1997

The Pragmatics of Promise

Jay Conison

The Pragmatics of Promise

Jay Conison

Introduction

The concept of promise stirs many to write. Among ethical theorists, a cottage industry flourishes, devoted to answering Hume's skeptical questions: What are promises? and Why are they binding?[1] Among jurists and legal philosophers, the leading questions have been: When should promises be enforced? and What is the relationship between promissory and other forms of obligation?[2] Among linguists and philosophers of language, the focus is different still. These scholars ask: What is the logical structure of the speech act of promising? and To what extent is promising a universal linguistic phenomenon?[3]

This widespread interest in promises and promising is driven by several factors. One is a belief that the moral and political stakes are high. Promising is not only

---

Work on this article was supported in part by a grant from the Robert S. Kerr Foundation. Richard Bronaugh, Nancy Conison, and an anonymous referee for the journal provided substantial and helpful comments on earlier drafts.

1. David Hume, *A Treatise Of Human Nature*, bk. III, pt. 2, sec. 5 (Oxford: Clarendon Press, 1978). For some recent philosophical discussions of the issues raised by Hume, see, e.g., P. S. Atiyah, *Promises, Morals and Law* (Oxford: Clarendon Press, 1981); Michael H. Robins, *Promising, Intending, and Moral Autonomy* (Cambridge: Cambridge University Press, 1984); Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990) ch. 12; J.E.J. Altham, "Wicked Promises" in Ian Hacking, ed., *Exercises in Analysis* (Cambridge: Cambridge University Press, 1985) 1; G.E.M. Anscombe, "Rules, Rights, and Promises" (1978) 3 Midwest Stud. in Phil. 318; R.S. Downie, "Three Accounts of Promising" (1985) 35 Phil. Q. 257; Christopher McMahon, "Promising and Coordination" (1989) 26 Am. Phil. Q. 239; F.S. McNeilly, "Promises De-Moralized" (1972) Phil. Rev. 63; Joseph Raz, "Promises and Obligations" in P.M.S. Hacker & Joseph Raz, eds., *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Oxford University Press, 1977) 210; Thomas Scanlon, "Promises and Practices" (1990) 19 Phil. & Publ. Affairs 199; Georg H. von Wright, "On Promises" in *Practical Reason: Philosophical Papers Vol. I* (Ithaca, NY: Cornell University Press, 1983) 83.
2. See, e.g., Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981); James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991); Pall S. Ardal, "Ought We to Keep Contracts Because They Are Promises?" (1983) 17 Val. U. L. Rev. 655; P.S. Atiyah, "Contracts, Promises, and the Law of Obligation" in *Essays on Contract* (Oxford: Clarendon Press, 1986) 10; Kent Bach, "Terms of Agreement" (1995) 105 Ethics 604; Randy Barnett, "A Consent Theory of Contract" (1986) 86 Colum. L. Rev. 269; Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 Mich. L. Rev. 489; Anne De Moor, "Are Contracts Promises?" in John Eekelar & John Bell, eds., *Oxford Essays in Jurisprudence (Third Series)* (Oxford: Clarendon Press, 1987) 103; E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract" (1969) 69 Colum. L. Rev. 576; Margaret Gilbert, "Is an Agreement an Exchange of Promises?" (1993) 90 J. of Phil. 627; Charles J. Goetz & Robert E. Scott, "Enforcing Promises: An Examination of the Basis of Contract" (1980) 89 Yale L.J. 1261; J.E. Penner, "Voluntary Obligations and the Scope of the Law of Contract" (1996) 2 Legal Theory 325; A.D. Woozley, "Promises, Promises" (1981) 90 Mind 289.
3. See, e.g., John Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1969); Andrzej Boguslawski, "An Analysis of Promise" (1983) 7 J. of Pragmatics 607; Allesandro Duranti, "Intentions, Self, and Responsibility: An Essay in Samoan Ethnopragmatics" in Jane H. Hill & Judith T. Irvine, eds., *Responsibility and Evidence in Oral Discourse* (Cambridge: Cambridge University Press, 1993) 24 at 42-43; Jef Verschueren, "On Boguslawski on Promise" (1983) 7 J. of Pragmatics 629.

a common way by which we come to have obligations. It is the simplest, most direct, and most individualistic way in which we *voluntarily* come to have obligations. If one wishes to account for social, political or moral obligation in a way that maximizes the scope of individual liberty, one likely will focus on promissory obligation and its potential to serve as basis for more complex—even non-voluntary—types of obligation.[4]

Another factor contributing to the interest in promising is the emergence of speech act theory as a framework for philosophical, linguistic, and to some extent jurisprudential, analysis.[5] Speech act theory treats language as a system of verbal acts that effect changes in the world. A person cannot utter "Let there be light," and bring it about that there is light. But he might be able to utter "I hereby declare you husband and wife" and bring it about that Jones and Smith are married to each other. This perspective on language quickly leads to an interest in promising, since promising appears to be one of the most straightforward ways of altering the world through words. What seems simpler than changing one's relationship by uttering "I promise to ϕ"?

Yet despite the great attention given to promise, analyses of the concept tend to display recurring flaws. One is a failure to pay sufficient attention to the fact that promising has both linguistic and social (or moral) features. Promising both conveys meaning *and* gives rise to obligations. These phenomena are quite different and both must be accounted for in any complete analysis. Yet most legal and jurisprudential analyses overemphasize the social features, while speech-act analyses overemphasize the linguistic ones.

A second flaw is the failure to recognize that the term "promise" is not univocal—that it can have different, albeit related, meanings in different contexts. What "promise" means in the law of contracts, for example, is different from what it means in everyday discourse, or in labor economics, or in the criminal law of confessions. Failure to appreciate that different concepts are at work in the different fields has obscured the diversity of roles that concepts of promise play and has facilitated confusion among those roles.

A third flaw is the failure to consider the nature of obligation. It is all too common to find a discussion of promise beginning with the observation that promises generate obligations, and then blindly proceed as if "obligation" were the clearest, most self-evident term in the world.[6] But the meaning of "obligation" is far from

---

4. See, e.g., Fried, *supra* note 2; Michael O. Hardimon, "Role Obligations" (1994) 91 J. of Phil. 333 at 354.
5. Speech act theory, first developed by John Austin, is based on the recognition that utterances can be operative—as when one says, "It's a deal," to conclude a contract. See J.L. Austin, *How to do Things with Words,* 2d. ed. by J.O Urmson & Marina Sbisa (Cambridge, MA: Harvard University Press, 1975) at 4-11. Despite the importance of legal examples in the development of speech act theory, its application to law and jurisprudence has been limited. For a few examples of such application, see Robert Samek, "Performative Utterances and the Concept of Contract" (1965) 43 Australasian J. of Phil. 196; Dick W.P. Ruiter, *Institutional Legal Facts: Legal Powers and Their Effects* (Dordrecht: Kluwer Academic Publishers, 1993).
6. An example is Downie, *supra* note 1. The author comes close to recognizing that there are two aspects to promise, but, because he fails to clarify the notion of "obligation," Downie does not recognize that only one aspect gives rise to obligations.

obvious and obligation is easily confused with other forms of commitment. Insufficient attention to the nature of obligation facilitates the view that the social aspects of promise can be explained entirely in terms of its linguistic aspects. This, in turn, reinforces the first analytical flaw noted above.

Finally, there is the failure to recognize that a promise has functions for both speakers and hearers, and that both functions must be taken into account. Many writers on promise concentrate on the speaker-related aspects of a promise: on its giving the speaker a reason to act or its obligating her to act in a certain way. In doing so they neglect a promise's hearer-related functions. This neglect leads to underemphasis of one of the most important functions of promising in both everyday life and in law—its providing assurance to the hearer.

The aim of this article is, first, to clarify the everyday concept of promise in a way that avoids these flaws, and, second, to show how the analysis can be extended to other, more specialized, promissory concepts. The plan of the article is as follows. Part I develops some conceptual tools that are essential both to understanding the weaknesses in prevailing accounts and to guiding the constructive phase of the analysis. Part II employs the tools developed in Part I to analyze the everyday concepts of promise and promising, and to illuminate the special character of promissory obligation. Part III examines several other concepts of promise: implied promise, the notion of promise found in the criminal law of confessions, and the several roles of promise in contract. It also lays the foundation for a promise-based analysis of concepts of contract.

I. Concepts and Meaning

Promising, in its basic form, involves an act of communication: the communication to a hearer of "I promise to ϕ" or the equivalent. Thus, an analysis of promise requires inquiry into how language—in particular, meaning—is involved in promissory phenomena.[7]

---

7. At this point a disclaimer is necessary. Promise is both a complex subject and a topic of widespread interest. Each person brings to the examination of promise his or her own scholarly or practical perspective. And each person who writes on promise, whether a jurisprudent, philosopher of language, anthropologist, or man in the street, tends to seek answers to the questions that are of greatest interest from that perspective.

   Although this article makes use of tools originally developed to handle technical problems in linguistics and the philosophy of language, it is written mainly from a jurisprudential perspective. In order that the argument be comprehensible to the interested, but philosophically non-expert reader, the philosophical tools and distinctions we make use of are not as detailed or refined as they potentially could be. Nonetheless, they are sufficient for the present task of understanding and analyzing the complexities of promise.

   Linguists and philosophers of language may be inclined to criticize parts of the argument on the ground that its discussion of meaning is too simplified. These readers might criticize the article for assuming debatable positions, such as whether the distinction between semantics and pragmatics can ultimately be maintained; or for failing to address subtle issues of concern to those whose professional task is to shed light on language phenomena. Such controversial or technical issues are indeed interesting. But to address them would make this a very different article, written for a very different audience.

A. Meaning and the Uses of Language

Discussions of meaning tend to address three clusters of related issues, each of which is associated with a different sense of the term "meaning."[8] Each sense corresponds to a different role for language: medium for thought, medium for communication, and medium for social performative acts. We will examine those three senses in turn.

1. Semantic Meaning

Language can be used for representing, reasoning about, and acting on the world. This is a central function—on some accounts, *the* central function—of language. The sense of "meaning" associated with this function is the sense people ordinarily have in mind when they ask what a word or sentence means, and it is what dictionaries try to provide. For convenience, we shall call it *semantic meaning*.[9] The basic concerns of the empiricist tradition—explaining knowledge and accounting for mind and thought—have made semantic meaning central. Even after the Wittgensteinian transformation of philosophy, and even after the recognition of other important senses of "meaning," semantic meaning remains conceptually fundamental[10], presupposed by the others and necessary to explain them.[11]

Semantic meaning is the role a word, phrase, or sentence has within a language (such as English) in representing, reasoning about, and acting on the world. If a person knows the meaning of "wombat," or understands the concept of wombat, she can perform a host of language-related (and wombat-related) acts. She can empirically determine the truth of various propositions: e.g., "that animal over there is a wombat." She can reason about wombat-related matters: e.g., "that animal is a wombat; therefore, it is a marsupial." And she can engage in various reasoned actions: e.g., she can search for wombats by traveling to Australia and looking for wombat burrows.[12] Meaning in this sense is a complex phenomenon.[13]

---

8. The following discussion substantially follows the explanation of senses of "meaning" advanced by Gilbert Harman in his "Three Levels of Meaning" (1968) 65 J. of Phil. 590.
9. Concepts and semantic meaning are closely allied. It seems a truism that the concept of fruit is much the same as the meaning of the term "fruit" (or some equivalent word in another language, such as "Frucht") and that to ask for the meaning of a term is to ask about the corresponding concept. It also seems a truism that a word has no meaning if there is no associated concept, and that it has more than one meaning if it can express multiple concepts. In light of this close correspondence, we will refer interchangeably to semantic meaning and concepts.
10. The fundamentality here is conceptual, rather than epistemic or psychological. To say that semantic meaning is fundamental is not to say that one must first grasp it before one can engage in communication—that would be absurd, since one learns meaning in this sense only through its being communicated. The fundamentality of semantic meaning lies in the fact that an adequate analysis of meaning in other senses presupposes an adequate account of meaning in this sense. See Harman, *supra* note 8 at 593.
11. The discussion in the text glosses over the difference between an individual's concept of *X* and the public concept of *X* (or the meaning of "*X*" in the relevant language), and the relationship between them. This topic is extremely technical and well beyond the scope of the article. Our concern is with the public concept.
12. A classic exposition of meaning in this sense is Wilfrid Sellars, "Some Reflections on Language Games" in *Science, Perception and Reality* (New York: Humanities Press, 1963) 321. See also Gilbert Harman, "Language, Thought, and Communication" in (1975) 7 Minn. Stud. in the Phil. of Science 270 at 290.
13. See, e.g., Wilfrid Sellars, "Empiricism and the Philosophy of Mind" (1956) 1 Minn. Stud. in the Phil. of Science 253, *reprinted in Science, Perception and Reality* 127 (1963); Hilary Putnam, "The Meaning of Meaning" (1975) 7 Minn. Stud. in the Phil. of Science 131.

2. Pragmatic Meaning

When we ask, for example, what Jones meant when he said he wanted help "right away," we need not be asking about the semantic meaning of "right away" in English. We could be asking about the intentions and beliefs involved in the use of the phrase on this occasion. We have here the difference between semantics and pragmatics. Pragmatics is concerned with language as medium for communication.[14] "Communication," however, should not be understood exclusively as the conveying of information from speaker to hearer. Rather, "communication" means intentional conduct by which the speaker attempts to induce some belief in, or induce some action by, the hearer. When speaker *S* performs an act by which he communicates something to hearer *H*, *S*, by that act, gives *H* either a reason to believe some proposition ψ or a reason to perform some action α. If *S* says to *H*, "It's noon," *S* ordinarily intends by that utterance to get *S* to believe that it is noon; and the fact that *S* said to *H*, "It's noon," is ordinarily a reason for *H* to believe that it is noon. Similarly, if *S* says to *H*, "Let's go to lunch," *S* ordinarily intends by that utterance to get *S* to go with him to lunch; and the fact that *S* said to *H*, "Let's go to lunch," is ordinarily a reason for *H* to go with *S* to lunch. What *S* means by his communicative utterances is connected with what *S* intends *H* to believe or do.[15]

3. Social Performative Meaning

A third sense of meaning is connected with language as a medium for social conduct. This perspective on language is based on the insight, first elaborated by J.L. Austin, that to utter a sentence often is to perform an action with social significance.[16] We use language not only to convey information, but to question, command, excommunicate, and achieve countless other purposes as well. In general, one can use language to perform what we shall call a ***language-conventional act.*** An act of this sort is one that is performed through an utterance, in an appropriate context and according to an appropriate rule or convention.[17] To take a very simple example, *greeting* is a language-conventional act. It results from an utterance, in a normal context and according to a social convention. An utterance *U*, by speaker *S*, in the presence of hearer *H*, in normal circumstances is the act of *greeting H* if: (a) *S* has just encountered *H*; (b) *U* functions as the friendly recognition of *H* by *S*; and (c) *S* intends for *H* to recognize that *U* serves as the friendly recognition

14. On pragmatics generally, see Steven C. Levinson, *Pragmatics* (Cambridge: Cambridge University Press, 1983); Steven Davis, ed., *Pragmatics: A Reader* (Oxford: Oxford University Press, 1991).
15. Pragmatic meaning is important to law and legal theory. Very often the question of what the law is comes down to the question of what a statement or document means; i.e., what it communicates. When one interprets a statute, contract, or other writing, one clarifies its meaning in this pragmatic sense. Sometimes one does so by eliciting the "legislative intent" (or "intent of the drafter"); and this is pretty much what, in pragmatics, is called "speaker's meaning." More commonly, however, one interprets a legally significant document by considering what the language ordinarily means when it is used in the given context. In doing this one elicits "plain meaning," which is pretty much what in pragmatics is referred to as "plain" (or "literal") meaning. For one effort to apply pragmatics to statutory interpretation, see Geoffrey P. Miller, "Pragmatics and the Maxims of Interpretation" (1990) Wisc. L. Rev. 1179. See also Jay Conison, "ERISA and the Language of Preemption" (1994) 72 Wash. U.L.Q. 619.
16. Austin, *supra* note 5.
17. J.O. Urmson, "Performative Utterances" (1977) 2 Midwest Stud. in Phil. 120 at 126.

of him.[18] Other language-conventional acts can be analyzed in similar fashion.

a. Illocutionary Acts and Social Performative Acts

There is an important distinction between types of language-conventional acts. Sometimes the relevant rule or convention making the act possible is purely linguistic. For example, it is a convention of our language that "Have you heard the news about Jones?" is (ordinarily) a question. One may call a language-conventional act of this type an *illocutionary act* or *speech act*. An illocutionary act ordinarily has the logical form, "*F(p)*," where *p* is a proposition and *F* is an indicator of the type of speech act it is. "Are you going?", "Go!", "I warn you to go," and "I hope you will go," are all variations on a common propositional theme—"you go." They have a common propositional content—a common *p*—but differ in their *illocutionary force*—in their *F*.[19] Illocutionary force is what the speaker, through the speech act, seeks to accomplish. Illocutionary force should be considered a matter of pragmatics, since it is an aspect of communicated meaning.

A similar, but distinguishable, type of language-conventional act is a *social performative act* (or, for short, *social performative*). Many social performative acts have the following characteristic: an individual, by uttering a phrase of the form, "I ϕ," in normal circumstances, thereby performs the act of ϕ'ing. An example is betting. In appropriate circumstance, "I bet the Cubs will lose again" is the act of betting. Other examples are giving a gift ("I give you this cat"), sentencing ("I hereby sentence you to thirty days in the county jail"), and marrying ("I now pronounce you husband and wife"). Sometimes—especially when the utterance takes the form "I *F* that *p*" (as in the betting example)—a social performative act looks like an illocutionary act. But while the two types are often conflated, they differ in an important way. In the case of social performative acts, the relevant conventions are substantially non-linguistic. The relevant conventions might be, for example, legal conventions, social conventions, or religious conventions.[20] Accordingly, social performatives, unlike illocutionary speech acts, presuppose the existence of social, legal, or other institutional arrangements.

b. Social Performatives and Powers

Important—and instructive—examples of institutional arrangements that underlie social performatives are legal institutions.[21] In our legal system, an individual may devise property to another by uttering, in proper circumstances: "I hereby devise property *Q* to individual *X*." There is a legal rule that enables individuals to do this. Similarly, in our system, a judge can remedy a wrong by ordering the

18. Searle, *supra* note 3 at 64-67. Certain other technical conditions should be added, but they need not be elaborated here.
19. Illocutionary force can be conveyed in a variety of ways: for example, by inflection, word order, a prefatory verb, or simply context. Searle, *ibid.* at 30.
20. Note, however, that the social or other conventions may themselves call for the use of language. Urmson, *supra* note 17 at 125-26. For a further discussion of the role of social and other conventions in the analysis of performatives, see Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition* (Oxford: Blackwell, 1995) at 244-46.
21. For an account of performatives in the law, see Neil MacCormick, "Law As Institutional Fact" (1974) 90 L.Q. Rev. 102.

particular relief. A judicial order is an order—a social performative—rather than an idle utterance because of legal rules providing that a judicial utterance of the form "I hereby order that ϕ" is, in appropriate circumstances, an order that ϕ. In both of these cases one calls the rule making possible the performative a *power* or *power norm*.[22] Powers enable one to create, modify, or eliminate a status.[23] Powers, however, are not peculiar to legal systems.[24] In everyday life, if one says in appropriate circumstances, "I bet you five dollars that ϕ," and the hearer accepts, there results a new (nonlegal) status for the speaker by which he should pay five dollars to the hearer in case ϕ does not come about. In general, the non-linguistic norms or conventions, by virtue of which certain acts involving utterances are social performative acts, are power norms of the relevant institutions.[25]

B. Semantic Meaning—A Preliminary Analysis

Our main interest is in the roles that the concept of promise plays in describing, reasoning about, and acting on the world. In short, we wish to clarify the semantic meaning of "promise." To provide a cogent analysis of this particular concept, however, we must first understand what is required for the analysis of *any* concept. Hence we must provide an account of semantic meaning in general, and how semantic meaning is properly conveyed, as framework for the subsequent analysis of promise.

An adequate account of semantic meaning must reflect not only its functional character and complexity, but as well the fact that it can be communicated, can change over time, and can sometimes be approximated by a dictionary definition, e.g., by a list of properties. The following is a sketch of a theory that satisfies these criteria. In its main features, it resembles several more elaborate theories that have been worked out by linguists and philosophers of language.[26] Although the account can be much refined, it is sufficient for the limited purpose of analyzing concepts of promise.

1. Paradigm and Point

To explain the semantic meaning of "magenta" to a person who does not know what the word means, one likely would first say that magenta is a color and then provide an example. One could provide the example directly, by pointing to a nearby magenta item, or indirectly, by stating that some known or nearby item is magenta. In pointing out such an item, one supplies a *paradigm* of magenta. For

22. See, e.g., Joseph Raz, *Practical Reason and Norms* (Princeton, NJ: Princeton University Press, 1990) at 97-106.
23. MacCormick, *supra* note 21 at 114-21.
24. Joseph Raz, "Voluntary Obligations and Normative Powers" (1972) 46 Proc. Arist. Soc'y (Supp.) 79 at 92-101.
25. See Urmson, *supra* note 17 at 124. Urmson does not use the notion of a power norm, but it clearly is the type of rule his analysis tries to capture.
26. See, e.g., Linda Coleman & Paul Kay, "Prototype Semantics: The English Word Lie" (1981) 57 *Language* 26; Gilbert Harman, "(Nonsolipsistic) Conceptual Role Semantics" in Ernest Lepore, ed., New Directions in Semantics 55 (Toronto: Atlantic Press, 1987); Putnam, *supra* note 13. See also Julius Kovesi, *Moral Notions* (New York: Humanities Press, 1967) at ch. 1-2.

colors, supplying a paradigm is all one can do to explain meaning. And it is all one has to do, since the role of a color word is largely specified by a statement of the things it is the color of. For most terms, however, linguistic role is more complex and meaning is generally supplied in a more elaborate way.

To begin, for most items, a paradigm can or must be supplied in some way other than through an example; for instance, through a dictionary-type description. Although one can point to a cup in order to explain what the term "cup" means, one can just as well explain that a cup is, say, a small bowl with a semi-circular handle, having a size, shape and weight that allows a person to hold the item with one hand. If the listener understands the constituent criteria, she does not have to examine any particular item to begin to see what "cup" means. In general, a paradigm is a relatively simple answer to the question, "What is an *X*?" in terms of what ordinarily counts as an *X*. Such an answer might be in the form of an exemplar (e.g., "That thing over there is *mauve*"), a list of properties (e.g., "A *wombat* is a large burrowing marsupial"), or even a method of bringing about an *X* (e.g., "To form a *contract*, one person offers to make an exchange and the other person accepts").

Yet, for most terms, supplying a paradigm is only the start of explaining semantic meaning. A person cannot, by consulting the paradigm alone, determine whether an object is a cup if it fits the paradigm but is, say, made of ice. It is no solution to amend the paradigm of "cup" so as to include, say, the characteristic of not being made of ice. The amended paradigm would suffer the same limitation as the original: one can always invoke new types of cup-like items and ask the same question: Is this item, which wholly or partially fits the paradigm, but has other features as well, a cup? The process of refining the paradigm would never end—the concept is said to be "open textured."[27]

Although the process of asking, "Is this an *X*?" cannot indefinitely refine the paradigm, the process is still useful. For by raising the issue about things that come one's way, one can refine the concept's extension. This process of refinement, while not a matter of deductive logic, is still far from arbitrary. There are always standards, rules or norms to help guide the answer to the question "Is this an *X*?"[28] Consider, for example, the concept of water. Suppose that a colorless substance were discovered which, in pure form, was found to consist of molecules of H_2O, to freeze at 0° and boil at 100°, but to taste very salty. Would this newly discovered substance be water? If a paradigm of water is: a colorless, odorless, and tasteless liquid consisting of molecules of H_2O; then the substance does not meet it. Yet we might be persuaded that it is water nonetheless by the fact that it largely (even if not entirely) satisfies the paradigm, along with the fact that it complies with some fundamental

27. Frederick Waismann, "Verifiability" (1945) 19 Proc. Arist. Soc'y (Supp.) 123. The term "open texture" was subsequently adopted by H.L.A. Hart to refer to a different linguistic phenomenon, see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 121-32.

28. By contrast, a spurious concept is one for which no rule or principle gives guidance in cases beyond the paradigm. Although one can say that Jones' cat Fluffy, the tallest sycamore tree in Central Park, and the final movement of Schumann's Spring Symphony are all kenzires, unless we have a rule to help determine what other items are too, there is no concept of kenzire. See Kovesi, *supra* note 26 at ch. 2.

physical laws governing water. In so doing, we would be making use of rules or standards, in addition to the paradigm, to guide our classification. We would implicitly be taking the approach—which is a matter of common sense—that something can fall under a concept either by meeting the paradigm completely, or else by partially meeting it and also complying with norms that are assumed to apply to the concept.[29]

The need to incorporate rules or norms into an account of semantic meaning is even more apparent when we examine concepts for artifactual items. To explain "cup" in a way that permits the explanation to be used for classifying, reasoning, and acting, one would have to add to the paradigm a statement of some basic rules applicable to cups, such as that they are normally used for drinking liquids, especially hot liquids. This reliance on rules does not make the process of determining what falls under the concept deductive. Yet it does allow the process of inclusion and exclusion to become more principled, indeed a process of practical reasoning. For example, it makes it possible to rule out the case of a putative cup made of ice in a principled, even if not logically inevitable, way.

Thus we find that rules or norms ordinarily are part of meaning. To convey semantic meaning one usually must supply, in addition to a paradigm, a rule or rules making use of the concept.[30] We may call such a meaning-generating rule or set of rules a *point* of the concept.[31]

This analysis of semantic meaning is not limited to what we commonly call descriptive terms. It applies as well to terms one would call evaluative or normative. "Courage" for example, can be explained in the same manner as "cup." There is a paradigm of "courage," in the form of a dictionary-type definition: facing danger without intimidation. But this paradigm cannot alone serve as a workable explanation of "courage": one can undauntedly face danger because of foolhardiness, unawareness of the danger, stupidity, or extreme anger. Whether an action should be considered an act of courage often requires that one take into account the point

---

29. A semantic theory in some respects similar to that sketched in the text may be found in Coleman & Kay, *supra* note 26. The authors of that article (who are linguists) develop a semantic theory based on *prototypes*: for a given word, *X*, a finite set of characteristics such that (a) an item's possession of all the characteristics ensures that people will consider the item an *X*, and (b) an item's possession of some, but not all, of the characteristics will lead a significant number of people to consider the item an *X*. The notion of prototype is similar to the notion of non-ostensive paradigm developed in the present article.

    The authors recognize, as they must, that the prototype alone cannot guide use of a term. For example, they observe from studies that the usage of "lie" (in the sense of prevaricate) is guided also by a speaker's consideration of whether conduct that partially satisfies the prototype is deserving of certain types of criticism. However, rather than treating the principle that lying is blameworthy as a further part of the semantics of "lie," the authors consider it a matter of social convention, a subject for ethnography. *Ibid.* at 35-38.

30. On the need to take rules into account in explaining the meaning of empirical concepts, see Wilfrid Sellars, "Concepts as Involving Laws and Inconceivable Without Them" (1948) 15 Phil. Sci. 287. On the role of rules in the meaning of social or artifactual concepts, see Kovesi, *supra* note 26. For another discussion of the role of rules in meaning, see Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1989) at 69-70.

31. The analysis admits of the possibility that, in certain cases, either paradigm or point is disproportionately important to meaning. At one end of the spectrum would be substantially indexical terms—those whose meaning is given almost entirely by an ostensive paradigm. At the other extreme are terms that are substantially functional, ones whose meaning is given mainly by point.

of courage—specifically, the rule that courageous actions should be highly commended.[32]

2. Concepts and Context

The above analysis permits one to better understand cases where there are two obviously related concepts referred to by the same term. Such cases abound. "Tissue," for example, means one thing in histology and another in the grocery business. More interesting is "mother," for which there are at least two different, yet related, concepts, one usually said to be descriptive and the other normative. On the one hand, there is a biological concept, mother (of *X*), whose paradigm is: female who gave birth to *X*. There are laws of biology dealing with mothers in this sense (for example, laws regarding a mother's contribution to an offspring of half its genes), one or more of which can be taken as the point. The laws that contribute to the point help one determine whether an individual who does not quite satisfy the paradigm is nonetheless a mother. For example, a female whose fertilized egg is developed *in vitro* may well be deemed a biological mother of the resulting individual, even though she does not fit the paradigm.

Contrasted with this biological concept is the moral concept, mother (of *X*). The paradigm may well be the same: female individual who gave birth to *X*. However, the relevant laws governing mothers (in this sense) which enter into the concept's point are different. They are laws of the sort: the mother of *X* ought to protect *X* against harm while *X* is a child. Hence, even though the paradigms of these two concepts overlap (and may even be identical), the applicability of the concepts will differ in some cases beyond the paradigm. A female individual who did not give birth to *X* and who did not contribute half of *X*'s genes might still be subject to the normative rules that enter into the point of mother, and thus be the mother of *X* for purposes of moral reasoning and action. Similarly, there may be situations in which an individual who biologically is the mother of *X* arguably is not subject to the moral norms of motherhood, and thus is not the mother of *X* for purposes of moral reasoning and conduct.[33] We may call histology, the grocery business, biology, everyday morality and the like *semantic contexts*.[34] And we may refine our

32. For present purposes, it suffices to take the difference between descriptive and normative concepts to be a difference in the rules or regularities that enter into the point. See Kovesi, *supra* note 26 at ch. 1. The simplest way to capture the distinction between descriptive and normative rules is as follows. Suppose *R* is a statement of a rule and *F* is a fact inconsistent with *R*. Then, if *R* is a descriptive statement, *R* is incorrect, and if *R* is a normative statement, *F* is incorrect. For a colorful elaboration of this distinction, see G.E.M. Anscombe, *Intention*, 2d ed. (Ithaca, NY: Cornell University Press, 1976) § 32. Much more, of course, can be said about the difference between descriptive and normative concepts and rules. However, there is no need to pursue the topic here.

33. See A.I. Melden, *Rights and Right Conduct* (Oxford: B. Blackwell, 1959).

34. To forestall confusion, we must emphasize that a "semantic context" for a term is not the context of its utterance, or any other social context. By "semantic context" we mean an organized body of practical or theoretical knowledge, concerning or involving the relevant term. For example, one semantic context for "tissue" would be histology, a body of medical knowledge; another might be what we call the grocery business, a practical body of knowledge and action. Of course, a semantic context is usually implicit in any occasion of communication—grocers discussing tissues will draw on the meaning of "tissue" in the semantic context of the grocery field. But our present interest is in the context for semantic meaning.

Although the label "semantic context" is invented here, the notion is largely commonsensical; dictionaries make use of it freely. For example, examine the dictionary entry for "point" and one

analysis of semantic meaning by making it clear that the semantic meaning of a term is meaning relative to a semantic context. A term may have only one meaning, the relevant context being the whole of language. Very commonly, though, it will have different meanings (or stand for different concepts) in different semantic contexts. In such cases there will be different, albeit related or overlapping, paradigms and points for those various contexts.

II. The Everyday Concept of Promise

With the analytical tools so far developed, we can explore the semantic meaning of promise (in the everyday sense). As we shall see, however, three special factors must be taken into account. First, the concept of promise does not have a straightforward paradigm. Second, the concept is used to explain human conduct, rather than to describe it. Third, promising has both illocutionary and performative features.

A. Paradigm

A promise is not something one can touch or point to. There is no ostensive paradigm or paradigm consisting of a list of ordinary properties. The most plausible paradigm seems to be one based on the way a promise is brought about: on the fact that a promise is what results from promising. More specifically (and implicitly giving the paradigm of promising as well), we can say that the paradigm of promise to ϕ is: that which results from an utterance of the form "I promise to ϕ" made in normal circumstances.

This statement requires clarification. For when we say that a promise results from promising, we cannot be using "result" as if a promise were some physical phenomenon, like the movement of air around the speaker. A promise cannot be said to be *caused* by promising, since the promise's existence is not a contingent consequence of the act. "Result" here must capture the idea that a promise is effected by the very act of promising.[35] In fact, this sense of "result" is precisely the sense in which an utterance results in a language-conventional act. A promise ipso facto results from uttering "I promise to ϕ" (or from other acts of promising) in the same way that a greeting is (or results from) uttering "Hello Jones!" or some similar act.[36] It is analogous to the sense in which, in normal circumstances, flipping

---

will find references to the word's meaning "in" music, astronomy, time measurement, sports and games, bridge, securities markets, typography, (Australian) meteorology, jewelry business, geometry, hunting, heraldry, sculpture, mountaineering, negotiation, punctuation, tatting, topography, military arts, animal breeding, dancing, nautical science, archaeology, electrical mechanics, theater, cricket, lacrosse, trial practice, and falconry. *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) at 2266-67.

35. Anscombe, *supra* note 1 at 319-20.

36. Compare Raz' notion of *normative effect*, which is based on the distinction between the *result* and the *consequence* of an act:

> That John wakes up is the consequence of my turning on the light, but [is] the result of my waking John[,] which I may have done by turning on the light.... Similarly, bullying somebody to promise to do A with the consequence that he does make the promise is causally effective in creating the norm that he ought to do A, but only his act of promising affects this norm normatively.

Raz, *supra* note 24 at 94. See also Raz, *supra* note 22 at 103.

a wall switch is turning on the lights; or the sense in which, in normal circumstances, placing arsenic in Jones' coffee is attempting to murder Jones. It is the sense in which, in normal circumstances, state of affairs ϕ, by virtue of some rule or convention C, is or results in state of affairs ψ.[37]

B. Promise as Explanatory Concept

There is an important difference between the everyday concept of promise and other everyday concepts such as cup or green. Promise functions more like a scientific concept such as gene than like a conventional one such as cup. Let us call concepts akin to gene *explanatory concepts.* These concepts explain ordinary phenomena through theories in which the concepts play a role. The concept of gene, as used in biology, explains the phenomenon of heredity through the laws of genetics; the concept of demand schedule, as used in economics, explains market phenomena through the laws of price theory. The laws that constitute the point of an explanatory concept, moreover, are laws which predict and explain; they are not descriptive or practical laws, as is the case with ordinary concepts.[38]

For present purposes, "theory" means an integrated set of rules, norms or regularities. It is a special type of semantic context—specifically, an explanatory semantic context—the rules and norms of which explain and predict phenomena, rather than facilitate practical conduct. A theory need not be scientific (in the way physics and botany are scientific), and explanatory concepts are not found only in empirical science. Outside the domains of empirical science, however, one is unlikely to find purely explanatory concepts. Instead, one finds concepts, part of whose point is explanatory and part of whose point is descriptive or practical.

Concepts with a significant explanatory component are common in domains considered normative or ethical. For example, mother has both a descriptive component and an explanatory component. So, too, does courage. Such concepts are often denominated *thick concepts.*[39] Concepts of this type play an important role both in explaining human conduct and in practical reasoning about what one should do. As a prominent ethical theorist has explained:

> The way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons or actions. Moreover, they usually (though not necessarily directly) provide reasons for actions.[40]

---

37. One may call this pattern the *institutional pattern.* It has been invoked to explain an array of social phenomena, ranging from tables to legal institutions. Following the lead of G.E.M. Anscombe, "On Brute Facts" (1958) 18 *Analysis* 69, we may call ϕ a *brute fact*; and following the lead of MacCormick, *supra* note 21, call ψ an *institutional fact.* For explanatory uses of the institutional pattern, see Kovesi, *supra* note 26; John Searle, *The Construction of Social Reality* (New York: Free Press, 1995).
38. For present purposes, it suffices to rely on commonsense notions of "describe" and "explain." No doubt the distinction between descriptive or practical laws, on the one hand, and explanatory laws on the other, can be much refined. But it is unnecessary to do so here.
39. See, e.g., Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985) at 140-45.
40. *Ibid.* at 129-30.

Promise and promising are explanatory (or thick) concepts; indeed, they are highly explanatory concepts. We make use of promise, not to describe the world, but to explain it. In fact, we use promise to explain phenomena in at least two ways. On the one hand, we use promise in a conventional causal manner to explain past conduct and predict future conduct. We invoke the fact of a promise, for example, to explain why Jones failed to respond to Smith's provocation: we say he promised his wife that he would control his temper. Used this way, promise functions analogously to gravity. It locates phenomena—specifically, human conduct—within a framework of rules that can be used to explain and predict in causal terms.

On the other hand, we use the concept normatively, to explain what people ought to do or why they may be criticized for doing or not doing something. We invoke the fact of promise, for example, to explain why Jones ought to attend Smith's birthday party—we say that he promised Smith he would come. Similarly, we explain why Jones should be criticized for not attending Smith's birthday party—we say he had promised to come and has no excuse for not doing so.[41] This use of promise also locates phenomena—the behavior of persons—within a framework of rules. This time, the framework is one that can be used to explain normatively and to evaluate, rather than to predict and provide casual accounts. But the use of promise is explanatory all the same.

C. Promise as Portmanteau Concept

In seeking the point of promise, we seek a basic norm or rule governing the state of affairs that results from promising to ϕ. There is an obvious candidate: the norm that the speaker is, in some manner, constrained to ϕ. That this norm can plausibly serve as a first approximation of the point is evidenced by the fact that there are countless explanation of "promise" that make use of it.[42] However, this obvious statement of point needs refinement, because "constrain," as used here, can have at least two meanings. This duality of meaning gives rise to two distinct points for promise.

1. Illocutionary Point

The rule that, if Jones has promised to ϕ, then Jones has a reason to ϕ (i.e., Jones

---

41. Some have noticed this fact, although they have expressed it in other ways. See, e.g., von Wright, *supra* note 1 at 85:

> The urge to establish (decide, find out) whether a promise has been given or not, usually comes from the claim on the part of an alleged promise-receiver that an alleged promise-giver should keep his word. The urge to establish the existence of the promise, one could also say, usually comes from a claim that a certain agent is under an obligation to another agent. The existence of the promise is the justification of this claim.

Anscombe takes a slightly different approach, contending that it is misleading to treat "Jones promised to ϕ" as an independently meaningful proposition. Rather, she argues, such a statement must be understood as part of a statement schema of the form: "Jones should (or should not) ... , because Jones promised ... ." Anscombe, *supra* note 1 at 322.

42. E.g., *Restatement (Second) of Contracts* § 2(1); The New Shorter Oxford English Dictionary, *supra* note 34 at 2375; E. Allan Farnsworth, "Decisions, Decisions: Some Binding, Some Not" (1994) 28 Suffolk L. Rev. 17 at 19.

ought to ϕ), is commonly treated as part of the meaning of promise.[43] The rule elaborates one sense in which a promise to ϕ constrains an individual to ϕ; after all, a reason for Jones to ϕ is a rational constraint on Jones. We may say that this rule is a first approximation of the point of promising, viewed as an illocutionary act, and of promise, viewed as the result of such an illocutionary act. Let us call it a first approximation of the *illocutionary point.*

Observe that the notion of obligation has not yet entered the analysis. To say that *A* has a reason to ϕ is not necessarily to say that *A* has an obligation to ϕ. To fail to act in accord with an obligation is to violate a social norm. But to fail to act in accord with a reason (if there are no countervailing reasons) may only be to fail to act reasonably or rationally.

2. Social Performative Point

As the prior observation makes clear, the analysis of promise as an illocutionary act fails to capture another important regularity, viz., that when Jones promises to ϕ, Jones becomes obligated to ϕ. In treating promising as an act that results in an obligation, we treat it in its social performative, rather than its illocutionary, aspect. The rule that a promise results in an obligation is another, different, point of promise; let us call it the *social performative point* or, for short, the *performative point.*

3. The Relation between the Points

As the reader will note, a promissory obligation to ϕ can be a reason for the promisor to ϕ, and this fact might suggest a close connection between the two points of promise. Indeed, some analyses of promise assume that the only reasons for action (on the part of the speaker) are those based on the promissory obligation, so that the illocutionary features of promising can be explained in terms of the obligational ones. Other analyses, by contrast, purport to explain the obligation-generating feature of promising in terms of the illocutionary features. Again, one aspect of promise is supposedly reduced to the other. In the course of our analysis of promise, we will argue that the illocutionary and obligational features are independent. As a prelude to those arguments, we will comment on some differences between the illocutionary and obligational points.

Consider a clear case of an illocutionary act, say, questioning. If we wish to know how one asks "ϕ?" in French we can ask: "How does one ask 'ϕ?' in French?" and receive the wholly linguistic answer: "One asks 'ψ?'," where "ψ?" is the French equivalent of "ϕ?" Analogous observations can be made about other illocutionary acts. But the matter is different with social performative acts. It is not appropriate to ask: "How does one get married in French?" Marrying is not just a speech act performed to convey meaning. Rather, it is (or is also) a social act, performed to bring about social consequences; and it is the kind of act it is by virtue of the rules of social institutions.[44] Accordingly, the proper question is "How does one

43. See, e.g., John Searle, "How to Derive 'Ought' from 'Is'" (1964) 73 Phil. Rev. 43. On the rationale for treating "ought to ϕ" as equivalent to "has a reason to ϕ." See Raz, *supra* note 22 at 29-32.
44. See Urmson, *supra* note 17 at 124-25; Neil MacCormick, "Voluntary Obligations and Normative Powers" (1972) 46 Proc. Arist. Soc'y (Supp.) 59 at 60.

get married in France?" Similarly, promising, in its obligation-generating respect, is a social act whose function is to effect social consequences; it is not just an act that conveys meaning. The proper question is not: "How does one promise in French?" but: "How does one promise in France?"

Thus, to explicate the concept of promising in its obligation-generating respect, one must make reference to social context and to social rules or conventions. Linguistic rules and conventions are not enough. This conclusion is not undercut by the fact that, in France, one ordinarily does promise by uttering "Je promis ψ'er." All this shows is that the social conventions in France are substantially the same as they are in English-speaking countries—an anthropologically unsurprising fact. The French social practice of promising might well have evolved to be as ritualized as the social practice of marrying; it might involve, say, crossing willow sticks over one's head while uttering, "Je ψ'erai." In France, the utterance "Je promis ψ'er" could well have been no more performative than the utterance "I divorce you" is in the United States.[45]

The upshot is that the illocutionary and social performative points of promise reflect different types of norms: linguistic in the one case and social in the other. One cannot just presume from the outset that the illocutionary features of promise are to be explained in terms of the obligational, or vice-versa; and we will not do so here. Thus, we will analyze the illocutionary and obligational features separately. In the course of the analysis, we will discover good reasons for concluding that neither feature of promise is reducible to, or wholly explicable in terms of, the other.[46]

D. Speech Act Analysis

We will now examine more thoroughly the concept of promising as an illocutionary act (and the corresponding features of promise). We will do so by refining the preliminary analysis of the illocutionary point. We have seen that a simple statement of the illocutionary point of promising is the rule that promising to ϕ gives

---

45. Cf. Duranti, *supra* note 3 at 43 (claiming that promising in Samoan society requires a public commitment in specific social settings).

46. Kurt Baier, *The Rational and the Moral Order* (Chicago: Open Court, 1995) at 316, seems to recognize the need to take both aspects into account, but makes little use of the speech act character of promising. Others who seem to recognize the dual character of promising, but without fully appreciating the implications, are Altham, *supra* note 1, and McMahon, *supra* note 1. Arguably, Hume recognized it when he wrote that:

> When a man says *he promises any thing*, he in effect expresses a *resolution* of performing it; and along with that, by making use of this *form of words*, subjects himself to the penalty of never being trusted again in case of failure. A resolution is the natural act of the mind, which promises express: But were there no more than a resolution in the case, promises would not create any new motive or obligation. They are the conventions of men, which create a new motive, when experience has taught us, that human affairs would be conducted much more for mutual advantage, were there certain *symbols* or *signs* instituted, by which we might give each other security of our conduct in any particular incident. After these signs are instituted, whoever uses them is immediately bound by his interest to execute his engagements, and must never expect to be trusted any more, if he refuse to perform what he promised.

Hume, *supra* note 1 at 522.

the speaker a reason to ϕ. But this statement is too simple. One objection is that the very same rule holds for many other illocutionary acts. Vowing, for example, is an illocutionary act whose paradigm is an utterance of the form "I vow to ϕ," and whose illocutionary point includes the rule that the act gives the speaker a reason to do what he vowed to do. We tend to think that promising and vowing are different, but the simple statement of illocutionary point would suggest otherwise. A second objection is that the analysis leaves out the hearer. We tend to think that the hearer must play an essential role in any analysis of promise. It will transpire that the two objections are related.

1. Reason-Generating Speech Acts

Many illocutionary acts give the speaker or hearer reasons to do or to believe something.[47] We have already noted that promising has this feature. Let us call illocutionary acts of this type *reason-generating speech acts.* One class of reason-generating speech acts consists of illocutionary acts such as suggesting, explaining, and denying; the class corresponds to what linguists and philosophers of language call *representatives* or *assertives.*[48] These illocutionary acts have the form "*B(p),*" for which the utterance of "*B(p)*" in normal circumstances ipso facto gives the hearer a reason to believe that *p* (or else to believe some proposition logically built from *p*, for example, *not-p*). Another class consists of illocutionary acts such as ordering, asking, and prohibiting; it corresponds to the familiar class of *directives.*[49] These have the form "*O*(you ϕ)," for which an utterance of "*O*(you ϕ)" in normal circumstances ipso facto gives the hearer a reason to ϕ (or not to ϕ). Yet another class of reason-generating speech acts consists of illocutionary acts having the form "*F*(I will ϕ)," for which the act of uttering "*F*(I will ϕ)" in normal conditions ipso facto gives the speaker a reason to ϕ. Let us call this the class of *reflexive reason-generating speech acts* or, for short, "RG speech acts." This class corresponds to the class known as *commissives.* It includes promising as well as other illocutionary acts similar to promising: vowing, swearing, resolving, and the like.[50] Other types of speech acts that give rise to reasons will be discussed below. For now our interest will center on RG speech acts.

2. Decisions, Reasons, and RG Speech Acts

The class of RG speech acts includes utterances which not only give the speaker a reason to do what he says, but obligate him as well. Yet generating an obligation cannot be an essential feature of RG speech acts. For example, the illocution of deciding merely gives the speaker a reason to act; there is no resulting obligation. The illocution of resolving to ϕ is similar; it appears to differ from deciding to ϕ

47. For a criticism of speech act analyses of promising on the ground that they fail to account for the motivational feature of promises, see McNeilly, *supra* note 1 at 76.
48. John Searle, "A Taxonomy of Illocutionary Acts" in John Searle, ed., *Expression and Meaning* (Cambridge: Cambridge University Press, 1979) 1 at 12-13.
49. *Ibid.* at 13-14.
50. *Ibid.* at 14. We are here concerned with vowing and swearing in their everyday senses, and not in their more specialized religious or legal senses. Thus, we are not concerned with, e.g., marriage vows.

only in intensity.[51]

Deciding to ϕ is the most basic RG speech act with the characteristic of by its nature giving the speaker a reason to ϕ. One respect in which it is basic is that its analysis is very simple: deciding to ϕ consists of intending to ϕ and rejecting the alternative of not ϕ'ing. The only phenomenon arguably simpler, which also ipso facto gives one a reason to ϕ, is intending to ϕ; but intending is not a speech act.[52] Because deciding to ϕ is a simple RG speech act without the complicating feature of generating obligations, examining it will be a useful way to study the reason-giving features of the class of RG speech acts.

a. Decisions and Speaker Reasons

We have said that deciding to ϕ ipso facto gives the speaker a reason to ϕ. But in truth the situation is more complex: there are several reasons for action that normally result from, or are otherwise connected with, any act of deciding to ϕ. The reasons differ in their logical properties and in their relationship to the act of deciding.[53]

i. First-Order Reasons. If a person ϕ's, where ϕ is an intentional action, he likely can cite a reason, connected to his wants and interests, that explains his ϕ'ing. If Jones takes a left turn, he may do so, for example, because of his wish to avoid congestion ahead or his interest in taking a new route home. We may call reasons of this type, for or against taking some ordinary action, *first-order reasons*.[54] They are reasons of the most common and familiar kind. A first-order reason is the most basic type of reason that enters into practical deliberation and the explanation of action.

Many theories and analyses of first-order reasons have been advanced.[55] A broadly accepted view (stated simply) is that first-order reasons are facts or beliefs in the context of some want, preference, or other motivational feature of a person. Jones' fondness for sweets, coupled with the fact that he is handed a piece of cake, is a complete first-order reason for him to eat the cake. In stating a person's reason for action, it is common to cite only the belief (or fact) or only the motivational factor. Such a statement of reason, however, is elliptical. A complete account requires both parts.

First-order reasons are not only reasons for actions; they usually underlie, or provide a basis for, a decision to act.[56] They can be weighed (in a metaphorical

---

51. Deciding and resolving, like vowing and many other illocutionary acts, can be performed either as mental acts or as illocutionary acts. So far as concerns their function of giving the speaker (or thinker) reasons for action, nothing relevant to the present inquiry turns on the difference.
52. Searle, *supra* note 48 at 9. Of course, expressing the intention to ϕ can be a speech act.
53. The analysis of decisions given here largely follows that of Raz, *supra* note 22 at 65-69.
54. *Ibid.* at 36.
55. E.g., Donald Davidson, "Actions, Reasons, and Causes" in Donald Davidson, ed., *Essays on Actions and Events* (Oxford: Clarendon Press, 1980) 3; Anscombe, *supra* note 32; Robert Audi, *Action Intention and Reason* (Ithaca, NY: Cornell University Press, 1993); Raz, *supra* note 22 at ch. 1.
56. However, the presence of underlying reasons is not a necessary feature of decisions. When pressed to explain why he decided to ϕ, an individual may deny that there is any further reason for his ϕ'ing.

sense) in a very familiar form of practical deliberation.[57] If Jones is trying to decide whether to play golf or study for the bar examination, he may invoke such considerations as that more study will increase his knowledge of matters tested, that exercise will improve his mental and physical state, that if he fails the test he can take it again, and so forth. These are all first-order reasons for and against golfing and studying, which Jones may weigh in deciding what to do.

ii. Formal Reasons. First-order reasons to ϕ remain reasons to ϕ after an individual decides to ϕ. If Jones decides to take a left turn, and then does so, he may continue to explain his action by invoking a reason such as the desire to avoid congestion ahead. What deciding adds to the calculus is a new reason for ϕ'ing, beyond the ones underlying the decision. Jones may cite the decision itself as a reason—even as the only reason—for his taking a left turn. It is very common for the question, "Why did you ϕ?" to be met with the peremptory—and sufficient— answer: "Because I decided to." The decision constitutes an additional reason for action because of the principle of rational conduct that an individual ought to do (has a reason to do) what he has decided to do. Let us call the reason that deciding automatically gives rise to a *formal reason.* A formal reason, like an ordinary first-order reason, can be cited as a reason for or against an ordinary action. It is distinctive in that it results as a matter of course from a decision. It functions, in effect, as a presumption—a reason that is automatically to be weighed in the decisional calculus.

iii. Exclusionary Reasons. The analysis of many speech acts requires invocation of a very different type of reason, a *second-order* reason. A second-order reason is not a reason for or against some ordinary action, such as mowing the lawn or taking a left turn. Rather, it is a reason governing the use of first-order reasons in practical deliberation and ordinary action. Deciding gives rise to a type of second-order reason. To understand the character of this reason, observe that deciding to ϕ necessarily involves an intent to end some or all further consideration of whether to ϕ. It would be strange for one to say, "I have decided to ϕ, but I am still weighing the pros and cons." Insofar as deciding to ϕ involves this additional intention concerning the treatment of first-order reasons, it involves a second-order reason. This reason, however is not a reason to ϕ or not ϕ; it is a reason not to consider further, or act on, some or all of the first-order reasons against ϕ'ing. Since it is a reason to *exclude* certain first-order reasons in one's action and practical deliberation, Joseph Raz calls it an "exclusionary reason."[58]

The practical distinction between first-order reasons and exclusionary reasons can be grasped by considering a fiduciary with responsibility to invest trust assets. Such a person has an exclusionary reason to avoid acting for reasons of self-interest in matters of trust investment. The fact that the fiduciary has this second-order reason does not mean that the investments she makes for the trust cannot, under any circumstances, further her own interest. Rather, it means that, when investing trust

57. For an account of weighing reasons in the context of judicial decision making, see Steven J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992).
58. Raz, *supra* note 22 at 70-71.

funds, the fiduciary should not act for the reason of furthering her own interest. Exclusionary reasons are reasons against acting on certain reasons; they are not reasons against the underlying action itself.

b. Other RG Speech Acts and Speaker Reasons

Thus, the act of deciding to ϕ adds to the decisional calculus both a formal reason to ϕ and an exclusionary reason not to consider some or all reasons against ϕ'ing. One can easily see that other RG speech acts have the same structure of speaker reasons as do decisions. Consider vowing. If Jones vows to ϕ, then he gives himself a new reason to ϕ—a formal reason—over and above the reasons (if any) behind the vow. Because of this, Jones can explain why he ϕ'ed, or why he will ϕ, by citing the fact that he vowed to do so. Moreover, a vow necessarily involves an exclusionary reason not to consider some or all first-order reasons not to ϕ. If Jones vows to ϕ, he must cease considering some or all reasons not to ϕ. If, after saying "I vow to lose ten pounds," Jones persists in considering all the reasons for and against losing weight, we would conclude that he had just mouthed the words—that he did not really vow to lose ten pounds. Precisely the same observations can be made about the speaker reasons involved in promising.

Accordingly, we may refine our analysis of the illocutionary point of promising as follows. Promising to ϕ ipso facto gives rise to: (1) a formal reason to ϕ; and (b) an exclusionary reason not to consider some or all reasons against ϕ'ing. And because this cluster of reasons also arises as a matter of course for deciding and and resolving—speech acts that do not give rise to obligations—we can account for at least some of the illocutionary aspects of promise without invoking the notion of obligation.[59] We can explain a promise's feature of ipso facto giving the speaker a reason to ϕ in terms of the fact that, from the perspective of the speaker, a promise to ϕ functions very much like a decision to ϕ.

3. Promising and Hearer Reasons

Some RG speech acts can be performed only as public illocutionary acts; some can be performed in other ways as well. Vowing may or may not be performed publicly; we all make private vows. Promising, by contrast, must be performed publicly. Although one can speak about Jones promising himself that he will ϕ, it is difficult to see how such an act could be deemed an instance of promising, rather than of resolving or vowing. Promising necessarily involves communicating with another person. Our task is to capture the illocutionary significance of this fact.[60]

---

59. Of course, the fact that the promisor is under an obligation may provide additional reasons for her to do what she promised. But the discussion in the text shows that she ordinally will have reasons to do what she promised, even without appealing to the presence of any obligation.
60. Speech act analyses of promise tend to understate the role of the hearer. Speech act theory, of course, recognizes that illocutionary acts call for a hearer. But it fails to appreciate that a full explanation of promising requires consideration of the hearer's perspective on the act. On speech act theory's neglect of the role of the hearer, see John R. Searle, "Conversation" in Herman Parret & Jef Verschueren, eds., *(On) Searle on Conversation* (Philadelphia: J. Benjamins Publishing Company, 1992) 7 at 7. See also Erving Goffman, "Footing" (1979) 25 *Semiotica* 1 (speech act theory tends to understate the potential complexity of the status of hearer).

a. The Hearer-Based Illocutionary Point of Promising

The speaker-based illocutionary point of promising—the structure of speaker reasons to which promising ipso facto gives rise—shows (in part) why, from the perspective of the speaker, it matters whether an act of his is an act of promising. From the perspective of the *hearer*, the illocutionary point—why (in part) it matters whether another person's act is an act of promising—is that promising to ϕ gives the hearer a reason to believe that the speaker will ϕ, and entitles her to rely on the speaker's ϕ'ing (i.e., she may act on the assumption that the speaker will ϕ). If Jones promises Smith that he will drive her to the airport, Smith has a reason to believe that Jones will drive her to the airport and (as one commonly says) has a right to rely on Jones' doing so.[61]

To understand this hearer-based illocutionary point better, it helps to generalize and consider a second class of illocutionary acts to which promising belongs.[62] This class consists of those speech acts which: (a) give the hearer a reason to believe that *p*; and (b) entitle the hearer to rely on the fact that *p*; where *p* is *any* proposition, and not just a proposition of the form: I (the speaker) will ϕ. As a moment's reflection shows, *assuring* that *p* and *swearing* that *p* have precisely this hearer-based point. In assuring that *p*, the speaker gives the hearer a reason to believe that *p* and a right to rely on the fact that *p*.[63] Let us call this class of illocutionary acts the class of *reliance-permitting speech acts* or "RP speech acts". Complexities aside, the basic features of promising as an RP speech act can easily be sketched.[64]

First, promising is indeed an RP speech act. As already noted, RP speech acts can have any propositional content, or at least any content that expresses a fact. One can assure a hearer as to anything that may be true or false, and the same holds for promising. Statements of the sort, "I promise you that there really are earthquakes in Missouri," are common and acceptable. It is easy to see that the locution, "I promise you that *p*" (where *p* is not a proposition of the form "I will ϕ") ordinarily means the same as "I assure you that *p*." It is also easy to see that the locution, "I promise that *p*," where *p is* a proposition of the form "I will ϕ," ordinarily includes, as part of its meaning, something that can be expressed as: "I assure you that I will ϕ." Promising, viewed as an RP speech act, is not materially different from assuring.[65]

---

61. Note that, just as with the speaker-based illocutionary point, there is nothing in this formulation of hearer-based illocutionary point that necessarily involves the notion of obligation. Although one can say that the hearer has a "right to rely" on the promise, this is to say no more than that the hearer may rely on the promise if she so wishes. The term "right" is not used here in a sense that involves a corresponding duty on someone else's part.
62. We are assuming, contrary to conventional classification schemes, e.g., Searle, *supra* note 48, that a speech act can belong to more than one usefully identifiable class.
63. On the relation between assurance and reliance, see Jay Conison, "Assurance, Reliance and Expectation", Southern Cal. Interdisc. L.J. (forthcoming).
64. For a more comprehensive analysis, see *ibid.*
65. Note also that when a speaker says "I assure you that I will ϕ," he ordinarily promises to ϕ. A systematic account of promising as a species of assuring is given in Thomson, *supra* note 1. Thomson largely agrees with our analysis of assuring, but contends that it must also involve the hearer's *uptake*. *Ibid.* at 296-98. It is unclear just what Thomson means by "uptake." She has in mind something more than merely hearing the speech act, but less than relying on it; "uptake"

Second, what one commonly calls the right to rely is a kind of second-order reason. Specifically, it is what Raz calls an *exclusionary permission*.[66] When a person has an exclusionary permission, he *may* disregard some or all first-order reasons for (or against) an action or class of actions. By contrast, when he has an exclusionary reason, he *ought* to disregard some or all of a class of first-order reasons.[67] When Jones assures Smith that the movie now playing at the Bijou is hilarious, Smith may disregard contrary reasons for action: he may disregard, for example, Wilson's opinion that the movie is dull, or the fact that persons leaving the cinema look glum, and see the movie anyway. To act on the exclusionary permission resulting from an assurance is to rely on the assurance—to exercise the right to rely.[68]

Third, the reason for believing in the propositional content of the assurance is not itself a reason for *action*. However, if the hearer becomes assured of the truth of the propositional content, she may then have a first-order reason to act on the basis of that belief. This is different from the second-order reason that entitles one to rely—the exclusionary permission—which results from an assurance or promise.[69]

Thus, we may describe the hearer-based illocutionary point of promising as follows. Promising that p, where p is any proposition, gives the hearer a reason to believe that p and an exclusionary permission which entitles her to rely on the fact that p. For the case in which the propositional content takes the form: "I will ϕ," the act ipso facto gives the hearer a reason to believe that the speaker will ϕ and an exclusionary permission that entitles her to rely on the fact that the speaker will ϕ.

b. An Additional Speaker-Based Point of Promising

Since promising, as we have just seen, is an RP speech act as well as an RG speech act, there must be an additional speaker-based illocutionary point, based on its being an RP speech act.[70] One would expect this additional point to be substantially the same as the speaker-based illocutionary point of assuring. In assuring

---

seems to be an analog to the contract-law concept of consideration. Thomson's account of promising differs from ours in two other ways. First, she neglects the structure of speaker reasons resulting from the illocutionary act. Second, she believes that the obligational aspect of promising ipso facto results from the hearer's uptake. *Ibid.* at 302.

66. Raz, *supra* note 22 at 90-91.

67. The similarities and differences can be elaborated further through a simple example. Suppose that Jones, a private in the army, is hiking in the woods as part of a military exercise. He comes to a stream. He can cross at that point only by walking on a log of uncertain strength. If, while pondering what to do, he sees Sergeant Smith on the other side, and Smith orders Jones to cross on the log, Jones has an exclusionary reason by virtue of which he ought to disregard first-order reasons for not walking on the log. If, instead, he had seen Private Wilson on the other side, and Wilson had said, "I assure you Jones, the log will support you," Jones would have an exclusionary permission by virtue of which he may disregard first-order reasons for not walking on the log. Whether Jones does disregard those first-order reasons will depend on Jones' assessment of whether, all things considered, he ought to do so.

68. On reliance as the exercise of the exclusionary permission, see Conison, *supra* note 63.

69. The reason to believe that p, which results from an assurance, appears to be a generalization of the notion of expectation, which, along with reliance, is of great interest to contract theorists. Much of the difference between expectation and reliance can be accounted for in terms of the difference between first-order reasons and second-order reasons. See *ibid.*.

70. Every illocutionary act must have some function for the speaker.

that p, the speaker intends: (a) to communicate to the hearer that p; and (b) to get the hearer to understand that she has an exclusionary permission by which she can rely on the fact that p.[71] It makes no sense to say: "I assure you that p, but p isn't true." Nor does it make sense to say: "I assure you that p, but don't rely on it." If the speaker does not intend to communicate that the propositional content is true, and intend that the hearer should be entitled to rely, the speech act is not an act of assuring. Again, it is easy to see that the same is true for promising.

Thus, we may complete our explanation of promising to ϕ, in the everyday sense, understood as an illocutionary act. The paradigm of promising to ϕ (where ϕ is an action) is uttering "I promise to ϕ" in normal circumstances. The point is threefold. Promising to ϕ: (1) ipso facto gives the speaker a formal reason to ϕ and an exclusionary reason to exclude further consideration of some or all reasons not to ϕ; (2) essentially involves the speaker's intention to give the hearer a reason to believe that the speaker will ϕ and an exclusionary permission which entitles her to rely on the fact that the speaker will ϕ; and (3) in fact gives the hearer a reason to believe that the speaker will ϕ and an exclusionary permission which entitles her to rely on the fact that the speaker will ϕ.[72] Stated less formally, promising to ϕ amounts to vowing to ϕ (or deciding to ϕ) and assuring the hearer that one will ϕ. This result seems to accord with our intuitions about what promising is and about what other speech acts it is like.

E. Social Performative Analysis

Promising is not only an illocution; it is a social performative. By promising to ϕ, an individual not only communicates that he will ϕ and gives reasons to both himself and the hearer; he exercises a power and obligates himself to ϕ. This feature must be accounted for.

1. Differences From Speech Act Analysis

As we have seen, the fact that the promisor has a reason to ϕ can be explained without necessarily invoking a promissory obligation to ϕ. The converse is also true: the obligational character of promise can be accounted for without necessarily invoking the notion of speaker's reasons. The basis for this contention will emerge from the analysis of obligation, but a few preliminary comments will be helpful.

Some analyses of promise purport to define or explain its obligational features in terms of its illocutionary features. One such approach relies on the premise that if a person, through a promise, *expresses his intention to be obligated to* ϕ it

---

71. The speaker's intent to get the hearer to understand that she has an exclusionary permission is not the same as an intent that the hearer should actually rely. The former is part of the illocutionary point of promise; the latter is an adventitious intent which may or may not accompany any act of promising. See Raz, *supra* note 22 at 99. Theories of promising that purport to explain the binding character of a promises in terms of reliance on it often err by focusing on the non-essential intent to induce reliance. See, e.g., MacCormick, *supra* note 44.

72. This analysis bears some similarities to the analysis of "low promising" in McNeilly, *supra* note 1 at 71-75. The most important difference is that McNeilly locates the motivation for doing what one has promised to do in some external sanction, rather than in rationality. For this reason, as will be seen more clearly below, McNeilly has not "de-moralized" promising, as he sought to do.

necessarily follows that he *is actually obligated to* ϕ, purely as a matter of linguistic, as opposed to social, convention.[73] But the premise is false.[74] For example, one cannot conclude from the fact that Jones promised to torture Smith to death (i.e., Jones expressed his intention to be obligated to torture Smith to death) that Jones is actually obligated to torture Smith to death.[75] Some, perhaps most, expressions of intention to be obligated do result in obligations—a promise to pay five dollars ordinarily does result in an obligation to pay five dollars. And perhaps in some societies Jones' promise to torture Smith to death does obligate him to do so. But whether an expression of intention to be obligated results in an obligation is a contingent matter governed by social norms, not by logical or linguistic rules.[76]

Another reductive gambit (due to Raz) is to propose that obligations are binding only in the sense that: (a) an obligation governs a person because a corresponding mandatory rule does; and (b) a mandatory rule is (or includes) a formal and an exclusionary reason.[77] On this analysis, the bindingness of an obligation is identified with its bindingness in the reason-based sense. Yet this treatment of obligation will not work, either. Obligations on this view are binding only to the extent that they provide reasons for the obligated party, and thus motivate her (or at least have the potential to motivate her) to act.[78] Hence, an obligation must automatically motivate (or have the potential to motivate). Otherwise, whether it was binding on a person would just be a matter of individual preference.[79] But this view of obligations is

---

73. See Searle, *supra* note 3 at 60-61, 177-82; Searle, *supra* note 43. Elsewhere, Searle describes a promise as a "linguistic fact," which needs no extralinguistic institution to account for it. John Searle, "How Performatives Work" (1989) 12 Linguistics and Philos. 535, reprinted in (1991) 58 Tenn. L. Rev. 371 at 384.
74. For criticisms of this premise, see Toni Vogel Carey, "How to Confuse Commitment With Obligation" (1975) 72 J. of Phil. 276; Altham, *supra* note 1 at 3-12; Jaako Hintikka, "Some Main Problems of Deontic Logic" in Risto Hilpinen, ed., *Deontic Logic: Introductory and Systematic Readings* (Dordrecht: Reidel, 1971) 58 at 93-98.
75. It is enough that the question of Jones' obligation be open, since that alone defeats the claim that the premise is a "tautology." Searle, *supra* note 43 at 46.
76. Bronaugh has similarly argued that "the obligation of promises is not fully content-independent." Richard Bronaugh, "Promises" in L. Becker, ed., *Encyclopedia of Ethics* (New York: Garland Press, 1992) 1020. In Bronaugh's view, whether an utterance of "I promise to ϕ" (or the equivalent) gives rise to an obligation to ϕ depends on the speaker's belief about the hearer's belief in the rightness of ϕ'ing. This view appears broadly consistent with the statement in the text, since both the hearer's views about ϕ'ing and the speaker's belief about the hearer's views will ordinarily depend on norms of the society in which they live. Furthermore, Bronaugh's proposal helps show why cases of cross-cultural promising can be morally ambiguous. If speaker and hearer are members of substantially different cultures, the speaker may have no belief (or, at least, no reasonable belief) about the hearer's belief about the rightness or wrongness of the promised action.
77. Raz, *supra* note 1 at 219-21.
78. Raz agrees that reasons for action must motivate. Raz, *supra* note 22 at 32-34.
79. Raz contends that if, in a society in which there is no social practice of promising, "a man communicates to another his intention to undertake by the very act of communication, an obligation to perform an action and confer a corresponding right on his interlocutor, I cannot see how we can avoid regarding his act as a promise." Raz, *supra* note 1 at 214. This highlights a tension in Raz' treatment of the rule behind promissory (and other types of) obligation. On the one hand, the mandatory rule must be accepted by the obligated individual in order for it to give her the relevant reasons. Hence, Raz notes that "[w]hich acts are held obligatory depends on the substantive practical principles one adopts." *Ibid.* at 225. On the other hand, the content and validity of the rule must ultimately be a matter of social fact, in order that it not just be an expression of personal preference. Thus Raz urges that a promising rule must be justified on the ground that "the creation of [certain types of] special relationships between people is held to be valuable." *Ibid.* at 228. Raz' discussion of promissory obligation slips back and forth between a view of the promising principle as a social rule, and as a rule that someone has accepted.

implausible. It is true that obligations very commonly motivate; but whether one does so is a contingent fact. It is not at all unintelligible—indeed, it seems a common phenomenon—for a person to be subject to an obligation to ϕ without at all being motivated to ϕ or even being susceptible, upon deliberation about her situation, to being motivated to ϕ.[80] In particular, there is no logical guarantee that the mandatory rule involved in promising gives any person reasons for action and thereby motivates her.[81]

This is not to suggest that obligations are not binding. It is only to say that the respect in which an obligation is binding must be one that does not necessarily involve any given person's wants, desires, or interests.[82] One view (which will be made plausible in subsequent discussion) is that obligations are considerations for action that some institution (e.g., law, religion, civil society) would have its members accept as reasons, and which, ideally, members would uncritically take as reasons. On such a view, it is perfectly coherent (even if immoral, antisocial, irreligious, or lawless) for an individual to be entirely unmoved by the fact that he has an obligation.[83] Other views are possible. For present purposes, what is important is that obligations and reasons are logically independent.

2. Promise As Obligation

To explain obligation is not a simple task. Yet it *seems* straightforward, because the word "obligation" is part of our everyday vocabulary. Consequentially, analyses of promise usually neglect to clarify obligation, and this neglect often undermines the conclusions. Hence, before we try to explain promise as a social performative, we must examine obligation and the respect in which promissory (and other) obligations bind.

a. The Meaning of Obligation: Point

Obligation is an explanatory concept. We invoke the fact that Jones has an obligation to ϕ to explain why Jones is, or may be, blamed or criticized (by himself or others) for not ϕ'ing. This central function of obligation suggests that, as first approximation, its point is as follows: if Jones has an obligation to ϕ then, if Jones does not ϕ, he may be criticized or blamed.[84] Of course, there are many grounds

80. See William K. Frankena, "Obligation and Motivation in Recent Moral Philosophy" in A.I. Melden, ed., *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958) 40; Williams, *supra* note 39 at 193.

81. For a somewhat different challenge to views that assimilate obligational and non-obligational commitment, see McNeilly, *supra* note 1 at 76-78.

82. Although the circumstance of an obligation's having no motivational potential is more common in cases of obligations thrust upon a person—such as obligations to family members—it can occur even in cases of promising and other obligations that are willingly assumed. For example, it might be that Jones promised Smith that he would ϕ, but then subsequently forgot the promise. Not only might Jones be unable to recall having made the promise; he might be unwilling to believe he made it. When asked by Smith to ϕ, he might be completely unmoved. In such a case, Jones no longer can be said to have a formal or exclusionary reason to ϕ. Yet one would not contend that memory lapse should affect his obligation.

83. See generally Philippa Foot, "Reasons for Action and Desires" (1972) 46 Proc. Arist. Soc'y (Supp.) 203 at 206-08.

84. See, e.g., Bernard Williams, "Ought and Moral Obligation" in Bernard Williams, ed., *Moral Luck* (Cambridge: Cambridge University Press, 1981) 114 at 121.

on which an individual might be criticized for action or inaction, not all of which amount to criticism for failing to fulfil an obligation.[85] The key to understanding obligation is to recognize the special type of criticism appropriate to non-fulfilment.[86]

i. Criticism of Action. To criticize conduct as the failure to fulfil an obligation is not to criticize it as a fundamental failure to conform to reason. Criticism of the latter type challenges logical deficiencies in a person's acting on reasons, and may be appropriate even when the reasons in question are not based on obligations. Conduct in breach of an obligation may well be irrational, but if so, that is an adventitious fact. Similarly, criticism of conduct as a breach of obligation is not the same as criticism for a defect of character. Persistent disregard of an obligation, of course, may betray a character flaw and justify criticizing the vice, but an isolated breach of promise, for example, shows little, if anything, about character. Every person breaks a promise now and then.[87]

Obligation-based criticism also differs from criticism on the ground that an act has caused harm. For example, a broken promise may be criticized even if the conduct has not injured the promisee. Conversely, conduct causing harm may deserve criticism even if there is no breach of obligation.[88] If one tells a stranger on the street that his tie looks cheap and ugly, and thereby wounds his feelings, one may be criticized, but not for breaching an obligation.

Finally, criticism for breach of obligation differs from criticism that the behavior in question was not the best course of action given the actor's interests and desires; namely, criticism that the actor has shown poor judgment. If Jones elects to play golf rather than study for the bar examination, he might be criticized for jeopardizing his career. This criticism of his conduct as contrary to his own best interest is fundamentally different from criticism for failing to fulfil an obligation.

> [W]e do not first have a determinate notion of moral obligation ... to which the notions of blame and related reactions are then added. The class of moral obligations ... just *is* the class of *oughts* to which the notions of blame and related reactions are added.

For a similar view, see H.L.A. Hart, "Legal And Moral Obligation" in Melden, *supra* note 80 at 82. Cf. Oliver W. Holmes, Jr., "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 458: "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."

85. For a discussion of this point, see Williams, *supra* note 39 at 192.

86. We are here concerned with "obligation" in its everyday sense. Although the concept of legal obligation, too, essentially involves criticism or blame (e.g., damages), a full explanation involves complexities that cannot be pursued here.

87. Hume sought to explain the obligational character of promising in terms of the desire to avoid the reputation for untrustworthiness which supposedly would result from failing to keep a promise. Said Hume: "by making use of this *form of words*, [an individual] subjects himself to the penalty of never being trusted again in case of failure." Hume, *supra* note 1 at 522. But this explanation is implausible. Although a chronic promise breaker likely would earn the sanction of a bad reputation, the failure to fulfil a promise in a single instance rarely has this effect. To the contrary, we accept the fact that promises are not always kept, and we do not consider occasional promise-breaking to be a character defect. One who always kept his promise, no matter what, would likely be thought to have a severe character defect, or even be mentally ill. For a modern attempt to explain the obligational features of promising along Humean lines, see McNeilly, *supra* note 1 at 72-73.

88. See, e.g., Craswell, *supra* note 2 at 499-500.

Obligations are categorical, rather than hypothetical, and are to be fulfilled irrespective of the agent's wants or interests.[89]

The distinctive character of criticism for failure to fulfil an obligation can be explained thus: criticism of conduct for breach of an obligation is based on the possibility of describing the conduct in terms of a special type of concept. That concept is one whose point (or part of the point of which) is that the conduct describable in this way is open to such criticism.[90] It is in the nature of murder that action constituting murder may be criticized; it is in the nature of son that a father's conduct which fails to give special attention to the son's needs and interests may be criticized; it is in the nature of promise that a breach of promise may be criticized.[91] As these familiar examples suggest, invocation of the concept associated with the obligation is a complete justification for criticism. If conduct is characterizable as, say, murder, then it is for that reason blameworthy. There is no need to state further that it is harmful, irrational, demonstrative of bad character, or foolish in order for it to warrant obligation-based criticism. Murder is blameworthy—it is criticizable—precisely because it is an action the nature of which is to be criticizable.

ii. Obligations and Obligational Concepts. The interdependence of an obligation and its associated concept can be appreciated further by considering what would be required for a new obligation to develop, say, an obligation not to eat grapefruit. Such an obligation is possible. If it were to develop, however, a new concept of grapefruit, different from today's, would have to emerge concurrently. This would become evident as soon as a new species of fruit was found that dessert chefs or botanists might call "grapefruit." For whether the new species would also be grapefruit for purposes of the obligation would depend largely on whether it was the sort of thing, the eating of which should be criticized. And whether it was that sort of thing would depend, not so much on biological features as on the social function of the prohibition and on whether, in light of that function, eating the new type of fruit should be discouraged. This new concept would be of such a nature as to permit one to answer the question: "Why should I not eat grapefruit?" by saying: "Because eating grapefruit is just wrong" or "Because that's what we mean by 'grapefruit'—it's something you shouldn't eat."

One would be able to give these responses, precisely as one can explain why a person should not murder by employing responses such as: "Because murder is just wrong," or "Because that's what we mean by 'murder'—it's something you shouldn't do."[92] Part of the point of this new concept of grapefruit would be the proposition that eating grapefruit is criticizable, and criticizable precisely because

89. Williams, *supra* note 39 at 178; Melden, *supra* note 33 at 42.
90. See Anscombe, *supra* note 1, for a similar explanation.
91. While obligations provide a basis for criticism, they do not necessarily require it. In any given case, there may be countervailing considerations that would make criticism or blame inappropriate. Jones may promise Smith that he will have lunch with her on Monday, but if Jones cancels because he is too busy, Smith and everyone else who knows of the failure may decline to criticize Jones for this breach of obligation because, e.g., they acknowledge the importance of Jones' getting his work done.
92. See John Rawls, "Two Concepts of Rules" (1955) 64 Phil. Rev. 3.

it is in the nature of grapefruit (in this new sense) that eating it is wrong.[93] The relationship between the new obligation-laden concept of grapefruit and the botanical concept would be parallel to the relationship between the everyday, obligation-laden concept of human and the non-normative, biological concept. The new concept of grapefruit would be a special type of explanatory concept. We may call it an *obligational concept*, an explanatory concept of just the same type as murder, father, citizen, and promise. All of these concepts have a statement of obligation as at least part of their point.

iii. The Social Role of Obligations. Obligations and obligational concepts do not develop for just any reason. They have a specific social function, namely, allowing people to rely on other members of society to conduct themselves in ways that help maintain social stability and facilitate social interchange. An obligation can fulfil this social role in one (or more) of several related ways.

Some obligations and obligational concepts pertain specially to a given status or relationship, marking it out for preferential treatment. Obligations of this type guide conduct that might affect the status or relationship. For example, obligational concepts such as citizen, friend, and brother designate important social institutions, and the corresponding obligations guide conduct in such a way as to enhance and preserve these institutions. They do so by encouraging forms of special treatment for those who stand in the relevant relationship to the actor, and by enabling those who stand in that relationship to rely on the fact that they will be given such special treatment.[94] Obligations of this kind are commonly affirmative. Examples are obligations to one's parents and to one's country; or, expressed otherwise, obligations to give special consideration to one's parents and to one's country.

Other obligations promote stability and interchange in a wide array of contexts, not just with respect to a special status or relationship. This function can be seen in obligations such as ones not to murder, steal, or lie. Obligations of this type make possible specific types of reliance in a panoply of social interchange. They make it possible for a member of society to deal with others under the reasonable assumption that they will not, for example, murder, rob, or lie to him. Obligations of this type ordinarily take the form of prohibitions on socially deleterious actions; the actions are the ones referred to by the associated obligational concept. These negative obligations commonly have an additional function: that of eliminating from practical reasoning any consideration of the disfavored conduct. Obligations not to murder, steal, and lie, and their associated obligational concepts, do not simply mark out actions that are strongly discouraged. They serve to prevent members of

---

93. In the society of the Norse sagas, the rules defining social roles and the obligations attaching to them included the rules of vendetta. Obligation is tied to kinship so closely that a near kinsman is a "skyldr fraendi" ["skyldr," a word etymologically related to "should," means "owe"]; and "o-skyldr," which might be naturally, if clumsily, translated as "not connected to one by way of obligation," means "unrelated."
Alasdair MacIntyre, "Ought" in *Against the Self-Images of the Age* (Notre Dame, IN: University of Notre Dame Press, 1978) 136 at 143. MacIntyre points out "that *promising* is an institution in our society comparable to vendetta in Icelandic society, in which the established rules are such that if you make a promise to someone, you ought to do whatever it is, in this sense, that you owe it to him." *Ibid.* at 153.

94. Melden, *supra* note 33; Hardimon, *supra* note 4.

society from even contemplating the relevant action.[95] The obligation not to murder is still efficacious if an individual continually reasons: "Well, I have an obligation not to murder, so I won't kill that fellow."[96] But something surely is missing, and none of us would be pleased to have to deal with him. The obligation not to murder can fulfil its social function only if the issue of whether to murder another person never, or only very rarely, arises as a live option.

b. Obligational Concepts and Paradigms

So far, we have been discussing the point of various types of obligational concepts. We are now able to make some helpful observations about their paradigms as well. As paradigm for the obligational concept of murder, one may take the non-obligational concept, *slay*. For some obligational concepts, a similar but non-obligational concept can serve as the paradigm and be labeled by the same term. The obligational concept father, may take as its paradigm the everyday biological concept, father. The obligational concept of human being may take as its paradigm the everyday biological concept for the animal we call "human being." One might say (speaking loosely) that obligational concepts of this type are normative concepts which have a non-normative core, i.e., the paradigm. For many other obligational concepts, however, there is no non-obligational concept to serve as paradigm. For example, there is no non-obligational concept to serve as the paradigm of friend. In everyday usage, "friend" is always used in a sense that imports obligation. It never has a purely descriptive, obligation-free sense. One might say (again, speaking loosely) that obligational concepts of this type are normative concepts without a non-normative core. Accordingly, they are more thoroughly explanatory than are obligational concepts of the first type.

c. Varieties of Obligation

The fact that obligations can be distinguished by social function, and the fact that obligational concepts can be distinguished by the presence or absence of a non-obligational paradigm, provide the basis for a useful taxonomy.

i. Canonical Obligations. One class of obligations consists of those that facilitate broad reliance (and that serve to put especially harmful actions out of mind), and for which the paradigm of the associated concept is a related, non-obligational concept. An obligation of this type has as its subject a relatively determinate action, and generally has the logical form: *obligation not to* ϕ, where "ϕ" is an action of the type referred to by the associated obligational concept. Let us call obligations of this sort *canonical obligations.* Examples are the obligations not to murder, steal, or lie. One might think of a canonical obligation as the prohibition of an intrinsic wrong or of a *malum in se*.

---

95. See, e.g., Alasdair MacIntyre, "What Morality Is Not" in *Against the Self-Images of the Age*, *supra* note 93 at 96 and 106.

96. Williams, *supra* note 39 at 185. This highlights another difference between reasons and obligations. Negative obligations, such as those relating to murder, should enter into practical deliberation only in exceptional circumstances.

ii. Institutional Obligations. A second class consists of those obligations having an institution- or relation-enhancing function, and for which the paradigm of the associated concept is a related non-obligational concept. These obligations generally have the logical form: *obligation to X*, where "X" is some person or some group referred to by an obligational concept. Let us call obligations of this type *institutional obligations*. Examples are the obligations of a person to her parent, child, or other immediate family member.[97] These obligations are often said to attach to social role or status—to "appl[y] to an individual in her capacity as an occupant of that role."[98]

iii. Voluntary Obligations. The final class of obligations consists of those having an institution- or relation-enhancing function, but for which the obligational concept does not have a related, non-obligational concept as paradigm. This class includes obligations associated with concepts such as friend or agreement. The class is commonly labeled *voluntary obligations*. The "voluntary" label for these obligations is a bit misleading because other sorts of obligations can also be assumed voluntarily.[99] Nonetheless, the term does serve to emphasize that obligations of this type generally have a closer connection to an individual's wants and goals than do other types of obligations. Accordingly, they are more likely to be motivationally efficacious than obligations from the other classes.

d. Promissory Obligation

Promissory obligation is usually considered a type of voluntary obligation, indeed, the epitome of voluntary obligation. Yet it does not neatly fit the taxonomy developed above. It partially resembles, yet partially differs from, both canonical and voluntary obligation. Promissory obligation, we shall see, is *sui generis*.

i. Promissory and Canonical Obligations. Promissory obligation resembles canonical obligation in that the subject of the obligation is an act, rather than a status or relationship. A given promissory obligation is an obligation to perform or not perform some act—to be home by midnight, for example—rather than a generalized obligation to a person *X*. However, promissory obligation differs from canonical obligation in that it need not take the form of a prohibition on socially deleterious conduct. To be sure, one can promise not to murder a person. But promises are most commonly to perform (or not perform) quite ordinary acts, ones of interest only to the hearer and, perhaps, a small number of other persons.[100]

ii. Promissory and Voluntary Obligations. Promissory obligation resembles voluntary obligation in that the associated obligational concept lacks a non-obligational paradigm. Promise, like friend, is a highly explanatory concept and is not

97. On this type of obligation, see generally Melden, *supra* note 33.
98. Hardimon, *supra* note 4 at 334-35. For an examination of obligations of this type, and a defense of their centrality in ethical reasoning and everyday life, see *ibid.* at 342-47.
99. Although a person is ordinarily born into citizenship, one can voluntarily become a citizen of a country through immigration and naturalization. Similarly, although the obligations of fatherhood are ordinarily imposed on a person, one can voluntarily become a parent through adoption.
100. Thus arises the supposed "puzzle about how we can commit ourselves to a course of conduct that absent our commitment is morally neutral." Fried, *supra* note 2 at 11.

based on some similar descriptive concept. Yet promissory obligation differs from voluntary obligation in subtle and important ways. The key difference is that a promissory obligation does not enhance a specific social institution or relationship referred to by the obligational concept. There is a relationship of friendship that is furthered or preserved by the obligations attendant upon friends, but there is no relationship or status of promiseship that is furthered or preserved by a promissory obligation. A promise may involve a state of affairs no more complex than the circumstance of the promisor's being under an obligation to do or not to do some act. As compared to voluntary obligation, promissory obligation is very simple.

Two aspects of this difference in complexity warrant comment. First, voluntary obligational concepts designate states of affairs in which two or more persons have obligations of a characteristic kind to each other. In a friendship, for example, each friend has obligations of a type normally associated with friendship to the other. Similarly with a partnership. By contrast, the relationship generated by a promise is intrinsically one-sided. Where there is a promise, only one person—the promisor—has the promissory obligation.[101] Second, voluntary obligational concepts designate states of affairs with a structure. Friendship may involve trust, affection, and support besides the obligations of friendship. This complex structure is supported by the obligations friends have to each other. By contrast, the state of affairs denoted by "promise" is characterized in full by the fact of promissory obligation. If *A* has promised *B* that he will ϕ, then *A* has an obligation to *B* to ϕ and, to the extent the parties have a promissory relationship, that is all there is to say about the matter. There is no more complex promissory status or relationship for the obligation necessarily to support.

iii. The Special Character of Promissory Obligation. Notwithstanding its differences from voluntary obligation, one may still consider promissory obligation to be a status- or relation-enhancing type of obligation. We are reluctant to say that Jones makes a promise if he approaches a complete stranger and says, "I promise to wallpaper my kitchen next week." There must be some antecedent relationship between the promisor and the hearer to which the promise is relevant. Yet as a status- or relation-enhancing obligation, promising remains distinctive in that it is *generic*. Just about any relationship between speaker and hearer can serve as the background for a promise—it need not be deep, longstanding or friendly. And whatever be the antecedent relationship, a promise can, and commonly does, promote, support, or build upon it. A voluntary or institutional obligation, one might say, is a *relation-specific ancillary obligation*, in that it is ancillary to a particular type of relationship or institution. By contrast, promissory obligation is a *generic ancillary obligation*, since it can be ancillary to nearly any relationship at all.[102]

---

101. Of course, two individuals can make promises to each other. But in such a case, there are two one-sided promissory obligations.

102. For a similar distinction, see Penner, *supra* note 2 at 327-28. Cf. Atiyah, *supra* note 2 at 39:

> The purpose of a promise, far from being, as is to often assumed, to create some wholly independent source of obligation, is frequently to bolster up an already existing duty. Promises help to clarify, to quantify, to give precision to moral obligations, many of which already exist .... The promise which is given without any independent reason for it is a peculiarity ....

This observation helps make sense of the fact that promises can be made in an endless variety of contexts. One can make a promise to a family member, a friend, or some other person with whom one already shares obligations; or a slight acquaintance, to whom the only obligation one has is the obligation generated by the promise. It also helps make sense of the fact that a promise can be made for an endless variety of reasons. One can promise in order to stiffen one's resolve; to make another happy; out of generosity; out of a desire to appear generous; with no expectation of return; as part of an exchange of promises; singly or as part of a group.[103] Promissory obligation is unique in its extraordinary versatility.

3. Promising and the Promisee

So far, we have been considering the social performative character of promise from the perspective of the speaker. Yet we naturally think there is a special, obligation-oriented role for some hearer—that of promisee—which must be clarified in order to explain fully the meaning of "promise." We will discuss two promisee-related topics: the hearer-based performative point, and the relationship between it and the hearer-based illocutionary point. An examination of these topics builds straightforwardly on the prior discussion.

a. Promising and Releasing

The performative point of promise (to ϕ) with respect to the promisee cannot simply be that the promisee may criticize the speaker if he does not ϕ. Anyone may criticize a promise breaker. Rather, the point seems to be that, if the hearer is a *promisee*, and she *releases* the speaker, the speaker no longer has an obligation to ϕ.[104] A fuller account would require explication of the interrelated concepts of promisee and release. Its main lines can easily be worked out, so we will not pursue that analysis here.

This account implicitly rejects some common views of promise, in particular the view that a promisee must specially benefit from, or want, the action promised.[105] In this respect, the account is consistent with our prior conclusions about the generic, ancillary character of promissory obligation. Given the enormous variety of contexts in which a promise may be made, there seems little that could be deemed functionally central regarding the promisee, save that she can release the promise from his obligation by fiat.

b. Illocutionary and Performative Points

The hearer-based performative point of promising and the hearer-based illocutionary point are independent. To see this, assume that speaker *S* utters to *H*, in normal circumstances: "I promise you that I will ϕ," and thereby promises *H* that

---

103. See Joseph M. Perillo & Helen H. Bender, eds., 2 *Corbin on Contracts* (St. Paul, MN: West Publishing Co., 1995) §5.5.

104. A similar observation is made in Bronaugh, *supra* note 76, who also distinguishes releasing the speaker from *relieving* him of responsibility.

105. For another argument against the view that the promisee must benefit from, or want, the promised act, see Raz, *supra* note 1 at 213-14.

he will ϕ. If *H* responds: "I don't believe that you are going to ϕ, and I am not going to rely on your doing so," *H* is reporting her decision not to exercise the exclusionary permission to which the promise (as an illocutionary act) ipso facto gave rise. Even so, *S* continues to have an obligation to ϕ (a social performative phenomenon). Neither *H*'s decision, nor the expression of that decision, constitutes or presupposes the releasing of *S* from his obligation. *H*'s decision affects her own and *S*'s practical reasoning, but it has no necessary impact on the susceptibility of *S* to obligation-based criticism. At most, *H*'s statement weakens or eliminates other possible bases of criticism, in particular criticism for harm induced by reliance.[106]

Consider now the converse case. Suppose that *H* announces: "I release you from your promise to ϕ." Then *S* would no longer have an obligation to ϕ. However, from the illocutionary perspective nothing would necessarily have changed. Certainly, in such a case, it is likely that *H*'s utterance reports (or presupposes) a decision not to exercise the exclusionary permission. But it need not do so. Even though *S*'s promise now fails provide a basis for obligation, it can continue to function as an assurance—for example, if *S* reaffirms that he will ϕ.[107] The upshot is that, in the case of a promise, exercising the exclusionary permission does not affect the obligation, and discharging the obligation does not affect the exclusionary permission. To that extent, the two hearer-based points are independent.

F. Some Basic Applications

The foregoing account of the everyday notion of promise can be applied to some problems commonly raised in the philosophical and jurisprudential literature. As we shall find, the key to resolving several well known problems is to distinguish the illocutionary from the obligational points of promise.

1. Coerced and Fraudulent Promises

A matter of longstanding controversy is whether a purported promise, made as a result of duress or fraud, is "really" a promise.[108] The underlying question seems to be whether the purported promise is binding. But, since a promise can be binding in two distinct ways, the question is ambiguous. It could mean either: is the utterance binding in the social performative sense of giving rise to an obligation? or is the utterance binding in the illocutionary sense of resulting in special reasons for action? The answers to these two questions need not be the same. While the

---

106. Similarly, if *H* had responded: "OK, I'll rely on you to ϕ," she would not have strengthened or confirmed the obligation. She simply would have created another ground for criticism in the event S should not ϕ.

107. Consider the following scenario:
Smith: "You don't have to pick me up at the airport. Just forget your promise."
Jones: "No, no. I'll do it."
Smith: "You don't have to. I won't fault you if you don't."
Jones: "I understand, but even though I don't have to do it, I will. You can count on me."
Smith: "Okay, okay, I'll expect you to pick me up. But remember: you don't *have* to."
Smith can rationally continue to rely on the promise, even though no one can now criticize Jones for breach of obligation if he fails to pick up Smith.

108. See, e.g., Margaret Gilbert, "Agreements, Coercion, and Obligation" (1993) 103 Ethics 679.

answer to both questions is "yes" in the paradigmatic case of promise, there is no logical bar to an utterance satisfying, say, the illocutionary, but not the performative, point. That is precisely the case with promises induced by duress or fraud. Consider whether an utterance of the form, "I promise to ϕ," made as a result of coercion, is a promise in the social performative sense. The answer clearly seems to be that no promissory obligation results from such an utterance. The conclusion reflects the social fact that, under prevailing norms, a coerced statement of form, "I promise to ϕ," is not a basis for criticism if the speaker does not ϕ. This is a matter of social fact, not logic: the situation could be different in some other society.[109]

On the other hand, the coerced utterance still seems to be a promise in the illocutionary sense. If the speaker is sincere, he has (just as in the paradigmatic case) both a reason to ϕ and an exclusionary reason to disregard some or all reasons to not ϕ.[110] For example, if he goes ahead, he can explain his conduct by pointing to the fact that he promised to ϕ. Similarly, if the speaker is sincere (and is taken by the hearer to be sincere), the hearer has a reason to believe that the speaker will ϕ, and can rationally rely on the speaker's ϕ'ing. In short, the fact of coercion seems to have no necessary impact on either the vowing or assuring functions of a promise. Thus, whether a purported promise made as a result of duress or coercion is "really" a promise depends on what one's concern is—it depends on why one is inquiring into the character of the induced utterance.[111] Similar conclusions can be drawn about fraud-induced promises. Like coerced promises, they are at most promises in the illocutionary sense.[112]

2. Threats

Threats and promises are alike in that one can make a threat by saying, for example, "I'm going to break your legs if you squeal, and that's a promise." Yet, they are somehow fundamentally different. It is common to explain the relationship between a threat and a promise by noting that, while both express an individual's intent to perform some future act, the respective future acts differ in kind: for a promise, the action is wanted by the hearer, but for a threat, the action is unwanted. However, the distinction will not hold. Although the paradigm of threat does seem to involve action undesirable to the hearer, one can easily produce non-paradigmatic

---

109. Arguably, some coerced promises do give rise to obligations in our society. See Altham, *supra* note 1 at 10-12. If so, the analysis is unaffected, since it still remains a matter of social fact which duressed promises do, and which do not, give rise to obligations. The analysis would simply have to be limited to those promises that do not give rise to obligations.

110. It is natural and understandable for the coerced individual to want to resist performing the speech act of promising, precisely to avoid the reason-generating features of the act. Why else would the coercer not be content with an immediate, casual statement by the victim that he promises to do what the coercer wants. It would be obvious in a such a case that the speaker had performed a sham speech act, and had not given himself a reason to do what the coercer wants.

111. Cf. Woozley, *supra* note 2 at 289-90:

> Conceptual questions about promises ... become the questions of how far we can deviate from the paradigmatic case of a simple two-person promise, in the direction of dropping one element or the other, before it becomes reasonable to deny that the performance was a promise.

112. The same conclusions appear to hold about promises to perform acts prohibited by a canonical obligation. In our society, a sincere promise to murder does not create an obligation, although it does give rise to the usual set of reasons.

examples of desired threats and unwanted promises. To distinguish promises from threats successfully, one must also contrast the respective points. A threatening utterance—for example, "I'll get even with you, that's a promise"—may satisfy the illocutionary point of promise by giving rise to the usual speaker and hearer reasons, but it does not give rise to an obligation.[113] It is a social fact that a speaker who makes a threat does not ipso facto provide a basis for criticism if he fails to perform the threatened act.[114] A threat to ϕ, then, is akin to a coerced utterance of "I promise to ϕ," in that it gives rise to distinctive types of reasons for action, belief, and reliance, but does not give rise to an obligation.

3. Insincere Promises

Insincere promises are, in a sense, the converse of coerced promises and threats. Suppose Jones utters to Smith, "I promise to ϕ," where Jones has no intention of ϕ'ing. This is the usual case of an insincere promise. Here, Jones has not given himself a formal or exclusionary reason to ϕ. The speaker-based illocutionary point is not satisfied, and so the act arguably is not a promise in the illocutionary sense. Yet under prevailing social norms, Jones ordinarily has an obligation and may be criticized if he does not ϕ. Hence, just as with a coerced utterance, whether an insincere utterance of "I promise to ϕ" should be deemed a "real" promise depends on whether one is concerned with the illocutionary or social performative aspects of the utterance. The difference is that an insincere promise is a promise at most the social performative, rather than the illocutionary, sense.

4. Non-Assuring Promises

With an ordinary insincere promise, the speaker-based illocutionary point is not satisfied. Our analysis enables one to see that there is a second way in which a promise can be insincere. It can fail to satisfy the hearer-based illocutionary point. A speaker can utter words to the effect that she will ϕ, by which she intends to give herself both a reason and an exclusionary reason to ϕ (as in the normal case of promising), and intends to give the hearer a reason to believe she will ϕ; yet not intend for the hearer to have a right to rely on her ϕ'ing. The speaker does not intend to create, and does not create, an exclusionary permission for the hearer.[115] In effect, the speaker resolves to ϕ in promise-like language, but avoids assuring the hearer that she will ϕ.

Non-assuring promises tend to be more complex than the first type of insincere promise. A speaker cannot achieve the desired result simply by uttering: "I promise to ϕ, but don't rely on me." To say expressly and unambiguously, "Don't rely," is to defeat the desired effect. To make a non-assuring, promise-like utterance, the speaker must express her resolution to ϕ in such a way as to give the hearer a reason

113. Cf. Bronaugh, *supra* note 76 (in the case of a threat, the hearer has no power of release).
114. See von Wright, *supra* note 2 at 88-89; Vera Peetz, "Promises and Threats" (1977) 86 Mind 578. Of course, one who fails to carry out a threat may be open to criticism on other grounds.
115. Alternatively, the speaker might create the exclusionary permission but make it unreasonable to exercise it, i.e., make it unreasonable to rely.

to believe the speaker will ϕ, and thus encourage conduct based on that belief, yet prevent there from being a basis on which the hearer can rationally rely. This requires skill and deviousness, but it can be done in countless ways.

An instructive example is found in the employment context. Before the enactment of ERISA,[116] an employer could hold out the prospect of a pension to employees, yet hedge the offer with so many conditions and limitations that a sensible employee could not rationally treat it as an assurance. The aim was to come as close as possible to promising a pension without actually doing so: to create the expectation of a pension, without making it reasonable for an employee, upon reflection, to rely on a pension's actually being granted.[117] Courts invariably held that there was no promise; thus no contract; thus no liability of the employer to the employee.[118]

Another example is found in intellectual property law. The developer of a new idea—say, a new game or a new situation for a television series—may need financial or technical assistance to exploit the idea, and thus may have to disclose the idea to someone who can provide this assistance. Disclosure would be foolish, however, without an assurance that the disclosee will not use the idea, or use it without compensating the developer. Yet the disclosee would be foolish to give such an assurance without first knowing what the idea is—it could be a matter of common knowledge or one that the disclosee had independently developed. Thus, what the disclosee will often do is make a non-assuring promise, one that gives the developer a reason to believe the disclosee will not use the idea without paying compensation, but does not enable the developer to rely on the fact that the disclosee will not do so. The disclosee can accomplish this either through vague promises to treat the developer fairly, or through a mix of specific promises and disclaimers.[119]

III. Other Concepts of Promise

Thus far, we have been analyzing the everyday concept of promise. Yet there are other concepts of promise as well. These include ones that are important in law, as bases for liability or for other purposes. We will examine some of these other concepts of promise and see how they relate to the everyday promise.

---

116. Employee Retirement Income Security Act of 1974, Pub L. No. 93-406, 88 Stat. 829 (substantially codified as amended at 29 U.S.C. §§1001 et seq. and in various portions of the Internal Revenue Code).
117. See generally Jay Conison, "Foundations of the Common Law of Plans" (1992) 41 DePaul L. Rev. 575 at 588-89, 599-600.
118. *Ibid.* at 601-10. A similar, contemporary example involves employer representations regarding the permanence or security of employment, possibly at variance with its at-will character. Courts are developing law to govern the issues of when an employer has made a "promise" (in a specialized sense) that limits its power to terminate employees, and when the promise is enforceable. See, e.g., *Rood* v. *General Dynamics Corp.*, 507 N.W.2d 591 at 606-07 (Mich. 1993).
119. See, e.g., *Burten* v. *Milton Bradley Co.*, 763 F.2d 461 (1st Cir. 1985); *Sylvania Elec. Prods., Inc.* v. *Brainerd*, 166 U.S.P.Q. 387 (D. Mass. 1970); *Davis* v. *General Foods Corp.*, 21 F. Supp. 445 (S.D.N.Y. 1937); *Downey* v. *Gen. Foods Corp.*, 286 N.E.2d 257 (N.Y. 1972).

A. Implied Promises

It is common to speak of implied promises and invoke them to explain conduct. But there is not just one type of implied promise; there are several, each with a different set of characteristics. Some are analytically important, others are not. Three types will be examined here.

1. Everyday Implied Promises

Promising is a language-conventional act. But language conventional acts can be performed other than through vocalized speech. Such is the case with promising. If Smith says to Jones, "Do you promise to drive carefully?", and Jones nods the appropriate way, then Jones has promised. It is as if Jones had expressly said, "I promise to drive carefully." Conduct of this sort can be considered a type of implied promise. But it differs from the paradigm of promise in only trivial and uninteresting ways.

2. Speech Act Implied Promises

A second type of implied promise has some noteworthy illocutionary features. Suppose that a museum has at its door a sign reading: "By entering, you agree to make a contribution to the Museum." A box for contributions is just inside the door. It is plausible to consider each visitor who enters the museum after reading the sign to have impliedly promised a contribution. Such a person has given himself a formal reason and an exclusionary reason to make a contribution,[120] has assumed an obligation to contribute, and has given the museum a reason to believe that he will contribute. However, he has not given the museum an exclusionary permission, i.e., a right to rely on his contributing. One would characterize any purported reliance by the museum as unreasonable. Hence, we have an implied promise of a non-assuring type. Yet it is different from the types non-assuring promises (of a pension of compensation for an idea) described previously. For here it is the promisee—the museum—rather than the promisor, that created the conditions under which it can expect the promisor to do as promised, but not rely on his doing so.

3. Obligational Implied Promises

A third type of implied promise has no illocutionary aspect. Suppose that Jones and Smith are moving a bookcase down a flight of stairs, with Smith leading the way. Although there is no speech act, express or implied, Jones has an obligation not to let go. In legal discourse, there is a tendency to speak of "implied promises" to explain such an obligation; following such usage, one might say that Jones here has impliedly promised not to let go. But there are good reasons not to describe Jones' situation this way. The only reason for invoking such a notion of implied

---

120. However, note the possibility of a visitor making, in effect, an insincere implied promise. Analogously to the everyday insincere promisor who utters "I promise to ϕ" but has no intention of ϕ'ing, a visitor might enter the museum having no intention of doing what he (here implicitly) has said he would do. For present purposes, we are concerned only with the sincere implied promisor.

promise is to justify criticism of Jones *were* he to let go.[121] Yet if Jones were to let go, it would be more appropriate to criticize him for breaching the obligation that automatically results from his and Smith's relationship as co-movers. Jones' obligation not to let go, unlike a promissory obligation, is relation-specific and does not depend for its existence on a promise. Indeed, if Jones, out of the blue, were to say, "I promise not to let go," Smith would wonder why Jones had bothered to make the promise and likely would feel less secure. The obligation is an integral part of the parties' relationship, not an adventitious add-on. "Implied promise to ϕ," in cases of this type, is merely a shorthand for "obligation to ϕ resulting from the relationship between the parties." It is used—and used misleadingly—to refer to a voluntary or institutional obligation: an obligation of a type fundamentally different from promissory ones.

B. Promises In Law: Assurances

Legal and jurisprudential writings tend to treat a promise only as a source of obligation, and to focus on promising in the context of contract law. To be sure, generating a legal obligation is an important function of promising, but it is not the only one. For in law, as in everyday affairs, promising may be important as a source of assurance. One area in which promising plays just such a role is the criminal procedural law of confessions.

The law of confessions is highly fact-dependent. As a result, it is hard to summarize. Nonetheless, several themes recur as reasons for excluding a confession from evidence, namely, the confession's involuntariness, the objectionable character of the police practices that preceded it, and the divergence of the suspect's decisionmaking process from a hypothetical norm. The first two themes are extensively discussed in the caselaw and commentary; the third has been less examined.[122] Yet the third is what underlies much of the law regarding confessions induced by promises. At least since the Supreme Court's decision in *Bram* v. *United States*, that law has been based on the principle that a confession may be inadmissible if it was induced by threats or promises.[123]

This body of caselaw rests on a paradigm of proper confession: an inculpatory admission, which the defendant elects to give after he has weighed the reasons pro and con and concluded that the reasons for confessing outweigh the reasons against.[124] This is reflected in judicial requirements that a confession be the product

---

121. It would be odd to appeal to a supposed promise to explain Jones' *not* letting go. If one asks Jones why he does not let go, he would say that there is no reason to do so, or that letting go would hurt Smith, or that it would defeat the whole purpose of his and Smith's work.

122. The third theme is more significant in the law of waiver of Miranda rights. See, e.g., *Moran* v. *Burbine*, 475 U.S. 412 at 421 (1986).

123. *Bram* v. *United States*, 168 U.S. 532 at 542-43 (1897). There is, however, no per se rule invalidating confessions induced by promises. See, e.g., *Brady* v. *United States*, 397 U.S. 742 at 753-54 (1970).

124. E.g., *Holland* v. *McGinnis*, 963 F.2d 1044 at 1051 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993):

> Inflating evidence of Holland's guilt interfered little, if at all, with his "free and deliberate choice" of whether to confess ... , for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong.

of "an essentially free and unconstrained choice,"[125] "rational intellect and free will,"[126] or the like. Although courts often call a confession "involuntary"[127], their real concern is the nature of the suspect's deliberation. As one court explained:

> [C]ourts' actual as distinct from articulated standard [is] to ask whether the government has made it impossible for the defendant to make a *rational* choice as to whether to confess—has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time.[128]

Law enforcement officers who interrogate a suspect necessarily interject themselves into his deliberation. They aim to affect the process by giving the suspect reasons to confess and thereby increase the likelihood that he will do so. In general, law enforcement officers have wide latitude to urge upon the suspect genuine first order reasons to talk.[129] Permitting conduct of this type is consistent with the paradigm because the suspect still decides whether to confess on the basis of reasons pro and con. But there are other types of official conduct which cause the deliberative process to deviate from the paradigm to such a degree that any induced confession becomes inadmissible legally.[130] Lying to the suspect, for example, gives him false reasons; it may render a confession inadmissible if the lie is sufficiently serious.[131]

> and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome Holland's will by distorting an otherwise rational choice of whether to confess or remain silent.

125. E.g., *State* v. *Smith*, 512 A.2d 189 at 196 (Conn. 1986).

126. E.g., *United States* v. *Haddon*, 927 F.2d 942 at 945 (7th Cir. 1991) [hereinafter *Haddon*].

127. In the law of confessions, "involuntary" is a catch-all term used to characterize a wide variety of Constitutional infirmities. "A confession is voluntary if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all the circumstances its admission would be fundamentally fair." *State* v. *Mikulewicz*, 462 A.2d 497 at 501 (Me. 1983). In *United States* v. *Long*, 852 F.2d 975 at 980 (7th Cir. 1988), Judge Easterbrook argued in a concurring opinion that confessions induced by promises—which are counted as "involuntary" confessions—are in fact voluntary from the perspective of contract law. The point is true, but irrelevant, since "involuntary" in the law of confessions means something quite different from what it means in contract law.

128. *United States* v. *Rutledge*, 900 F.2d 1127 at 1130 (7th Cir.) (Posner, J.), *cert. denied*, 498 U.S. 875 (1990). The court continued:

> The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible.

Ibid. at 1130. See also *Miller* v. *Fenton*, 796 F.2d 598, 605 (3d Cir.), *cert. denied sub nom. Miller* v. *Neubert*, 479 U.S. 989 (1986) (decision to confess must be "a product of the suspect's own balancing of competing considerations").

129. See, e.g., *Welch* v. *Butler*, 835 F.2d 92 at 95 (5th Cir.), *cert. denied*, 487 U. S. 1221 (1988) (confession resulting from prayer session with police officer; "[a]t most, the police set up a situation that allowed Welch to focus for some time on those concerns [about salvation and divine forgiveness] with a fellow Christian in the hope that his desire to be saved would lead him to confess").

130. E.g., *Spano* v. *New York*, 360 U.S. 315 (1959) ("official pressure, fatigue and sympathy falsely aroused" invalidated confession). On the other hand, where an apparent distortion of the deliberative process derives from sources other than official conduct, the confession is not necessarily inadmissible. *Colorado* v. *Connelly*, 479 U.S. 157 (1986) (mental illness of defendant led him to seek out police and confess).

131. On the other hand, courts allow law enforcement officers a fair amount of leeway in deceiving suspects. "These ploys may play a part in the suspect's decision to confess, but so long as the decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." *Miller* v. *Fenton*, 796 F.2d 598 at 605.

In the view of courts, promises made to the suspect can also distort the deliberative process. Promises, when deemed objectionable, are commonly explained to be so because they overbear the will[132] or are difficult to resist.[133] Yet these explanations make little sense; the whole point of police interrogation is to convince the suspect to confess by giving him reasons that overcome his resistance. What seems to be the true, but unarticulated, objection to making promises to a suspect is that they function as assurances. As assurances, they give the suspect a second-order reason—specifically, an exclusionary permission—that he can use in his deliberation. An exclusionary permission, if exercised, distorts the straightforward weighing of first-order reasons, because it serves to exclude consideration of some or all countervailing first-order reasons. Hence, promises (and threats) tend to distort deliberation and, as a result, may be deemed objectionable.[134]

This diagnosis of the judicial difficulty with promise-induced confessions helps explain some features of the law. First, it helps explain why courts do not exclude confessions resulting from promises that the suspect's cooperation will be brought to the attention of the prosecutor or judge.[135] A prosecutor or judge will learn of the cooperation as a matter of course, and so any putative assurance would—or at least should—be superfluous to the suspect.[136] Accordingly, the statement should function only as a first-order reason for the defendant and not distort his deliberation.[137] Similar conclusions can be drawn about promises of the obvious or

---

132. E.g., *United States* v. *Walton*, 10 F.3d 1024 at 1028 (3d Cir. 1993) [hereinafter *Walton*].

133. E.g., *Streetman* v. *Lynaugh*, 812 F.2d 950 at 957 (5th Cir. 1987).

134. See, e.g., *Walton*, *supra* note 132. Where a promise plays no significant role in deliberation, however, a confession which follows it is not thereby invalidated. See, e.g., *State* v. *Walton*, 769 P.2d 1017 at 1025-26 (Ariz. 1989), *aff'd*, 497 U. S. 639 (1990):

> It is clear from the context of the whole interrogation that the defendant did not respond to the statement as if he understood it as a promise .... When he at length offered some information, he did so not in response to a promise, but due to the continued confrontation with known details and the effect that had on his guilt or fear of retribution, compounded by the need to provide more facts to extricate himself after he had implicated himself .... The actions of the defendant show that he did not treat the detective's statement as a promise.

Moreover, there is no black-letter rule that a confession induced by a promise is inadmissible. *United States* v. *Guerrero*, 847 F.2d 1363 at 1366 (9th Cir. 1988) [hereinafter *Guerrero*]; *State* v. *Starling*, 456 A.2d 125 at 127-29 (N.J. Super. Ct. 1983), *aff'd*, 504 A. 2d 18 (N.J. Super. Ct. App. Div. 1985), *cert. denied*, 511 A.2d 658 (N.J. 1986). For example, a law enforcement officer's promise of a so-called collateral benefit does not render a confession inadmissible. E.g., *State* v. *Holloman*, 731 P.2d 294 at 300 (Kan. 1987) (release of suspect's brother).

135. See, e.g., *Guerrero*, *supra* note 134; *United States* v. *Robinson*, 698 F.2d 448 at 455 (D.C. Cir. 1983) [hereinafter *Robinson*].

136. See *United States* v. *Fraction*, 795 F.2d 12 at 15 (3d Cir. 1986) [hereinafter *Fraction*]. Similar reasoning has been applied to apparent threats. See *Neal* v. *State*, 522 N.E.2d 912 at 913 (Ind. 1988) (defendant was arrested along with his girlfriend and told that the girlfriend would go to jail and her four children would be turned over to the Welfare Department; this was "simply a factual statement concerning the situation", rather than a threat).

137. Cf. *Fraction*, *supra* note 136 at 15, where the explanation for the rule is said to be that a promise must be of something "within the control of the promisor."

Note that, despite what the courts say, a statement about cooperation being brought to the attention of the prosecutor and judge can indeed function as an assurance, and be intended by the officer to do so, even if a fully reflective person would not treat the statement as such. In refusing to deem such a statement a promise, courts may be assessing it under a reasonable person standard. Cf. *Haddon*, *supra* note 126 at 946 (coercion to be determined by reference to impact on a reasonable person under the circumstances).

inevitable.[138] Second, it explains why courts deem it irrelevant whether the officer making the promise had any authority to do so. The *apparent* authority of the person making a supposed promise may be relevant to the defendant's understanding of the statement as an assurance,[139] but his actual authority is not.[140] In the law of confessions, the point of promise is only that the utterance provides assurance to the hearer; it is not that the speaker will be criticized if the assured event does not come to pass. The law of confessions (unlike, say, the law of contracts) is not centrally concerned with whether the promise that induces a confession is or is not fulfilled, for a promise may be objectionable or unobjectionable in either case.[141] Third, the assurance aspect of promising helps explain why courts do not find a confession objectionable if the defendant had requested the promise as a precondition of confessing.[142] In such a case, the defendant reached his decision to confess—on certain terms—after proper deliberation. Although a promise is involved, it comes only after the defendant's deliberation is complete and the promise played no distorting role in the deliberative process.

C. Promise and Contract

In this final part of the analysis we examine some basic connections between promise and contract. What follows, though only a sketch, can serve as guide to a more comprehensive analysis.

1. Promise and Contract Law

More than any other branch of Anglo-American jurisprudence, contract law seems to depend on promise. It does so in several ways. One is definitional. Contract law's fundamental notion, contract, is often defined or analyzed in terms of promise. The *Restatement of Contracts*, for example, defines "contract" as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[143] This definition is typical. Promise-based explications of contract abound in law and jurisprudence.

The second way that contract law seems to depend on promise is with regard to formation. Contracts are not natural phenomena. They are—to use the prevailing metaphor—formed. They are most commonly formed through what appears to be

---

138. For example, one court said of an interrogator's statement that "cooperating defendants generally 'fared better time-wise,'" that it merely gave the defendant a "'chance to make an informed decision'" about cooperating with the government. *United States* v. *Nash*, 910 F.2d 749 at 752-53 (11th Cir. 1990).
139. *Fisher* v. *State*, 379 S.W. 2d 900 at 902 (Tex. Ct. Crim. App. 1964); *People* v. *Dandridge*, 505 N.E.2d 30 at 32 (Ill. App. Ct.1987).
140. *United States* v. *Conley*, 859 F. Supp. 830 at 839 n. 6 (W.D. Pa. 1994).
141. *Robinson*, supra note 135 at 455; *People* v. *Stachelek*, 495 N.E.2d 984 at 991 (Ill. App. Ct. 1986). If the promise is not kept, however, it may make the confession objectionable on grounds that the police acted unfairly. See *Santobello* v. *New York*, 404 U.S. 257 (1971).
142. *Drew* v. *State*, 503 N.E.2d 613 at 617 (Ind. 1987) (collecting cases); *Ex Parte Siebert*, 555 So. 2d 780 at 782 (Ala. 1989), *cert. denied*, 497 U.S. 1032 (1990); *People* v. *Hendricks*, 737 P.2d 1350, 1354 (Cal. 1987).
143. *Restatement (Second) of Contracts* §1 (1981).

a language-conventional act: two (or more) persons agreeing that each, respectively, will do or not do some thing. It is widely assumed that conduct of this sort can be analyzed as, or as involving, promises by each party to perform the act to which he agreed,[144] and that the contract in question results from this exchange of promises.[145] If Jones and Smith agree that Jones will sell Smith his old car for $2000, payable in cash, it is conventional to say that there are two promises, describable (approximately) as: Jones promises to transfer possession and ownership of his car to Smith, and Smith promises to pay Jones $2000 in cash. It is also conventional to say that exchanging those promises is what forms the contract between the parties.

The third way contract law seems to depend on promise is with respect to enforcement. Enforcement of a contract is commonly treated as a matter of enforcing one or more promises, each a part of the contract. Sometimes the promise to be enforced is one that the parties expressly exchanged. Sometimes the promise is only implicit in the contract or is imposed by law (e.g., the covenant of fair dealing).

This vision of contract law as pervaded by promise has wide appeal. Yet, as the reader should appreciate, there is a preliminary question: just what concept, or concepts, of promise are involved? There are several possibilities. The failure to recognize this fact vitiates many an effort to clarify the role of promise in contract law.

2. The Restatement Definition

A case in point is the *Restatement of Contracts*, which, as noted above, defines "contract" as a "promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[146] This statement has serious flaws, even if viewed as only the beginning of a definition. On the one hand, it specifies that a contract "is" a promise (or set of promises). To this extent the statement looks to the way promising gives rise to contracts and so looks to the law of contract formation. But the definition also specifies that to enforce a contract is to enforce a promise. To this extent the statement looks to the way in which contracts are enforceable promises, and so looks to the law of contract enforcement. The *Restatement* appears to suppose that the sense of "promise" relevant to contract formation is the same as the one relevant to contract enforcement, and that only one sense is needed to define and account for the law of contract. This is a mistake. To begin to see why, consider the straightforward question: What is meant by "promise" in the *Restatement* definition?

The *Restatement* elsewhere defines "promise" as "a manifestation of intention

144. Indeed, modern contract law is based on the willingness of courts to find such promises in a contract. In Slade's Case, the Court of King's Bench was willing to allow an action of assumpsit to proceed for breach of a simple contract because:

> [E]very contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it ....

Slade's Case, Eng. Rep. 1074, 1077 (K.B. 1602).

145. Restatement (Second) of Contracts, *supra* note 143 at §§17-18.

146. *Ibid.* at § 1.

to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[147] This is a simplified version of the account of promise in the everyday sense developed above, with both illocutionary and performative features. On this understanding, the *Restatement* definition of "contract" is too broad. Modern law provides remedies for many breaches of promise that one would not call breaches of contract. Misrepresentation law provides remedies for some breaches of promise that generate reliance-based harm, but the promise whose breach is remedied need not have any connection with a contract. Similarly, ERISA provides remedies for unfulfilled promises of a pension when the promise is a feature of a pension plan—an institution quite different from a contract.[148] To save the *Restatement* definition of "contract" from overinclusiveness, either a different notion of promise must be used or the "law" referred to must be limited to contract law.

Yet overbreadth is not the sole problem. The definition is underinclusive as well. One can easily find enforceable contracts that do not satisfy the definition, even in the *Restatement* itself. For instance, as the *Restatement* notes, an arrangement for a person to serve as an exclusive distributor can be structured in such a way that, in the formation of the arrangement, the distributor does not "promise" anything in the ordinary sense. Yet courts are quite willing to find an enforceable contract with obligations that the distributor can breach. The *Restatement* and courts try to rationalize the finding of a contract by announcing the discovery of the distributor's implied promise to use his best efforts.[149] The appeal to an implied promise is attractive because it seems, on its surface, to bring the case under the *Restatement* definition. Yet it does not, because the implied promise is not a promise in the everyday sense. It is a promise in the sense (described above) of an implied obligation; that is, an obligation ancillary to a status or relationship between the parties.

But what is more important, the implied promise is an obligation ancillary to the *contractual relationship* between the parties,[150] and it results automatically from the parties' contract, without the need for any express or implied speech act. While this obligation appears to be a type of contract-related promise that is *enforced* through contract law, it cannot be the basis on which a contract is *formed.* One has here a contract not formed from promises in the everyday sense or, indeed, in any other familiar sense. To try to save the *Restatement* definition of contract in cases like this, where a party does not promise anything in the ordinary sense, one would have to invoke an entirely new sense of "promise" (one whose scope and defining characteristics would have to be explained). But this new formation-related type

147. *Ibid.* at § 2. The First Restatement is less explicit, but the comments suggest that promise in the everyday sense is meant. *Restatement of Contracts* § 2 & comment a (1932).
148. Conison, *supra* note 117 at 593-98.
149. *Supra* note 143 at § 77, illustration 9. See generally *supra* note 103 at § 5.27.
150. The Uniform Commercial Code makes this very clear, providing that:

> A lawful agreement by either the seller or buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed on obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

U.C.C. § 2-306(2).

of "promise" would not necessarily have any connection with the type of implied promise invoked by the *Restatement* or, in general, with contract enforcement.

The *Restatement* definition of "contract" breaks down because it presumes that a single concept of promise can account for both contract formation and contract enforcement, and further presumes that the ordinary concept of promise is the appropriate one. Both presumptions are doubtful. We will later see that a statement similar to that of the *Restatement* can be defended as a statement of part of the point of "contract." But before we can reach that stage we must first pay careful attention to the way promissory concepts are actually used in contract law and contract-related discourse.

3. Promise and the Definition of Contract

In the remainder of this section we take seriously the fact that contract law may rely on concepts of promise which differ from the everyday one, and that more than one concept of promise may be needed to treat the subject. We will try to give substance to the idea that concepts of contract are related to concepts of promise, while avoiding an overly simplistic view of the connection.

a. Paradigm

Contract is clearly an obligational concept. Specifically, it is a voluntary obligational concept: there is no related, non-obligational concept to serve as paradigm. Accordingly, it seems best to locate the paradigm in contract formation in the way contractual relationships are brought about.

Contract law and the literature on contract suggest that there are two paradigms, differing in subtle ways. These paradigms correspond to unilateral and bilateral contracts. The first paradigm takes "contract" to refer to the state of affairs or relationship resulting from the following sequence:

(1) Jones: "If you ϕ, I will ψ."
Smith: (Begins to ϕ).

The other paradigm takes "contract" to refer to the state of affairs or relationship resulting from the different sequence:

(2) Jones: "If you ϕ, I will ψ."
Smith: "It's a deal."

The *Restatement* describes the state of affairs that results from both of these sequences as *bargains*.[151] The *Restatement* treats bargains as paradigms of contract, observing that "in the typical case ... bargains are enforceable unless some other principle conflicts."[152] We will examine the two paradigms in turn.

i. First Paradigm. There is a strong temptation to describe Jones' action in case (1) as the making of a promise. "Promise," of course, is an adaptable term,

151. Restatement (Second) of Contracts, *supra* note 143 at §§ 17, 18, 71.
152. *Ibid.* at § 17, comment b. See also *supra* note 103 at 38.

and it is convenient to use it here. But if one opts to do so, one must recognize that the term cannot have its everyday sense. Even proponents of the view that Jones has made a promise recognize that there is some difference between an utterance of "I promise to ψ" and an utterance of "I will ψ if you ϕ," and give the latter a special name, "conditional promise."[153] They err, however, in thinking that a conditional promise is just a variety of promise in the everyday, unconditional sense analyzed previously.

There are clear illocutionary differences between the two promissory concepts. For present purposes, the most important is that the utterance, "I will ψ if you ϕ," unlike the utterance, "I promise to ψ," ipso facto gives the hearer a reason to take action relating to the propositional content. Specifically, it gives the hearer a reason to perform the act referred to by the speaker, or an act that is a means to performing it. For example, if Smith offers Jones a hundred dollars to rescue Smith's cat from a tree, Jones has a reason to climb the tree. It is possible to analyze this illocutionary phenomenon in full-blown technicality but, stated simply, it comes down to this. While an everyday promise is analyzable as a communicated vow plus an assurance, a so-called conditional promise has an additional component: an invitation to act (or not act) in certain ways.[154] This invitational component gives the hearer a reason to take action.

There are also performative differences between the two concepts. The most significant is that the utterance of "I will ψ if you ϕ" does not ipso facto generate an obligation. Rather, it generates what one might call an *obligational condition*: a state of affairs in which, if the hearer ϕ's, the speaker is obligated to ψ. To see that a conditional promise does not ipso facto generate an obligation, but does ipso facto generate an obligational condition, note that from:

(3) Jones promises: if Smith ϕ's then Jones ψ's; and
(4) Smith ϕ's;

it follows that:

(5) Jones is obligated to ψ.

Since the inference is valid, the obligational state of affairs represented in (3) is not:

(3') Jones is obligated as follows: if Smith ϕ's then Jones ψ's.

The reason is that (5) does not follow from (3') and (4).[155] The obligational state of affairs represented in (3) must instead be:

(3") If Smith ϕ's, then Jones is obligated to ψ .

Propositions (3") and (4) do entail (5), as a matter of elementary propositional logic, i.e., *modus ponens*.

Jones' promise-like utterance in (3) thus does not result in an obligation on his

153. E.g. Fried, *supra* note 2 at 46.
154. The term "invitation" is chosen as a relatively neutral description for this illocutionary component.
155. Hintikka, *supra* note 74 at 95. More accurately, the argument shows that, even if (3') does result from (3), the fact is irrelevant to any obligation which arises from the fulfilment of the condition.

part to perform some conditional event.[155] Rather, it results in a conditional state of affairs in which, if the hearer ϕ's, Jones will have an obligation to ψ. And this fact highlights a second performative difference between ordinary promises and conditional promises: a performative point of the conditional promise is the norm that the hearer has the power to place the speaker under an obligation (i.e., by performing the invited action). In the ordinary case of promising, by contrast, the hearer-based illocutionary point is simply that the hearer has the power to release the speaker from the obligation.[157] Action of the hearer has no role in initially bringing about the obligation.

Thus, while the utterance of "If you ϕ, I will ψ" in paradigm (1) has many features in common with a promise in the everyday sense, it also has features that are different. Because of these differences, it might be preferable to call the utterance by some name other than simply "promise." Nonetheless, we will continue to use the common term "conditional promise." A better label might be (again following common usage) *offer* or *proposal;* yet even they are not wholly free of misleading connotations.

ii. Second Paradigm. In paradigm two, it appears that Jones is making the same type of utterance as in (1), save that he is inviting Smith to promise to ϕ, rather than to do ϕ. But this interpretation is implausible. Sometimes, one does invite another person to utter a promise. But ordinarily a person invites a promise when she wants assurance, not when she is looking to enter into an agreement. Scenarios along the following lines are typical:

(6) Wilson: "Promise that you'll never leave me."
Green: "I'll never leave you."

Wilson is not requesting a new obligation, but assurance, and that is precisely what Green gives her through the invited promise.

Example (6), of course, involves a freestanding invitation to promise. But the same observations can be made about cases in which the invitation to promise is the conditional part of a conditional promise. For example:

(7) Wilson: "If you promise never to leave me, I'll give you a big surprise."
Green: "I will never leave you."

In this case, too, Wilson invites the promise because she wants assurance straight out, not because she is bargaining for Green not to leave. Because she is not bargaining, a response by Green of "I'll agree not to leave you for eight years, and that's my final offer" would be entirely out of place.

It thus misses the point to construe Jones' utterance in (2) as necessarily offering some item or some act in exchange for Smith's merely promising to ϕ, on the analogy of Jones' offer in (1) of something in exchange for Smith's ϕ'ing. In the case of Jones' utterance in (2), just as in the case of Jones' utterance in (1), what Jones

156. The underlying problem with (3') may simply be that the content is a conditional event, not an action; thus, it cannot be the subject of an obligation.

157. It would seem that the power to release, too, is a point of conditional promises, subject to the emendation that the obligation in question is the one resulting from fulfilment of the condition.

wants, and what he will perform ψ in exchange for, is Smith's ϕ'ing. Should Smith fail to ϕ after the exchange in (2), we do not console Jones by reminding him that, after all, Smith gave him all that he asked for (a promise). We commiserate over the effect of the broken contract. If, then, Jones' utterance in paradigm 2 is not the act of inviting Smith's promise, and Smith's action in paradigm 2 is not the act of accepting an invitation simply to promise to ϕ, what are Jones and Smith doing?

The answer begins with an assay of the logical structure of paradigm 2. In brief, the structure is as follows:

(2') Jones: "I propose that: Smith ϕ's and Jones ψ's."
Smith: "I agree to this: Smith ϕ's and Jones ψ's."

There are two significant features to this logical reconstruction. First, whereas in paradigm 1 the content of Jones' utterance is the conditional proposition: if Smith ϕ's, then Jones ψ's; in paradigm 2 it is the conjunctive proposition: Smith ϕ's and Jones ψ's. Jones' utterance in (2) does not even have the logical form of a conditional promise. Second, Smith's response has the same conjunctive propositional content as Jones' utterance. Smith's response is not the act of her simply promising to ϕ (in the everyday sense of promise). It is something different and more complicated. The easiest way to appreciate these features is to note that Jones' and Smith's exchange in paradigm 2 constitutes the culmination of negotiations directed toward establishing a package that the parties can jointly agree to. (The two utterances may, of course, be the entirety of negotiations.) At each stage of negotiation, the parties are proposing, discussing, inviting, modifying, or accepting a package consisting of acts to be done by Jones and acts to be done by Smith. Through the sequence of utterances in (2), Jones and Smith in effect perform a joint illocutionary act of the form:

(2") We agree to this: Smith ϕ's and Jones ψ's;

which is, in fact, the form taken by written contracts.[158] A full illocutionary explication of contract most likely would require a theory of joint action,[159] but it is sufficiently clear in outline what is involved in two people agreeing to the same thing.

Paradigm 2 also differs from paradigm 1 in its performative aspects. The most striking difference is that Smith's agreement to the proposed package of actions does not simply bring about an obligation on Jones' part to ψ. It also brings about an obligation on Smith's own part to ϕ. However, Jones' obligation does not result from Smith's having satisfied the condition of a conditional promise, and Smith's obligation does not result from her having made a promise in the everyday sense.

---

158. Corbin points out that not all bilateral contracts are formed through a sequence like (2'), and that (2") may in fact accurately represent the formative acts. For example, a mediator may propose that Smith ϕ's and Jones ψ's; to which both parties assent. An act like (2") is often what takes place at a closing. See Joseph M. Perillo, ed., 1 *Corbin on Contracts* (St. Paul, MN: West Publishing Company, 1993) at § 1.12.

159. Joint acts are very common; everyday examples are walking together, playing a duet, and conversing. Yet, the notion of joint action has proven difficult to analyze. For some efforts, see Gilbert, *supra* note 30; Searle, *supra* note 37; John Searle, "Collective Intentions and Actions" in Philip R. Cohen, Jerry Morgan & Martha E. Pollock, eds., *Intentions in Communication* (Cambridge, MA: MIT Press, 1990) at 404.

Rather, both parties' obligations come about because Smith's utterance completes the process of creating a new relationship—a contract—of which Jones' and Smith's obligations are a part.

This relationship has a complex structure, and includes more than just the obligations of Jones and Smith respectively to ψ and ϕ. It includes other obligations, too, such as the obligations of good faith and fair dealing which are said to be "implied" in every contract. It may also include so-called implied terms and default rules—features which, as contract theorists emphasize, cannot be explained simply through an appeal to promising and to what results from promising.[160] And it may include features such as trust and cooperation between the parties, particularly where the contract involves a complex, ongoing relationship.[161]

As to contractual obligations, it must be emphasized that they are ancillary to the contractual relationship; they are not freestanding obligations like those resulting from a promise. This is clear for the implied obligations, such as those of good faith, which have no counterpart in the utterances that enter into the formation of the contract and which cannot exist independently of the contract. But it is true even for those obligations whose content is reflected in the formative utterances because, as we have seen, there are no obligations ipso facto resulting from those utterances. If Jones says, as part of contract negotiations, "I will ψ if you ϕ," there is no obligation to ψ until there is a contract. The obligation to ψ in this case cannot exist independently of the contract.

b. Point of Contract

We can make a few observations that will help clarify the point of contract. They show the way to a fuller analysis of the concept and to a means for resolving some issues concerning the scope and function of contract law.

First, a methodological note. Any plausible explication of legal concepts of contract should build on an explication of the everyday notion of agreement or contract. It is very likely that legal concepts of contract elaborate aspects of the everyday concept, much as legal notions of promise elaborate aspects of the point of the everyday one.

Second, the everyday concept of contract or agreement, like the everyday concept of promise, has both illocutionary and obligational[162] points. Where two people have entered into an agreement, each has, *inter alia*, a reason to believe that the other will take certain actions, and an exclusionary permission to rely on the other party's taking such actions. These are parts of the illocutionary point.[163] Furthermore,

160. See Craswell, *supra* note 2, for what is in effect an argument that theories of the role of promise in contract formation can tell us little about the obligational character of the relationship so formed.

161. See generally Ian R. MacNeil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, CT: Yale University Press, 1980).

162. It seems preferable to call the latter an *obligational point*, rather than a performative point, since in the case of contract (and other relationships involving voluntary or institutional obligations) the obligation does not result straightforwardly from a performative.

163. Each party also has first-order and exclusionary reasons to take certain actions. However, these illocutionary features play no role in the basic legal notion of contract, and so will not be discussed here.

each party has obligations to the other that result from, and that are ancillary to, the contractual relationship. This is a simple statement of the obligational point.

Third, unlike the ordinary case of promising, actions that are the subjects of contract-related assurance and obligation do not have any necessary connection with an utterance. The subject of a contractual obligation may well be expressed in the parties' illocutionary act of agreement, but it may just as well result from the agreement as a so-called implied obligation or term. Similar observations can be made about the subject of a contractual assurance—that is, about what a party has a reason to believe and about what he has a right to rely on.

Fourth, when we pass to the legal concept of contract, we can say, as a first approximation, that the obligational point may be expressed in the following generalization: a contract is that relationship, breaches of obligations ancillary to which are remedied, as breaches of obligation, by contract law. The fact that contract law remedies a breach of contract obligation is a definitional feature of "contract"; it is not an interesting, but contingent, fact. There is no descriptive, or non-obligational, concept of contract that contingently forms the subject matter of a body of rules concerning contracts, in the way there seems to be a descriptive, non-obligational notion of dog that contingently forms the subject matter of a body of rules prohibiting dogs in the park.[164] Contracts are enforceable—breaches are blameworthy—because our social practices, including those embodied or reflected in contract law—make them so. It is idle to think that the concept of contract can be explained or understood apart from social practices having reference to it, in particular the social practices involving obligation-based criticism.[165]

Fifth, the illocutionary features of contract play two distinct roles. One is to give guidance to the law of contract remedies. Merely to say that breaches of contractual obligations are ipso facto remediable (i.e., remediable because they are obligations) is to say nothing about what the remedies should be. Guidance must be sought elsewhere and, for good or ill, it is commonly sought in the illocutionary features of contract: in the fact that a contract may give rise to expectations (i.e., reasons to believe), to a right to rely, and to actual reliance. In particular, the most accepted ways of determining the remedy for a breach involve the value of what a party expected or the cost of his reliance. The other role for the illocutionary features is as independent bases for liability. Conduct relating to a contract may constitute a wrong other than a breach of obligation. Some such wrongs involve harms connected with illocutionary phenomena. Actions for promissory estoppel, misrepresentation, or unfulfilled expectation (e.g., the expectation of a pension, in employee benefit plan law) seek remedies for wrongs of this type: wrongs

---

164. For a theory of a purely contingent relation between rules and their subject matter, see Frederic Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991).

165. This is not a radical insight. For example, the authors of *Corbin on Contracts* recognize that to ask why a bilateral contract is enforceable is to ask the wrong question:

> [W]e must start out with the general proposition that mutual promises are consideration for each other. We do not need a reason for holding that a bargained for promise is consideration. Instead we must find a reason why sometimes it is not and deal with these exceptions as they arise.

2 Corbin on Contracts, *supra* note 103 at 129.

connected with reliance or some other illocutionary features of a contract (or of a promise, assurance, or related illocutionary act). Sometimes, these types of remediation are considered part of contract law; sometimes they are not.

Sixth, this dual role for the illocutionary features of contract helps explain the urge to view enforcement of contract obligations as a disguised way of protecting reliance, expectations, or the right to rely. If one fails to understand that contract is an obligational concept, and that a breach is ipso facto criticizable, one will inevitably ask why contracts are enforceable, just as one might ask why dogs should be excluded from the park. Indeed, one might even think the important question is why some *promises* are enforceable and others not.[166] In asking such questions, however, one is implicitly rejecting the view that a point of contract involves obligation, and that enforceability is part of its meaning. If one does so, one is faced with the task of explaining the criticism appropriate in cases of breach in non-obligational terms. The illocutionary aspects of contract are natural choices; and the view that they are proper choices is fostered by the role these features play in shaping the law of remedies for breach. But that view, while understandable, misperceives the point of contract.

Conclusion

Some of the most important conclusions that we have reached in our examination of promise are as follows.

First, and most fundamental, the everyday concept of promise is a complex notion. It can be understood fully only by recognizing that promising is both an illocutionary act, ipso facto generating reasons for belief and action, and a social performative, ipso facto generating obligations. These features are logically distinct. In addition, the illocutionary and social performative aspects of promise themselves have distinct speaker-related and hearer-related aspects. Only by recognizing and properly analyzing these four aspects of the everyday notion can one avoid common confusions and see the connections between the everyday notion of promise and other ones.

Second, the notion of obligation is far from straightforward. In brief, it is a social concept and its meaning involves a special type of criticism appropriate in certain types of conduct. Having an obligation is not the same as having a reason. Although the fact that one has an obligation to ϕ may (indeed, should) give one a reason to ϕ, it does not necessarily do so. Without a proper analysis of obligation, one risks conflating the illocutionary and the social performative aspects of promise, and risks failing to distinguish the various ways in which a person can be bound by a promise.

Third, the relationship between contract and promise is nowhere near as simplistic as the initial definition provided in the *Restatement of Contracts* and conventional wisdom make it out to be. There are several promise-like concepts that play an important role in contract formation and in contract enforcement. Not only

166. E.g., Goetz & Scott, *supra* note 2.

are these concepts different from each other; they differ from the everyday concept of promise as well. Moreover, contract has both illocutionary and obligational features. A proper analysis of contract requires that one recognize these features and appreciate their respective roles.

Much of the foregoing has clear applications to law and legal analysis. We have shown how one discrete body of legal rules—a part of the law of confessions—can be reorganized in a more principled way, and we have sketched how another—the law of contract—can be put on a conceptually more secure foundation. It is not difficult to see, in general, how the methods developed here can be used to clarify other fundamental notions, such as reliance and expectation, and how other bodies of law, such as misrepresentation law and benefit plan law, can be reexamined and recast to improve conceptual clarity. The tools and methods of analysis developed here cannot answer questions about social policy choices. But they can help make the process of developing legal rules and refining legal concepts more principled and more intellectually coherent.