissory remedial rights are enforceable or not (i.e., if they render appropriate forceful execution via, for example, the granting of a judicial remedy) requires further argument than the mere existence of such rights. For a helpful account on the divergences of both traditions on this matter *see* Helge Dedek, 'The Relationship between Rights and Remedies in Private Law: A comparison between the Common Law and the Civil Law Tradition' in Robert J. Sharpe & Kent Roach (eds), *Taking Remedies Seriously: Les Recours et les Mesures de Redressement* (Canadian Institute for the Administration of Justice, 2009).

[148] Even if what I am calling 'the words' of a promise figures among the determinants of a promise's communicative content (i.e., of the rights and duties the parties communicated to be creating through the promise), it is just *one* of its determinants. On this point *see* Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor & Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 241 ff.

not paid yet, Aldo would not have a promissory right to the $100, since the words of Guido's promise did not include giving him $100 on Tuesday (or on any other day but Monday). Yet this result seems clearly wrong. Against this purely textualist approach, one might suggest, for example, that when making his promissory offer, Guido had (or declared) an intention to grant Aldo a promissory right *to $100*; and requested a liability waiver from Aldo until Monday (i.e., that Aldo cannot demand performance or complain to him for failing to pay the $100 before Monday). And it is to acquiring a right to the $100 and to the granting of the liability waiver that Aldo agreed to by accepting Guido's offer. Thus, after the breach, Aldo would still have a promissory right to claim the $100. Similarly, suppose Guido promises Aldo to take him out for dinner to The River tomorrow; a promise that Aldo accepts. Yet, when they go to The River, it happens to be indefinitely closed. Is then Aldo's promissory right fully extinguished? Again, the answer to this question depends on the content of Guido's offer and Aldo's acceptance. It may be that in their shared understanding of the promise, Guido offered Aldo a right to go with him to The River or, by default, to another pub. Thus, *if* this is the case, Guido would still have a promissory obligation to take Aldo to another pub in case The River is not available. In both examples the content of promissory rights and obligations is determined by the promissory intentions of the parties. If Guido would have instead promised to give Aldo $100 on Monday, but also clarified that he is only undertaking an obligation to give the $100 to him *on Monday*, and that *if Monday passes he has no duty to give him the money*; and Aldo accepts this offer, it may be the case that Aldo has no promissory right to claim the $100 after Monday. Similarly, Guido's offer might have been to assume a promissory duty to take Aldo to The River, and *just* The River, and then Aldo would not have a promissory right to go to another pub with him. The point is that the promissory intentions of the parties establish the content of promissory rights and obligations, and the words or the text of a promise is just one relevant element in decoding such content.[149]

In some cases, the breach of a promise may entail a permanent failure to conform to the promisor's obligation. If Guido promises to take Aldo to The River and just to The River, and he fails to do so because it is not possible anymore, the breach of his promise is also a total failure to conform to his promissory obligation. In other cases, it is still possible for the promisor to conform to his promissory obligation after the breach. Here we must distinguish two types of cases. First, there are cases in which the promisor, after the breach, can still perform the promise in the *primary* way intended by the parties. Second, there are cases in which though the promise cannot be performed in its primary mode of completion, the promisor can still perform his promissory duty in a *secondary* or next-best way intended by the parties. With these clarifications in mind, we can identify two kinds of remedial rights. I will call them the right to 'original' performance and the right to 'substitutive' performance. Both of these rights are remedial rights in the sense that they presuppose a breach, namely that the promisor is failing to meet his promissory duty. Yet, what distinguishes original performance from substitutive performance, is that the former consists in fulfilling, after the breach, the promissory obligation in the primary modality of

[149] Again, as we saw, the parties' communicated promissory intentions prima facie bind them. But what I am calling the words of a promise does not exhaust the communicative content of a promise, and thus does not necessarily, even prima facie, constitute the content of promissory rights and duties.

completion intended by the parties. By contrast, performing a promise by substitutive performance consists in fulfilling the promissory obligation in a secondary or next-best modality of completion intended by the parties. Part of what contracting parties seek when suing each other for breach of contract is the legal vindication of their right to original or substitutive performance of a promise.[150] To be clear, whether a given promissory right can survive the breach and admits original or substitutive ways of conformity (and whether one act counts as original or rather as substitutive performance of a given promise), depends on the content of the promise, that is, on the parties' shared understanding of their promissory obligations and rights (i.e., on their promissory intentions). Indeed, contractual disputes often are about the existence and scope of these remedial rights: they are interpretative disputes about what rights and obligations have the parties created by entering the promise.

As we saw, in case the promisee has no remedial rights left after the breach, the breach of a promise terminates the promissory relationship between the parties. In fact, this is one of the reasons why what we may call 'personal' promises are regularly not enforced by the law (e.g., your promise, made out of pure friendship, to visit your ill friend in the hospital). It *might* be the case that by making and accepting this type of promise, the parties do not intend to furnish their promissory rights with the modality of substitutive performance. And this may be because in promises over this type of matter, the parties tend to assign a

[150] I say this is only part of what the parties seek when bringing about contractual judicial claims because they also typically seek *reparation* of the *losses* caused by the promisor's violation of their promissory right. As we will see later (Chapter 5), it is indeed the fact that the promisor *harmfully* violates the promisee's right that renders enforcement mechanisms such as damages awards or specific performance permissible.

lesser degree of 'fungibility' or interchangeability to the promised act. Thus, one reason why the law tends to refrain from enforcing such promises is simply that, after the breach, if the original performance is no longer possible, the parties have no rights to vindicate at all.[151] By contrast, it is not a coincidence that sales contracts and other types of commercial contracts are largely enforced by most legal systems. The promises that constitute these contracts, one may presume, are often created under the understanding that a greater degree of fungibility over the promised act applies. For example, manufacturers' promises to deliver certain goods to a distributor usually, one may assume, entail a monetary payment as a substitutive way of performance (after all, it may all be about the money!).[152] Thus, one of the reasons why the law largely tends to enforce promises over commodified aspects of social life is simply that promises in these realms typically leave remedial rights after the breach; and, as we will see in Chapter 5, the

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[151] In Chapters 4-5, I provide more arguments on why personal promises are not legally enforced.
[152] For a defence of expectation damages as the default remedy that adopts a similar approach *see* Daniel Markovits and Alan Schwartz, 'The Myth of Efficient Breach: New Defences of the Expectation Interest' (2010) 97 *Virginia Law Review* 1939. Markovits and Schwartz hold that efficiency-oriented parties enter 'contracts [that] typically impose alternative obligations on the promisor: either to supply goods or services for a specified price or to transfer to the promisee the gain the promisee would have made had those goods or services been supplied' Id., 1948 (emphasis omitted). I share Markovits' and Schwartz's conviction that the justification of *remedial rights* ought to be found in the parties' promissory intentions. However, of course, my account leaves open the possibility that the parties may adopt an alternative remedial arrangement. Unlike them, I am not subordinating my claim about the grounds of contractual remedial rights to an ideal model about how parties must have contracted. For criticism of Markovits' and Schwartz's view along these lines *see* Seana V. Shiffrin, 'Must I Mean What You Think I *Should* Have Said?' (2012) 98 N°1 *Virginia Law Review* 159, 167 ff; and Gregory Klass, 'To Perform or Pay Damages' (2012) 98 N°1 *Virginia Law Review* 143, 146-148. Furthermore, Markovits and Schwartz seem to imply that the parties' promissory intentions directly determine the appropriateness of a given legal remedy (i.e., of a given enforcement mechanism). I think this is incorrect. As we shall see later (Chapter 5), remedies certainly presuppose remedial rights (which, as we have seen, are determined by the parties' promissory intentions). Yet they also presuppose that the promisor's breach has *harmed* the promisee. The appropriateness of a certain remedy is determined by the kind and degree of harm caused by the promisor's violation of the promisee's promissory right, and thus not exclusively by the parties' promissory intentions.

existence of promissory rights (and thus the fact that the breach does *not* terminate these rights) is a necessary condition for promises' enforceability. To be sure, a breach of a promise that does not leave any remedial duties and rights left after the breach may still make the case that the promisor ought to apologise for her breach and seek forgiveness from the promisee. Her breach thus may *wrong* the promisee. What the promisor lacks in these cases is the opportunity to conform to her promissory *duty*. It is *this* opportunity that the existence of remedial rights and duties makes possible.[153]

I have argued that the right and duty to original and substitutive performance are just promissory rights and duties. The scope and content of these rights and duties is exclusively fixed by the parties' promissory intentions. This, however, as I remarked before and will argue in Chapter 5, does not mean that such rights and duties are enforceable (e.g., that they merit a judicial remedy such as damages awards or specific performance). The appropriateness of remedies presupposes the existence of promissory remedial rights, yet is also determined by the kind and degree of *harm* caused by the promisor's breach. I will argue later that remedies such as damages awards or specific performance aim at remedying the *harm or loss* caused by the violation of the promisee's rights, and not to vindicate rights as such.

[153] The non-availability of remedial rights and duties may be seen exclusively as a benefit for the breaching promisor and a burden for the promisee. However, it may constitute a serious burden for the promisor too. Those breaching promisors who derive value from performing their duties (promissory among them), will be permanently deprived from this opportunity if their promise does not allow for remedial conformity. Highlighting the value of remedial duties as ways by which agents can at least in part conform to their unconformed reasons *see* John Gardner, *From Personal Life to Private Law* (Oxford University Press 2019) Chap. 4.

To be sure, legal actors may have good reasons to establish ‘default rules’ or ‘implied terms’ that dictate the remedial rights to which the promisee is entitled in case of breach. Look at, for example, article 43 (3) of the United Nations Convention on Contracts for the International Sale of Goods (the ‘CISG’) which provides that:

‘If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances.’[154]

This provision is a typical example of a default rule establishing a remedial right (i.e., the buyer’s right to demand repair in case of deficient products). Yet we should not understand this type of rule as creating legal remedial rights. There are cases in which the law creates legal rights or duties in the contracting parties. We can find many examples in both labour and consumer law. As intrinsic normative effects of the law, these rights and duties are under the exclusive control of the law (i.e., they are created, modified, and terminated by an exercise of legal deontic power). I will say more on this type of case in Chapter 4. What goes on in cases such as article 43 (3) of the CISG is different. In these cases, legal drafters stipulate the remedial rights that reasonable parties would have typically chosen under the circumstances of a certain contractual deal (e.g., in sales contracts, that the seller has a duty to repair the goods in case they are defective). Here the law is not interfering with the parties’ contracts by simply creating a legal duty or right in them. This type of default rule constitute *error-saving* devices, where the law precisely aims at making less likely that adjudicators hold the parties liable to

[154] The CISG is applicable in 93 different jurisdictions.

perform duties and to assume rights different from the ones they have agreed to. Yet the parties can always defeat these provisions by proving that their promissory intentions depart from the rule. Default rules such as article 43 (3) of the CISG reinforce the idea that contractual duties and rights are ultimately under the parties' control. Likewise, this type of default rule may perform another important function. Provisions like article 43 (3) of the CISG may constitute what writers have called *penalty* default rules.[155] These rules incentivise agents who do *not* wish to undertake the rights and duties in it stipulated to provide clear evidence of their promissory intentions at the moment of the formation of their contract. This type of rule shifts the costs that courts incur in investigating the parties' promissory intentions (e.g., time, resources, etc.,) to the contracting parties: if they are not clear enough (i.e., if they do not provide clear evidence of their promissory intentions), the default rule applies. It is crucial to note, however, that both the error-saving and penalty justifications of remedial default rules presuppose that, at the fundamental level, the parties' promissory intentions determine their contractual remedial duties and rights. Default rules of this sort aim at increasing the likelihood that judges discover the parties' promissory intentions, and/or at incentivising contracting parties to give clear evidence of their promissory intentions at the time of making their contract.

We saw that promisees may have a right to original and substitutive performance. These rights are some of the remedial rights that courts identify when adjudicating contract law disputes. In addition to these rights, the parties to a contract have another kind of right, that I shall call a 'right to indemnification'.

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[155] *See* Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 N°1 *The Yale Law Journal* 87, 95 ff.

The right to indemnification is a power to demand reparation for the losses caused by the breach of a promissory right. We do not possess a general right to receive reparation for all the losses or harms that others cause to us. Yet, as I will argue in detail in Chapter 5, we do have the power to demand reparation for at least some of the losses caused by the violation of our *rights*. This principle extends to promissory rights. Let us illustrate it with an example.

Suppose Guido is organising a dinner for a large conference. He needs a cake for desserts and asks his baker friend Aldo if he could bring one. Aldo says that he cannot promise to bring one but that he anticipates being able to do so, that is, he declares that he has a firm intention to bring the cake. Since Guido knows that Aldo usually sticks to his plans (i.e., to his firm intentions), Guido relies on the fact that Aldo will bring the cake. However, Aldo does not show up with the cake, and Guido has to buy one at the only, very expensive store that was open late that evening. It seems clear to me that, though Aldo may owe an explanation or even an apology to Guido, he has no duty to compensate Aldo by paying him what he spent on the cake. Now suppose that Aldo promised Guido that he will bring the cake. Furthermore, assume that the promise adds nothing in terms of certainty of performance when compared to the case in which Aldo declares his firm intention to bring the cake. It gives Guido no extra reasons to believe that Aldo will bring the cake (e.g., because, although Aldo usually sticks to his plans, he is not a great promise-keeper). Still, it seems that Aldo's *promise* makes the case that he has a duty to pay for at least part of the losses suffered by Guido (e.g., at least part of the price that Guido had to pay for the cake). True, his duty to compensate may be restricted to the losses that are directly caused by the breach or even to those that were foreseeable at the time the promise was made. And the law may establish additional limits to promisors' duties to repair the losses caused by their breach (e.g., limitation periods). Yet, the point that the example above illustrates, is that the fact that Guido's losses arise from a violation of Guido's *promissory rights* constitutes a condition for Aldo being under a duty or liability to compensate some of these losses.

Some writers have argued that our right to demand compensation is just part of the cluster of powers that primary rights entail, and thus that it is grounded in the same considerations that justify a given primary right.[156] Under this view, the promisee's right to compensation for the losses caused by the breaching promisor is grounded in the same considerations that justify the promisee's right to performance in first place (e.g., according to the view I have defended, in the parties' authority interest). Others defend a different view. They maintain that compensatory rights and duties are grounded in the morality of defensive harming. Rights to compensation for the losses caused by the violation of our rights are just an *ex post* version of our right to *defend* ourselves from *the harm* caused by others' violations of our rights.[157] Later, in Chapter 4 and more in detail in Chapter 5, I shall endorse and defend this view. I will argue that the promisee's right to indemnification is justified by the same principles that justify defensive

[156] Though different in some important regards *see* e.g., Hart, *Essays on Bentham: Jurisprudence and Political Philosophy*, 183-184; Ripstein, 'As If it Had Never Happened', 1971-1974; Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice', 28 ff. For a helpful systematisation and partial defence of this view *see* Sandy Steel, 'Compensation and Continuity', MS.

[157] This tradition of thought starts at least with Pufendorf, *On the Duty of Man and Citizen*, 56 ff; and Christian Thomasius, *Larva legis Aquiliae: The Mask of the Lex Aquilia Torn off the Action for Damage Done* (first published 1703, Margaret Hewitt ed and trad, Hart Publishing 2000). For some contemporary advocates of this view *see* e.g., Jeff Mc Mahan, 'Self-Defense and the Problem of the Innocent Attacker' (1994) 104 N°2 *Ethics* 252; and Victor Tadros, 'Causation, Culpability, and Liability', in Christian Coons and Michal Weber (eds), *The Ethics of Self Defence* (Oxford University Press 2016) 118. On this point I benefited from an unpublished work on compensation and self-defence by Sandy Steel.

harming. But at least for now, the point I wish to highlight is just that if any of these plausible views is correct, we do not need to invoke *legal* grounds to justify contracting parties' rights and duties to claim compensation for the losses caused by their breach. Like the rights to original or substitutive performance, our right to indemnification would not be legal in nature. According to the views mentioned above, the right to indemnification is grounded in the same considerations than promissory rights (e.g., in the parties' authority interest), or in the general principles of defensive harming.[158] Thus, an exercise of legal deontic power would not figure among the reasons why promisees' rights to indemnification obtain.

In this chapter, I have argued that contractual obligations, rights, and powers, share the same normative grounds and structure as promissory obligations, rights, and powers. Moreover, I argued that the remedial rights (i.e., the rights to original and substitutive performance) that arise from the breach of a contract are just modalities of promissory rights; they are grounded in the parties' promissory intentions. Thus, like primary contractual rights, remedial rights are not legal rights, that is, they are not a product of an exercise of legal deontic power. Let me conclude this chapter with some clarifications.

I have argued that the *parties'* duties and rights to contractual performance and the parties' remedial rights, and their power to create these rights and duties, are not intrinsic normative effects of the law. They are grounded in their own

[158] Indeed, as we will see later in Chapter 5, both views are complementary. Remedials *rights* are grounded in the same considerations that justify primary promissory rights (i.e., in the parties' authority interest). And the promisee's right to demand compensation (i.e., her right to indemnification) presupposes the existence of a remedial promissory right in first place. However, the promisee is entitled to compensation only as a means to repair the *harm* caused by the promisor's violation of her promissory right. Thus, we shall see that both views capture important aspects of the morality of contractual remedies.

authority interest. This, of course, does not entail that *judges* have no legal obligation to apply the law when solving contract law disputes. One thing is that legal norms do not constitute the grounds of the parties' contractual rights and duties. A different one concerns the duties that judges, and other legal officials have in solving contractual disputes. In adjudicating contractual disputes (as in adjudicating in general), judges are typically legally bound to apply the law. Furthermore, the parties may have a legal duty to obey the judge. And also their right to bring about judicial claims to solve their contractual disputes may well be a legal right.[159] But again, these are general, important questions about judges' and citizen's obligations to apply and obey the law, and about citizens' rights to activate the judicial system, and not about the binding force of contracts. The central claim I have defended in this chapter is that the parties' duties and rights to contractual performance are not legal in kind.

I have rejected the view that contractual duties and rights are a product of the law's deontic power. Instead, I have argued that they are grounded, like promissory duties and rights, in the contracting parties' authority interest. By defending this view, I have implicitly rejected another view, namely the one that holds that even promissory duties and rights are grounded in the law's deontic power. According to this, let us call it 'legalistic view', without law there are no binding promises: the law makes the case for the bindingness of all voluntary deontic arrangements, including contracts *and* promises.[160] As we shall see in

[159] I will say more on the justification of contractual adjudication in Chapter 4.
[160] For a well-known version of this idea, *see* Thomas Hobbes, *Leviathan*, 100. According to Hobbes, in the state of nature there are no valid, binding covenants. They 'are in vain, and but Empty words'. For a recent defence of this view *see* Liam Murphy, 'The artificial morality of private law: The persistence of an illusion' (2020) *University of Toronto Law Journal* (forthcoming), arguing

Chapter 4, the law's contractual enforcement practices play an important role in shaping our promissory practices. They impact the type of promises we make or refrain from making. Yet, maintaining that we have the power to make binding promises—even simple, ordinary life promises—only if the law grant us such power, seems clearly mistaken to me. Promissory rights and duties are under the exclusive control of the parties of a given promissory arrangement, that is, they are the ones exclusively entitled to create, modify, or terminate, their promissory duties and rights. If these rights and duties were legal in nature, this would not be the case. For, as we saw, one of the essential features of legal rights, duties, powers etc., is that they are *always* under the exclusive, ultimate control of the law. And this is certainly not the case with promissory duties, rights, and powers.

Endorsing a less radical version of the legalistic view, one may hold that contractual duties and rights are grounded *both* in our basic deontic powers and in the law's deontic power. But I do not see why one should endorse such a view. If, as I hope to have shown, we can account for the structure of contractual duties and rights by reference exclusively to our authority interest why would we need to bring an extra element on board? What the advocate of such hybrid legalistic view (or of any alternative view) must show first, is that our basic interests in being able to shape our own deontic world cannot account for a relevant aspect of the structure of contractual duties and rights.[161] Until proven necessary, I see no

that both our power to make contracts and our power to promise are products of legal and social conventions.

[161] Moreover, like the full-on legalistic view, this hybrid view must also explain why is it the case that contractual rights and duties are under the exclusive control of the parties, and not under the control of the law. For if they are at least partially grounded in the law's deontic power, there must be at least some aspect of contractual rights and duties that is under the ultimate control of the law.

reason to add more explanatory complexness to the simple explanation of the binding force of contracts I have offered.[162]

In this chapter, I defended an account of the grounds of contractual duties and rights. I have not said much yet about the function of contract *law*. We have seen that one of contract law's important tasks is to facilitate the discovery of promissory rights and duties (e.g., by settling rules of contractual interpretation, or by establishing remedial default rules). In the following chapter, I explore what I take to be one of contract law's most distinctive functions: its capacity to direct (i.e., develop and restrict) the practice of contract-making (i.e., the practice of promising). We shall see that the law performs this role whilst generally refraining from exercising legal deontic power over the contracting parties. Over contracting parties, the law of contracts has mainly what I will call a *steering* role rather than an authoritative role.

[162] To be sure, I have aimed at defending the view that contracts made by individual agents are grounded in the parties' authority interest, that is, in one of their basic deontic interests. I have not provided an account of the bindingness of collective agents' contracts (e.g., contracts made by corporations or international treaties signed by states). Plausibly, we can justify the bindingness of their contracts only by reference to their interests as collectives.

4. The Normativity of Contracts and The Limits of Legal Authority, Part II: Contract Law's Steering Role

A great deal of contemporary jurisprudential thought is devoted to understanding the law's authority, that is, what I have called the law's deontic power: its capacity to intrinsically affect the duties, rights, powers, etc., of its subjects.[163] The pervasiveness of legal authority as an object of theoretical inquiry stems from the assumption that the only important way by which the law directs or guides people's behaviour is precisely by exercising authority over them. Yet, this is not the case. Contract law, I shall argue, constitutes a *non*-authoritative way in which legal actors and institutions interact with us. The role of contract law, however, is not a trivial one. As important as the law's authoritative role (i.e., its capacity to guide its subjects by creating duties, rights, powers, etc., in them), is what I shall call the law's *steering* role. Contract law, I will argue, has mainly a steering role: it aims at developing and improving a given human practice (i.e., the practice of promise-making), whilst refraining from exercising authority (i.e., deontic power) over it. Although here I focus on contract law, the law's steering role extends to other domains of legal activity such as parts of the regulation of personal property, and of some forms of consent. Thus, the conclusions we will reach regarding contract law's steering role may apply, mutatis mutandi, to other areas of legal and moral life too (I say more on these other domains in Section III).

In Section I, I defend the claim that contract law generally refrains from exercising deontic power in the contractual realm: it refrains from extending its authority to the parties' contractual duties and rights. And I shall argue that this

[163] Hereinafter I use the terms 'legal deontic power' (as understood in Chapter 3) and 'legal authority' as synonyms.

feature of contract law is a valuable one. It constitutes what I will call, appropriating a traditional label, the value of *freedom of contract*. Later, I will characterise contract law's steering role (Section II). I explore two paradigmatic features of contract law enforcement practices that exemplify its steering role: the fact that the law predominantly enforces promises given in exchange and not gratuitous promises, and the law's treatment of what I shall call 'undesirable promises' (e.g., unfair or exploitative promises, and promises of people who lack legal capacity). Section III concludes.

I. Freedom of Contract and the Law of Contracts

I argued in Chapter 3 that contractual duties and rights are not the product of an exercise of legal deontic power. References to legal deontic power and its grounds (i.e., the subjects' communal interests) are neither necessary nor sufficient to explain the binding force of contracts. I argued that contractual rights and duties, like promissory rights and duties, are grounded in *the parties'* authority interest. I shall now argue that we should not characterise contract *law* as generally exercising its deontic power over the parties' contracts, and that this is a good thing: there is value in legal systems abstaining from extending their legal authority over the contracting parties in the matter of their contracts. But before moving on to defending these points, let me introduce some important clarifications and caveats.

First, I shall not contend that the fact that the law refrains from exercising deontic power over the contracting parties in the matter of their contract is anything like an essential, immutable property of contract law. Sometimes the law exercises deontic power over the contracting parties. Though this is less common in what is usually referred to as core or traditional contract law, areas such as consumer or employment law often create legal rights and duties in the parties that might contradict and claim normative priority over the rights and duties the parties themselves have created. The interpretative claim I wish to endorse here is that, at least *to a great extent*, in *our* legal systems (i.e., those comprising the most representative cases in the common and civil law traditions) the law generally abstains from exercising deontic power in contractual matters. I do not, however, intend this claim to apply to all legal systems, or deny that our own legal systems may adopt a different configuration in the future.

Second, the normative claim I shall defend here is that contract law's deference towards the parties' own promissory arrangements is a valuable thing. However, I shall maintain that the law's abstention from utilising its deontic power in contractual matters is only *pro tanto* valuable. It might be that it is all-things-considered better that the law exercises some control over the parties' duties and rights in certain cases. For instance, the European Directive on Consumer Rights gives consumers in certain types of contracts a legal right of withdrawal. Though subjected to some exceptions, such right is not under the control of the parties. It is attached or incorporated to the parties' contracts even if the parties' promissory intentions state otherwise.[164] This type of legal interference over agents' contracts may be justified by, for example, welfare distribution considerations.[165] The point I will argue for here is that legal actors

[164] Arts. 9-16, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights.

[165] For different perspectives on the relationship between distributive considerations and contract law *see* e.g., Anthony T. Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472; Arthur Ripstein, 'Private order and Public Justice: Kant and Rawls' (2006) 92 N°7 *Virginia Law Review* 1391; Aditi Bagchi, 'Distributive Justice and Contract' in Klass et al., *Philosophical Foundations of Contract law*, 197; Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 N°2 *Oxford Journal of Legal Studies* 213; and

have at least *one* important reason not to extend their deontic power over contractual matters. Writers have been seduced by extremes on this point. Some believe that the law should almost unconditionally refrain from extending its authority to the contractual domain.[166] Others believe that the law's deference towards the parties' voluntary undertakings is not a valuable thing at all, but just an unwelcomed institutional arrangement typical of capitalist, bourgeois legal regimes.[167] Here I do not wish to commit to any view on how *much* intervention the law should have in the contractual domain. The answer to such question, as to all questions about how to weigh different values, depends on many complex features about the society in which a given legal system operates. I shall just defend the claim that there *is* value in the law refraining from interfering with agents' voluntary undertakings.[168] Let us now explore what this value is.

a. Freedom of Contract

As we saw, contractual duties and rights are promissory in nature. At least by reference to their normative grounds, contracts are just promises. Here I am endorsing the thesis that contract law generally refrains from shaping or

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Felipe Jimenez, 'Contracts, Markets, and Justice: On Peter Benson's "Justice in Transactions"' (2020) *University of Toronto Law Journal* (forthcoming). Unlike some of these writers, however, I do not have a general view on how much weight should be given to distributive concerns (or to any other important concern) in setting the limits of agents' deontic powers.

[166] *See* e.g., F.A. Hayek, *Law, Legislation, and Liberty: A new statement of the liberal principles of justice and political economy* (Routledge 1982) 141-143; and R.A. Epstein, 'Unconscionability: A critical reappraisal' (1975) 18 N°2 *Journal of Law and Economics* 293.

[167] *See* e.g., Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2002) 121-124.

[168] The interpretative claim about how contract law actually works that I defend here (i.e., that it generally does not purport to extend its authority to the parties' contracts), and the normative claim I defend (i.e., namely that it is in principle valuable that the law refrains for extending its authority over the parties' contracts) are independent from each other. Thus, one may agree with my normative claim, and disagree with my interpretative claim, or vice versa.

impacting contractual rights and duties, and that this, as we will see now, is a valuable thing. But, in first place, how can this claim even make sense?

If, as I argued, the source of contractual rights and duties, like in the case of promissory rights and duties, lies exclusively in the contracting parties' will and not in the law's authority, the law, strictly speaking, *cannot* determine (i.e., create, modify, or terminate) contractual duties and rights. Contractual rights and duties (and powers, etc.,) simply lie beyond the reach of the law's deontic power. Thus, even if the law dictates otherwise, capable agents can always enter contractual arrangements—as they can always enter promissory arrangements even if these arrangements are not legally recognised or vindicated. This observation is correct. Under the view I have defended, the law's deontic power cannot extinguish agents' power to make contracts. As we saw, agents' power to make contracts—their power to create contractual obligations and rights—is not a legal power: it is a basic deontic power and not one conferred on individuals by the law. Therefore, it cannot be extinguished or terminated by an act of legal deontic power.[169] Having this point in mind, I contend that we should *not* characterise the problem of the law's interfering with agents' power to make contracts as a kind of legal limitation or termination of this power in itself. The law, as we saw, can only terminate or limit deontic powers that are legal in nature. We must thus

[169] Of course, as I shall argue below, the law may dictate that certain contracts should not be *enforced* by courts. What the law simply cannot do is to deprive agents from their power to make contracts. Thus, for example, legal provisions such as s. 27 of Alabama's HB 56 'Alabama Taxpayer and Citizen's Protection Act', which declares null and void most contracts entered by undocumented migrants in Alabama, should not be understood as depriving undocumented migrants of their power to make contracts, since it is simply not up to the law whether they have such power or not. This type of provision just expresses a legal system's commitment to a certain contractual enforcement policy.

characterise the moral significance of legal authority's interferences over contractual arrangements differently.

I maintain that the law may interfere with agents' contractual arrangements in two ways.

First, it may interfere *ex post*, that is, after the parties' contract has been made. The typical form of ex post legal intervention is performed by courts which, in the context of adjudicating a contractual dispute, may impose on a contract a certain legal duty or right that contradicts the parties' own promissory arrangement. In such scenario, the parties' promise puts them under a duty and right to φ, and the court commands or grants them a permission to omit φing or perform an act that is incompatible with them φing. In these cases, the law undermines the promisee's *promissory right* to φ, by putting the promisor under a duty or a right to omit φing or under a duty or right to perform an act incompatible with him φing. For example, I may have promised to deliver you some coffee beans tomorrow, and you to pay me $100 in exchange. Suppose that we know that our promissory intentions dictate that I am obliged to give you *the coffee beans tomorrow*, and that we did not specify anything regarding the beans quality standard. You, disappointed at the beans' quality, submit a judicial claim asking the court to fix this allegedly unjust situation. The court, sympathetic to your cause, determines that I had an implicit contractual duty, or a duty of contractual good faith, to give you beans of a certain quality. Thus, the judge dictates, for instance, that I have a duty to remedy the situation by giving you the $100 back. This is an example of ex post intervention. The judge, neglecting our promissory arrangement, has undermined my promissory right to the $100 by putting me under a legal duty to perform an act (i.e., to give you the money back) incompatible with my promissory right.[170]

Second, the law may interfere with the parties' contractual powers *ex ante*, by enacting legislation that imposes or attaches certain legal rights or duties on the parties to certain types of contracts. In such cases, unless it applies retroactively, the enacted legal rule does not interfere with existing contracts like in cases of ex post intervention. Yet ex ante interventions undermine agents' power to make contracts by restricting *the matters* over which they can make contracts *without thereby contradicting their legal duties and rights*; and thus without putting themselves into a situation of deontic conflict. For example, by mandating the existence of a right to withdrawal in (some) consumer contracts, the European Directive on Consumer Rights puts burdens upon agents who aim at making contracts of the type covered by the Directive but do *not* wish to establish a right to withdrawal. *Because* of the Directive, agents who indeed make such contracts will always put themselves into a situation where their contractual duties or rights conflict with some of their legal duties or rights (i.e., with their legal right to withdrawal).

To be sure, ex ante and ex post interventions may often go together. In common law systems—where judicial precedents often have the force of

[170] Courts are rarely transparent when they intervene in the parties' contracts. They often disguise their interventions under the idea that they are just discovering 'implicit' contractual duties. Arguably *see* e.g., Cardozo's ruling in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). In civil law systems, statutes often give judges discretion to interfere in the contractual realm by invoking broad concepts such as 'equity' or 'good faith'. *See* e.g., art. 1194 of the French Civil Code, which provides that: '[c]ontracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation.'

prospective, general law-making acts—ex post interferences in a given case may constitute at the same time an ex ante intervention for potential, future contracting parties.

Again, I am not arguing that the law should always refrain from exerting its authority over contractual arrangements. It may be justified for it to do so. The point is that whenever the law does so it comes at the cost of undermining agents' promissory powers or their capacity to conform to their promissory rights and duties. Following the standard terminology, I shall call *freedom of contract* the value of the law generally refraining from exercising deontic power over the contracting parties in the matter of their contract. As I argue below (Section II), a legal system's commitment to respecting the value of freedom of contract does not entail that the law must always *enforce* contractual rights and duties. The value of freedom of contract prescribes that legal institutions must, at least in principle, refrain from exercising their deontic power in a way such that interferes with agents' promissory powers, duties, and rights in the ways mentioned above.

There is another dimension of freedom of contract that must be mentioned, namely its *social* dimension. Our interest in possessing deontic powers such as the power to make promises is not an interest in being able to exercise such powers *ex nihilo*. On the contrary, we benefit from living in a culture which recognises and cultivates such deontic powers, and thus allows their development onto our social world.[171] We may call such cultural state of affairs the 'free market'. For instance, the fact that there *are* sales, leases, agencies, partnerships, licenses, etc., depends on people making and recognising such

[171] Making a similar point *see* Raz, *Ethics in the Public Domain*, 53-54.

arrangements over time. This rich, diverse contractual typology facilitates the exercise of our power to promise by providing social moulds or templates through which we can exercise our promissory powers. As we saw in Chapter 3, an offer to sale or to buy is just a complex promissory arrangement. Yet, the complexity of such arrangement appears unnoticeable to us because we have *the practice* of selling or buying. We can avoid the case-by-case drafting of our promissory arrangements by simply adhering to these practices. The fact that there *is* a contractual typology (sales, leases, etc.,), however, depends on there being a culture that has allowed its flourishing in first place. It depends on social patterns of behaviour: it depends on not only us but *others* systematically making and recognising such arrangements. It depends on there being a free market. Thus, we not only have an individual interest in freedom of contract. We have a social interest in living in a culture that respects the free market, which gives us reasons to endorse institutional arrangements that contribute to the free social development and recognition of our deontic powers.[172] Indeed, below I shall argue that the law has a central role directing the flourishing of our contractual culture, and that it achieves this without undermining freedom of contract (i.e., without extending its deontic power over agents' contracts).

The way I am characterising it here, freedom of contract can only justify the law's refraining from extending its authority to the contractual domain. It is, one might say, a reason *against* contract law more than one in its favour. A legal

[172] Again, I am not making any claim regarding how *much* weight freedom of contract or the protection of the free market should have. I am just arguing that freedom of contract and the free market constitute genuine normative considerations and thus have *some* weight at the moment of evaluating our legal and social institutions. They thus should impact judges' and legislators' deliberations, even if they are in occasions outweighed by other considerations.

system that abolishes all contractual regulation, and terminates courts' power to adjudicate contractual disputes and enforce contractual rights, indeed conforms with the value of freedom of contract as I have characterised it here (i.e., in such a legal system, the law would completely refrain from extending its deontic power over agents' contracts). This way of understanding freedom of contract is not shared by some writers, who seem to believe that the value of freedom of contract provides a positive justification for contract law, and for contractual adjudication and enforcement.[173] I reject such a view. I shall argue that the considerations that justify adjudication in contractual matters, and the enforcement of contractual rights and duties have nothing to do with freedom of contract. True, as we will see below, the value of freedom of contract explains the distinctive *form* that contract law takes (i.e., it explains why it assumes a steering and not an authoritative role). However, it alone cannot make sense of any of the most important aspects of contractual regulation (e.g., it cannot explain why contract law deals mainly with bargains and not gratuitous promises, or why some otherwise capable agents do not have the power to make contracts, etc.,).

Let us now explore the values that may justify different aspects of the legal phenomenology of contracts. I believe it is helpful to begin by distinguishing between the considerations that justify contractual adjudication and

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[173] *See* e.g., Stephen A. Smith, *Contract Theory* (Oxford University Press 2004) 246. *See* also Murphy, 'The artificial morality of private law' (forthcoming), who, although critical of freedom of contract, simply assumes that a defence of the value of freedom of contract entails maintaining that '*a priori* […] all agreements are equally worthy of enforcement.'

enforcement, on the one hand, and the justification of contract law or contractual regulation, on the other.[174]

b. Contractual Adjudication and Enforcement

Norms of adjudication, namely those which grant institutions (i.e., courts, arbitrators, etc.,) powers to settle conflicts among individuals constitute an important aspect of the legal phenomenon. The justification of these norms, one may argue, lies in the fact that society as a whole is better off if at least some disputes are authoritatively settled by impartial adjudicators in a definitive manner. This rationale extends to contractual disputes.[175]

Since at least some promises are the source of serious disputes between promisors and promisees, we benefit from having institutions devoted to settling promissory disputes in a peaceful, authoritative way. Similar considerations apply to justifying the legal enforcement of contractual rights. As we shall later see, under certain circumstances, individuals are permitted to use force to avoid, stop, and ameliorate the harm caused by others' violations of their own and others' rights. However, they must do so at the lower possible personal and social cost: they can only use the force that is *necessary and proportionate* to stop the harm caused by the violation of these rights. Writers have derived the justification of state punishment from this type of normative constraint on defensive or protective harming. State punishment, at least under certain circumstances, may

[174] *Infra* we will see that these realms relate to each other (i.e., contract law's steering role presupposes the enforceability of contracts).

[175] For a plausible genealogy of adjudication *see* Hart, *The Concept of Law*, 91-99. On the value of definitiveness or, as he calls it, 'finality' in private law adjudication *see* Gardner, *From Personal Life to Private Law*, 226-231. Arguing for contractual adjudication's important role in reducing various forms of conflict between contracting parties *see* Paul MacMahon, 'Conflict and Contract Law' (2018) 38 N°2 *Oxford Journal of Legal Studies* 270, 273-283.

be overall more desirable (i.e., less detrimental, more effective, etc.,) as means of protection of our rights from harmful interferences than private forms of protection. Thus, if this is the case, we may have the duty to establish the institution of state punishment.[176] One may resort to this type of consideration to justify contractual enforcement too. Individuals are entitled to use necessary and proportionate force to prevent, stop, or ameliorate the harm caused by others' violations of their rights, including promissory rights (I defend this claim in detail in Chapter 5). If this is the case, it is not hard to reach the following conclusions. First, as a collective, we may be under a duty to establish centralised forms of enforcement *if* such a system would make the reparation of the harm caused by others' violations of our promissory rights and duties less costly for everyone. Enforcement mechanisms such as judges ordering defendants to pay damages awards or to perform their contract *in specie*, backed by threats to seize the defendant's goods in case he fails to comply, may be generally less harmful and more effective than private forms of protection of promissory rights (e.g., the promisee herself forcefully extracting the promisor's performance or compensation). Thus, the state is under a duty to establish a system of judicial remedies if it is possible for it to do so.[177] Second, *if* such a system is in place, *and* it is indeed generally more desirable than private forms of vindication (e.g., more or equally effective and less harmful), disappointed promisees are under a pro

[176] For different accounts along these lines *see* Warren Quinn, 'The Right to Threaten and the Right to Punish' (1985) 14 N°4 *Philosophy & Public Affairs* 327; and Victor Tadros, *The Ends of Harm* (Oxford University Press 2011) Chaps. 12-13.

[177] Also highlighting some of the important costs of centralised, state-based systems of enforcement *see* Gardner, *From Personal Life to Private Law*, 19, 209-210.

tanto duty to enforce their promissory rights through the judicial remedial system.

The sorts of reasons that I have argued may justify legal institutions' power to adjudicate contractual disputes, and their entitlement to enforce contracts, do not extend to justifying contract *law*. One could imagine a legal system where there are no statutes regulating contractual disputes, and where judicial precedents do not have a law-making capacity, yet in which courts still have authority to solve disputes between promisors and promisees, and to administrate the enforcement of promises. Such a system operates *without* contract law. It may not have, for example, rules determining which contracts are legally enforceable and which are not, or rules of contractual interpretation. Our needs for centralised, authoritative mechanisms of dispute resolution, and for institutional mechanisms of promissory enforcement, do not in themselves serve as a justification for contract law.[178]

In Chapter 3, I argued that a great deal of contract law simply aims at identifying promissory rights and duties. Some of its rules simply mirror the morality of promising (e.g., the basic rules of offer and acceptance), and others aim at making it more likely that judges correctly identify the parties' promissory

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[178] *Contra*, *see* e.g., MacMahon, 'Conflict and Contract Law', 283 ff., arguing not only that contractual adjudication and enforcement have a conflict-minimising role, but also for the, in my view, less plausible claim that aspects of contract *law* may be illuminated by conflict-minimising considerations.
Perhaps at a more fundamental level, those who merge the morality of *law* with the morality of adjudication and enforcement may also disagree with my claim that the normativity of contractual regulation is not grounded in the considerations that justify contractual adjudication and enforcement. They maintain that the law's distinctive value derives precisely from its role in justifying state coercion and thus some forms of legal enforcement. *See* Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 405-415.

intentions (e.g., some remedial default rules). I shall now argue, however, that the law of contracts has another crucial, distinctive role. It aims at *steering* or *directing* the practice of promising. I contend that legal rules such as those that establish certain requirements for the enforcement of certain contracts do not constitute exercises of legal deontic power over the contracting parties. But they do not aim either at discovering or identifying promissory rights. They do not simply mirror the morality of promising or constitute rules of thumb that help judges discovering promissory duties and rights. They aim at causing what I have called an extrinsic normative effect on contracting parties. They constitute reasons for agents for *entering* some contracts and for *refraining* from entering others. As we will see, their purpose is to direct the practice of promising, whilst refraining from exercising authority over it: they guide our promissory habits while respecting the value of freedom of contract.

II. How Contract Law's Steering Role Works

Legal systems determine which promises should or should not be enforced by courts. For instance, as we will see later, only promises given in exchange, and not gratuitous promises, tend to be enforced by the law. Yet legal systems' decisions to grant legal enforcement or not to certain contracts should not be confused with the question of whether or not those contracts are binding.[179] As we saw, the law does not determine contracts' bindingness. Legal enforcement conditions

[179] In civil law jurisdictions, the law often fails to distinguish clearly between requirements for the *bindingness* of contracts and requirements for their legal *enforceability*. *See* e.g., art.1128 of the French Civil Code, which states that '[t]he following are necessary for the *validity* of a contract: 1. the consent of the parties; 2. their capacity to contract; 3. content which is lawful and certain' (emphasis added). This provision includes under the broad rubric of contractual validity both requirements for the bindingness of contracts (e.g., n°1) and what I shall argue below are generally enforcement conditions (e.g., n°2 and n°3). We observe the same ambiguity in e.g., art. 1325 of the Italian Civil Code; or art. 1445 of the Chilean Civil Code.

constitute requirements set by the law for the legal protection of promissory transactions. These requirements are for those who make promises a type of *offer* or incentive: *if* you make a promise of such content, the law will enforce it; or *if* you make a promise of such content, the law will *not* enforce it. By establishing these requirements, the law gives agents reasons for or against entering certain promissory transactions. I maintain that it is by utilising this technique that the law crystallises its function of directing the practice of promise-making.

Let us begin by exploring promises' enforcea*bility*. I argued that we are justified in using a necessary and proportionate degree of force to prevent, stop, and mitigate the harm caused by the violation of our promissory rights. The appropriateness of the use of force does not depend on the matter of a promise alone. It is determined by the kind and degree of harm caused by the breach. Take some examples. Suppose that you are seriously ill, and that your health seriously depends on you taking a certain medicine. Since you are about to run out of the medicine, I promise you, out of friendship, to bring it to you by tomorrow. Now suppose that out of pure convenience I simply decide to breach my promise, thus putting you at serious risk. It seems clear to me that you are entitled to use some force on me to ensure performance. For example, you may be morally permitted to *threaten* to proportionally harm me if you suffer any harm because of my breach. Take now another example. Suppose you promise to give me $ 100 if I give you a lift from work tomorrow. I give you the lift, but you refuse to pay me. I may also use some force to execute your promise. For instance, it may be morally permissible for me to threaten to retain the (not very expensive) jacket that you accidentally left in my car until you pay me. The promises in both examples may be thus enforceable,[180] either by the promisees themselves or by courts.[181] However, legal systems significantly converge in enforcing promises such as your promise to pay me $ 100 in exchange for a lift whilst refraining from enforcing my promise to bring you the medicine. How can we explain this?

We will not find the rationale behind contractual enforcement practices by just looking at the considerations that justify the use of force in the protection of promissory rights (i.e., the harmfulness of the breach and the harmed cause by the defensive response itself). The breaches of both promises in our examples are harmful in a way that makes these promises enforcea*ble*. Later, in Chapter 5, I will argue that a promise is enforcea*ble* when the harmful consequences of its breach justify imposing at least some degree of harm on the promisor in order to prevent or ameliorate the harm caused by the breach. We shall see that the main mechanism by which legal actors enforce promises, that is, judicial remedies such as damages awards or specific performance, aim precisely at stopping or repairing the harmful consequences of the promisor's violation of the promisee's rights. When exercising its steering role, however, what the law does is that it indeed refrains from enforcing promissory rights that *are* enforceable in principle (e.g., my promise to bring you the medicine). It is only by enforcing some enforceable promises, *and* refusing to enforce others, that the law is capable of directing the practice of promising.

[180] I am assuming that the parties themselves have not limited the enforceability of their promissory rights and duties. Recall our discussion in Chapter 3 regarding the intention to create legal relations.

[181] As suggested above, promisees may, under certain circumstances, have a duty to enforce their promissory rights through the judicial system.

As we will see below (II a and b), the availability of legal promissory enforcement may constitute a reason for agents *for* making certain types of promises. Yet it may also constitute a reason *against* the making of others. It is through controlling the mechanism of promissory enforcement that contract law achieves its fundamental role of directing our promissory practices. In Chapter 3, I distinguished between intrinsic normative effects of the law (i.e., those that are product of an exercise of legal deontic power) and its extrinsic normative effects. I contended that a legal directive has extrinsic normative effect if, as a consequence of an exercise of legal deontic power, it impacts certain normatively salient facts, thus effecting subjects' normative profile. We saw that extrinsic normative effects of the law are not grounded in the law's deontic power: they are normative consequences of the law that are not *legal* in nature. The law of contracts fulfils its steering role precisely by extrinsically effecting subjects' normative reasons (i.e., their reasons for and against making certain promises).

I have contended that the law generally refrains from exercising deontic power over the contracting parties in the matter of their contract: it is committed to freedom of contract. Yet the law still guides agents' promissory practices by impacting their reasons for and against entering some promissory transactions. For example, as we shall see in detail below, the law generally desists from enforcing what we may call unfair or exploitative contracts, and it does so by *ordering adjudicators not* to enforce such contracts. By exercising its authority, the law puts *judges* under the legal duty to not enforce transactions of such kind. However, it does not intend to put *the parties* under a legal obligation to refrain from making unfair or exploitative contractual transactions—it does not purport to extend its authority over *them*. By ordering judges not to enforce this type of transaction, the law gives contracting parties a reason not to enter them. By administrating the mechanism of contractual enforcement, the law is capable of directing agents' promissory practices without undermining their freedom of contract, that is, without exercising deontic power over them.

One final clarificatory remark regarding the scope of contract law's steering role. As I argued in Chapter 2, insincere authority-giving and accepting communications (and insincere voluntary undertakings more generally) are prima facie binding. As we saw, their bindingness is grounded in our interest in restricting our authority-giving and accepting communications towards sincerity. Now, it may well be the case that we treat these communications as binding in part because there is a *practice* of treating them as binding (i.e., a widespread belief that authority-giving and accepting communications are capable of producing genuine deontic effects). The law of contracts, by treating these communications as binding, may play a relevant role in contributing to prevent the erosion of this practice. Of course, the soundness of this claim depends largely on empirical questions regarding the impact of law on our psychology (i.e., on our beliefs, attitudes, etc.). But it is plausible to hold that the law, as arguably the most powerful tool of social control, has the capacity of impacting our psychology and thus to help maintain and develop our social practices, including our epistemic ones. In any case, besides this plausible role in maintaining the epistemic practices that uphold the bindingness of insincere promises, here I understand contract law's influence on the practice of promising in a different way. Contract law aims at giving us reasons for making promises we would have less reasons to make otherwise, and reasons against the making of some promises. It is in this sense that I claim the law guides and develops our promissory practices: it expands our opportunities to enter certain types of promissory arrangements, and deters us from entering others.[182]

I will not try to provide a complete answer here to the question of which promises should the law enforce or not. As we shall see, the answer to such question depends on the law's assessment of the motivations and values that underlie the rich, diverse forms of promissory arrangements that take place in our social lives. Instead, I will just explore the rationale behind some enforcement practices that I take to be distinctive of our legal systems. First, I aim to provide an account of why the law has reasons to enforce promises that are given in exchange ('bargains'), and to refrain from enforcing 'gratuitous' promises. Second, I shall explore the law's commitment not to enforce promises that it deems immoral or socially undesirable. Contract law's steering role, we will see, is neatly illustrated in these cases.

[182] Several writers have highlighted different ways by which the law contributes to maintaining and protecting the practice of promising. Joseph Raz, for example, argues that contract law helps preventing the erosion of the practice of promising by holding liable those that misuse or exploit this practice (e.g., by making negligent, insincere promissory representations). *See* Joseph Raz, 'Review: Promises in Morality and Law' (1982) 95 N° 4 *Harvard Law Review* 916, 933-935. Following Raz on this point *see* Hanoch Sheinman, 'Contractual Liability and Voluntary Undertakings' (2000) 20 N°2 *Oxford Journal of Legal Studies* 205, 216 ff. Seana Shiffrin argues that the distinctive way in which the law protects the practice of promising is by promoting a culture that takes promise-keeping seriously. *See* Shiffrin, 'The Divergence of Contract and Promise' 713-719, 740-743. Liam Murphy maintains that contractual enforcement supports the practice of promising by encouraging its use (i.e., promise-making). *See* Liam Murphy, 'The Practice of Promise and Contract,' in Klass et al., *Philosophical Foundations of Contract Law*, 168-70. I agree with many of the points expressed by these authors, and believe that my own account is not incompatible with theirs. In my view, the distinctive role of contract law is to conduct or direct our promissory habits by impacting our reasons to make certain promises, and to refrain from making others. Apart from this function, the law may also perform other valuable roles such as sanctioning those who exploit our promissory practices, or to encourage a culture of promise-keeping.

a. Bargains and Gratuitous Promises

We should begin by distinguishing between two different types of bargains: *bilateral* and *unilateral*. A sale is an example of a bilateral bargain. As we saw in Chapter 3, an offer to sell is a conditional promissory offer, in which the seller assumes an obligation to transfer a thing to the buyer if the buyer assumes an obligation to pay an agreed price. In bilateral bargains like sales, the obligation of one party is assumed by her under the condition that the other party assumes *an obligation* to perform another act in return. By contrast, a unilateral bargain is a promise given in exchange not of the promisee's obligation but upon *his performance*. For instance, I may promise to drive you to work tomorrow only if you pay me $ 100 first. In this example, I am only obliged to drive you to work *after* you pay me the money.[183] You do not assume any obligation to pay me the money, yet your performance triggers my promissory obligation. The law largely tends to enforce both types of bargains and refuses the enforcement of gratuitous promises, that is, those that are not made in return for another's obligation or performance (e.g., my purely benevolent, non-transactional promise to give you a lift from work tomorrow).[184] What can explain this? Let us consider the case of bilateral bargains first.

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[183] For a helpful discussion of a similar phenomenon *see* Margaret Gilbert, 'Is an Agreement an Exchange of Promises?' (1993) 90 N°12 *The Journal of Philosophy* 627, 632.

[184] Although there are some exceptions (e.g., promises made under seal), common law systems enforce only promises given in 'consideration' or exchange for someone's promise or performance. On the consideration requirement as a formality through which the law signals its policy commitment towards the enforcement of bargains *see* Lon L. Fuller, 'Consideration and Form' (1941) 41 N°5 *Columbia Law Review* 799, 814 ff. Civilian systems express their commitment towards the enforcement of bargains through the *causa* requirement, and by requiring exceptional formalities for the enforcement of gratuitous promises. For an overview *see* James Gordley (ed), *The Enforceability of Promises in European Contract Law* (Cambridge University Press 2001) 337-340.

Typically, agents who undertake bilateral bargains tend to make these promises only if they have reasons to believe that the other party will *perform* their part of the deal. They become obliged to the promisee expecting to secure the performance offered in exchange. Thus, the parties to a bilateral bargain enter this type of promissory deal only if they believe performance is likely to occur. For instance, the fact that the buyer will actually *pay the price* is a reason for the seller to make her promissory offer to sell in first place. If the seller has no or little reason to believe this, she might simply not enter the arrangement. Here is where legal enforcement plays a relevant role: by enforcing them and thus making performance more likely, the law provides motivational grounds for the *making* of bilateral bargains. Of course, whether the law succeeds in achieving this goal or not is a question of fact. Yet it seems plausible to hold that without the backing of legal enforcement bilateral bargains are more likely to be ruled out from our—or at least from rational agents'—menu of promissory arrangements.

It is not the case that the only reason the law has for enforcing bilateral bargains is that they are an important vehicle for agents to exchange goods and services. By contributing to the development of this type of promissory deal the law may indeed contribute to fostering commercial exchange. And this may be a good thing. Yet I maintain that the law's concern with the flourishing of bilateral bargains goes beyond exchange. By enforcing bilateral bargains, the law contributes to the flourishing of this type of promissory arrangement, and thus enhances agents' well-being by *expanding* their opportunities to exercise their promissory powers. And this is *in itself* valuable regardless whether it fosters commercial exchange or not.[185]

A different rationale explains the enforcement of unilateral bargains. Unlike the case of bilateral bargains, by enforcing unilateral bargains the law does not provide additional reasons for agents to *make* such promises. Since the promisor's promise in a unilateral bargain binds her only after the promisee has performed, her believing that the promisee will not perform does not count against her making the promise. In other words, the promisor does not face the risk of being bound towards the promisee whilst not receiving the promisee's performance in return. It is indeed *the promisee* who risks the promisor's default. This explains why legal enforcement of unilateral bargains does not aim at

[185] For a recent account that vindicates the role of quid pro quo exchange in explaining the rationale that underlies the consideration doctrine in common law systems *see* Jed Lewinsohn, 'Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration' (2020) 129 N°3 *Yale Law Journal* 690. I do not side with Lewinsohn, however, in maintaining that the notion of exchange in itself can account for any central aspect of the normative structure of contracts. As I argued above, the fact that the parties to a bargain are typically motivated by an overarching project of exchange may figure as one of the reasons the law has for enforcing their bargains. I maintain, however, that the law of contracts distinctively cares about developing and containing the practice of bargains and not the practice of exchange in itself (which, as Lewinsohn correctly notes, does not require promises to take place). In other words, it is by enforcing certain promises (i.e., bargains) that the law (if it does) develops the practice of exchange. What is thus distinctive of contract law (compared to any other social institution that facilitates exchange e.g., a common language, a culture of trust in commercial dealings, or even the criminal law) is *the means* through which it facilitates exchange, namely the enforcing of certain promises (i.e., bargains). I have a similar type of disagreement with those who argue that by enforcing bargains the law's central concern is to give reasons to promisees for relying on such promises, that is, to act upon the belief that promisors will perform their promises. *See* e.g., Richard Craswell, 'Two Economic Theories of Enforcing Promises' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press 2001) 12 ff. I maintain that we should understand the enforcement of bargains as primarily destined at providing a reason for people for *entering* bilateral bargains, and at *containing the making* of unilateral ones. Otherwise, if the goal of the law is simply to encourage reliance on existing promises, why should we not extend this to gratuitous promises? Promisees may have a strong interest in being able to rely on the promises made to them regardless of these promises being gratuitous promises or bargains. Yet if, as I claim, the primary concern of the law when administrating legal enforcement is to develop or contain the *making* of certain promises, we can explain why gratuitous promises are not enforced even if the promisee has interest in being able to rely on them. *See infra* my discussion of gratuitous promises.

developing or encouraging the practice of unilateral bargain-*making* but at *restricting* or containing it. By enforcing this type of promise the law attaches burdens to their making: it puts promisors under the burden of becoming answerable to courts in case they fail to perform. By providing such burden, the law aims at directing the practice of unilateral bargain-making towards those promisors who are motivationally inclined to perform (i.e., those for whom legal enforcement will *not* be a reason against the making of their promise), and thus protect promisees who rely on these promises.

Let us now contrast bargains with gratuitous promises. Legal enforcement does not generally constitute a relevant motivational ground for the making of gratuitous promises. This type of promise are ubiquitous in social life even if largely unenforced by the law. Of course, some promisors may benefit from having their gratuitous promises legally enforced (e.g., because they want to provide a strong form of assurance of performance to their promisee). The law, accommodating this need, enforces such promises when the parties comply with certain formalities that are not typically required for the enforcement of bargains (e.g., being in writing or under seal). Yet the practice of gratuitous promise-making generally does not require the support of legal enforcement. True, as we saw for the case of unilateral bargains, enforcing gratuitous promises may deter agents who are not motivationally inclined to keep their promises from making gratuitous promises. And this may be a valuable thing. Yet enforcing gratuitous promises may not have the same consequences as enforcing unilateral bargains. Those who make gratuitous promises are not entitled to receive anything in return for their promise. This is precisely the point of gratuitous promises.[186] Hence, unlike the case of bargains where the promisor receives or is entitled to receive something in return for her promise, legal enforcement may constitute too much of a dissuading force in the making of gratuitous promises (it is perfectly sensible for you to refrain from making a gratuitous promise to give me a lift from work tomorrow—even if you intend to perform—if you risk that I might take you to court if you fail to perform). Thus, if the law aims at protecting the practice of gratuitous promise-making, it makes sense that it generally refrains from enforcing this type of promise.[187]

Some have suggested that the fact that the law generally refrains from enforcing gratuitous promises expresses a certain disregard for a culture of promise-keeping. Both bargains and gratuitous promises are capable of binding promisors, and thus the law should not make differences in their legal worth.[188] Yet this need not be the case. A legal system's commitment to respecting a

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[186] They may, of course, *expect* or *hope* to receive something in return. Yet the *fulfilment* of such expectation or hope is not the paradigmatic reason that motivates an agent's making of a gratuitous promise.

[187] Many writers have argued that by enforcing gratuitous promises the law may undermine in one or another way the value of this kind of promises. *See* e.g., Fuller, 'Consideration and Form', 813, arguing that agents should have space for promissory intercourse free from legal interference; Melvin Eisenberg, 'The World of Contract and the World of Gift' (1997) 85 N°4 *California Law Review* 821, arguing that enforcing gratuitous promises may undermine their character of being distinctively motivated by care and altruism; and Kimel, *From Promise to Contract*, 135 ff., arguing that we have a right to shape our bonds towards others without legal intervention. Though I agree with some of the points these authors make, they all fail to note the important fact that, as we saw in Chapter 3, the parties *always* have the power to render their promises (gratuitous or not) unenforceable. What I am arguing in the text is that the problem with establishing a legal practice of enforcing even *enforceable* gratuitous promises is that such a practice might discourage promisors from making gratuitous promises because of the risk of being brought to courts. Such risk may make them either refrain from making the promise, or to be overly careful in communicating that their promise should not be enforceable. And this need for excessive communicative care in the making of a promise may both count against its making, and distort the spontaneous or informal nature of our gratuitous promise-making practices.

[188] *See* Shiffrin, 'The Divergence of Contract and Promise', 727-728; 736-737.

valuable human practice may be revealed precisely by its refusing to interfere with it. Since gratuitous promise-making is a practice that survives and flourishes without the backing of legal enforcement—and may even be undermined by it—the law protects it by refraining from interfering with it. To be clear, it is not, as some writers contend, that only bargains can generate enforceable rights and duties, whereas gratuitous promises cannot.[189] Both types of promises may be enforceable: both the breach of a bargain and of a gratuitous promise may render the use of some force a permissible means to execute them. In fact, as we saw, the breach of a gratuitous promise may be significantly more harmful than the breach of a bargain, and thus make permissible a broader range of enforcement measures (e.g., my failing to keep my promise to bring you the medicine compared to your failing to pay me the $ 100 you owe me). The fact that the law generally tends to enforce bargains and not unilateral promises does not mean that, in the eyes of the law, bargains produce different deontic effects than gratuitous promises, or that breaching bargains is often more harmful than breaching gratuitous promises. It reveals that the law considers legal enforcement to have an important role in developing or containing the practice of bargains, whilst it may constitute a threat to the flourishing of the practice of gratuitous promises.

Authors such as David Hume have suggested that bargains and promises in general *bind* only once we have established some kind of social practice of promissory enforcement (i.e., until we enter the social habit of censuring or rebuking promisors in case of breach). Though I believe Hume's view is mistaken

[189] Maintaining that only bargains give rise to enforceable promissory rights the *see* Peter Benson, 'The Idea of Consideration' (2011) 61 N°2 *University of Toronto Law Journal* 241, 258 ff.; or Henry Winthrop Ballantine, 'The Source of Obligation in Bilateral Contracts' (1916) 3 N°6 *Virginia Law Review* 432, 437.

as an account of the normative grounds of promissory obligations and rights (i.e., the bindingness of promises does not derive from the fact that they are socially enforced), it correctly grasps the point that some types of promissory arrangements (e.g., bilateral bargains) may require the motivational force of social or legal enforcement in order to develop as a human practice.[190] The fact that the law enforces transactions such as sales or leases does not constitute a reason for us possessing the deontic power to enter these transactions, or a reason for the existence of the duties and rights that arise out of them. Contracts, both bargains and gratuitous ones, are the product of our basic deontic powers. Yet one of the central roles of contract law consists in directing our promissory practices by impacting the reasons we have for and against the making of some promises.

b. Undesirable Promises

We have seen that the law, by enforcing certain promises, may foster the development of some promissory practices (e.g., bilateral bargains) and restrict others (e.g., unilateral bargains). And we saw that by refusing enforcement of some promises, the law may indeed contribute to the development of other promissory practices (e.g., gratuitous promises). Yet the law may also refuse to enforce some promises in order to restrict their making. For example, this is the case of promises undertaken by some of those that the law deems not being capable of contracting. Some of the cases of incapacity to contract are cases of

[190] *See* Hume, *A treatise of Human Nature*, 331-337. We should not rule out, however, the possibility that the motivational role of legal or social enforcement will be rendered irrelevant if we find more effective ways of inducing contractual compliance (e.g., smart contracts?). Convincingly arguing—against writers such as Hume or Rawls—that the value of promissory compliance cannot justify the practice of promising as we know it *see* David Owens, *Shaping the Normative Landscape*, 136 ff. Refer also to our discussion in Chapter 1 *supra* at note 36.

people who arguably lack the power to make binding promises (infants, the mentally disabled, etc.). Yet, the legal rules that determine agents' capacity to contract not only mirror the norms of promissory capacity. They may just reflect a given enforcement policy destined at discouraging certain promissory practices even if the parties involved are fully capable of making binding promises.

For instance, legal systems often do not enforce contractual deals between a non-infant underage person and a fully capable adult. In such cases, we should not understand the law as simply depriving minors of the power to make contracts, since, as we saw, our power to contract is not legal in nature. What the law does is to refrain from enforcing these transactions in order to disincentivise the making of promissory arrangements that, for instance, may crystallize situations of disproportionate vulnerability between the parties involved.[191] Similarly, the law refuses the enforcement of bargains between fully capable agents if deemed grossly unfair or exploitative. If correctly formed, these promissory deals may create promissory rights and duties like any valid promise. Yet, we may decide not to back these rights and duties with legal enforcement. Institutions like the *unconscionability doctrine* in common law systems and the *laesio enormis* in civil law systems should be understood along these lines. These doctrines set limits to the enforcement of some promises (i.e., unfair, exploitative promissory deals) in order to discourage their making. They do not aim at

[191] In fact, the law tends to give some deontic effect to these promissory transactions. For instance, in some jurisdictions, a contract between a non-infant underage person and a person with full legal capacity generates 'natural obligations', that is, it allows the parties to *retain* what has been *paid* in virtue of these transactions whilst *not* granting them a legal remedy to demand performance or compensation upon breach. *See* e.g., arts. 1760 and 1762 N°2 of Louisiana's Civil Code.

mirroring the norms that govern the creation of promissory rights and duties, but at signalling promissory practices that the law wants to restrict or eradicate.[192]

A similar rationale to the one that explains the unenforceability of exploitative or unfair promissory deals applies more generally to the case of illegal contracts. Some of the contracts that the law considers illegal or immoral are not binding at all. A promise to torture someone may simply not generate promissory obligations or rights. We may just lack the power to make such promises.[193] Yet the law of illegal contracts does not simply track cases where the parties are not bound by their promise. Some illegal contracts are binding but simply not backed by legal enforcement in order to discourage their making and keeping (e.g., gambling promissory deals, sales of illegal substances, etc.). Again, it is an empirical question whether or not the law, by failing to enforce these types of promissory arrangements, discourages their proliferation. The point that must be clear is that the fact that the law fails to enforce these contracts has no bearing on the question of whether such contracts produce rights and obligations or not. That is why referring to an *illegal contract* is not always oxymoronic. An illegal

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[192] My claim is that the unconscionability doctrine's *central* role is to constitute a device by which the law identifies a certain kind of undesirable promise (i.e., grossly unfair, or exploitative promises). Yet it may perform other additional roles. For example, in at least some exploitative or grossly unfair bargains, the promisee may have no standing to complain against the promisor for her breach even if the promisor is bound by her promise. The claimant's (the promisee) lack of standing to complain about the breach may in some cases count as a reason for the law to *refrain* from enforcing a contract. For a defence of the unconscionability doctrine along these lines *see* Nicolas Cornell, 'A Complainant-Oriented Approach to Unconscionability and Contract Law' (2016) 164 N°5 *University of Pennsylvania Law Review* 1131. Against this view, however, I do not think that the fact that the promisee has standing to complain about the breach constitutes a sufficient reason to justify the enforcement of a promise. *See infra* Chapter 5.

[193] For two contrasting positions on the binding force of immoral promises *see* Seana V. Shiffrin, 'Immoral, Conflicting, and Redundant Promises' in R. Jay Wallace et al. (eds), *Reasons and Recognition: Essays on the Philosophy of T.M Scanlon* (Oxford University Press 2011); and David Owens, 'Promises and Conflicting Obligations' (2011) 11 N°1 *Journal of Ethics and Social Philosophy* 1.

contract may bind the parties even if the law has good reason to refrain from enforcing it.[194]

The examples of bargains and gratuitous promises, and the one of undesirable promises, show contract law's steering role. By establishing conditions for legal enforcement, the law extrinsically impact agents' normative profile, giving them reasons for and against entering certain promissory arrangements. It contributes to the flourishing of some promissory practices and to undermining others.

III. The Enforcement of Promises and The Law's Steering Role: Concluding Remarks

In Chapter 3, I argued that contractual rights and duties are not intrinsic normative effects of the law. Like promissory obligations and rights, they are product of agents' basic deontic powers. We saw that contractual rights and duties are created, modified, and terminated by the contracting parties themselves—and that their power to create, modify, or terminate these duties and rights is not conferred by the law. In this chapter, I argued that the law generally refrains from extending its authority into the parties' contracts, and that this is a valuable thing. Legal systems have reason to take freedom of contract seriously. We saw that a legal system's commitment towards freedom of contract, however, does not preclude the law from directing agents' contractual practices. Whilst refraining from extending its deontic power upon our contractual arrangements, the law contributes to developing and restricting our contract-making practices. The law's steering role can explain why legal systems tend to enforce bargains, and

[194] Making a similar point *see* Nicholas J. McBride, 'Not Just a Principle of Justice?' in Sarah Green & Alan Bogg (eds), *Illegality After* (Hart Publishing 2018) 93, 98.

refrain from enforcing gratuitous, and undesirable promises such as exploitative or illegal ones.

A complete normative account of a legal system's contractual enforcement practices, however, requires further development. Some promises are not legally enforced simply because they are unenforcea*ble*. For example, as we saw in Chapter 3, a promise is unenforceable if the promisee's right and the promisor's promissory duty are fully extinguished by the breach. Qua promissory rights, remedial rights such as the rights to original and substitutive performance, are grounded in the promissory intentions of the parties. And, as we saw, it might be the case that the breach of a promise indeed extinguishes all the possible modalities of fulfilment that can be ascertained from the parties' promissory intentions. Thus, the breach may entail a complete termination of the promisee's promissory rights. In these cases, I argued, promissory obligations and rights are completely *non-fungible*, that is, they do not admit second or next-best ways of conformity after the breach. The availability of remedial duties and rights may contribute to explaining why legal systems tend to enforce promises over commodified matters of social life. The parties to a promise tend to assign a higher degree of fungibility to the promissory obligations and rights that arise from promises over these matters (e.g., promises to give a sum of money) than to those that arise from promises over, let us say, 'personal' domains (e.g., a promise to provide affection or care to a friend or family member). It is not that the law enforces the former because they are in some sense more important or socially relevant than the latter. It is just that promises over commodified matters are the ones that tend to leave remedial rights and duties left after their breach.[195] As I will argue in Chapter 5, it is the existence of promissory *rights* that constitutes a necessary (yet not sufficient) condition for the enforceability of promises, that is, for the permissibility of the use of force to prevent, stop, or repair the harm caused by the promisor's breach. Thus, when the breach of a promise does not leave any promissory rights left, the breach renders the promise unenforceable.

If, as I argued in this chapter, the law has reasons to enforce bargains and to refuse enforcing gratuitous promises and undesirable promises; and if it only enforces promises that admit remedial ways of conformity, we can makes sense of the core structure of modern legal systems' contractual enforcement practices. Roughly, the law tends to enforce only promises that are bargains, over matters which the parties assign a high degree of fungibility (e.g., commercial matters), and that do not go against important values that the law aims at protecting (e.g., they are not exploitative or illegal). Again, our contractual enforcement practices heavily rest on our assessment of the values that underlie certain types of promissory arrangement, and of the reasons that motivate agents to make certain promises. It may well be the case that in a given society agents do not tend to make gratuitous promises unless they believe the promisee will rely on them. The promisee's trust in the promisor's performance would be a central motivation for the promisor making his promise in first place. In such a culture, perhaps a legal

[195] I believe this explains why some legal systems require the matter of a contract to be susceptible of 'pecuniary' valuation (civil law); or that what is given in consideration for a contract is something of 'value' (common law). *See* e.g., art. 1174 of the Italian Civil Code, and cases such us *Bret v JS & Wife* (1600) Cro Eliz 756; where the court considered that promises to provide affection do not constitute good consideration. I understand these legal requirements as formalities that aim at signalling the fungibility of promissory obligations and rights, and thus the likelihood of there being remedial rights and duties after the breach. It is the availability of remedial rights and duties what really matters.

practice of enforcing gratuitous promises will indeed contribute to developing the practice of gratuitous promise-making. I have only provided a (partial) account of the considerations that I believe underlie *our* contractual enforcement practices. Yet these considerations may significantly differ among cultures with divergent understandings of the values and motivations that shape our promissory practices.

I have contended that contract law has a steering role: it purports to guide the exercising of a deontic power that is our own, and not a product of the law, namely our power to make promises. Yet the law's steering role is not exclusively confined to contract law. It constitutes the distinctive way by which the law directs the practices of other of our deontic powers. I shall conclude this chapter by considering some examples. Consider first the case of the legal regulation of certain forms of consent.

As we have the power to create obligations and rights by making promises, we also have the power to grant permissions. We have, for example, the power to make permissible others' interactions with our own bodies. And the law often regulates instances of this power. One case is our power to consent to sex. In most modern legal systems the law establishes the age at which individuals are legally capable of having consensual sex, imposing sanctions to those who have sex with people below the allowed age. We should not understand this type of legal rule, however, as providing conditions for the existence or the validity of our power to consent to sex. Agents' power to consent to sex is grounded in their own basic deontic interests (i.e., in their basic interest in being able to choose the duties and rights that concern their own bodies). It is not a legal power, and thus the law simply cannot establish validity conditions for its exercise. Of course, it might be the case that some of those who the law declares legally incapable of consenting to sex indeed lack such power (e.g., infants). In such cases, the law simply mirrors or replicates the morality of consent. Yet this is often not the case. As the law of contracts, the law of sexual consent aims at conducting the practice of consensual sex by giving us reasons to refrain from exercising our power to consent to sex in certain cases (e.g., when, even if consensual, sex may result in significant harm to one of the parties involved).[196] Consider now the case of property.[197]

As we have briefly discussed in Chapters 1 and 2, property rights often constitute powers to control others' duties and rights. The fact that one has a property right over *O* often entails that one has the power to control others' obligations and rights regarding *O*. I believe it is correct to maintain that some of our property rights are legal rights, namely that they are product of the law's deontic power (e.g., corporate property rights). These property rights obtain only if the law creates them, or arise from powers that the law has conferred onto individuals. Yet, like our power to make contracts or our power to consent to

[196] Some authors seem to assume that the law indeed has or adopts a view on sexual consent's validity conditions (i.e., a view on the considerations that make consent deontically effective). *See* e.g., Ferzan, 'Consent, Culpability, and the Law of Rape', 407 ff. However, as I suggest in the text, the so-called validity conditions for sexual consent (and for other forms of consent) established by the law may be simply understood has conditions for imposing punishment or sanctions on the consentor or consentee. I believe we make a mistake in trying to gain insights about the ontology and normativity of consent from the law without previously inquiring into what the point is of the legal regulation of consent. The view I defend is that, as the law of contracts, the law of sexual consent is not generally in the business of establishing validity conditions of our deontic power to consent (i.e., conditions that determine the deontic force of this power and its scope). It aims at directing *our* power to consent. A question I am leaving aside, of course, concerns the justification of using punishment as a tool for directing the practice of consensual sex.

[197] For further discussion on how the law of consent may contribute to improving our consensual sex practices *see* Leslie Green, Should Law Improve Morality? (2013) 7 *Criminal Law and Philosophy* 473, 490 ff.

others' interferences with our bodies, some of our property rights are not legal in kind. My power to acquire and transfer property rights over, for example, my home or my personal items is not conferred by the law. These powers are grounded in our authority interest. There are basic deontic powers to control others' duties and rights *through* parts of the physical world that are particularly relevant for our own individual flourishing.[198]

As in the case of contract law or the law of sexual consent, part of the law that regulates the acquisition and transfer of property rights has a steering and not an authoritative role. For example, the legal rules which prohibit certain property transfers (e.g., bribes, unlawful campaign donations, etc.,) should not be understood as always aiming at depriving us from the power to make these transfers. By issuing this type of rule, the law need not be purporting to extend its authority over the proprietorial realm. It may be just refusing to use the state enforcement apparatus to protect the rights created by such transfers, and thereby direct our property-transfer and property-acquisition practices away from these transactions. Of course, like the law of contract law, the law of sexual consent and the law of property of a given legal system may or may not be right in trying to develop or restrict the practices of consensual sex or property towards one or another direction. What I have tried to show, is that the law often guides

[198] Recall our example on racially segregated property rights in Chapter 3. The law, I suggested, cannot deprive agents from their basic power to acquire and transfer personal property. Yet again, it may well be the case that legal deontic powers play a central role in accounting for the normativity of *some* aspects of even our personal property rights (e.g., it may have a central role in both establishing specific mechanisms of property acquisition and transfer, and in specifying the contours of our property rights more generally).

our behaviour not by extending its deontic power or authority over us, but by impacting the reasons we have for or against exercising our *own* deontic powers.

It should not surprise us that notions such as contract or property are currently conceived as terms belonging exclusively to the legal discourse. It is natural that after centuries of exercising its steering role over the promissory and the proprietorial domain, the law succeeded in 'legalising' great deal of the phenomenology of these domains. This is particularly true for the case of property. Though we can still think of promises outside the contractual realm (e.g., ordinary, personal promises), we almost cannot separate the concept of property rights from legal enforcement (i.e., it seems that I cannot have a property right over *O* unless the law somehow recognises such a right; there seem to be no property rights outside the law). The legalisation of the phenomenology of contracts or property reminds us of Hans Kelsen's King Midas metaphor:

'[j]ust as everything King Midas touched turned into gold, everything to which [the] law refers becomes law […].'[199]

Kelsen's claim, however, is correct only when heavily qualified. It is right to hold that the law *can* extend its deontic power into all our affairs. And it is also true that, as a matter of fact, the law has the power to permeate the phenomenology of all domains of life. However, I have tried to show that, although the law steers our contractual practices and as a consequence infuses the contractual domain with its distinctive discourse, it generally refrains from extending its authority over our contracts. Contractual rights, duties, and powers,

[199] Kelsen, *General Theory of Law and State*, 161.

like some of our property rights, are not created by the law. Even if the phenomenology of contracts is inundated with legal discourse, contractual rights, duties, and powers, are not a product of the law's authority. Contractual rights and duties are product of individuals' basic deontic powers.

In this chapter and in Chapter 3 I have explored the normative grounds of contractual duties and rights, and the role of contract law and contractual enforcement practices in directing the practice of promise-making. I have not discussed, however, a central aspect of the normativity of contracts. We have seen that only promises that allow remedial forms of conformity are enforceable, and that, even if enforceable, the law may decide whether or not to enforce certain promises based upon its aim of developing or curtailing certain promissory practices. The law, however, is mainly concerned with a certain type of promise. It is concerned with promises that are what in Chapter 2 I called *relationships of voluntary authority*. I will argue that only this kind of promises, and not the type of voluntary undertakings that I called *commitments* are enforceable. In the following chapter, I maintain that it is only by distinguishing between promises that are authority-creating acts and those that are commitments that we can fully grasp the relationship between the morality of promises and the morality of contracts.

5. The Enforceability of Promises

Anyone familiar with our contractual practices will point at the possibility of enforcement as one of contracts' defining features. Contracting parties are usually under a liability or duty to pay damages for the losses caused in case of breach. And courts execute such liability or duty by utilising coercion (i.e., by threatening to seize some of the defendant's goods in case he fails to comply; and by materialising such threats). Both promises and contracts bind us in the same way, one may hold. Yet contracts also carry what we may call the *mark of enforceability*: unlike promises, they typically render permissible the use of some force to execute them. The mark of enforceability is a salient fact of contractual phenomenology, one that any theory of the normativity of contract must account for. This call for an explanation extends to promissory theories of contracts such as the one I have defended so far. If contracts are promises, we must account for the link between promises and contractual enforcement. In Chapter 4, I have already offered an account of the rationale behind some of our contractual enforcement practices. I defended the claim that by administrating the mechanism of contractual enforcement, the law directs or steers the practice of promise-making. Yet the law performs its steering role, I argued, by administrating the enforcement of promises that are in principle enforce*able*, that is, promises whose forceful execution is in principle permissible. Building upon ideas developed in previous chapters, now I will develop an account of promises' enforceability.

The prominence of enforcement in our contractual practices has led some to argue that promises and contracts are categorically different. Since, in their view, promises as such are not enforceable, contracts cannot be promises.[200] Here I shall reject such a view, and hold on to the claim I have defended so far, namely that contracts are promises. Yet I aim to vindicate the idea that contracts are normatively linked to enforcement in a sense that at least *some* promises are not. I contend that promissory theories of contract have been unsuccessful in explaining the relationship between contractual enforcement and promissory morality largely because they have failed to distinguish between what I called (Chapter 2) relationships of voluntary authority, on the one hand, and commitments, on the other. In this chapter, I shall argue that only authority-creating promises are enforceable. I maintain that commitments, where the promisee does not acquire authority over the promisor in the matter of their promise, are not enforceable. Once we distinguish authority-creating promises from commitments we can explain why it may be both true that contracts are normatively linked to enforcement whilst at least some promises are not, *and* that contracts are promises. It is simply that only a certain kind of promises are enforceable (i.e., authority-creating promises), and only those are contracts.

In Section I, I expand in some more detail on the distinction between authority-creating acts and commitments. Adopting the notion of promissory right proposed in Chapter 1, I shall characterise authority-creating promises as those promises that grant the promisee a *right* to performance. In contrast, commitments put the promisor under an obligation to perform yet do not give the promisee a right to performance. I devote Section II to arguing that both the harmfulness of the breach and the fact that the promisee has a right to

[200] As we saw in Chapter 3, some maintain that contracts are enforcement-permitting-acts, and not merely promises. *See* e.g., Barnett, 'Contract is not Promise; Contract is Consent', 55 ff.

performance are necessary conditions for promises' enforceability. I contend that remedies such as damages awards and specific performance are justified as mechanisms by which courts help promisees to obtain reparation for the *losses* caused by the promisor's breach. Thus, I propose we understand them not as merely recognising, correcting, or vindicating the promisor's wrong or rights violation, but as *indemnification measures*. Section III concludes, and briefly offers a reinterpretation of the so-called transfer theory of contracts. I argue that we can avoid some of the transfer theory's obscurities, and understand it precisely as advocating for one of the central claims of this chapter, namely that only authority-creating promises are contracts.

I. Commitments and Rights

In Chapter 2, we saw that the practice of promising may serve at least two different interests. First, agents may use promises to serve their authority interest, that is, their interest in forming relationships of voluntary authority with others. Promises that serve our authority interest put the promisor under an obligation to perform, and grant the promisee a claim to performance, and an exclusive power to release the promisor from his duty. Second, agents may also invoke the practice of promising to satisfy their allegiance interest. Promises that serve agents' allegiance interest are commitments. By making a commitment the parties assume a voluntary obligation and claim to performance, over which both parties retain *equal* deontic control.

To be sure, what makes a promise an authority-creating act or a commitment is determined exclusively by promisors' and promisees' choices, by their promissory intentions. Whether we utilise the practice of promising to grant authority to others or to satisfy our allegiance interest will depend precisely on the type of interest we, as promisors and promisees, aim to serve by entering a given promissory arrangement. For instance, it may well be the case that by promising to have you over for dinner next Monday I chose to assume an obligation, and to grant you a claim to performance and exclusive control over such claim, and that you accepted my promise under the same understanding. But we may have intended that I assume an obligation and grant you a claim to performance whilst retaining control over such claim. In Chapter 2, I argued that authority-creating acts and commitments may take different social forms, and that one of them is the form of a promise. Among other things that it may be, a promise may possess the normative structure of a relationship of voluntary authority or the structure of a commitment. I argued that both types of arrangements plausibly fall into our promissory practices, and that they are both normatively intelligible once we acknowledge that we have an interest in being able to form relationships of voluntary authority (the authority interest) *and* an interest in being able to assume voluntary claims and obligations towards others yet retaining control over them (the allegiance interest).

True, even if it is up to us qua promisors and promisees to shape our promises as authority-creating acts or commitments, it is often the case that certain promises will be socially *typified* as authority-creating acts or as commitments. Both our authority interest and our allegiance interest have permeated the social form of some promissory types. Take, for example, the case of sexual promises (recall our discussion of this point in Chapter 2). In a culture like ours, that values sexual autonomy, it makes sense that our promises to refrain from having sex with some people (e.g., sexual exclusivity promises), or our promises to have sex, will *typically* be commitments and not authority-creating acts. At least in our culture, one may assume that agents generally undertake promissory bonds of a sexual content whilst preserving control over their obligations to have sex or to refrain from having sex with others. However, it is *not* that our social promissory types determine whether certain promise is a commitment or an authority-creating act. It is always up to the promisor and promisee whether they make a promise an authority-creating promise or a commitment—*their promissory intentions* determine whether their promise is meant to serve their allegiance interest or their authority interest.[201]

The fact that there are socially specified promissory types serves our promissory powers. As we saw in Chapters 3 and 4, by simply adhering to the social template of a given promissory arrangement (e.g., a sale) we summarise a whole set of complex promissory intentions: these social forms serve as shortcuts through which we exercise our deontic powers. Thus, there is value in there being socially typified promissory forms.[202] To be sure, idiosyncratic promissory

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[201] Some may argue that in a culture that respects sexual autonomy, one simply has *no power* to make authority-creating promises over sex. I do not think this is true. However, it may well be the case that we lack *any* deontic power over certain matters (e.g., I simply have no power to assume an obligation to torture someone); that we *only* have the power to make commitments over some matters; and that we have *both* the power to make commitments *and* the power to establish relationships of voluntary authority in other cases. And, as I have argued in the text, it may be the case that we have both the power to make commitments and the power to create relationships of voluntary authority over a given matter, yet that it is typical for us to exercise one or the other. I have argued that such typicality may give rise to socially recognised promissory types which set the 'standard' type of promissory arrangement over a certain matter. Yet, I have argued, these social forms do not determine whether a promise *is* a commitment or an authority-creating act. More on this point below.

[202] I have highlighted the purely instrumental role of socially typified promissory types. Employing economists' jargon, one may say that socially typified promissory arrangements reduce promisors' and promisees' *transactions costs*: they facilitate the making of some promissory transactions (e.g., sales, different sorts of promissory debts, etc.,). However, I am not arguing that the value of all social promissory types is exclusively instrumental. At least some of them may be valuable for their *own sake*. For instance, the value of the social institution of marriage (and thus of the social

intentions may clash with the social form of a promise. For example, Jane may be better than John at grasping the social meaning of sexual promises in our culture. *They are commitments and not authority-creating acts!* She might rightly claim. Thus, when she promised John to have sex with him tomorrow *that* is what she meant. She offered him to assume an obligation to have sex with him, yet preserving control over it. Yet John thought that she was offering him exclusive control over such an obligation. He thought that, after the promise, he would have promissory authority over her on this matter. In this case, the social typology of sexual promises, one that understands them as aiming to serve agents' allegiance interest, clashes with John's idiosyncratic understanding of Jane's promise. The same kind of disagreement may arise from promises that are socially typified as authority-creating acts. For instance, it may be that promises to give a sum of money are typified as authority-creating acts. If Jane promises John to give him $ 10 tomorrow, our social conventions dictate that she offers him exclusive deontic control over her obligation—that she does not preserve control over her obligation to give him $10 tomorrow. Thus, when Jane communicates to him that she is no longer committed to give him $10, John may rightly protest that she has no such power. He understood, correctly grasping our promissory practices, that she was granting him exclusive deontic control over her obligation.

In both examples, Jane's and John's fundamental mistakes trump the bindingness of their promise (recall the '*The River' vs the river* example in Chapter

promissory types that constitute marriage) cannot be exclusively confined to its role in reducing promisors' and promisees' transactions costs. People who get married often do so because they see value as such in the fact of entering a marital relationship. Furthermore, the value of marriage may hold precisely *because* it is socially recognised. Marriages may thus be valuable at least in part because they have a social existence (i.e., because of the social significance attached to them).

3). They did not achieve a shared understanding of the content of the obligations and rights that their promise was meant to create, and thus their promise is void *ab initio*. Again, the different promissory types we find in our social life enrich our promise-making practices by facilitating the making of all sorts of complex promissory arrangements—and as we saw, some of these promissory types may take the shape of commitments (e.g., sexual promises, partnerships, etc.,) and others of authority-creating acts (e.g., promissory debts). Yet it is a mistake to maintain that it is the social type of a promise that *determines* whether a given promissory arrangement *is* an authority-creating act or commitment. Our social typology of promises does include commitments and authority-creating promise, but what *constitutes* a commitment, or an authority-creating act are the promissory intentions of the parties involved.

In Chapter 1, I defended the view that promissory rights are grounded in agents' authority interest, that is, in their interest in being able to form relationships of voluntary authority. This, of course, applies only to promises that constitute relationships of voluntary authority or exclusive deontic control and not to commitments. Promises that are commitments create obligations and claims to performance, yet only authority-creating promises create rights. In a relationship of commitment, both the obligor and the moral creditor have control over the moral creditor's claim. The moral creditor, therefore, does not have the kind of immunity that rights constitute for right-holders (immunity that I shall later call 'sovereignty'). Below we shall see that because in commitments the promisee does not have a right to performance, that is, because she does not have authority over the matter of the promise, she does not acquire the distinctive kind of protection that only right-holders have against others. And it is this that explains why commitments are not enforceable.

II. Promises and the Enforceability of Rights

In Chapter 4, I provided an account of some of our contractual enforcement practices. I argued that the law administrates the mechanism of contractual enforcement and thus directs the practice of promise-making. We saw, for example, that the law has reasons to enforce bargains over gratuitous promises. By enforcing (bilateral) bargains, the law contributes to their development as a promissory practice, whereas it is precisely by refraining to enforce gratuitous promises that the law contributes to their flourishing. Yet, as I argued, the law's steering role presupposes promises' enforcea*bility* in first place. Legal actors are permitted to enforce only promises that are in principle enforceable. In this section I explore the requirements for promises' enforceability.

In Chapter 4, I argued that the degree and kind of force that the promisee is permitted to utilise in order to execute a promise is determined by the harm caused by the promisor's violation of the promisee's promissory right. Only *harmful,* and not merely wrongful, violations of promissory rights render permissible the use of force by the promisee, or by those acting on his behalf such as legal officials. Here, I shall call this principle 'the harmful violation principle'. According to this principle, the harmfulness of the breach is a necessary condition for promises enforceability, but it is not sufficient. Only promisees who have a *right to performance*, have the standing to enforce a promise. Thus, the promisee in a commitment, who has no right to performance, may be seriously harmed by the breach, yet still have no claim to enforcement. Both the existence of promissory rights *and* the fact that the promisor's breach harms the promisee determine the enforceability of a promise. I will offer a justification of the harmful violation principle below in II c. But let us begin by exploring its content.

a. Enforcement and The Harmful Violation Principle

In Chapters 3-4, I sided with the view that the morality of rights-enforcement is determined by some of the general principles that regulate defensive harming. Under the view I propose, what determines the degree and kind of force one may utilise in order to defend one's rights, including promissory rights, is the *harm* caused to us by those who violate our rights. My thesis is that a promise whose breach will result in no harm to the promisee is not enforceable.

Unless justifications or excuses hold, the promisor's failure to perform violates the promisee's right to performance, thus wronging the promisee, and often rendering appropriate blame and guilt on the promisor. However, the sheer fact that one has a promissory right, and that such right is or will be violated, does not render permissible the use of force on the breaching promisor as a means to vindicate one's promissory right. Some philosophers seem to defend another view. They appear to believe that rights, contractual ones included, *as such* entitle the right-holder with a claim to enforcement—rights grant right-holders a permission to use at least some force in order to defend their rights. For this view, one essential attribute of rights is precisely their enforceability.[203] At least without further qualifications, the harmful violation principle rejects this view.

[203] Some notable proponents of this view include e.g., Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1996) AA: 6:231, 23-26; Hart, 'Are There Any Natural Rights?', 177-178; Hart, *Essays on Bentham: Jurisprudence and Political Philosophy*, 254; and Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 30, 146, 159.

According to the view I propose, agents are only permitted to use the force that is necessary to prevent or stop *the harm* caused to them by those who violate their rights. In itself, a rights violation does not suffice to justify the use of *any* degree of force to vindicate one's rights. In other terms, what one may call the purely *normative injury* caused by the breach, the fact that one's rights have been (or will be) violated, does not render permissible the use of any enforcement measure against the rights violator. Rights violations, or at least unjustified ones, render appropriate feelings of anger and resentment in the right-holder. The appropriateness of these reactive attitudes and feelings is constitutive to rights violations. According to the harmful violation principle, however, the kind of harm that justifies enforcement measures *excludes* the holding of the feelings and reactive attitudes that are constitutively attached to rights violations. According to this principle, the right-holder has a claim to enforcement measures only if his interests *other* than his purely normative expectation qua right-holder have been set-back or injured by the breach. The harmful violation principle thus puts a restraint on the morality of enforcement. It dictates that purely normative injuries or losses entailed by rights violations are not sufficient to justify using any force to vindicate one's rights. This principle thus assigns a distinctive normative significance to harm: it is only harm (i.e., harm beyond a purely normative injury) that can justify harmful defensive responses. Only *harmful* violations of our rights justify their harmful vindication (i.e., enforcement).[204]

[204] I do not aim to provide here, of course, any comprehensive account of the nature and normativity of harm. I shall just endorse the view that harming consists in causing a set-back in the victim's *well-being* (i.e., in a set-back of her interests); and that at least one of harming's normative effects is that it renders permissible the exercise of some degrees of force upon the harm-doer to prevent, stop, and repair the harm caused. Furthermore, the view I am endorsing may include some degrees of *risk* to our well-being, and not only actual injuries, in the notion of

To be sure, the harmful violation principle is not a thesis about the concept of harm. It is not the case that according to it, purely normative injuries shall never count as harm. It is a thesis about the scope of the *normative significance* of harm, namely one that holds that purely normative injuries do not render defensive harming appropriate. Consider the example of a harmless trespasser.[205]

Suppose John secretly enters Guido's flat. He sleeps in Guido's bed; he uses Guido's bathroom, kitchen, etc., all without causing any damage to Guido's flat and belongings. After cleaning everything and leaving no trace behind, John leaves Guido's flat. Furthermore, assume that Guido never finds out about John's sneaky trespass. Some writers struggle even to account for the fact that John *wrongs* Guido. One may hold that if property rights are grounded in our interest in being able to use some things without others' interference, and such an interest has not been affected at all by the harmless trespasser, he does not really commit any wrongful act.[206] Yet we need not share this view. As we saw in previous chapters, we may have an interest in being exclusively in charge of determining if someone wrongs us by using at least some of our property. Thus, John may wrong Guido simply because he entered his house *without Guido's permission*. As such, the harmful violation principle does not aim at providing an account of the

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harm. For a defence of the view that only set-backs in our well-being, and not, for example, in our preferences, constitute harm *see* Victor Tadros, 'What Might Have Been' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 173-177.

[205] This example is inspired by Ripstein's. *See* Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 N° 3 *Philosophy & Public Affairs* 215, 218 ff.

[206] John Gardner, for instance, argues that the harmless trespasser's wrong is only some kind of rule-based wrong. Since a system of property rules that prohibit trespass simpliciter (harmful or not) contributes to avoiding the harm caused by trespass when it is indeed harmful, and harmless trespasses undermine such a system of rules, harmless trespassing is wrongful. John Gardner, *Offences and Defences: Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 12. I have argued against Gardner's account in Molina, 'The Authority in Property', 18-19.

wrongfulness of harmless rights violations. It is a doctrine about the permissibility of enforcement. In our example, it dictates that, since Guido solely suffers a normative injury, he is not entitled to use any force to protect his property right. Only had he been harmed by John's trespass he would be entitled to enforcement.[207]

Some final clarifications regarding the scope of the harmful violation principle are needed. This principle does not tell us anything about how *much* force or which *types* of force we are entitled to utilise to defend ourselves from the harmful violations of our rights. Again, the answer to this question depends on the general principles that regulate the scope of defensive harming (necessity, proportionality, etc.,). Moreover, the harmful violation principle—besides excluding purely normative injuries—does not tell us anything *else* regarding which interests of the victim should be set-back or affected in order for her to be entitled to enforcement measures. Some may hold, for example, that only set-backs of the right-holder's first-order, personal interests, and not of her second-order interests (e.g., her interests in being able to serve others' needs) justify enforcement. Finally, it is agnostic regarding the question whether only rights violators who are *culpable* for the harm caused to the victim are liable to suffer

[207] What if Guido knows about John's trespass? This fact may impact our answer regarding enforceability. For instance, it may be that by knowing that John is using his property without permission, Guido gets psychologically disturbed in a severe way. And, under some accounts of the grounds of harm, this phycological impact may count as harm. Thus, it may render permissible the use of *some* degree of force to prevent, stop, or repair the harm caused by John's trespass even if no further interest of Guido is affected (e.g., if there is no damage to his property). I do not wish to adjudicate these cases here. The point I wish to defend is that, when aiming at determining the permissibility of any enforcement measure, we must identify a set-back in the right-holder's well-being that goes beyond the purely normative injury entailed by rights' violations. One, of course, may add further conditions to enforceability (e.g., add further limits to the *aspects* of our well-being that must be undermined in order to render enforcement permissible). As I argue below, the harmful violation principle is agnostic regarding these further conditions.

the consequences of enforcement or not.[208] All these are important questions for a general account of the morality of rights-enforcement. The principle I am endorsing here, is just that a right violation as such never constitutes sufficient grounds for the permissibility of enforcement mechanisms.

Let us now go back to promises. When breaching his promise, the promisor may cause no harm to the promisee. Consider some examples.

Suppose Guido promises to pay $10 to John. Yet also assume that Octavio, out of pure friendship, agrees to act as a benevolent insurer, promising to pay $10 to his friend John *only* if Guido fails to keep his promise. Thus, when Guido failed to keep his promise, Octavio paid $10 to John. If we adopt a counterfactual a view of the measurement of harm, we may easily reach the conclusion that Guido's breach does not make John worse off. Guido's breach violates John's promissory right. Yet had Guido kept his promise (and everything else equal), John would *not* be better off than in the breach scenario.[209] Think about another example. Suppose your beloved but unreliable friend, in order to demonstrate to you that he can keep his promises, promises you that he will give you a lift for work tomorrow.[210] Suppose you take him seriously and accept his promise. However, whilst accepting his promise and thus taking its bindingness seriously, you may not trust that he will *keep it.* You may acknowledge the binding force of *his promise*

[208] Arguing that (harmful) rights-violations need not be blameworthy or even unjustified in order to render permissible some enforcement measures (e.g., compensation) *see* e.g., Neil MacCormick, 'The Obligation of Reparation' (1977-78) 78 *Proceedings of the Aristotelian Society, New Series* 175, 176-183. *See* also the court's judgement in the famous case *Vincent v Lake Erie Transportation Co* 109 Minn.456, 124 NW 221 (1910).
[209] For a convincing defence of the counterfactual view *see* Tadros, 'What Might Have Been' 185 ff.
[210] Recall Scanlon's 'profligate pal' example. Scanlon, *What We Owe to Each Other*, 312.

(his capacity to bind himself at will) yet not trust that he will perform.[211] If your friend breaches his promise without a justification or excuse, as a victim of a normative injury, you have the standing to blame and resent him for his breach. Yet again, his breach may have not harmed you. Because you never thought he would perform you may have, let us assume, already arranged a lift to work for tomorrow with another friend. Thus, his breach did not make you worse off. Of course, had he not breached his promise, he would not have violated your promissory right. Yet, besides this purely normative injury, his breach did not put you in a worse position that you would have been in had he performed, since you already secured the benefits of the promised performance through other, let us assume, costless means.

According to the harmful violation principle, the promises in these examples are not enforceable. Since John has not been harmed by Guido's breach, and you have not been harmed by your unreliable friend's breach, neither John nor you have a claim to enforcement. Let us now consider harmful breach of promise.

As the previous examples already suggest, there is a paradigmatic way in which the breach of a promise may harm the promisee. The promisor's breach may harm the promisee by undermining what we may call her *performance interest*. The performance interest consists in the promisee's interest in being (i.e., her well-being) in the position that she would have been in had the promise been

[211] Helpfully distinguishing between trusting the promisor's *performance* and trusting the *bindingness* of his promise *see* David Owens, 'Trusting a Promise and Other Things' in Paul Faulkner and Thomas Simpson (eds), *The Philosophy of Trust* (Oxford University Press 2017) 218 ff.

kept by the promisor. As we will see later (II c), the promisee's performance interest is worthy of protection only insofar she has a right to performance in the first place. We must distinguish, however, harms to the promisee's performance interest from the purely *normative injury* entailed by the promisor's breach (i.e., by his violation of the promisee's right to performance). In the examples of harmless breach considered above, Guido and your unreliable friend indeed violated John's and your promissory rights, and thus normatively injured both of you. However, the promisors' breach did *not* harm John's or your performance interests. Though wrongful, their breaches do not make John or you *worse off*—and thus, according to the harmful violation principle, John and you lack a claim to enforcement. Promisors become liable to enforcement measures only when their breach makes their promisees worse off, that is, not only when they violate their promisees' rights, but when their breach also undermines (at least) their promisees' performance interest.

The performance interest is an interest in being in the position in which the promisee would have been in had the promisor *performed his promise*. Some writers have tried to distinguish this interest from another supposed contractual interest. Lon Fuller and William Perdue, for example, distinguished what I am calling the performance interest (which they termed the 'expectation interest') from what they called the 'reliance interest', and argued that the aim of contract law should be only to protect the latter. On their account, the reliance interest is the parties' interest in not being worse off as a result of relying on the promise *at the time the promise is made*.[212] Fuller & Perdue, however, seem to ignore the fact

[212] Fuller & Perdue, 'The Reliance Interest in Contract Damages: 1', 54.

that what they called the 'reliance interest' is only worthy of protection if it is imbedded in our performance interest.[213]

As we shall see later in more detail (II c), promisors are only liable to repair the losses caused by the promisor's *breach*, that is, by his violation of the promisee's *right to performance*. And such losses may or may not include some of the losses incurred by the promisee because of the promisor's *making* of his promise. Therefore, the relevant counterfactual is:

'had the promisor *performed*, how would the promisee be';

and *not*

'had the promisor not *made his promise*, how would the promisee be'.

Consider an example.

Suppose you obliged yourself to pay $ 3000 to a manufacturer who promised to deliver a coffee machine for your coffee shop tomorrow. The manufacturer fails to deliver the machine, causing you to freeze your sales for an entire day. In this example, your performance interest includes all the benefits of having the machine tomorrow (e.g., obtaining the regular profits of the sales). Had he performed his promise, you would (we are assuming) have been able to operate your business and thus obtain profits from your sales. Now, suppose that you mistakenly thought that, in order to operate the coffee machine, you needed to buy a very expensive additional gadget (e.g., a fancy mould extractor). So, after the manufacturer promised to deliver the machine (and precisely because of his

[213] Making a similar point *see* Daniel Friedman, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628.

promise) you went ahead and paid $500 for this device. Yet the promisor's *breach*, that is, his violation of your right *to performance*, has not contributed at all to make you worse off *in this regard*. Had the promisor delivered the machine, you would have *not* been better off (i.e., you would have still spent $500 on a useless gadget). Thus, even though you spent the $500 *because* of the manufacturer's promise, his performance would not have fixed your loss. By contrast, if the manufacturer had not failed to deliver the coffee machine (i.e., performed his contract), you would have *not* been, we are assuming, deprived from the profits of your habitual sales. The promisor is only liable to repair the losses caused by his *failure to perform*, and thus not all the losses caused by his *making* of the promise.

I have maintained that an undermining of the promisee's performance interest is the paradigmatic type of harm caused by a promissory breach. This is because it constitutes the only type of harm that promisors are liable to alleviate *qua breaching promisors,* that is, because they have violated the promisees' promissory right to performance. When breaching a promise, the promisor may harmfully violate other *non*-promissory rights of the promisee and thus for this reason become liable to enforcement. For instance, the manufacturer in our example may have, instead of delivering a functioning coffee machine, delivered a defective one that exploded in the middle of your coffee shop, causing serious injuries to you and some of your customers. This type of harmful violation, however, is not distinctive of promissory breach. The promisor may be liable to alleviate the harm caused by his violation of your and your customers' *bodily rights* regardless of him having also violated your promissory right.

Similarly, by breaching his promise, the promisor may also harmfully violate your property rights. Suppose you already paid the $3000 to the promisor for the coffee machine. It seems clear to me that, after his breach, you are entitled to get your $3000 back. If he, after his breach, refuses to give you the $3000 back upon your request, he will be violating your property rights. You gave him the $3000 precisely under *the condition* that he will perform. By failing to perform, your property transfer of $3000 to him is cancelled. Thus, he harmfully violates your property rights if he does *not give you the money back upon request*. This type of harm may be entrenched in our performance interest, yet it is by no means exclusive to it. I may give you $10 now under the condition that you run a marathon tomorrow. In such case, I have not promised to give you $10 (I already did) and you have not promised to run the marathon. Yet you accepted my $10 under the condition that you run the marathon. Your running the marathon is a condition of your entitlement to the $10. Thus, if you do not run the marathon yet still insist on retaining the $10 after I demand restitution, you violate my property rights, causing me a loss of $10.

Harmful violations of property and bodily rights, and of all sorts of rights, may take place in the contractual realm. An act may constitute both a harmful violation of a promissory right (i.e., a breach of contract which undermines the promisee's performance interest), and a harmful violation of other rights of the promisee. Thus, even if harm to our performance interest is the paradigmatic form of harm for which promisors are liable to enforcement, it is not surprising that disappointed promisees in contractual disputes seek reparation for all sorts of harms caused by the promisor's breach.

So far I have argued that the promisor's liability to enforcement is grounded in the basic principles that regulate *defensive* harming. Yet how can this be the case? Contract law typically enforces promises by ordering promisors to pay damages, that is, to compensate or repair the losses suffered by the promisee (and by backing such orders with threats to seize the defendants' goods, and by executing such threats in case they do not comply). By contrast, one may argue, the norms of defensive harming regulate the permissibility of our interventions to *defend* ourselves from others' harm. They do not apply to our rights to execute others' duties to *compensate or repair* the harm they have wrongfully caused us. They exclusively target the justification of different forms of self-defence, but not our rights to obtain reparation. I believe this constitutes a misunderstanding of the scope of the principles that regulate defensive harming.

Suppose a thief is about to steal my wallet. The morality of defensive harming, one may assume, permits me to use the necessary and proportionate force to prevent the thief from taking my wallet. For instance, it may permit me to use some degrees of non-lethal physical force over him. Since he is *about to* harmfully violate my property rights by taking my wallet, he is liable to suffer the harm that is necessary and proportionate to avoid his attack. And once he is in the process of *taking* my wallet (e.g., while he is pulling it away from me), I am still permitted to take defensive measures. Now suppose he managed to finally take my wallet. It would be a serious mistake to hold that the morality of defensive harming does not apply any longer. Harm, or at least being in a harmed condition, is a state or a process and not merely a discrete, instantaneous event.[214] When the

[214] Defending the view that harms are events and not states *see* e.g., Mathew Hanser, 'The Metaphysics of Harm' (2008) LXXVII N°2 *Philosophy and Phenomenological Research* 421. I have

thief has taken my wallet he *is* harming me. He has violated my property rights and set-back my property holdings (i.e., taken my wallet); and he is thus liable to suffer some harm in order to stop the harmful state he is causing. He may be liable, for instance, to my applying some force to get my wallet back from him, or to my retaining some of his property until he gives me my wallet back. Rights violators' reparatory or compensatory duties derive precisely from their liabilities to suffer the harm necessary and proportionate to stop or alleviate the harm caused by them to their victims.[215] This extends to the promissory realm.

b. Remedies as Indemnification Measures

In Chapter 3, I have argued that promisees have what I called the *right to indemnification*, that is, a right to receive reparation for the harm caused by the promisor's violation of their promissory right. This right, I maintained, is not promissory in nature since its content is not determined by the parties' promissory intentions. It is, of course, conditional on the promisee having a right to performance. Yet, its content is fixed by the morality of defensive harming. *What* the promisor is liable to suffer in order to repair the harm caused to the promisee depends on the kind and degree of the harm caused by his breach. I contend that, at least in the contractual realm, coercive judicial orders to pay damages and even remedies such as specific performance are not justified as means by which the law merely vindicates promissory rights or corrects

no problem with such view as long as it considers that at least the facts of *harming*, *causing harm, or being harmed* may extend over time. If that is the case, we may reformulate the claim I have defended to maintaining that it is the act of harming or causing a harmful state that renders defensive harming permissible, and not harm in itself.

[215] As we saw in Chapters 3 and 4, there is a long-standing tradition that understands liabilities or duties to compensate as the normative continuation of liabilities to defensive harming. *See supra* note 157.

promissory wrongs, but as mechanisms that facilitate the execution of promisees' right to indemnification.[216] By, for example, ordering the promisor to pay a sum as compensation, and by forcefully extracting such sum by seizing the defendant's goods in case the promisor does not comply, courts declare and facilitate the execution of the promisor's liability to repair the losses caused by his breach.[217]Once we understand remedies' role as indemnification measures, one may explain why a great deal of the practice of contractual disputes consists precisely in determining and measuring the *losses* caused by the parties' breach, and not only in establishing the promisor's breach, that is, his violation of the promisee's right to performance.

True, some remedies may not aim at facilitating the execution of the promisor's liability to repair the harm caused by his breach. They may perform other relevant roles (e.g., deterrence). Yet at least the most canonical contractual remedies, that is, compensatory damages and specific performance, should not be understood as merely aiming at recognising contractual rights and vindicating

[216] Though different in many regards, for views that maintain that remedies' role is to vindicate or correct rights violations or wrongs *see* e.g., Ernest Weinrib, *Corrective Justice* (Oxford University Press 2012) Chap. 3; Ripstein, 'As If it Had Never Happened', 1969 ff.; John Goldberg & Benjamin Zipursky, *Recognizing Wrongs* (Harvard University Press 2020) esp. Chaps. 2-3; Robert Stevens, '*Damages and the Right to Performance:* A Golden Victory or *Not*?' in Jason W. Neyers et al. (eds), *Exploring Contract Law* (Hart Publishing 2009), 171; and Nicolas Cornell, 'What Do We Remedy?' in Paul B. Miller & John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020) 209, 221 ff.

[217] When I maintain that courts help or facilitate the promisee's reparation I surely do not mean to imply that it is morally optional for the promisee to seek enforcement through courts. As I argued in Chapter 4, it may be the case that the promisee is under a duty to enforce his promissory rights through the law (i.e., via judicial enforcement) if doing so is overall less costly (e.g., less harmful and equally effective) than private enforcement. Accordingly, judges are under a pro tanto duty to facilitate the enforcement of enforceable promissory rights. *See infra* Chapter 4, I b. As we saw, judges' duty to facilitate the enforcement of enforceable promises is often defeated by the law's goal of protecting and directing our promise-making practices (i.e., its steering role). We then saw that judges may have strong reasons to refrain from facilitating the enforcement of otherwise enforceable promises (e.g., reasons against enforcing some gratuitous promises).

them upon the promisor's violation, but at facilitating the execution of the promisor's liability to repair the harm caused by his breach. This, of course, need not mean that the promisee must always have the burden of *proving* that the breach harms her in order to be entitled to a remedial response. The law may indeed have good reasons to shift the burden of proving the harmlessness of the breach to the defendant; presuming thus that a promissory breach in principle always harms at least the promisee's performance interest. The point I have defended is that remedies find their *justification* as mechanisms by which the law facilitates the promisee's right to indemnification, and that this characterisation of their justification contributes to explain various central aspects of our contractual enforcement practices. Let us begin by considering the practice of granting so-called 'expectation' damages.

Expectation damages are those that aim at putting the promisee as close as she would have been had she received the promised performance.[218] They should not be understood as a legal vindication of the promisee's right to performance as such; or, as their misleading title suggests, as purporting to grant the promisee the benefits that she merely *expects* the promisor's performance would grant her. They are an enforcement mechanism that protect the promisee's *performance interest*, that is, her interest in being in a position such as if performance had taken place. A simple example illustrates the importance of this point. Suppose I promised to transfer $50 to your bank account tomorrow in exchange for a

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[218] For a clear characterisation of the expectation remedy along these lines *see* e.g., *Robinson v Harman* (1848) 1 Exch 850, 855; 154 ER 363, 365 (Parke B). Though it comes under different rubrics (e.g., *lucrum cessans* and *damnum emergens*), the expectation criteria is also the central measurement of contractual damages in civil law jurisdictions. *See* art. 1231-2 of the French Civil Code; art. 1223 of the Italian Civil Code, or art. 1556 of the Chilean Civil Code.

service, but instead I only transferred $45. I have breached my promise (i.e., I did not give you what I promised to give you) and thus have violated your promissory right. However, I *only* harmed your performance interest up to $5. Other things equal, had I kept my promise you would have been better off in $5. Thus, it makes perfect sense for courts to do what they would normally do in this type of case, that is, to order me *only* to pay $5 and *not* to perform my contract (i.e., give you $50). Expectation damages are destined precisely at benefiting the disappointed promisee in order to put him in a position close to where he would have been had the promisor performed. They are not aimed at undoing or correcting the wrongfulness of the promisor's breach, but at correcting or alleviating the harm caused by the breach to the promisee.

One well-known objection to courts granting expectation damages, formulated by Fuller & Perdue, fails to understand that expectation damages (and remedies in general) do not purport to vindicate the promisee's right to performance as such. In these writers' view, by awarding expectation damages 'we "compensate" the plaintiff by giving him something he never had'.[219] By granting such damages, they argue, courts grant compensation for what I have called a purely normative injury. As they put it, by awarding expectation damages courts mistake what '[appears] as a loss only by reference to an unstated *ought* [i.e., a purely normative injury]'.[220] These authors fail to see, however, that expectation damages do not aim at correcting purely normative injuries, but at

[219] Fuller & Perdue, 'The Reliance Interest in Contract Damages: 1', 52-53.
[220] Id., 53. Similarly *see* Murphy, 'The Artificial Morality of Private Law' (forthcoming), arguing that 'losses in the domain of the performance interest are not real; they are not losses actually suffered because the promise was made and not kept. The loss from non-performance is a loss only in the strongly normative sense that I did not get what I was entitled to.'

repairing the promisee's performance interest. Some of those who disagree with Fuller & Perdue's view, also miss the point. For instance, writers such as Peter Benson pretend to defeat Fuller & Perdue's view by arguing that contractual breach genuinely deprives the promisee of her right to performance. In Benson's view, by awarding expectation damages, the law simply restores a right that already belonged to the promisee.[221] As we have seen, Benson is certainly correct in maintaining that the promisee in a contract acquires a right to performance, which the promisor's breach violates. However, he is mistaken in trying to find in such a right and its violation alone the ground of the expectation remedy. Expectation damages, as compensatory damages in general, find their justification as mechanisms destined at the reparation of the promisee's performance interest.

Characterising remedies as indemnification measures may also contribute to explaining why third-party payments of a debt (e.g., government's debt reliefs) may indeed extinguish the debtor's liability to payment even when the third-party does *not* act as the debtor's agent (or even when the debtor is not aware of the third-party payment). In such cases, the third-party payer is not the one obliged to perform, and thus it is in principle not in her power to extinguish the debtor's promissory obligation by paying the debt. However, the third-party payment may satisfy the promisee's (i.e., the creditor's) performance interest to the point that his right to the owed amount becomes *un*enforceable against the promisor. It thus

[221] Benson, *Justice in Transactions*, 8. Many writers, at least since the late scholastic period have made this type of argument in order to defend the expectation remedy. For a historical overview *see* James Gordley, *Foundations of Private Law* (Oxford University Press 2006) 292-297.

may terminate the promisor's liability to enforcement without necessarily cancelling his promissory duty.[222]

Not only damages awards but also other remedies such as specific performance have an indemnification role. We must not understand specific performance merely as a *judicial order to comply with the promisee's remedial right to original performance*.[223] It is best understood as a genuinely reparative measure, destined at repairing the losses caused by the promisor's breach.[224] The reparative nature of specific performance explains why it is generally up to the claimant (i.e., the disappointed promisee) to demand specific performance *or* damages awards. She has this option precisely because by demanding a given remedial response, the promisee is not merely exercising her right to performance but her right to indemnification. By contrast, *if* remedies were about replicating or vindicating promissory rights as such, it would make sense that the wronged promisee, in case performance was still possible, had *only* a right to performance, and not also an alternative claim for damages. Thus, we make a

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[222] Of course, it may be the case that, by accepting the third-party payment, the creditor obliges herself to release the debtor, and thus to terminate her promissory right. And it may be also true that in most promissory debts the parties intend their promissory obligations not to be 'personal' in nature, but dischargeable not only by the primary debtor but also by third parties, and, accordingly, the creditor's right to be transferable to others. My point is that even if these facts do not hold, a third-party payment of a debt may still render the debt unenforceable against the debtor. By paying the debt, the third-party assures the satisfaction of the creditor's performance interest even if it does not extinguish the debt itself (i.e., the promisor's promissory duty). It thus converts the debtor's potential breach into a harmless breach. This may contribute to explain why legal systems tend to consider legitimate, debts payments made by third-parties to a contract *see* e.g., art. 1342 (final part) of the French Civil Code, providing that the 'satisfaction [of an obligation] may even be rendered by a person who is not bound to do so, except where the creditor legitimately refuses it.' Also recall our benevolent insurer example *supra*.

[223] Holding that specific performance consists in a judicial order that merely replicates the promisee's right to performance *see* e.g., Smith, 'Breach of Contract: One Principle or Two?' in Klass et al., *Philosophical Foundations of Contract Law*, 341.

[224] Making a similar point *see* John Gardner, *Torts and Other Wrongs* (Oxford University Press 2020) 339-340.

mistake by considering specific performance as having some sort of a priori normative priority over compensation as a contractual remedial response. Overlooking this point, Seana Shiffrin, for instance, argues that by failing to recognise specific performance as the principal, generally available remedy for breach of contract, we neglect promissory morality, that is, we neglect the fact that the promisor has in first place a duty to perform, and not a duty to perform *or* pay damages.[225] This view, however, incorrectly assumes that specific performance, and contractual remedies in general, aim at reflecting or vindicating promissory rights and duties as such. Instead, I maintain we should think of remedies, including specific performance, as reparative or indemnification measures. And, depending on various factors, specific performance *may or may not* constitute a more optimal reparative measure than a damage award.[226]

As we saw in Chapters 3 and 4, contracting parties may have established remedial, next-best ways of conforming to their promissory duties and rights. As we saw, these remedial rights and duties are promissory in nature (i.e., they are grounded in the parties' promissory intentions). For instance, the parties may

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[225] Shiffrin, 'The Divergence of Contract and Promise', 722-724.

[226] Legal systems may have reasons to establish damages awards and not specific performance as a default remedy. Monetary awards may not only be easier to execute than specific performance or injunction, but also less *harmful* to the promisor. Although appropriate in some cases, these remedial measures may be *generally* disproportionate or unnecessary to repair the promisor's harm. If this is the case, the law may be justified in establishing a rule that shifts the burden to the plaintiff to demonstrate that an alternative to damages awards as a form of reparation, such as specific performance or injunction, is required. Arguing that specific performance constitutes too much of an intervention with the defendant's freedom, and that it is too costly for the law enforcement apparatus *see* G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press 1988) 47. This restrictive approach towards specific performance is typically adopted by common law jurisdictions, where the remedy of specific performance has an exceptional, discretionary nature when compared to damages. By contrast, most civil law jurisdictions (e.g., Germany and France) take a more sympathetic approach towards specific performance or injunction. *See* Id., 47 ff.

have established a duty to pay a monetary sum as an alternative or subsidiary way of discharging their *promissory duty*. In such cases, the parties' duty to pay such monetary sum upon breach may constitutes a genuine way of conforming to their promissory rights. Yet again, promisors' liabilities to repair the harm caused to their promisees in case of breach are not promissory in nature—they are not remedial duties. The breaching promisor has a liability to repair the harm caused by his breach regardless of whether he has promised to do so or not. Indeed, the non-promissory nature of remedies explains the law's careful treatment of so-called remedial clauses.

For example, respecting freedom of contract, the law allows the parties to 'liquidate damages' before any breach takes place (i.e., to contractually establish and quantify damages at the time of the making of their contract). However, it proscribes these clauses when they are not aimed at contractually evaluating a likely *loss*, that is, when they go beyond a purely reparative function thus constituting 'penalty clauses'.[227] Here the law does not merely give liquidated damages the treatment it would give to any exploitative or unconscionable contractual term. It simply proscribes liquidated damages that are not meant to repair losses, even if their amount may not be considered exploitative or unfair towards one of the parties. This is perfectly intelligible once we recognise that

[227] For the traditional rule in English law *see Dunlop Pneumatic Tyre Co v New Garage and Motor Co Ltd* [1915] AC 79 (HL). Slightly departing from it *see Cavendish Square Holdings BV v El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373. Civilian jurisdictions are often said to be more permissive regarding remedial clauses. I do not think this is true. For instance, the parties are generally not allowed to claim *both* their liquidated damages and ordinary damages. Thus, like in the common law, unless they are understood as primary monetary obligations (i.e., debts), civilian systems allow remedial clauses only if they have a reparative function. For some very clear statements of this point *see* e.g., art. 1622 of the Civil Code of Québec, or art. 793 of the Argentinian Civil Code.

damages awards, as remedies in general, have exclusively a reparative function and are not ways of conforming to our promissory duties and rights. If we grant the parties the absolute discretion to contractually specify remedial responses in case of breach, we risk violating the harmful violation principle—since it would be always up to the parties to bypass the harmful violation principle by contractually stipulating their remedies. In other words, it would be up to them to always render a promise enforceable, even when its breach does not harm the promisee.[228]

From Chapters 3 and 4, we saw that the law of contracts has at least two central roles. First, it establishes rules that help adjudicators identify promissory rights and duties, that is, rules that facilitate (and also regulate) adjudicators' task of discovering the parties' promissory intentions. Second, by administrating the mechanism of contractual enforcement, the law fulfils a steering role: it directs the practice of promise-making. Now we must add another crucial role: legal institutions help or assist promisees who have been harmed by the promisor's breach in extracting reparation from the promisor. By ordering to pay damages (or by ordering specific performance or injunction), judges assist promisees in executing the promisor's liability to suffer the harm reasonably necessary to repair the harm caused to them by the promisor's breach. To be sure, this liability is not legal in nature. It is grounded in the promisee's right to indemnification. What judges do is to facilitate the execution of such liability by exercising their

[228] Not surprisingly, those who endorse the idea that remedies should mirror or replicate promissory morality (i.e., promissory rights and duties) need an alternative explanation as to why liquidated damages should be limited. *See* e.g., Seana V. Shiffrin, 'Remedial Clauses: The Overprivatization of Private Law' (2016) 67 *Hastings Law Journal* 407, 419-425, arguing that remedies should reflect the public significance of the breach and thus cannot be exclusively determined by the parties' purely private agreements.

deontic *and* coercive powers (e.g., by putting the promisor under a legal duty to pay damages to the promisee, backed by a threat to seize the promisor's goods in case she fails to comply).[229]

I have defended the view that contractual enforceability is determined by the harm caused by the promisor's breach. The morality of contractual enforcement is shaped by the harmful violation principle. Only harmful violations of promissory rights render permissible enforcement mechanisms such as specific performance or forced extractions of compensation through damages awards. However, as I have argued, contractual enforceability presupposes in the first place the existence of promissory *rights*. Thus, when determining the enforceability of a contract, judges must first identify the existence of promissory remedial rights, that is, of promissory rights that survive the promisor's breach. Only promisees that have a right to performance, either in its original or substitutive form, have the right to indemnification. As we shall see, the existence

[229] It is at least in part *up to the victim* to determine if and how the rights violator ought to repair the harm caused to her. Harm is a set-back in an agent's well-being, and since an agent's well-being is at least in part determined by such agent's own assessments regarding what is good for her (i.e., which things promote or undermine her well-being), she must have some power to determine what counts as an appropriate reparative measure. For instance, the victim may be better off simply by not executing the rights violator's liability to reparation at all (e.g., she may be better off by simply forgetting everything once for all, and thus avoiding any enforcement procedure). This is why I prefer to refer to the rights violator's *liability* rather than to his *duty* to repair the losses caused to the victim. However, one may capture the same idea by maintaining that the rights violator is under an *un*determined duty to repair the harm caused, which the victim has certain power to make determinate. We should not thus quarrel over terminology. When the execution of the rights violator's liability (or undetermined duty) to repair the losses caused by his violation is performed through courts, one may characterise the victims (i.e., the claimants) as requesting courts to authoritatively determine the rights violator's reparative duty by issuing a legal order to pay damages or another remedy such as specific performance. Yet again, the relevant point is that the court is justified in coercively ordering the rights violator to pay damages or to perform *only* if the rights violator is liable to reparation (i.e., if he is liable to reparative harming). Making a similar point on the 'liability to pay damages vs. duty to pay damages' discussion *see* Gardner, *Torts and Other Wrongs*, 18-19.

of promissory rights as a condition for promises' enforceability explains why commitments are not enforceable. Since they do not grant the promisee a right to performance, they are not enforceable even if their breach harms the promisee.

c. Enforcement and Sovereignty

I argued that according to the harmful violation principle, rights as such are not enforceable. Yet, according to this principle, the permissibility of enforcement is determined by the existence of rights. One may permissibly harm others in order to prevent, stop, or repair the harm caused by them only if such harm is the result of them violating one's *rights*.

I have argued that one of the normative effects of harm is precisely that it allows us to react to it in a way that otherwise is not permissible: it permits its victim to harm the harm-doer in order to prevent, stop, or repair the harm caused by him. However, this normative effect of harm (i.e., the permissibility of defensive harming) is conditional on its sufferer having a right that the harm-doer avoids the harmful act. Thus harm displays its capacity to render enforcement permissible, only if it is caused by a rights violation. Unless the harm-doer violates the victims' rights, he is *not* liable to suffer harm in order to prevent, stop, or repair the harm caused to the victim. I shall now offer a justification of what I have called the harmful violation principle, that is, the claim that enforcement mechanisms are permissible only in cases of *harmful* violations of *rights*.

Harmful interactions are ubiquitous in our lives. Your toughest competitor may open a coffee shop just next to yours precisely with the aim of undermining your business. If successful, he might end up causing you serious harm. You may lose most of your customers, and therefore suffer significant financial losses coupled with considerable psychological distress. Yet he may not owe you any reparation for the harm caused by his conduct. He is not liable to enforcement precisely because he (let us assume) has a right to set up the coffee shop next to you. This type of scenario are extremely common in our daily lives. Your boss may lawfully fire you, yet still gravely harm you. Moreover, she may be aware that by firing you, you will suffer significant financial and personal losses. But again, she may not be liable to enforcement (e.g., owe you any reparation). In such cases, perhaps it is fitting or appropriate for you to resent your ruthless competitor and your merciless boss for what they have done to you. However, since they have not violated your rights in first place, they are not liable to enforcement. What accounts for the fact that rights are the starting point and thus the limit to the morality of enforcement? Would we not be better off by having a moral principle that makes us liable to repair *all* the losses we cause to others? I do not believe so.

We have two different interests which are often in tension. First, we have an interest in conducting our affairs without suffering harm, that is, without our interests being undermined. Harm consists precisely in a set-back of our well-being. In normal circumstances, if someone chops off one of my arms or causes me to fall into an indefinite state of anxiety, they have undermined my well-being: they have narrowed down all sorts of valuable opportunities associated with my having my both arms and my not being under a permanent state of anxiety. Thus, we have at least pro tanto reasons to avoid harm regardless of its source. Given our interest in not being harmed and thus our need to avoid it, seems plausible to hold that those who cause harm to others must be the ones primarily liable to prevent, stop, and repair such harm. This is why we are liable to defensive harming. Our general interest in not being harmed, plus a plausible principle of fairness that allocates the burdens of preventing and alleviating harm firstly on harm-doers, make the case for our liability to suffer harm in order to prevent, stop, or repair the harm we cause to others; a liability that we must acquire *only* when we harm others.[230] However, our well-being also depends on our capacity to conduct our affairs freely, without incurring liabilities towards others simply because of how we chose to act. Thus in addition to our interest in avoiding harm, we have an interest in what we may call *sovereignty*: an interest in being able to conduct our lives without becoming obliged towards others.[231]

We must have domains of our life in which we are *in full control of what we owe to others.* And these spheres of freedom or sovereignty cannot be simply reduced to the activities we can perform without thereby harming others. Indeed, numerous, valuable dimensions of our lives involve the possibility of suffering and inflicting harm on others (e.g., all sorts of competitive activities, and most forms of personal relationships entail such possibility). The way in which we reconcile our interest in not suffering harm with our interest in sovereignty is precisely by restricting our liability to defensive harming only to rights' violations, that is, by endorsing what I have called the harmful violation principle. Only if we *harmfully*

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[230] Many writers endorse some version of the so-called 'harm principle'. In some of their views, the harm principle constitutes a limit to state or legal interventions, which dictates that the law may only legitimately coerce agents in order to prevent, stop, or repair their harmful behaviour. I endorse such a principle, yet do not think it only applies to state agents or legal interventions. What I have called the harmful violation principle dictates that all agents, including legal actors, are only entitled to use coercion or use force on others in order to prevent, stop, or repair harmful violations of their own or others' rights. For a helpful survey of the several forms the harm principle may take *see* James Edwards, 'Harm Principles' 20 N°4 *Legal Theory* (2014) 253.

[231] Our sovereignty interest, one may hold, constitutes the flipside of what I have called our allegiance interest, that is, our interest in being able to control our own obligational world. As we have an interest in being able to actively control some of our obligations (i.e., the allegiance interest), we also have an interest in being able to refrain from incurring such obligations (i.e., the sovereignty interest).

violate others' rights, we are liable to enforcement, that is, liable to prevent, stop, and repair the harm we have caused to them. Rights thus protect us from harm in two ways. First, they entitle us *to* defensibly harm others when they harm us (e.g., to obtain reparation from them). Secondly, they shield us *from* being liable to suffer harm for the harm we cause to others. Rights thus constitute a sphere of sovereignty, one in which we are protected from harm: they both enable enforcement and protect us from it.

We saw in Chapter 1 that not all rights are grounded in our authority interest. My right that you do not stab me is grounded *both* in my interest in bodily integrity, *and* in my interest in possessing exclusive control over my body's deontic situation (i.e., in my interest in being the one exclusively entitled to grant you a permission to stab me or not). And there may be rights that are not grounded in our authority interest at all (e.g., some of the so-called 'non-waivable' rights). As we then saw, *DIT* is capable of accommodating all these cases. Yet despite the kind of interest that grounds them, rights always entail a sphere of sovereignty or immunity: they entail for the right-holder a zone free of liability; a domain in which they may conduct their affairs, even harmful ones, without owing anything to others. Sure, under certain circumstances, we may have reasons not to exercise our rights. And such reasons may be given by the fact that exercising our rights will harm others. Given the harm caused to you, perhaps your ruthless competitor and your merciless boss ought not to have exercised their rights to set up the coffee shop just next to yours, or to fire you. Thus, you may be justified in resenting them for doing so. Yet still, by exercising their rights, they incur no obligation or liability towards you. It is in this sense, and not as a complete theory of the grounds of rights (as we saw in Chapter 1), that Hart's will theory grasps an important truth about rights.[232] Right-holders are always a small-scale sovereign: they possess a, let us call it, *deontic immunity* over others. In the matter of their right, they do not *owe* anything to others. Let us now go back to promises.

I have argued that only a certain kind of promise grants a right to performance to the promisee, namely authority-creating promises. Only promises that serve agents' authority interest, and not those which serve their allegiance interest grant the promisee a right to performance. As we saw in Section I, and previously in Chapter 2, the obligor in a commitment assumes an obligation to perform the committed act. He, however, shares equal control over his obligation with the moral creditor. Our allegiance interest is precisely an interest in being able to voluntarily assume obligations towards others without thereby relinquishing sovereignty over the committed matter. By contrast, promises that are authority-creating acts involve a transfer of sovereignty from the promisor to the promisee. As we saw in Chapter 2, while the commitment relationship stands, the obligee has the standing to *demand* performance. And, even after the commitment has been revoked by the obligor, the obligee may have the standing to resent and rebuke the obligor—the obligor's self-release terminates what I have called a commitment's *demandingness* or *deontic force*, but it has no direct bearing on the *wrongfulness* of the breach (i.e., the obligor's self-release may still wrong the obligee). However, the obligee has no *right* to performance; he is not sovereign over the matter of the commitment. Therefore, if I am right by maintaining that only invasions to our sovereign spheres (i.e., only violations of our rights) entitle us to enforcement mechanisms, it is clear why obligees in a

[232] Hart, 'Are There Any Natural Rights?', 188-191.

commitment have no claim to enforcement, even if they are harmed by the obligor's breach or termination. Consider an example.

Suppose you make a commitment offer to have me over for dinner next week, which I accept. Such commitment may take the linguistic form of a promise or, for instance, of an invitation. Yet despite the form it takes, let us assume that our arrangement has the normative structure of a commitment. We agreed to your assuming an obligation to have me over for dinner next week, whilst sharing with me equal control over your obligation. Even if harmful, the breach of your commitment does not entail a violation of my sovereignty. Your breach does not violate my rights, and thus I do not have a claim to enforcement mechanisms (e.g., a claim to reparation of the losses caused by your breach). I may have harmfully relied on our commitment. I may have already cancelled other important meetings, or undertaken several arrangements for my visit (e.g., buy train tickets, etc.,). I maintain, however, that you are not liable to repair the losses that your breach has caused me. Your breach, even if harmful, does not constitute an invasion of my sphere of sovereignty. Again, it may be appropriate for you to give me an explanation, an apology, and perhaps even to offer to contribute to alleviate the harm caused by your breach. As I argued in Chapter 2, your breach may be in this sense *wrongful* even if it does not violate my rights. Yet, since I have no *right to your performance*, you are not liable to repair the harm caused to my *performance interest* by your breach. Of course, your failure to perform your commitment might entail the violation of some of my non-promissory rights. For instance, you may have requested me to contribute with money to cover some of the dinner expenses in advance, and I may have transferred you the money under the implied condition that the dinner will take place. Therefore, as I have argued, if you dismiss my restitution claim and retain the money after you have cancelled the dinner, you harmfully violate my property rights. Thus I am entitled to some forms of enforcement because of your harmful violation of my property rights. The point is that the harmful breach of a *commitment itself*, unlike the harmful breach of an authority-creating promise, does not entail the violation of the obligee's rights. And this is why commitments are not enforceable.[233]

I have argued that the fact that the obligee in a commitment lacks a right to performance explains why some promises are not enforceable even when their breach harms the promisee. Not all commitments come in the shape of promises (they may, for example, come in the form of invitations); yet at least some promises are commitments. I contend that only promises that are authority-creating acts are contracts. In the following, final section I aim to vindicate a tradition of thought that characterises contracts as mechanisms by which agents transfer rights to others. I will argue that although it has some evident problems, such a theory rightly highlights the fact that only promisees who acquire authority (i.e., exclusive deontic control) over the promisor in the matter of the promise acquire contractual rights, and thus have a claim to contractual enforcement.

[233] Pufendorf made a similar point. As we saw in Chapter 2, he distinguished between promises that only create obligations to perform (imperfect promises), and those that create rights to performance (perfect promises). And when discussing our duties to repair the harm we cause to others, declares that '[…] if what is usurped was due only by an imperfect obligation, it is not considered to be a loss requiring compensation. For it would be inappropriate if I considered it a loss and demanded compensation for not having received what I could expect from another only as a voluntary favour, and which I could not treat as my property before I had actually received it'. Pufendorf, *On the Duty of Man and Citizen*, 57.

III. Contracts as Authority-Creating Promises

I have argued that damages awards and other remedies used by courts as enforcement mechanisms (e.g., specific performance) should be understood as reparative responses to the harm caused by the promisor's violation of the promisee's right. They constitute judicial forms of executing the promisor's liability to repair the harm caused by his breach. Yet, as we saw, only promises that are authority-creating acts are enforceable. Only the harmful violation of a promissory *right* entitles promisees to enforcement measures. Commitments are not enforceable. In Chapters 3 and 4, I have defended a promissory theory of contractual obligations and rights. Like promissory rights and obligations, contractual rights and obligations are product of our basic deontic powers. Here I propose we sharpen up this theory, and maintain that only authority-creating promises are contracts. Contractual obligations are grounded in the parties' *authority interest* and not in their allegiance interest.

Characterising contracts exclusively as those promises that serve the promisee's authority interest sheds light on some of our contractual enforcement practices. For instance, it helps us understand why the law generally refrains from enforcing promises over what we may call personal matters. For example, it does not generally enforce sexual promises, or marital loyalty vows.[234] As we already

[234] For example, at least in all liberal jurisdictions I am aware of, sexual workers are not liable to enforcement (e.g., to specific performance or compensatory damages) in case they breach their promise to have sex with their clients. Their client's promise to pay the agreed remuneration is, of course, often enforceable. Yet *their* promise is not enforceable. For a very illustrative example of this sort of regulation *see* Section 1 of the German Act Regulating the Legal Situation of Prostitutes ('Prostitution Act') of 2002. Similarly, most liberal jurisdictions do not enforce marital loyalty vows as such. True, the breach of such obligations may constitute one of the grounds for a divorce, which in turn may amount to some forms of compensation. Yet in such cases, besides pending property distributions and other financial adjustments between spouses, compensation is typically awarded to the partner who, as a result of the marriage, incurs a financial 'opportunity

saw in Chapters 3 and 4, there are several reasons the law may have for not enforcing such promises. It may be the case that they are not enforceable simply because they do not leave any remedial rights left after their breach. They are over matters that the parties may take to be completely non-fungible, and thus do not admit any remedial way of conformity. It may also be the case that, even if enforceable, the law does not enforce them because they are gratuitous in nature. And, as we saw, by refraining from enforcing gratuitous promises, the law indeed protects the practice of gratuitous promise-making. However, it may also be the case that such promises are simply not enforceable because they do not create rights to performance at all. They may be commitments and not authority-creating promises.

Though it often takes different forms, there is a tradition of thought that maintains that contracts are some kind of rights-transferring device; one akin to property or ownership transfers.[235] Those who defend this view, hold that by entering a contract, the promisor transfers a right to the promisee—a right that, before the promise, belonged exclusively to the promisor. By breaching a contract, the promisor deprives the promisee of something that now belongs to the

cost' by relying on the *stability of the marriage* (e.g., abandoning her career in order to become the main care-taker of the family). Compensation thus is not awarded for the harm caused in virtue of the breach of the loyalty obligations as such, but as a distributive measure to alleviate the often unfairly distributed burdens of marital arrangements. As s. 25 A 2 of the English Matrimonial Causes Act 1973 provides, such compensation is awarded to repair the 'undue hardship [caused by] the termination of [one of the parties'] financial dependence on the other party'. For some recent cases that vindicate this rationale in English law *see* e.g., *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; or *RC v JC* [2020] EWHC 466 (Fam).

[235] Prominent writers have defended versions of this view, among them Kant, Hegel, Grotius, and Pufendorf. For more recent defences *see* e.g., Andrew Gold, 'A Property Theory of Contract' (2009) 103 N°1 *Northwestern University Law Review* 1; and Benson, *Justice in Transactions*, Chaps.10-12. As we saw in Chapter 1, some writers maintain that all promises are indeed rights-transferring devices. *See supra* note 52.

promisee. A breach of contract is in this sense like an injury of someone's property. Legal remedies for breach of contract such as damages awards or specific performance purport to give back to the promisee what is hers. Formulated in such manner, this account—the 'transfer theory'—is vulnerable to some obvious criticism.

Its first clear problem derives from its use of the *transfer* metaphor. Suppose John promises to give $ 100 to Guido in exchange for some widgets. Before they entered the contract, John has a power or a liberty-right to use the $100 as he pleases. Yet after the contract is made, Guido does *not* simply acquire such power or liberty. He acquires a promissory right to the $ 100, that is, a claim that John transfer the $100 to him and a power to liberate John. Thus, it is confused to maintain that John is simply *transferring* a right to Guido. There is no continuity of identity at all between the right the promisor is supposedly transferring to the promisee, and the one the promisee allegedly receives. Second, the transfer theory goes too far in maintaining the analogy between contracts and property transfers. There are some very clear differences between the kind of right that contracting parties acquire and property rights. For instance, property rights are *erga omnes* rights. They bind everyone not to interfere with the right-holder's property without permission. In contrast, contractual rights bind only *inter partes*. It is only the promisor who is bound to perform the promised act. Furthermore, property rights are not extinguished by fulfilment. By refraining from interfering or engaging with *O*, over which you have property rights, I conform to my duty to respect your property right. Yet my respecting your property in any case extinguishes your property over *O*. Unlike property rights, fulfilment extinguishes contractual rights. By performing his promise, the promisor fulfils his promissory duty and thereby extinguishes the promisee's right to performance. Finally, another central flaw in the transfer theory lies in its account of contractual remedies. As we have seen, remedies such as damages awards or even specific performance should not be understood as purporting to vindicate remedial rights as such. They are mechanisms by which courts execute the promisee's liability to repair the harm caused by the violation of a promissory right. Yet according to the transfer theory, by ordering expectation damages or specific performance courts are vindicating the promisee's right to performance as such. For the transfer theory, remedies correct the *normative* injury involved in the promisor's violation of the promisee's right. I have contended that we should reject such a view.

Despite its problems, however, the transfer theory captures a fundamental aspect of the normativity of contracts. Promises that are contracts move something that belongs to the promisor towards the promisee, namely the promisor's capacity to control his deontic situation in the matter of the promise. If you promise me to read my manuscript, you no longer can choose to refrain from reading my manuscript without thereby violating my rights. You granted me an exclusive power to determine how you are obliged to act. It is in this sense that you indeed transferred something to *me* that belonged to *you*. You relinquished your power to control your deontic situation over the promised act; a power I thereby acquire. It is *this* thing, an exclusive power to control the deontic situation regarding the promised matter, that the promisor transfers to the promisee. Promisors do not transfer, as the transfer theory often claims, a right to performance to the promisee. By *creating* a right to performance in the promisee (i.e., a claim to performance accompanied by the exclusive power to liberate the promisor), promises transfer authority over the promised act from the promisor to the promisee. As we saw, such transfer does not take place in commitments. By making a commitment, the obligor grants a claim to the obligee, yet retains control over such a claim. She does not transfer authority over the promised matter to the promisee. Although different in some important regards, both contracts, and property transfers are tools by which agents grant voluntary authority to others.

The transfer theory is often presented as a critique of promissory theories of contract.[236] I maintain that we should not understand it in such way. A promissory and a transfer theory of contracts are indeed complementary. There are at least two kinds of promises, those that constitute relationships of commitment and those that constitute relationships of voluntary authority between the promisor and the promisee. Promissory theorists of contract are right in holding that contracts are promises. And transfer theorists are right in holding that contracts are mechanisms by which agents grant rights to others. The synthesis of promissory and transfer theories of contract lies precisely in the distinction between authority-creating promises (those that aim at serving the parties' authority interest), and commitments (those aimed at serving their allegiance interest). All contracts are promises, but not all promises are contracts.

[236] *See* e.g., Gold, 'A Property Theory of Contract', 19-21. Peter Benson also presents his account as an alternative to promissory theories of contract. Benson, *Justice in Transactions*, 1. Later, however, he states that his theory should be understood as an account of what writers such as Grotius and Pufendorf called perfect promises, that is (as we saw), promises that do not only generate obligations to perform but enforceable rights to performance. *See* Id., 10-11. Though he does not provide an explanation of what non-contractual, imperfect promises are, he is certainly right. As I argue below, only promises that generate rights are contracts: commitments are not contracts. Yet again I do not see why Benson would consider this claim to be a rejection of the promissory theory. It is indeed a refinement of such theory.

Only authority-creating promises belong to the contractual realm. Only them, and not commitments, carry the mark of enforceability.

Concluding Remarks: Alternatives to Promissory Theories?

In this thesis, I have defended an account of promissory morality and a promissory theory of contracts. I have argued that contractual duties and rights, like some of our promissory duties and rights, are grounded in one of our basic deontic interests, namely our authority interest. Contract law, we saw, adopts its basic form as the law of promising. Some of its basic rules mirror the norms of promising formation (e.g., offer and acceptance), others aim at facilitating judges' task of discovering promissory rights and duties (e.g., the basic norms of contractual interpretation), and some of them aim at directing the development of the practice of promise-making (e.g., those that dictate the unenforceability of gratuitous contracts, or of exploitative ones). Furthermore, I contended that judicial remedies, the distinctive legal means by which courts enforce contracts, are ways in which legal agents facilitate the execution of the breaching promisor's liability to repair the harm caused by his breach. We may thus characterise the phenomenon of contract law and contractual adjudication as the set of rules and institutional practices concerning the identification and enforcement of promissory rights. Does this characterisation—the promissory theory of contracts I have defended here—miss something important about the contractual phenomenon? I will conclude this thesis by exploring some allegedly alternative accounts.

Many writers agree that contractual duties and rights are voluntary undertakings, that is, that they are grounded in the fact that the parties chose to assume such rights and duties (or at least in the fact of them communicating such a choice). We saw that they often disagree about the *kind* of voluntary undertaking contracts are. For instance, some believe that contracting is akin to a permission granting act (i.e., consent).[237] Others believe that contracts are close relatives to ownership transfers.[238] And others, whilst endorsing a promissory account, have substantive disagreements on the normativity of promising, and thus also endorse divergent accounts of the grounds of contractual obligations and rights.[239] Though different in many regards, all these views maintain that contracts are some kind of voluntary undertaking, *and* that at least the basic aspects of the law of contracts (e.g., the norms of contractual formation and interpretation) are explained by reference to the kind of voluntary undertaking that contracts are (e.g., by reference to the morality of promising, of consent, or of ownership transfers). In previous chapters, I have discussed, and often quarrelled with some of these views. Now, however, I shall consider two approaches that have often presented themselves as genuine alternatives to all these views.

Under one of these approaches, it is only of secondary interest whether contractual obligations and rights have different grounds from other non-voluntary obligations and rights. According to this view, the role of private law, including contract law, is primarily to secure what I have called the right to indemnification. The fact that the source of the harm resides in a breach of *contract* is important only as a preliminary step to determine whether (and to which extent) the claimant has been harmed. Yet it is indemnification as such what the law really cares about. Therefore, under this view, contractual claims

[237] *See* e.g., Barnett, 'Contract is not Promise; Contract is Consent', 55 ff.
[238] *See* e.g., Benson, 'Justice in Transactions', Chaps.10-12.
[239] Contrast e.g., P.S. Atiyah, *Promises, Morals, and Law* (Oxford University Press 1981) 184 ff.; T.M. Scanlon, 'Promises and Contract' in Benson, *The Theory of Contract Law: New Essays*, 86; and Shiffrin, 'The Divergence of Contract and Promise', 708.

should be understood just as species of *tort claims*. I shall call this the 'tort approach'.[240] According to the other approach I shall discuss here, in regulating and adjudicating contractual disputes, the law should consider not only the parties' promises or voluntary undertakings, but also the cluster of bonds and claims that derive from the parties' *relationship* beyond their purely promissory one (e.g., the duties and claims they have qua business partners, seller and customer, employer and employee, etc.,). I shall call this, the 'relational approach'.[241]

If correctly qualified, we shall see that both approaches have some merit. Yet we make a mistake by thinking of them as genuine alternatives to promissory theories. Indeed, by understanding their scope, we reach a better grasp of the force of the promissory theory I have defended in this thesis.

The tort approach correctly grasps the fact that remedies for breach of contract, as we saw, aim at helping the promisee to execute the promisor's liability to repair the harm caused by the promisor's breach. In this sense, remedies for breach of contract are just like remedies in tort. Like contractual remedies, tort remedies are justified precisely as mechanisms that facilitate the victim's indemnification. Thus, it is no surprise that the general principles that regulate the appropriateness of remedies in both contract and tort coincide. Yet still there are important differences in contract's and tort law's scopes.

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[240] Perhaps the most famous contemporary exploration and (arguably) defence of the 'tortification' of contracts was offered by Grant Gilmore, *The Death of Contract* (Ohio State University Press 1974) Chap. IV.

[241] The most well-known contemporary advocate for the relational approach is Ian McNeil. *See* e.g., Ian R. McNeil, 'The Relational Theory: Challenges and Queries' (2000) 94 N°3 *Northwestern University Law Review* 877.

Contractual remedies, distinctively react to harmful violations of *contractual* rights, that is, to harmful violations of promissory rights. Accordingly, great deal of contract law is in first place concerned with the identification of contractual rights (i.e., it establishes rules of contractual formation and interpretation). Adjudicators in contracts cases, must engage in the preliminary task of determining whether the claimant has a *right to contractual performance* (i.e., she must determine the existence, and content, of the claimant's promissory right). As we saw, remedies do not vindicate rights as such, yet their appropriateness presupposes the existence of a right that the harm-doer avoids the harmful behaviour. Only when the task of ascertaining the promisor's promissory right is accomplished, it is justified for adjudicators to grant remedies to repair the harm caused to the promisee by the promisor's harmful violation. Here contract law differs from tort law.

In tort cases, judges typically do not engage in this preliminary 'rights-identification' task.[242] In a standard tort case, the fact of whether the victim has a right or not to the wrongdoer avoiding the tortious behaviour is usually out of question. If I by accident smash your car, and you bring a negligence claim against me, the fact of you having a *right to me not smashing your car* will typically not be an issue in the same way as in contractual disputes, where often the central issue at stake is what *are* the promissory rights of the parties involved (i.e., what is the scope of their contract).

[242] I say 'typically' because in some tort cases judges do perform something close to a rights-identification task. Consider, for instance, cases of so-called 'pure economic loss'. In such cases, judges actively engage in the task of determining whether the claimant has a right or not to the defendant's avoiding the conduct that caused the claimant's economic loss. The same applies to other tort cases (e.g., cases of negligent psychiatric injury).

Of course, adjudicators in tort cases face complicated questions. For example, among other things, they must determine if the defendant, when harmfully violating the claimant's right, breached or not the *standard of care* that she was supposed to comply with. They must thus determine whether the harmful violation of the claimant's rights constituted a breach of the due standard of care. Yet, again, tort law is not characteristically concerned with the identification of rights, that is, with determining their *existence*. In this sense, tort law at least as we know it, has a more limited role than contract law. It protects us from harmful violations of our rights whose existence typically presupposes. One of contract law's central tasks, by contrast, is to facilitate judges' discovery of certain type of rights, namely promissory rights. This is why contract law is by no means reducible to the law of torts. Again, remedies for civil wrongs in general, including contractual and non-contractual breaches, have arguably the same function; they are justified as indemnification measures. But the law of contracts is not just the law of contractual remedies.

Some writers argue that what distinguishes the rights that concern tort law from contractual rights is that tort law rights, unlike contractual rights, are not voluntary in nature.[243] This is not quite true. Some of the rights tort law protects are indeed as voluntary as contractual rights. For instance, tort law is certainly concerned with protecting us from harmful interferences against our property rights. Yet we have seen that at least to some extent property rights are voluntary rights. They are grounded at least in part in the fact that agents chose to bring them about (i.e., to transfer them, or to acquire them). It is thus more accurate to

[243] Making this point *see* Gardner, *Torts and Other Wrongs*, 341-344.

maintain that tort rights are different just from *one* type of voluntary undertakings, namely promissory rights. As we saw, one of the facts that distinguishes contract law from tort law is that tort law is not typically concerned with the identification of rights as contract law is: it typically assumes the existence of the rights it is meant to protect.[244] To this, we may add now that tort law is concerned with helping us to obtain reparation for the harmful violation only of our *extra* or *non*-promissory rights.[245]

Let us sum up. If we understand the tort approach to be claiming that *once* we have determined the existence of contractual rights, there is not much difference between the typical role of tort law and contract law, the tort approach is indeed correct. Both tort and contract remedies are indemnification measures whose main (if not the only) relevant difference is the type of harmful-rights-violation they are concerned about (i.e., extra-promissory rights in case of tort remedies, and promissory in case of contract remedies). Yet again, the tort approach is seriously mistaken if it ignores that contract law, unlike tort law, is not only aimed at protecting contractual rights but also at identifying these rights, and, as we saw in Chapter 4, that it plays a central role in directing our promise-making practices. I am of course not claiming that this is how tort law ought to be. I am just maintaining that, at least as we know it in western legal systems, tort law's scope diverges from contract's, and thus we cannot learn much about the

[244] Part of property law is in this sense like contract law. It generally comprises norms that determine the creation, modification, and extinction of a certain type of rights (i.e., property rights).

[245] Accordingly, several legal cultures in civil law jurisdictions identify the area of tort law as the law of extra-contractual liability.

nature and normativity of contract law by understanding it just as a branch of tort law. Let us now explore the relational approach.

The relational approach takes many forms. I will consider only some of them. First, this account may come in the form of a theory about the grounds of contractual rights and duties. It may claim that the content of contractual rights and duties should not be exclusively determined by the parties' promissory intentions: contractual content is also determined, this view may suggest, by the special duties and claims (and by the facts that make the case for such duties and claims) the parties have in virtue of their *non*-promissory relationships. For instance, the contracting parties may have loyalty and 'good faith' duties in virtue of their relationship as business partners, as seller and customer, etc. And these relational duties and claims may not be grounded in the parties' promissory intentions. According to this version of the relational approach, even if not promissory in nature, these relational duties are *part* of the parties' contract—they *constitute* and not merely regulate the content of their contract. This version of the relational approach strikes me as clearly mistaken.

There is no legal system I am aware of that dictates that the *content* of a contract should be determined by anything roughly different from what I have called the parties' promissory intentions (i.e., the rights and duties they chose to bring about when making their contract). Sure, the law often orders those in charge of solving contractual disputes to identify and consider duties of the parties that often go beyond their promissory intentions. For instance, many civil codes mandate judges to apply the principle of 'good faith' in solving contractual disputes.[246] And it is plausible to characterise at least some duties of good faith as loyalties that the parties owe to each other in virtue of their relationship beyond their promissory arrangement. Yet the legal norms that bound judges to consider the parties' good faith duties when solving contractual disputes should not be understood as aiming to *integrate* such duties to the content of the parties' contracts. They are norms, if you wish, of contractual *regulation* and not of contractual determination.[247] It is perhaps contracts' most basic feature that they are voluntary undertakings. They obtain only as a result of parties' choice to bring them about. By contrast, whilst contractual rights and duties are necessarily the product of the parties' choice, at least some of the relational loyalties we owe to each other are not.

You do not only owe loyalty to your friend, or to your customer, when you chose to be loyal to them. You owe it to them because *they are your friend* or *your customer*. Of course, you may have some power to choose your customers and even your friends. Yet surely not all the obligations and claims these relationships entail are voluntary. Some of them hold even if you never intended to assume *them* when entering or maintaining such relationships. You may owe your friend help when he needs it even if you never signed up for such a duty. And you may owe a more preferential treatment to one of your regular customers than to a new one even if you never agreed to grant him a claim to such preferential treatment. As such, your friendship and commercial loyalty-obligations are grounded in your

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[246] *See* e.g., art. 1104 of the French Civil Code, art. 1366 of the Italian Civil Code, art. 7 (1) of the CISG, and art. 1546 of the Chilean Civil Code.

[247] I have defended this point about the nature of good faith duties in Molina, 'El Valor de la Obligación Contractual', 183-184.

relationship or *role* as a friend or commercial partner, and not in your interest in being able to shape your deontic world at will.[248]

Perhaps the relational approach may be understood as a reaction against a poor theory of contractual *interpretation*, for instance, against one that adopts what in Chapter 3 I called a purely textualist approach to the determination of contractual rights and duties. This version of the relational approach, claims that contracts should be interpreted by reference to the 'context' in which the contract was made, and this often entails inquiring into different aspects of the parties' relationship.[249] Thusly understood, one cannot but side with the relational approach. Yet, again, it is by no means an alternative to the promissory theory I have defended.

I have argued that the content of a contract is determined by the parties' *shared* promissory intentions. The shared promissory intentions of the parties are constituted by the rights and duties that they both understood to be creating when entering their contract. The process of interpreting a contract is precisely the task of ascertaining the scope of the parties' shared promissory intentions. When undertaking such a task, the parties' relationship may give the interpreter important hints. The text of our tenancy agreement may not state when exactly I ought to pay you the monthly rent. But perhaps the fact that you, my landlord,

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[248] Hart rightly distinguishes the obligations which are 'truly created by the choice of an individual' like promissory obligations, and the ones that are only '*assumed* by entry upon [a] particular role […]'. *See* H.L.A. Hart, 'Legal and Moral Obligation' in A. I. Melden (ed), *Essays in Moral Philosophy* (University of Washington Press 1958) 103-104. Also contrasting the ways in which we acquire promissory and friendship obligations *see* Joseph Raz, *The Authority of Law*, 257; and Owens, *Shaping the Normative Landscape*, 106-107.

[249] *See* e.g., Ian R. Macneil, 'Reflections on Relational Contract Theory After a Neo-Classical Seminar' in David Campbell, Hugh Collins, & John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing 2003) 210 ff.

have always allowed me to pay the rent by the second week of each month, constitutes good evidence that it is our shared understanding that you have a right to demand the rent only then, and not earlier than that. Here our relationship as landlord and tenant—our shared habits, and mutually induced expectations—may count as good evidence of our promissory intentions. Yet again, to reach this conclusion we do not need an alternative to the promissory theory of contracts. We just need a theory of contractual interpretation or determination that rejects textualism.

As I suggested before, the most plausible version of the relational approach is not as a theory about the content of contracts, that is, about the determinants of contractual rights and obligations. Instead, the relational approach may grant that contractual rights and obligations are exclusively determined by the parties' promissory intentions, but maintain that, when solving contractual disputes, judges must bring on board the rich network of relational duties and claims that the parties' have in virtue of their relationship beyond their contract. Put in these terms, the relational approach has some truth in it. For it is clear than in solving disputes judges are bound to consider all the normatively salient facts that apply to each case, and these may include facts about the parties' relationship. We should be careful, however, of falling here into what we may call *legal moralism*. In Chapter 5, I have defended the thesis that contractual remedies are justified as mechanisms by which the law executes promisors' liability to repair the harm caused by their breach. The role of contractual remedies is not simply to make the parties better conform to all their duties or normative reasons, as the legal moralist may claim. As coercive, harmful measures, remedies are only justified as reparative responses to the *harmful violation of a right*. Thus, the parties breaching their special loyalty-obligations is not as such sufficient reason to justify the appropriateness of a remedy. Unless the breach of such loyalty-obligations constitutes indeed a harmful violation of one of the parties' *rights*, their breach, though wrongful, may merit no remedy. I may have a right to your contractual performance, yet not a right to your loyalty as a commercial partner (or friend, etc.,).

To be clear, I am certainly not arguing that judges must always enforce the parties' contracts against their relational duties and claims, but only that these relational duties and claims may not be enforcea*ble*. As I have argued in Chapter 4, judges may have good reasons to refrain from enforcing a contract that is in principle enforceable. This applies, as we saw, to the case of gratuitous promises. Similarly, it may well be the case that there are good reasons for the law to refrain from enforcing a contract (or a term of a contract) if it seriously violates the parties' special non-contractual loyalties. There may be value in the law refraining from enforcing an enforceable contract that benefits those who seriously betrayed the loyalty owed to their contracting party. By refraining to grant enforcement in such cases, the law may contribute to restricting the development of disloyal contractual practices.[250] Yet again, we do not need to endorse any alternative theory to the promissory theory of contract I have proposed in this thesis to reach this result. As we saw, one of contract law's central roles is to direct our promissory practices by administrating its enforcement mechanisms. And the

[250] Moreover, it may also be the case that, even if enforcement is in principle permissible, enforcing certain loyalty rights may indeed undermine instead of protect the relationships in virtue of which these rights hold. Making a similar point *see* Dori Kimel, 'The Choice of Paradigm for a Theory of Contracts: Reflections on the Relational Model' (2007) 27 N°2 *Oxford Journal of Legal Studies* 233, 245.

protection of our special loyalties may be one of the reasons the law must consider when deciding whether to enforce or not certain contracts.

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I would be pleased if this thesis had achieved at least its basic goal of convincing the reader that one cannot truly grasp the nature of contracts without inquiring into the nature of promising. Since contracts, I have argued, *are* promises, our answers to the central questions of promissory morality determine our answers to the most fundamental questions of contract law (e.g., the ones regarding contractual formation and interpretation). Furthermore, I tried to convince the reader that, just as our account of contracts depends upon our account of promising, a full account of promissory morality must explain some central aspects of our contractual practices. For instance, any complete account of the morality of promising must be able to explain why some promises are enforceable and others are not. We thus incur an unjustified disciplinary bias by simply severing our theory of promising from a theory of contracts. Besides these basic points regarding the interconnectedness of our accounts of promising and contracting, I hope to have convinced the reader of the plausibility of at least some of the fundamental substantive claims I defended in each chapter.

In Chapter 1, I have argued that the interest theory of rights must incorporate our authority interest among the grounds of our rights. It is in such an interest that the promisee's right to performance finds its ground. In Chapter 2, I have argued that not all voluntary undertakings, and also not all promissory obligations, are grounded in our authority interest. Some of them are commitments, that is, they are grounded in the obligor's and obligee's allegiance interest. In Chapter 3, I argued that contractual obligations and rights are not legal in nature. Like promissory obligations and rights, they are product of our basic deontic powers. Thus, unlike legal obligations and rights, they are not the result of an exercise of what I have called legal deontic power. Chapter 4 highlights one of contract law's central functions, namely its capacity to direct the practice of promise-making by administrating contractual enforcement. Developing the distinction between authority-creating promises and commitments, Chapter 5 provides a theory of the enforceability of promises. It defends the thesis that contractual remedies are justified as indemnification measures, and not as mechanisms by which the law protects or recognises rights or wrongs as such. Contractual remedies, I argued, are reparative responses to harmful violations of our promissory rights.

There is, of course, plenty of room for further exploration. I have tried to provide answers to at least some of the main questions that underlie the morality of contracts and promises. I have concluded this enterprise with some partial (hopefully correct) answers, yet also with several new puzzles. I hope, however, that this is not a problem, but a sign that some progress was made.

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