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RESEARCH ARTICLE

Contract as Vow or Oath

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Abstract

Many scholars and judges attempt to harmonize legal practices of contracting with the social practice of promising in ordinary life. This article explores an alternative genealogy of contract in traditional social practices that track many of contract's core norms: taking vows and oaths. Without denying that promissory morality infiltrates modern contract, contract-as-vow-or-oath can expose by way of a supplementary account why some contract rules work as they do and can take some pressure off of a more unitary promissory theory in justifying, explicating, and reforming contract law.

I. Introduction

Much contract law and contract theory puts promise at its center. The first section of the current *Restatement* defines contracts as promises or sets of promises,[1] and some of the most discussed work in contract theory seeks to explore the relationship between the legal practice of contract and the conventional practice of promising in private life.[2] There are some obvious reasons to be skeptical that contracts are all and only about promises, however: the breach of a contract usually produces a damages remedy in Anglo-American jurisprudence, whereas the moral opprobrium reserved for promise-breakers in ordinary life does not seem appropriate to reduce to a monetary payment. Second, promises are routinely made unilaterally, whereas contracts essentially seem to be about exchange. The age of the click-through agreement further challenges the "contract-as-promise" paradigm: we don't use the magic word "promise" in our standard form agreements that we don't read, nor would an ordinary person tend to treat consumer form agreements as partaking in the sanctity

[1] Restatement (Second) of Contracts §1 (1981) ("A contract is a promise or a set of promises …").

[2] *See, e.g.,* Joseph Raz, *Promises and Obligations*, in Law Morality, and Society: Essays in Honor of H.L.A. Hart 210 (Joseph Raz & P. M. S. Hacker eds., 1977), Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981); Dori Kimel, From Promise to Contract: Towards a Liberal Theory of Contract (2003); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708 (2007) (hereinafter, "*Divergence*"); Jody Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603 (2009); Michael G. Pratt, *Contract: Not Promise*, 35 Fla. St. U. L. Rev. 801 (2008); Seana Shiffrin, *Is a Contract a Promise?* in Routledge Companion to Philosophy of Law (Andrei Marmor ed., 2012); T. M. Scanlon, *Promises and Contracts*, in The Theory of Contract Law: New Essays 86 (Peter Benson ed., 2001).

of promise. Finally, the spot purchases we make in stores and marketplaces that bind us to agreements don't have us using much speech drawing on conventions of promise from private life either; market morality seems to exist in a different sphere of life activity. To be sure, promissory contract theorists have sought to explain these most basic divergences between contract law and the moral practices of promising—with varying degrees of success. Yet we are still left with a contract law and contract theory that invokes the promisor and promisee as part of a promise-like practice at the root of contracts, helping to ballast justifications for their legal enforcement.[3]

Some have tried to leverage the departures of promissory morality from contract law to urge a fresh start, emphasizing other core normative features of contract that could serve as a potentially better basis for building contract theory and guiding contract law. Some examples might be Patrick Atiyah's more reliance-based reconstruction of contract[4] or Randy Barnett's effort to put "consent" at the center of the contracting enterprise.[5] But certain kinds of pluralists[6] can concede that promise matters to modern contract law and many corners of theory without giving up the effort to offer supplemental theoretical resources to explain contract law's normative structure and that can serve as a basis for understanding and improving it. Thus, this article is not about the potentially puzzling persistence of promissory contract theory per se.

Instead, the argument in what follows is that vows and oaths furnish a surprisingly illuminating window into contract, one that has been obscured by a promissory theory that has tended to exclude serious consideration of these other institutional practices. Promise may have boxed out the relevance of vows and oaths because of a misunderstanding of their histories and institutional manifestations: if we mistake vows and oaths to be merely non-legal mechanisms of self-binding—usually in the sacred or religious sphere[7]—we will miss just how much they have to reveal about

[3]Many scholars in the law and economics tradition have sought to de-emphasize the promissory principle, *see, e.g.,* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489 (1989), and other scholars try to retain the importance of the promissory principle even while making room for other values too, *see, e.g.*, Jody Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 Phil. Issues 420 (2001).

[4]*See generally* P.S. Atiyah, The Rise and Fall of Freedom of Contract (1979).

[5]*See generally* Randy E. Barnett, *Contract Is Not Promise; Contract is Consent*, *in* Philosophical Foundations of Contract Law 42 (Gregory Klass, George Letsas, & Prince Saprai eds., 2014).

[6]*See generally* Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (2017); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 Suffolk Univ. L. Rev. 915 (2012); Howard M. Erichson & Ethan J. Leib, *Class Action Settlements as Contracts?*, 102 N.C. L. Rev. 73 (2024); Aditi Bagchi, *Pluralism*, *in* Research Handbook in the Philosophy of Contract Law (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459627.

[7]*See generally* Herbert J. Schlesinger, Promises, Oaths, and Vows: On the Psychology of Promising 173–198 (2008). A short and thoughtful effort to try to distinguish vows and oaths from promises appears in Martin Hogg, Promises and Contract Law: Comparative Perspectives 38–45 (2011). As I will make clear below, the laudable summaries there miss some pretty important realities about the histories of these practices; how widespread they likely were even outside of strictly religious contexts; and how tied up with law they have long been. Hogg treats vows as "specialized" to biblical and medieval contexts so rules concerning vows "can only have been of very restricted influence so far as the overall impact of promissory idea on contract law was concerned." *Id.* at 41. While he concedes the legal significance of oaths even in modern law, he probably understates their centrality in the development of contract, assuming that all breaches of

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contract's core and even its modern doctrinal contours.[8] By appreciating how much these historical practices with modern corollaries track contract law's basic norms, we can improve our understanding of contract law and develop new insights to orient its reform. Although in modern usage we might assume vows are reserved for marriage or charitable pledges[9] and that oaths are largely symbolic and rarely enforceable (though oaths of office and juror and witness oaths continue to have some legal status in public law),[10] a wider lens into these practices can cast contract in a new light. Ultimately, vows and oaths have been somewhat more transactional than is commonly understood among contract theorists, and that has implications for the kind of social practices that we can reasonably treat as genealogically and analogically relevant for contract.[11] Indeed, one doesn't even need to be a full-throated pluralist

oaths triggered only ecclesiastical jurisdiction, removed from civil justice and the ultimate common law of contracts. *Id.* at 41–45. *See also* Joseph Raz, *Is There a Reason To Keep a Promise?*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 5, at 58, 65 (acknowledging that vows and oaths "differ from promises in many ways, among them the fact that … they are established by law or custom" and that people using them "undertake duties whose content is determined by law or custom" with "restrictive qualifications for being able to undertake these obligations" and with "strict conditions for being released from them") (citing no history or any authority); Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 5, at 96, 97 ("Unlike, say, a vow, or other putative forms of personal undertakings, a promise is made to someone; it involves a promisee.") (citing no history or any authority); James Penner, *Promises, Agreements, and Contracts*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 5, at 116, 130 (assimilating oaths and vows to promises—as not really "upping the ante").

[8]Although D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (1999) at first seems to treat oaths as a mere footnote to the common law of contract because in his quick summary oaths "attracted no human sanction," *id.* at 4, he later concedes that the very birth of the cause of action that became breach of contract in the sixteenth century (assumpsit) could be traceable to "some transplantation of language and ideas from the ecclesiastical courts to the secular courts," *id.* at 136. I will discuss this development *infra* Part III.

[9]Fried, *supra* note 2, at 41–43, seeks to distinguish vows from promises without usefully defining vows other than claiming they need not be communicated to any beneficiary. Fried offers no support for that proposition nor does he offer any engagement with any literature about vows. I assume his marriage vows, like most, were communicated to their beneficiary. Atiyah, for his part, also very quickly offers some ruminations on vows without any consistent definition or engagement in study. *See* P. S. ATIYAH, PROMISES, MORALS, AND LAW 54 (1981).

[10]Legal academics have not ignored these oaths. *See, e.g.*, Youngjae Lee, *Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries*, 31 LAW & PHIL. 299, 323–338 (2012); Helen Silving, *The Oath: II*, 68 YALE L.J. 1527 (1959); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016); Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009); Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARD. PUB. L. POL'Y & ETHICS J. 303 (2014); Ian Gallacher, *"Swear Not at All": Time to Abandon the Testimonial Oath*, 52 NEW ENG. L. REV. 247 (2018); Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 TOURO L. REV. 489 (2016). For recent contributions to the historical study of oath practices, see Andrew Kent, Ethan J. Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2141–2178 (2019); and Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & M. L. REV. 1297 (2021).

[11]By invoking a genealogical method here, I have in mind an effort to use history to both "defamiliarize" the predominance of promising as such within contract and "reconceptualize" vows and oaths as relevant to contract morphology, looking at family resemblances with other volitional institutional practices that

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about contract's values to appreciate this new window into contract-as-vow-or-oath because vows and oaths could be understood as sufficiently within a class or order that contains promises that they can be admissible in a more pluralist conception of promise itself, as well.[12]

Part II introduces the reader to the history of vows and oaths before the common law, offering an analytical definition rooted in these practices. Part III then explores how some of that history might inform the structure of the common law of contract. Part IV offers some lessons about why any of this should matter to contract theorists and contract law today. If vows and oaths turn out to be more exchange-oriented, with real beneficiaries, and more law-saturated than contract theorists and lawyers have thus far appreciated, these practices and institutions should take their rightful place alongside promise as a resource for understanding contract better. The genealogical method here is calibrated to help us see the centrality of vow and oath practices in the constellation of voluntary obligations—and then to help us reconceptualize contract itself as sharing in the morphology of those practices.

II. Vows and Oaths Before the Common Law

Among contract theorists, it is commonplace to assume that vows and oaths—particularly as distinguished from promises—are essentially in the realm of the sacred and not subject to enforcement through secular authority,[13] or only made to oneself rather than another person,[14] so perhaps create no one else with a claim to enforce them.[15] Yet even thinking in modern terms about marriage vows and oaths of office can help us see some limits to the quick dismissal of these institutions as outside law and without beneficiaries with a claim to enforcement. But, taking a broader lens to examine the history of votive and swearing institutions in this part, promissory

predate and might inform contract. *See* Derek Hook (with Brett Bowman), *Foucault's 'Philosophy of the Event': Genealogical Method and the Deployment of the Abnormal*, *in* Foucault, Psychology and the Analytics of Power 138 (2007). Although history is certainly relevant in this critical project, I am not seeking to decisively support a causal claim. As Foucault himself suggests, genealogy "opposes itself to the search for 'origins'." Michel Foucault, *Nietzsche, Genealogy, History*, *in* Language, Counter-Memory, Practice: Selected Essays and Interviews 139, 140 (D. F. Bouchard ed., 1977).

[12]*See* Kyle Fruh, *Promising's Neglected Siblings: Oaths, Vows, and Promissory Obligation*, 100 Pac. Phil. Q. 858 (2019). Nothing, it seems, turns here on taxonomic rank; whether promises, oaths, and vows are "siblings" or in the same genus or species should not matter for a promise pluralist.

[13]*E.g.*, Atiyah, *supra* note 9, at 54; Hogg, *supra* note 7, at 38–45. For an argument that most vows don't trigger obligations, see Anita L. Allen, *Vowing Moral Integrity*, 19 Eu. J. App. Phil. 2, 21–22 (2023).

[14]*E.g.*, David Owens, Shaping the Normative Landscape 171, 223 (2014) (although only provisionally committing to a theory of vows, defining them as obligations one takes only upon oneself, inwardly directed, and with no provision for release—all unlike promises on his view).

[15]*E.g.*, Kimel, *supra* note 7, at 97; Bagchi, *supra* note 6, at 3. There is something a little puzzling about this way of distinguishing vows and promises, since our most common vows in ethical life—marriage vows—are made directed to others, a point appreciated by Raz, *supra* note 7, at 65. And there is reason to think, in any case, that self-promising is more legible than is usually appreciated by promissory theorists. *See* Alan Habib, *Promises to the Self*, 39 Can. J. Phil. 537 (2009); Connie Rosati, *The Importance of Self-Promises*, *in* Promises and Agreements: Philosophical Essays (Hanoch Sheinman ed., 2011); Kyle Fruh, *The Power to Promise Oneself*, 52 S. J. Phil. 61 (2014). Although often made to divine authority, oaths are also routinely done publicly, as if to indicate that others may hold those who swear accountable.

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theorists' sidelining of vows and oaths does not do justice to the much more nuanced use of these set of voluntary undertakings and commitments in human history. In what follows, I will treat vows and oaths in a unified manner without denying that there are some plausible ways of distinguishing oaths from vows. However, because their dismissal by promissory theorists rests on a similar set of oversights about the ways these practices align, working out their differences is beyond the scope of my effort here. The tour of votive and swearing practices I survey below will tend to support the following analytical definition (even if not every instance in world history conforms):

> *People undertake vows or oaths when they volitionally and with outward manifestation through action or words commit to a personal binding obligation typically in exchange for something else, offering as a guarantee either implicitly or explicitly a form of sanction backed by some authority.*

Admittedly, I cast a wide net in arriving at this definition, reaching beyond traditional legal sources to make sense of the Anglo-American common law. Still, our civilization's understanding of vows and oaths is not parochial—and we can only see that if we look panoramically at these institutions.

* * *

In ancient China, the standard "occasion of [the taking of] vows or oaths was usually the conclusion of a treaty of peace or alliance" and "vows or oaths" there "practically correspond[ed] to the modern seals and signatures."[16] True enough, vows and oaths were linked to sacrifices of animals and other rituals meant to project seriousness of commitment—in part to address times in which "loyalty and sincerity had worn thin."[17] Notice, though, as a mechanism of undertaking and credible commitment, the rituals provide a *cautionary* moment for those entering the alliance; *evidence* to others about the binding nature of the undertaking; and a *channeling* mechanism for participants to negotiate their relationship.[18] It was presumptive that the alliances would create "beneficiaries" with claims to enforcement.

Alliance vows were not just between rulers navigating warfare but also between friends. In the Song dynasty (960–1279 CE), so-called "blood brothers" would take vows of reciprocal exchange: "We will cling together like serpents and dragons inextricably coiled. When one of us attains riches and honour he will share his prosperity

[16]R.F. Johnston, *Vows (Chinese)*, *in* XII Encyclopaedia of Religion and Ethics 646 (James Hastings et al. eds., 1962).

[17]*Id.*

[18]These functions of form are well known to contract theorists from Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941). In his article, Fuller mostly took the promissory theory for granted, mentioning promises more than 100 times but not once considering the cautionary, evidentiary, and channeling functions of vows or oaths. Fuller is also associated with "reliance" theorists, given his other major contribution to contract theory. *See* L.L Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52 (1936); L.L Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: II*, 46 Yale L.J. 373 (1937). For the use of Fuller to understand rituals in law, see Peter Meijes Tiersma, *Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues*, 9 J. Legal Hist. 3, 15 (1988).

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with the others."[19] The enforcement mechanism was indeed "divine chastisement,"[20] but it was also practiced as a *bilateral* commitment, not a unilateral promise. This is not to say that oaths were not taken individually in early societies,[21] but it is worth spotlighting that parties often exchanged oaths in a mutual process—sometimes associated with a commitment to pay.[22]

Primitive societies generally used oaths even without appealing to deities or objects, drawing upon what was likely thought to be the magical power of the spoken word.[23] The Hebrew word for oath (*shevuah*) clearly derives from the word for seven (*sheva*), a seemingly magic number.[24] The idea is that certain linguistic formulae can bring the will into being in the material world. The core formula for an oath was essentially in the first place a curse[25]—that some ill should befall oath-takers if what they say is or becomes untrue. The conditional structure—some dimension of exchange of truthfulness backed by sanction—is at least as significant as who may enforce the oath.[26] And the binding nature of the oath never needed to be established (in contrast to promissory theorists who puzzle over just how the speech act of promising triggers obligation)[27] because the oaths themselves were thought to have a magical quality of bindingness;[28] gods themselves undertook oaths, even once deities became central to oath practices.[29] Significantly, however, oaths were not limited to sacred contexts: the Hammurabi Code had judicial oaths as early as 2000 BCE and ancient civilizations used oaths of attestation in their tablets documenting ordinary business life, invoking kings and cities (which looks more like secular enforcement than is routinely acknowledged) rather than gods.[30] The oath, importantly, was there often to demarcate not moral suasion but legality—for when "due penalty may be exacted."[31]

One might not think Chinese vowing practices or primitive oaths could be etiologically relevant to the common law of contract but Greek and Roman practices also have resonances of the modern contractual form. For example, among the Greeks,

[19]Quoted in Johnston, *supra* note 16, at 647.

[20]*Id.*

[21]*See* A. E. Crawley, *Oath (Introductory and Primitive)*, *in* IX Encyclopaedia of Religion and Ethics, *supra* note 16, at 430.

[22]*Id.*

[23]*See* Helen Silving, *The Oath: I*, 68 Yale L.J. 1329, 1330 (1959).

[24]*See* Maurice A. Canney, *Oath (Semitic)*, *in* IX Encyclopaedia of Religion and Ethics, *supra* note 16, at 436; Manfred R. Lehmann, *Biblical Oaths*, 81 Zeitschrift für die Alttestamentliche Wissenschaft 74, 76, 78–80 (1969).

[25]*See* Silving, *supra* note 23, at 1330, 1336–1337.

[26]Crawley, *supra* note 21, at 430–433

[27]*E.g.*, Fried, *supra* note 2, at 7–17.

[28]Crawley, *supra* note 21, at 433.

[29]*Id.*

[30]*See* Canney, *supra* note 24, at 436 n.2, 437; *see also* W. Ernest Beet, *Oath (NT and Christian)*, *in* IX Encyclopaedia of Religion and Ethics, *supra* note 16, at 435. ("As time went on, the oath, in ever growing measure, became a factor in almost every social relationship; e.g., in addition to the judicial oath, guaranteeing truth, may be mentioned those pledges of fidelity, the oath of fealty, the coronation oath, and the oath of office more generally. This was the case in ecclesiastical no less than in civil life, as witness ordination oaths, monastic and crusaders' vows.")

[31]*Id.*

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"the condition [of a vow] is the rendering of aid; and the vow, thus strictly regarded, is the proposal of a *bargain* that the recipient of the favour required shall make suitable recompense … The fulfillment of a contingent vow is often pledged by the security of an oath."[32] Notice here that exchange is central: "to the Greek conception a vow could not be merely negative; a definite offering must be [committed] as a return for the favour to be granted."[33] Ultimately, the vow form was structurally bilateral. For Romans, the form was also in heavy use in private and legal life,[34] and the "oath tended to supplement divine retribution *with … secular punishment*."[35] A common use of the oath was essentially a "wager"—it was a pledge for a litigant in a legal dispute.[36] But the oath also figured in classical Roman law to render enforceable ordinary transactions, serving as a validation device before it was a litigation device.[37]

To be sure, there are also divergences between the structure of vows and ordinary business dealings in the Greco-Roman tradition. To wit, vows were generally made "in times of fear and danger. Women especially, Plato tells us, and men too [vowed] when they [we]re sick or in trouble, if alarmed by dreams or apparitions."[38] So the vow was connected with vulnerability rather than equal bargaining power. And a "usual occasion for the making of vows was at the opening of a war," which although it had the form of a "regular contract" certainly had some dimensions of "sacred compact" too.[39]

The Judeo-Christian context—perhaps still more etiologically relevant to the common law of contract—also has a rich tradition and history of vows and oaths in use as "suret[ies] for …. veracity."[40] Two big ideas emerge from the Christian perspective on vows:[41] first, a vow must be an undertaking of "something not generally regarded as already obligatory";[42] and second, there were what one might call public policy limits upon the practices of vowing, since one could not voluntarily undertake something that would hinder an already commanded duty.[43] So, although oaths and vows of

[32]A. C. Pearson, *Vows (Greek and Roman)*, *in* XII Encyclopaedia of Religion and Ethics, *supra* note 16, at 652 (emphasis added).

[33]*Id.*

[34]*Id.* at 653.

[35]Silving, *supra* note 23, at 1337.

[36]*Id.* Silving also describes "decisory" oaths, which one party could offer another to resolve an issue and "suppletory" oaths, which are offered by a judge to one party to help buttress its case. *Id.* Far from oaths being extra-legal here, they were heavily wrapped up in legal procedures. Even the oath of office was a mode of changing legal status. Silving traces this tie to legal procedure through Germanic law in *id.* at 1340–1343. For its role in early modern English legal history, see Conal Condren, Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices (2006).

[37]*See* Hogg, *supra* note 7, at 112 nn.7 & 9 (identifying a *spondere* formulation in the standard early *stipulatio* as associated with oaths), citing Reinhard Zimmerman, The Law of Obligations: Roman Foundations of the Civilian Tradition 71 (1996).

[38]Pearson, *supra* note 32, at 652 (citing Plato, The Laws 909e).

[39]*Id.* at 653.

[40]Jacob Mann, *Oaths and Vows in the Synoptic Gospels*, 21 Am. J. Theo. 260, 260 (1917).

[41]For an important effort in this regard, see James Endell Tyler, Oaths: Their Origin, Nature, and History (1834).

[42]A.J. Grieve, *Vows (Christian)*, *in* XII Encyclopaedia of Religion and Ethics, *supra* note 16, at 650.

[43]*Id.* at 651.

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all kinds were drawn into ecclesiastical jurisdiction upon their breach,[44] some familiar common law contract ideas are on display here, too: the pre-existing duty rule—that one cannot undertake to do something which is already under a prior obligation as relevant consideration[45]—and public policy limitations to enforceable voluntary undertakings.[46] It is also probably true that the Christian perspective on vows and oaths was influenced by Matthew's famous exhortation to avoid oaths,[47] though this worry about vows and oaths being demeaned by their too-often invocations is also a theme in ancient China[48] and the Jewish tradition.[49]

The conception of the vow or oath from the Hebrew Bible also has the feature of supererogation in that a vow or oath either goes beyond the normal demands of religious command or prohibits something that would otherwise be permitted.[50] The case of the Nazirite, who vows to forgo haircuts, grape-based products, and being near the dead, is perhaps the canonical case of a vow in the Pentateuch.[51] And although there is also the Greco-Roman sense here that the vow is "born in a sense of need or an experience of distress," it also has the character of something "quasi-commercial" in dealing with divinity:[52] the vow is a kind of bargain, expressed conditionally,[53] and it "must cost the offeror something, whether in money, effort, or privation."[54] Even when God himself swore, it was often in exchange for something.[55] Also as in the modern law of contracts, the Old Testament vow is "external" rather than internal.[56]

[44]*Id.*; *see also* Richard H. Helmholz, 1 The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s, at 418–420 (2004); Hogg, *supra* note 7, at 120.

[45]*E.g.*, Alaska Packers' Ass'n v. Domenico, 117 F.99 (1902) (holding that a pre-existing duty to do a job for one price vitiates the possibility of agreeing to do the same thing for a new commitment to pay more money for the same performance).

[46]*E.g.*, Restatement (Second) of Contracts §§178–199 (1981).

[47]*See* Matthew 5:33–37.

[48]*See* Johnston, *supra* note 16, at 646.

[49]*See* Saul Lieberman, Greek in Jewish Palestine 115 (1994 [1942]).

[50]*See* John E. McFadyen, *Vows (Hebrew)*, *in* XII Encyclopaedia of Religion and Ethics, *supra* note 16, at 654; Moshe Benovitz, Kol Nidre: Studies in the Development of Rabbinic Votive Institutions 24 (1998) (arguing that oaths in contravention of biblical law are void *ab initio*). To some extent, Jewish law developed otherwise and a codification of Jewish law in the sixteenth century permitted vowing to fortify oneself to fulfill a positive commandment or to avoid a negative commandment. *See* Shulchan Aruch, Yorah Deah 203. The oath, however, seems not to be valid "if one swears either to fulfill or to violate any of the provisions of the Sinaitic covenant," because "the entire people of Israel has already sworn to fulfill them at Sinai." Lawrence H. Schiffman, *The Law of Vows and Oaths (Num. 30, 3–16) in the* Zadokite Fragments *and the* Temple Scroll, 15 Revue de Qumran 199, 202 (1981).

[51]*See* Numbers 6: 1–21. John the Baptist and Paul were both Nazirites, partaking in this vow. *See* Luke 1:15 (John the Baptist); Acts 18:18, 21:23–26 (Paul).

[52]*See* McFadyen, *supra* note 50, at 656.

[53]*Id.* at 654; *see also* Benovitz, *supra* note 50, at 9 ("The biblical vow is usually conditional") (citing Genesis 28:20–22 (Jacob vows to God if he watches over his journey); and I Samuel 1:11 (Hannah offers a son to service if God gives her a son); *id.* at 130–131 (the oath is conditional, too); Lehmann, *supra* note 24, at 80 (the oath is a "conditional curse going into effect only when the oath is broken"); *id.* at 85–86 (the vow is also a "measure for measure" exchange).

[54]*See* McFadyen, *supra* note 50, at 655.

[55]*See, e.g.*, Deuteronomy 11:13–21.

[56]McFadyen, *supra* note 50, at 654–655.

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Furthermore, two more core features of vows in the Hebrew Bible make their way to our contract law as well. First, the validity of a vow is conditional on the *capacity* of the vower.[57] Second, if someone vowed an animal (or house or land) to God but wished to retain or redeem it, the vower could buy his way out of performance under certain conditions or engage in substitute performances.[58] Perhaps surprising, the Jewish tradition of vowing has a "perform or pay" (or substitute) quality, suggesting a damages approach rather than a specific performance approach to enforcement.[59] Although one might think the vow or oath is pre-legal, there is another perspective that is also available from biblical exegesis: "a legal act became binding only if the parties took upon themselves the jurisdiction of the supreme powers."[60] Again, far from being an extra-legal source of obligation, vows and oaths—and their "element[s] of curses and blessings"—gave "binding force" to "contractual relationships"[61] as well as covenants and treaties.[62] In modern terminology, they are validation technologies.

During the Second Temple period and the robust development of rabbinics thereafter, the law of vows and oaths became considerably more elaborate. Two whole tractates of the Talmud are devoted to vows (*Nedarim* and *Nazir*), and one is devoted to oaths (*Shevuot*), though the small differences between them are not particularly important for the current inquiry and they are often run together.[63] Thirty-three

[57] *Id.* at 654.

[58] *See* Leviticus 27:9–25.

[59] *See* Schiffman, *supra* note 50, at 201 (citing 1 Sam. 14:45 for the view that "an oath could be set aside if a sum was donated to the Temple"). This is not to say there was no conception of "specific performance" for forcing one to perform his vow in certain circumstances. *See* BT Kiddushin 50a ("With respect to one who vows to bring an *olah* sacrifice, the verse states 'he shall bring it.' This teaches that we coerce him to fulfill his vow.") (citing Leviticus 1:3).

[60] Lehmann, *supra* note 24, at 74.

[61] *Id.*

[62] *Id.* at 84. For some examples in the Old Testament, see Numbers 5:21, 27 (curses associated with the secluded wife and jealous husband ceremony (*sotah)*; Genesis 26: 28 (oaths associated with entering a treaty). There is another word in the Hebrew Bible—*berit*—that might be relevant to this reconstruction effort. It often translates as "covenant" but there might be warrant to think of it more as a "pact" or "obligation." *See* M. Weinfield, *Berit—Covenant vs. Obligation*, 56 Biblica 120 (1975). Although one might be able to trace a line that translated *berit* with *pactum* in Latin sources drawing the concept closer to contract, the Jewish rabbinical tradition never developed the conception of *berit* into an operational legal idea. Trying to link covenantal community to the law of contract is a subject for another day. There is certainly warrant to draw oaths and covenants closer in the Hebrew Bible: in Isaiah 54:9, God uses the language of having sworn matters (*nishbati*) to Noah—but Genesis treats God's representations in the language of covenant (*berit*), *see* Genesis 9:9–17 (invoking *berit* five times). The covenant with Abraham also uses the language of *berit*—but, like the relationship with Noah, it feels as if it too is in exchange for fealty (and is later rendered in the language of oath (*shevuah)*): *see* Deuteronomy 11:21.

[63] *See* Lieberman, *supra* note 50, at 117 ("[I]n practice, the people seem not to have discriminated between these two terms," though there was a theoretical difference in that the oath was seen as a "personal obligation to do or not do something," "whereas a vow makes an item forbidden to the person."). *See also* Zeev W. Falk, *On Talmudic Vows*, 59 Harv. Theo. Rev. 309, 309 (1966) (conceding "a basic difference between vows and oaths, though both are sometimes formulated in a similar way"); Shulchan Aruch, Choshen Mishpat 207:19 (announcing that vows and oaths and handshake deals are all similarly acceptable validation devices for transactions). There is some reason to think that a conditional self-imposed curse model of the oath, *see* Benovitz, *supra* note 50, at 127 ("an oath is a curse to which the swearer subjects himself in the event that his words prove false: in a future-tense oath, the curse is to take effect if and

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chapters of the *Shulchan Aruch*—a canonical code of Jewish law from 1565—cover rules about vows; the rules' "magnitude and complexity are themselves an indication of the large place which vows occupied in Jewish life … and of the importance attached to the subject by the Rabbinical mind."[64] Perhaps evidence of a concern among the Jews (as among Christians and the Chinese) that vows might be taken too casually or without deliberation or good reason, much rabbinical energy focuses on figuring out plausible legal ways to help people either annul or nullify their ill-taken vows and oaths,[65] the seeds of which are already in evidence in Philo's *On Special Laws*.[66] Perhaps this is reminiscent of Allan Farnsworth's claim that "[m]uch of contract law is devoted to identifying the reasons that … excuse reneging."[67] In any event, in this period there is lots of evidence that vows and oaths were taken in many non-sacred contexts.[68]

The rabbinical literature rehearses many debates and develops several legal innovations that are remarkably familiar to modern contract lawyers. At the start of both major tractates on vows, the Talmud meditates on all manner of equivalents and partial declarations that, as speech acts, count as vows that bind the speaker.[69] Foreshadowing one of the complexities of promissory theory—that part of what binds in a promise is partaking of the speech act of promising with its own conventions[70] even though we enter contracts with language that departs from promises all the time and it is actually rare than anyone in a contract invokes the language of promise directly—the Rabbis include in the relevant speech acts that trigger legal obligation a wide range of similar terms, just as today we might say that the language of agreement, consent, obligation, guarantee, and the like can all successfully bind one who utters a wide set of pronouncements.[71] Although it would be misleading to suggest that the Rabbis recognized implied vows and oaths (and it may be that implied

when the oath is violated; in a past-tense oath, the curse is to take effect if the statement made is untrue"), renders it more difficult to justify empowering rabbis to dissolve them, *id.* at 164. That is subject to some debate among the Rabbis in the Talmud, however, some of whom took the view that the oath could be dissolved just like vows could be. Benovitz essentially needs to concede that is the dominant position of the authoritative Babylonian Talmud, which incorporates a position credited to one rabbi in the Palestinian Talmud (PT Nedarim 11:1, 42c). *See id.* (citing BT Shevuot 27b; Nedarim 28a; Ketubot 77b; Sotah 36b; Sanhedrin 38a). There are definitely moments in the Babylonian Talmud that reinforce the view that a false oath was more troubling to the Rabbis than a vow—and they tried to channel people into vowing rather than swearing. *See, e.g.*, BT Gittin 34b–36a. *But see* PT Gittin 4:3 (suggesting that vows were feared more than oaths).

[64]Morris Joseph, *Vows (Jewish)*, *in* XII Encyclopaedia of Religion and Ethics, *supra* note 16, at 657.

[65]*See* Lieberman, *supra* note 50, at 115.

[66]*See* Philo, II On Special Laws III(9)–IV(17).

[67]*See* E. Allan Farnsworth, Changing Your Mind: The Law of Regretted Decisions 20 (1998).

[68]*See* Lieberman, *supra* note 50, at 116 ("The people swore and adjured on every occasion; they affirmed their statements by an oath in business affairs, in formulas of courtesy when they invited their friends, accepted invitations or rejected them, and in support of stories which strained credulity"); Mann, *supra* note 40, at 267 n.1 (listing examples from the Talmud of the use of vows to disinherit children).

[69]*See* BT Nedarim 2a ff. (highlighting that a vow can be taken on with all manner of equivalences); BT Nazir 2a ff (highlighting that if someone says they are a *"nazik"* or a *"naziach"* or a *"paziach,"* he took on the vow of being a Nazirite).

[70]*E.g.*, Fried, *supra* note 2, at 7–17.

[71]Long after the Rabbis expansively interpreted the language of vows, more contemporary legal systems sought to retain narrowly drawn testimonial oaths and not permit departures from their formulations. *See* Silving, *supra* note 23, at 1355.

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promises are more legible in a modern register), many of the formulations they believed triggered obligation are rather removed from the core language of vow and oath.

Yet much of the Rabbis' concern was in helping individuals unwind their voluntary undertakings in these formats. As they sought to systematize a set of legal rules for vows and oaths, the Rabbis established what clearly looks to modern eyes as a *force majeure* doctrine, specifying a range of cases where the vow or oath should have no legal effect because of circumstances beyond one's control, an impossibility doctrine of sorts.[72] They also seem to have adapted from Cicero a doctrine of duress, rendering vows and oaths taken to murders and tax-collectors not to be legally enforceable.[73]

At some point the Rabbis even discouraged the study of the tractates on vows in part because they appreciated that vows might be taken less seriously if everyone understood all the legal loopholes they had discussed and created for their invalidation.[74] Indeed, "the Rabbis have been accused of too readily 'opening the door,' to use their own phrase, to … annulment of vows."[75] Their eventual establishment of their ritual nullification before the holiest day of the year—Yom Kippur—surely reinforces both that vows and oaths (both practices referenced overtly in the relevant formulation all Jews recite annually) were central and feared, but also that getting out of them mattered a great deal to a law-abiding Jew.[76] The early Christian idea from Matthew to avoid oaths[77] seems to have roots in early parts of the Jewish tradition, too.[78]

* * *

In summary, this tour of vowing and swearing practices reveals a lot in their structure that should be familiar to any student of contract law: vows and oaths were involved in commercial transactions, had a conditional and bilateral structure,[79] required outward manifestations that were objective, had baselines for capacity and public policy, permitted excuses for *force majeure*, duress, and change of

[72]*See* Mishnah Nedarim 3; BT Shevuot 26a–b.

[73]*See* Lieberman, *supra* note 50, at 142–143 (citing PT Nedarim 3:5; Cicero, De Officiis III XXIX 107).

[74]Joseph, *supra* note 64, at 658.

[75]*Id.*; *see also* Mann, *supra* note 40, at 272 ("Yet seeing the great necessity of this device [of annulling vows] for the welfare of the people, the [Rabbis] clung to the innovation and helped to make it the accepted opinion and practice.").

[76]*See generally* Benovitz, *supra* note 50, at 149–164 (on the annulment of vows and oaths in rabbinical literature); *id.* at 165–176 (on the annual prayer which accomplishes annulments of both vows and oaths).

[77]*See* Matthew 5:33–37.

[78]*See* Midrash Tanchuma, *Vayikra* 7: "Let not someone from Israel be unrestrained in vows or in jesting (or to lead one's companion astray with an oath by saying it is not an oath). There is a story about the royal mountain where there were two thousand towns, and all of them were destroyed because of a truthful oath that was unnecessary. Now if one who swears in truth has this happen, how much the more so in the case of one who swears to a lie?"

[79]One reader suggested to me a counterexample in Ruth 1: 16, in which Ruth famously declares to her mother-in-law: "wherever you go, I will go; wherever you lodge, I will lodge." Perhaps this statement is plausibly conditional—but not bilateral because on its face it requires nothing of Naomi. The reason I don't think this succeeds as a counterexample (though I'm sure there are some) is twofold. First, nothing in the Hebrew text suggests this declaration is a vow (*neder*) or an oath (*shevuah*). Second, even if it were, it actually *is* an instance of Ruth bargaining; the context of the passage is Ruth begging Naomi not to urge her to leave and this declaration is meant to incentivize (as it does, *see* Ruth 1:18) Naomi to stop arguing with her to return to her people and gods (as her sister-in-law Orpah does).

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circumstance, had a pre-existing duty rule, had expansive ideas about the power of words, had a theory of bindingness and obligation with some flexibility about the formulae that triggered obligation, and already prefigured somewhat a perform-or-pay-or-substitute structure in some contexts.[80] Many of these characteristics of vows and oaths look like they could serve as a basis for similar doctrinal ideas within contract law, anachronisms aside. Although some of these early manifestations of vows and oaths come from societies without a clear concept of secular authority that was distinct from the sacred, as these sources of authority pulled apart, vows and oaths did not remain exclusively within a sacred sphere.

This cluster of ideas, then, supported by the history of these practices explored in this part, largely fits the analytical definition of a vow or oath with which I began. Notice that this definition might distinguish vows and oaths from many definitions of promises insofar as promises need not be offered in a relationship of exchange—and insofar as vows and oaths already contain the justification for their enforcement by an authority in a way ordinary promises do not.[81] The historical instantiations of votive and swearing institutions also underwrite several features of the common law of contract in a way that the social practice of promise alone probably cannot. These morphological similarities are deserving of attention on their own terms.

But could any of these features of vows or oaths have furnished direct or indirect models to help frame the common law of contract itself? Other than the unusual common lawyer like John Selden (1584–1654), who had learning in rabbinics,[82] or other so-called "Christian Hebraists" or "Talmudical Commonwealthsmen,"[83] who

[80]*But see* Hogg, *supra* note 7, at 39 (arguing from a Thomistic viewpoint that vows always require strict fulfillment and are only made to god).

[81]For a conventional analytical definition of promise, see *id*. at 64 ("a statement by which one person commits to some future beneficial performance (or the beneficial withholding of a performance) in favour of another person"). There are other differences between vows and oaths on the one hand and promises on the other one could emphasize using Hogg's definition: vows and oaths, in this definition, do not focus on *another person* per se in the way his definition of promise requires, *accord* Fruh, *supra* note 12, at 860, though many cases of vows and oaths do in fact trigger another's right of redress for default and are other-directed. True enough, the contemplated "authority" in the analytical definition need not be the state. But that enforceability matters already draws vows and oaths closer to contract than its "sibling" mere promise.

[82]For a review of Selden's engagement with Jewish law, see Jason P. Rosenblatt, John Selden: Scholar, Statesmen, Advocate for Milton's Muse (2021); Jason P. Rosenblatt, Renaissance England's Chief Rabbi: John Selden (2008); Jason Rosenblatt, *Rabbinic Ideas in the Political Thought of John Selden*, *in* Political Hebraism: Judaic Sources in Early Modern Political Thought (Gordon Schochet, Fania Oz-Salzberger, & Meirav Jones eds., 2008); Isaac Herzog, *John Selden and Jewish Law*, 13 J. Comp. & Int'l L. 236 (1931) (arguing that Selden evidences substantial familiarity with rabbinic law but also some non-Talmudic ways of thinking). For confirmation that Selden knew the law of vows and oaths particularly, see *id*. at 241; John Selden & Samuel Weller Singer, The Table-talk of John Selden 200–02 (J. Russell Smith ed., 3rd ed. 1860) (entry on "Oaths" discussing the rabbinical laws of annulling vows); John Selden, 1 De Synhedriis & Praefecturis Iuridicus Veterum Ebraeorum (1646) (translated in part as "The Synedria and Judicial Institutions of the Ancient Hebrews" by Peter Wyetzner on commission from The Shalem Center, on file with author); G.J. Toomer, II John Selden: A Life in Scholarship 449, 748–751 (2009). Toomer confirms that false oaths could lead to civil legal punishments, not just damnation. *See id.* at 750.

[83]For some work in this vein, see Eric Nelson, The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought (2010); Daniel D. Slate, *Franklin's Talmud: Hebraic Republicanism in the Constitutional Convention and the Debate over Ratification, 1787–1788*, 1 J. Am.

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had more interest in political theory than contract law, what mechanisms might have existed to make vows or oaths salient in the development of the common law of contract?[84] If the common law mind was "insular,"[85] is there any trace of these ideas in the early years when contract law was getting off the ground in earnest? No one doubts the law of oaths—such as it exists in testimonial contexts and investitures into offices—has long been disaggregated from the law of contract.[86] But are there points of contact among vows, oaths, and contract that might illuminate the history of contract law? Part III offers a brief engagement with that question. Part IV then offers some lessons for modern contract law and theory.

III. Vows and Oaths in the History of the Common Law

Among the more prominent uses for oaths in English legal history was in the development of the jury. The Crown convened under oath what we would today call grand juries around 1166 to inquire into subject matters pertaining to criminal justice, using the information for prosecution and the collection of taxes and revenue.[87] Trials of those discovered during these inquisitions sometimes proceeded by ordeal but eventually were more "rationalized" by having—through "wager of law"—witnesses come forward under oath (in a procedure called compurgation) to testify to the truthfulness and credibility of the accused and his oath of innocence.[88] In civil cases, compurgation was protected by statute for use as a defense to actions for debts as late as 1364 and was not abolished until 1833 (though the basic form of compurgation is long thought to have led to the modern petit jury—and its oaths of investiture).[89]

One key to understanding the core of the common law of contract is to look to its earliest manifestations in actions for debt. As Plucknett describes: "Twelfth-century lawyers in the King's Court were not given to metaphysical speculation, but were just practical administrators who saw a need for enforcing some of the commoner types of debt … [T]hey said nothing about mutual grants, consent, consideration, or any other theory of contract. All they did was to establish a procedure for

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Con. Hist. 232 (2023). For a takedown of John Milton's superficial knowledge of Jewish law, see Leonard R. Mendelsohn, *Milton and the Rabbis: A Later Inquiry*, 18 Studs. in Eng. Lit. 125 (1978).

[84]England essentially expelled its Jews in 1290 under Edward I. They were not resettled until Oliver Cromwell in the 1650s. That makes Selden's accomplishments all the more impressive and rare.

[85]*See generally* J.G.A. Pocock, The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century (1957). For discussion, see Martha A. Ziskind, *John Selden: Criticism and Affirmation of the Common Law Tradition*, 19 Am. J. Legal Hist. 22 (1975).

[86]On their role in the law of public office especially, see Kent, Leib & Shugerman, *supra* note 10; and Leib & Kent, *supra* note 10.

[87]*See* Theodore F.T. Plucknett, A Concise History of the Common Law 112–113 (2010) (1929).

[88]*Id.* at 113–116. *See also* Silving, *supra* note 23, at 1361 (arguing that the jury trial came out of oath practices); *id.* at 1363 (arguing that the oath system was "rationalized" because it had its own power that wasn't reliant on divine intervention); Sir Frederick Pollock & Frederic William Maitland, 2 The History of English Law Before the Time of Edward I, at 224 (2010) (1898) (discussing the use of oaths and "oath-helpers" in debt cases); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 594 (1969).

[89]Plucknett, *supra* note 87, at 116–38. On the abolition of compurgation, see Statute of 3 & 4 Will. 4, c. 42, §13 (1833).

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compelling debtors to pay their obvious dues."[90] Yet by the 1300s, the model of exchange and voluntariness was already at the core of what would become contract, long before "promise" was in view as a source of obligation.[91] By the 1400s, we already see evidence of capacity requirements, voluntariness requirements, the defense of duress, and the doctrine of mistake, though some of the excuse doctrines arose in Chancery courts rather than in the common law courts themselves.[92] It is suggestive that votive and swearing practices already had these features—as did what would become contract—though promise as a basis for enforcement would not become relevant for contract for at least another 100 years.

Even apart from litigation over debts, with the scaffolding of doctrines that would be familiar to those knowledgeable about the law of vows and oaths long before promise was a theory of liability, there existed the solemn ceremonial ways of getting into what we would now call contracts through pledges and betrothals and treaties—domains where vows and oaths were common.[93] Ceremonial formalities such as sharing a drink and handshakes were also reminiscent of oaths that often required some kind of physical manifestation or action.[94] In the fourteenth century, the device of the "conditional bond" took root; here people made "covenants" to perform duties that were essentially guaranteed by a bond for a sum of money, though the structure looks an awful lot like a vow: "I will grant you this money on the condition I don't fulfill my obligation."[95] At the end of the fourteenth century, *force majeure* was developing within what would come to be contract law,[96] still before promise took center stage. By the early 1500s, learned jurists essentially couldn't easily tell the fine differences among "a contract, a concord, a promise, a gift, a loan or pledge, a bargain, a covenant or such other,"[97] suggesting that many forms of voluntary undertakings influenced court enforcement of transactions even if the role of promising and the morality of promise-breaking was beginning to matter.[98] Even in 1550, promise was not routinely in the definition of a contract,[99] though sometimes it was thought severed from the contract "chronologically and logically" to add something to it.[100]

[90] *Id.* at 363.

[91] *See* Ibbetson, *supra* note 8, at 71.

[92] *Id.* at 72–73.

[93] Plucknett, *supra* note 87, at 628–629. Some of these ceremonies with formalities—such as the *stipulatio*—sometimes partook of a promissory institution too. *See* Tiersma, *supra* note 18, at 8, 17. Some have seen this promissory institution as connected to oaths, in particular. *See* Hogg, *supra* note 7, at 112 nn.7 & 9.

[94] *See* Bernard J. Hibbitts, "*Coming to Our Senses:" Communication and Legal Expression in Performance Cultures*, 41 Emory L.J. 873 (1992); Ibbetson, *supra* note 8, at 75.

[95] *See id.* at 28–30, 92; A.W.B. Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpsit 90-126. The centrality of the bond structure—so similar to the vow—to the American common law of contract until the nineteenth century is emphasized by Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. Cal. L. Rev. 1323, 1334–1337 (2020).

[96] Ibbetson, *supra* note 8, at 93–94.

[97] Christopher St. Germain, Doctor and Student dia II, c. 24 (1530).

[98] *See, e.g.*, Ibbetson, *supra* note 8, at 130–131, 137 (citing Pykeryng v. Thurgoode (1532) 94 SS 247).

[99] *See* Ibbetson, *supra* note 8, at 83.

[100] *Id.* at 138.

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It was not really until 1558 or 1559 that "promises" as such were deemed to trigger what we would today call contractual liability—and in 1602, debt cases and assumpsit cases essentially became very hard to distinguish.[101] Some have concluded that contract was extended to promises mostly by "analogy" from the duties "springing from the plaintiff's receipt of property, a fact which could be seen and sworn to."[102] Even once promises get much more rhetorical attention, such that pleadings in assumpsit seemed to be about something unilateral in the promise, "by the beginning of the seventeenth century at the latest assumpsit had to all intents and purposes adopted the structure of contractual liability found in the medieval law" which had a "bilateral" and "reciprocal" component.[103] This structure mimics the old forms of vows and oaths we saw in Part II; and reciprocity took center stage in the smaller range of cases where it truly mattered—whether it was promise or bilateral agreement that was the source of obligation.[104]

None of this is to downplay that eventually promise does seem to have come to matter to the jurists who continue to develop contract actions after 1602.[105] But so much of the basic structure of contract law—reciprocity, objectivity, excuses, *force majeure*, capacity, damages rather than specific performance, a version of the preexisting duty rule, even—was already embedded in the law prior to promise's prominence. It is plausible that the very common commitment devices of vows and oaths furnished some of that firmament, especially since some of these doctrines sit in tension with "promise" as the core basis of liability—such as consideration and the preexisting duty rule—and they continued to be relevant even after promise's ascendency.[106]

Further reinforcing the plausibility that vows and oaths had some role to play in the contours of contract law is the likelihood that the rise of promise in the secular courts can be traced back to ecclesiastical court jurisdiction over "fidei laesio" actions, which mostly involved promises "clothed" by oaths—but were disappearing at just the time the royal courts started getting into the promise game.[107] For the ecclesiastical courts that rooted the very idea of promise in assumpsit, "the promise was something very much stronger than a simple voluntary undertaking; it was akin to an oath."[108] Ibbetson speculates that the secular courts had the oath dimension recede but he concedes that "we cannot be certain whether or not something additional occurred to strengthen the promissory aspect" or whether participants in what might look to us to be ordinary commercial transactions felt like they were taking on "duties"

[101]Plucknett, *supra* note 87, at 643–646; *see also* David Ibbetson, *Sixteenth Century Contract Law:* Slade's Case *in Context*, 4 Ox. J. Legal Studs. 295 (1984).

[102]Oliver Wendell Holmes, Jr., The Common Law 264 (1991) (1881); *see also* Atiyah, *supra* note 9, at 119.

[103]Ibbetson, *supra* note 8, at 135.

[104]*Id.* at 139–140.

[105]*Id.* at 136: "The very fact that lawyers came to use [promise] so consistently at least raises the possibility that they meant something by it." *But see* Hogg, *supra* note 7, at 109, arguing that the real story about promise is about its "eclipse" from "Western legal systems" that "dwindled in importance" from the seventeenth century onwards.

[106]Ibbetson, *supra* note 8, at 145.

[107]*See* R.H. Helmholz, *Assumpsit and* Fidei Laesio, 91 Law Q. Rev. 406 (1975).

[108]Ibbetson, *supra* note 8, at 136.

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that might be similar to those that were oath-based.[109] So even though it is easy to see that promise itself gets brought to the center of contract, its roots were likely in a different set of social practices related to the *faithfulness* of those promises in canon law,[110] which might have cross-referenced votive institutions.[111] Those institutions had rules and a law of their own, some of which were incorporated into contract law itself, even as assuredly some swearing and votive practices were reserved for conscience rather than courts, as well.[112]

* * *

Should any of this matter to contract theorists and contract lawyers today? Most promissory theorists do not actually rest their arguments on the history of promise, so it might be thought a quixotic form of engagement with promissory theory to use a genealogical method here.[113] But it seems that the morphological similarities and the plausible historical linkages between vows and oaths and the common law of contract should encourage us to ask whether promissory theorists have not missed something by ignoring how much of the underlying structure and contouring of contract doctrine tracks votive and swearing institutions. Part IV ruminates on that question.

IV. Promise's Plural Forms?

There have been perennial difficulties among promissory theorists of contracts to explain a set of divergences between the legal regime of Anglo-American contract law and the ordinary morality of promises.[114] An easy example comes from Seana Shiffrin's important article about that divergence: that "contract law only regards as enforceable promises that are exchanged for something or on which the promisee has reasonably relied to her detriment," whereas the "moral rules of promise typically

[109]*Id.* at 136–137. *See also* Hogg, *supra* note 7, at 42 (conceding important conceptual overlaps between oaths and promises).

[110]*See* Richard H. Helmholz, *Contracts and the Canon Law: Possible Points of Contact Between England and the Continent*, *in* Towards a General Law of Contract 49 (John Barton ed., 1990).

[111]Helmholz, *supra* note 107, at 421; Hogg, *supra* note 7, at 124–125. Perhaps little of this would be surprising to some of the earliest and best-known historians of the common law of contract who traced its roots to oath-like practices with the use of hands and found its "essence" in "*fides*" or "faith." *See* Pollock & Maitland, *supra* note 88, at 196–197, explaining the idea of the use of hands as follows: "As I here deliver myself to you by my right hand, so I deliver myself to the wrath of Fides … if I break faith in this thing." Although Pollack and Maitland see this root of contract as "sacral," and therefore not yet subject to legal enforcement, the arc of their history is from a binding contractual ceremony of the *fides facta* (with this oath-like or vow-like structure) to enforcement by the Church to the common law. That story resonates with Samuel von Pufendorf, too. *See* Hogg, *supra* note 7, at 133, identifying Pufendorf as tracking agreements "backed by oath" to "general civil enforcement."

[112]*See* Simpson, *supra* note 95, at 389 (discussing the "advow"—a votive institution of a promise made to god—as it is discussed in St. Germain, *supra* note 97, at Ch. 24 (though Simpson cites Chapter 23)).

[113]For one effort by a promissory theorist to offer a "genealogy of promise" (by which he means "demonstrating how [promise] could have evolved by a series of steps that each make sense, whether or not it actually came about in that fashion"), see Owens, *supra* note 14, at 159.

[114]Obviously, there are plenty of theorists who find the moralism of promissory theory altogether worth abandoning. *See, e.g.*, Barbara H. Fried, *What's Morality Got To Do with It?*, 120 Harv. L. Rev. F. 53 (2007). One interesting effect of the discovery that the "Holmesian" idea of pay-or-perform was already immanent in the law of vows is that we can tie it to a pre-existing ecosystem that wove law and morality together, *see* P.S. Atiyah, *Holmes and the Theory of Contract*, *in* Essays on Contract 57–72 (1986).

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require that one keep a unilateral promise, even if nothing is received in exchange."[115] Or consider Charles Fried's proposition that breaching a contract is essentially a strict-liability wrong because, "since a contract is first of all a promise, the contract must be kept because a promise must be kept."[116] That is hard to square with all the pockets of contract law that allow fault still to matter.[117] Recall in this regard Cardozo in *Jacob & Youngs v. Kent*: "The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of … conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong."[118] Finally, ordinary morality would seem not to commodify our promises, though that is the routine remedial posture of Anglo-American contract law. If contracts are primarily and in the first instance promises, contract law sets up a counterintuitive preference for damages as a default, making specific performance awards very difficult to obtain.[119] There are many more divergences one could emphasize and that have been discussed in the literature engaging promissory theory,[120] but these are three useful examples to drive home how it can be illuminating for contract theory to trace a genealogical line from

[115]Shiffrin, *Divergence*, *supra* note 2, at 710; *see also* Hogg, *supra* note 7, at 38 (arguing that a pure promissory theory would have all unilateral and gratuitous promises enforced at law). To be fair, some promissory theorists seek to solve this problem by defining a promise to require some kind of acceptance or performance by the promisee induced by the promise. *See* Owens, *supra* note 14, at 224–225. That seems in tension with contract law, too. If the nephew in Hamer v. Sidway, 124 N.Y. 538 (1891), had been blotto when his uncle made him the promise for $5,000 to turn his life around—and the nephew turned his life around the next morning not because he remembered anything about the uncle's promise but because he was ashamed that he got wasted at his parents' anniversary party, few think the law wouldn't award him the money.

[116]Fried, *supra* note 2, at 17.

[117]*See generally* Richard Craswell, *When is Willful Breach "Willful"? The Link Between Definitions and Damages*, 107 Mich. L. Rev. 1501 (2009) (exploring bad faith in contract law); Kimel, *supra* note 7, at 103 (promissory approaches to contract impliedly are committed to strict liability). Kimel himself thinks promissory theory can be reconciled with fault-based contract law. *See id*. at 105.

[118]Jacob & Youngs v. Kent, 230 N.Y. 239, 244 (1921). I always like to imagine Cardozo was inspired by the Day of Atonement services in light of his membership at Congregation Shearith Israel. But he very much distanced himself from temple-going after his Bar Mitzvah in 1883. *See* Andrew L. Kaufman, Cardozo 24–25 (1998). He did seem to come back to the synagogue on matters of governance and tradition, though. *Id*. at 69–70 (making a speech to sustain segregation of the sexes, opposing a reform to the seating rules in the sanctuary); *id*. at 189 (reflecting on the meaning of religion at a celebration for his childhood rabbi). Those haunting tunes from Kol Nidre night, however, are not easily forgotten from youth. Linking Kol Nidre to Cardozo's contract law will have to await a future project.

[119]*See* Liam Murphy, *The Practice of Promise and Contract*, *in* Philosophical Foundations of Contract Law, *supra* note 5, at 151, 156–157; Shiffrin, *Divergence*, *supra* note 2, at 722–724.

[120]Shiffrin also discusses the mitigation doctrine—that the aggrieved party in a contractual breach is required to mitigate damages, a rule that isn't easy to reconcile with promissory morality, she argues. *Id.* at 724–726. I am not certain that this particular divergence is actually quite so damning from the standpoint of promissory theory since promissory morality could probably be rendered consistent with the basic principle of mitigation. Shiffrin's discussion of the divergences that might be on display in the rules about punitive and liquidated damages indicate that even she isn't really sure those rules diverge from promissory morality either. *See id.* at 726–727. For general agreement that these areas of divergence are not particularly troubling to promissory theorists, see Liam Murphy, *Contract and Promise*, 120 Harv. L. Rev. F. 10, 16–17 (2007). Murphy, to be fair, is even doubtful that the damages remedy is a divergence—but I think he is in the minority on that.

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vows and oaths to contracts. Even if promissory theory can further refine itself to address these divergences, these examples still help us amplify the value in focusing on vows and oaths.

Seeing how many structural features of contract law track the much older obligational ecosystem of vows and oaths—as this article has sought to establish—facilitates an explanation for the divergences of contract law from the ordinary morality of promises.[121] First, oaths and vows routinely had a transactional and conditional frame. Even when they weren't overtly commercialized (though they were clearly routinely utilized in commerce and deal-making, too), an early commitment to "exchange" as the basic structure of voluntary undertakings was already in evidence in votive and swearing practices in the lead-up to the common law's engagement with contract. That renders it much less mystifying how, even after assumpsit took on promissory liability, the structure of exchange quickly took hold and the law refused to enforce gratuitous promises or promises for which no new consideration was proffered. That wasn't a design feature attributable to something exogenous to contract law's core or a compromise to pragmatism; it is just that vows and oaths furnished substratum that was not easily displaced by onboarding promise as a newer central theory of liability.

So too with the pockets of fault that remain within contract law. There is a different kind of historical explanation there, which might focus on how assumpsit eventually took over deceit or trespass (or trespass on the case) claims, rooted in fault and fraud.[122] So the holdover could be an accident of history, taking into contractual contexts ideas imported from tort. But the idea of contract-as-vow-or-oath furnishes a more conceptual explanation for the centrality of faithfulness to contract law in way that promissory theory probably cannot.[123] That contract law makes some remedies turn on good faith and bad faith—and that excuse doctrines also pursue fault—would make plenty of sense in a regime in which contract took on concepts from extant legal regimes associated with vows and oaths.

Finally, where promissory theory has struggled to explain how promises got commodified into damage assessments rather than awards of specific performance, the conception—perhaps surprisingly—of contract-as-vow-or-oath offers an explanation

[121]One might add to the list the concept of duress, "which the promissory regime treats as [an] anomal[y]." *See* Charles Fried, *The Ambitions of* Contract as Promise, *in* Philosophical Foundations of Contract Law, *supra* note 5, at 17, 19. As discussed previously, the vow and oath regimes already had rules for using duress as a basis for excuse. Similarly, some of the doctrines of so-called "paternalism" that seem "inconsistent with the promissory principle" (*see id.* at 35) might have their roots in some of the rules surrounding vows and oaths and are therefore not extrinsic to the moral ecology of contract-as-vow-or-oath.

[122]*See* Simpson, *supra* note 95, at 242–247 & 253–258; Plucknett, *supra* note 87, at 640–643; Pollock & Maitland, *supra* note 88, at 25. *See also* Ibbetson, *supra* note 8, at 88–91 (discussing how the fault-based law of tort made its way into contract law).

[123]*See generally* Fault in American Contract Law (Omri Ben-Shahar & Ariel Porat eds., 2010); Good Faith and Fault in Contract Law (Jack Beatson & Daniel Friedmann eds., 1995); George M. Cohen, *The Fault Lines in Contract Damages*, 80 Va. L. Rev. 1225 (1994). Daniel Markovits has sought—*qua* promissory theorist—to explain good faith as contract's core value. *See* Daniel Markovits, *Good Faith as Contract's Core Value*, *in* Philosophical Foundations of Contract Law, *supra* note 5, at 272. The claim here is that it fits well with the causes of action that came from the *fidei laesio*, rooted in oaths. *See* Helmholz, *supra* note 107.

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for why specific performance is not a default: votive institutions and swearing practices already had methods to assimilate damage regimes. So, when faithful promises are enforced,[124] the other legal regimes already in place supply a model for enforcement quite different from whatever some indeterminate and contested morality of promise might require for a remedial system. True enough, only a little in the vow or oath context (substitute performances, for example) looks precisely like *expectation* damages per se, so that standard measure might have to be linked to the promissory principle or other utilitarian calculations. Still, the very idea of substitute payments was already immanent in votive and swearing institutions before the common law adopted damages as a way to remediate breached or unperformed contracts. And contract-as-vow-or-oath supplies an unlikely and plausible conceptual explanation for how the common law adopted damages over specific performance.

What I hope to have shown here is that the commitment mechanism of contract that is with us today can be thought to draw not only from the morality of promise-keeping and promise-breaking, but also is rooted in the practices of vows and oaths that have served and continue to serve as a kind of conceptual template for voluntary undertakings in our law. Much of the structure of contract law that was already in place prior to assumpsit's crediting the binding promise as a theory of liability likely drew from the institutions of commitment that were already familiar. So much of that structure didn't come from promise itself. And even once promise took center stage, there were many holdover ideas from votive and oath-oriented institutions that were sure to continue to have import in the development of contract law and help explain some features of it that don't sit comfortably with a more purely promissory theory.

Some promissory theorists might want to get purer still and try to squeeze out any residuals from other moral and legal ecologies that remain within contract law.[125] But promissory theorists should instead admit that promises come in many different shapes and sizes—and that perhaps they have been too eager to ignore vows and oaths as types of commitment devices that themselves have a relevant law that is the source of and/or can illuminate some of our common law of contract. Once that admission is made, it becomes easier to loosen some of the concerns about the divergence of contract from pure promise as such—as other forms of voluntary undertakings can give shape to the contract law we have.

Some promissory theorists have been willing to go this far: "Lawyers cannot thus ignore the function and consequences of the oath."[126] But here Professor Hogg thinks that the oath is principally in the jurisdiction of public law. My urging here has

[124]The kinds of promises that were enforced originally were the ones undertaken "faithfully" (*see id.* at 419), which might be a source of good faith duties; *see also* Ibbetson, *supra* note 8, at 136–137.

[125]There is some evidence that the original promissory theorist has conceded that the links between the promissory principle and actually existing contract law were "overstated." Fried, *supra* note 121, at 34. Fried's concessions, however, are ultimately grounded in the view that much about contract law that doesn't comport with the promissory principle comprises features merely of law's pragmatism. The view here, by contrast, is that many of those features—consideration, duress, excuse doctrines—already had their basis in the conceptual ideas associated with contract-as-vow-or-oath. Thus, by having a more pluralistic conception of promise that admits these other distinctive types of institutions into promise's matrix, we can gain a greater understanding of the internal structure of contract.

[126]Hogg, *supra* note 7, at 45.

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instead been that private law theorists should be paying more attention to vows and oaths too. There may even be doctrinal lessons beyond just supplementing promissory theory.

Consider that courts have resisted implementing the *Restatement*'s section 90(2) that "charitable subscriptions" or "marriage settlements" should be deemed binding even "without proof that the" pledge "induced action or forbearance."[127] Some have pushed back against most forms of non-promissory liability, such as that suggested by section 90(1).[128] But section 90(2) doesn't even use "induced action or forbearance" as a consideration substitute.[129] The courts have not for the most part adopted section 90(2).[130] From the perspective of the doctrine of consideration—that enforceable promises usually must be in exchange for something, whether for goods, services, another promise, or a forbearance—that might be intuitive. But to the extent that it is easier to see pledges to charitable subscriptions and marriage-focused agreements as in line with votive and oath-based institutions, a contract-as-vow-or-oath conception that supplements a perspective that just focuses on traded promises could underwrite more enforcement in this legal terrain. Perhaps the pledges would need to be under oath or in a vow format for contract law to onboard them. But seeing contract as continuous with earlier commitment mechanisms might give courts more comfort with welcoming other voluntary undertakings into its ambit, such as is suggested by *Restatement* section 90(2). A purer promissory theory might be willing to onboard these unilateral or gratuitous promises too, disbanding the doctrine of consideration or the conception of contract-as-exchange with it.[131] But contract-as-vow-or-oath can take on faithfully undertaken pledges without getting rid of the doctrine of consideration or the exchange structure, which was implicit in lots of commitment institutions before "contract" came on the common law scene. Contract-as-vow-or-oath sees the exchanges implicated in these voluntary undertakings.

A second doctrinal area in which a conception of contract-as-vow-or-oath might usefully be able to break an impasse is the divide among the states about

[127]Restatement (Second) of Contracts §90(2).

[128]*See* Edward Yorio & Steven Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111 (1991).

[129]Some promissory theorists should have no truck with the core of Section 90 since it, after all, requires first and foremost a promise. There was, however, always a worry that "promissory estoppel"—as Section 90 had come to be called—was a bit of a "misnomer" because "reliance" would "come to dominate its 'promissory' aspect." Michael B. Metzger & Michael J. Philips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472, 537 (1983). To be fair, that may never have quite come to pass. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661, 671 (2007).

[130]*See* In re Bashas' Inc., 468 B.R. 381, 384 (D. Ariz. 2012) ("As of 2005, only two states, Iowa and New Jersey, appeared to have adopted subsection 2 of §90.") (citing Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future,* 29 Seton Hall Legis. J. 471, 514 n.133 (2005); E. Allan Farnsworth, *Promises and Paternalism,* 41 Wm. & Mary L. Rev. 385, 404–405 (2000): "The exception for charitable subscriptions has played to mixed reviews." For the Iowa and New Jersey cases adopting it, see Salsbury v. Northwestern Bell Telephone Co., 221 N.W.2d 609 (Iowa 1974); More Game Birds in America, Inc. v. Boettger, 14 A.2d 778 (N.J. 1940). For a famous case declining to follow §90(2), see King v. Trustees of Boston University, 647 N.E.2d 1196, 199 n.4 (Mass. 1995).

[131]Fried reminds us that *Contract as Promise* "pours" "much scorn" on the doctrine of consideration. Fried, *supra* note 121, at 35.

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the enforceability of intra-marital (or post-nuptial) agreements. Some states—such as Ohio,[132] Iowa,[133] Hawaii,[134] and California[135]—reject the use of a contract law framework to agreements within a marriage as a general matter. These courts tend to find that a public policy in favor of no-fault divorce should render these agreements invalid, as they are often predicted on a renewing of vows, focused on a renewed commitment to virtuous conduct (surrounding extramarital affairs and/or substance abuse). Other states—such as Utah,[136] Pennsylvania,[137] Tennessee,[138] and Massachusetts[139]—find these marital agreements generally enforceable (sometimes with some special conditions about disclosure or fairness). Recognizing that some of contract law's structure is rooted in vows might render courts somewhat more amenable to allowing the enforcement of these agreements, especially when the relevant state legislature has already passed a statute—as Hawaii's had—declaring that, "All contracts made between spouses, whenever made … and not otherwise invalid because of any other law, shall be valid."[140] The contract-as-vow-or-oath conception might nudge courts to want to see different kinds of formalities and conditions associated with post-nuptial contracts as compared with standard commercial agreements, but still might provide some modest reinforcement for the view that "renewing vows" can be made legally effective through contract law.

A final potential institutional design idea inspired by the contract-as-vow-or-oath conception could be to reintroduce overt vows or oaths back into certain private law undertakings. An illustrative example might come from Jewish law: a steward or guardian is often appointed to manage the affairs of minors and there is a Talmudic debate about the conditions under which the so-called *apotropus* is put under an oath so that when the minors reach the age of majority they have further assurance that the trustee did not engage in any self-dealing with the relevant property under administration.[141] Anglo-American jurisdictions might consider the possibility that some kinds of voluntary undertakings such as these would usefully be buttressed by the abandoned practice of taking oaths upon appointment or execution

[132]*See* Ohio Rev. Code Ann. §3103.06 (2023).

[133]*See* In re Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009).

[134]*See* Crofford v. Adachi, 150 Hawaii 518 (2022).

[135]*See* In re Marriage of Mehren & Dargan, 118 Cal.App. 4th 1167 (2004); Diosdado v. Diosdado, 97 Cal.App. 4th 470 (2002).

[136]*See* Reese v. Reese, 984 P.2d 987 (Utah 1999).

[137]*See* Laudig v. Laudig, 425 Pa. Super. 228 (1993).

[138]*See* Gilley v. Gilley, 778 S.W.2d 862 (Tenn. Ct. App. 1989).

[139]*See* Ansin v. Craven-Ansin, 457 Mass. 283 (2010).

[140]Hi. Rev. Stat. Ann. §572–522 (2019).

[141]BT Gittin 52a–b. The Aramaic *apotropus* clearly comes from the Greek for "guardian." Today we would probably use the word "fiduciary" here. The debate in the Talmud centers on whether the fiduciary needs to swear only when appointed by the father, only when appointed by the courts, or irrespective of appointment method. Israel's Supreme Court incorporated some of the Talmudic principles of fiduciary law in Muberman v. Segal, 32(iii) P.D. 85 (1978). For discussion, see 4 Menachem Elon, Jewish Law: History, Sources, Principles 1692, 1739, 1837, 1865–1866 (Bernard Auerbach & Melvin Sykes trans., 1994) (1988). For a more general treatment of Jewish law and fiduciary law (with plenty about oaths), see Chaim Saiman, *Fiduciary Principles in Classic Jewish Law*, in Oxford Handbook of Fiduciary Law 544 (Evan Criddle et al eds., 2019).

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of certain contractual tasks.[142] Average fiduciaries get their jobs through a contract (lawyers, managers and directors of corporations, trustees) but we routinely want the fiduciary to take on a seriousness of purpose and especial good faith or loyalty to a set of beneficiaries who cannot easily monitor them.[143] To sustain those private law duties—even if we are contractarian about them[144]—it is worth considering whether some set of contractually undertaken fiduciary assignments would benefit from an oath of installation or an oath upon execution of the fiduciary office, reinforcing legal enforcement not through mere conscience but through the structure of transactional contract law itself.

V. Conclusion

This article has offered a proof of concept: that important structural features of contract law are made less mystifying when one appreciates that old practices of vowing and swearing might have served as potential models for contracting practices even before promise as a theory of liability made its way into the common law. The features that are consistent with contract-as-vow-or-oath but not contract-as-promise have generally been retained and remain part of the warp and woof of our law. Thus, contract-as-vow-or-oath has a theoretical payoff in that it takes some of the pressure off a unitary theory of contract-as-promise to manage divergences from promissory morality. It also offers up often-ignored quasi-promissory institutions as guides to understand the contract law we have and the contract law we could have. For those promissory theorists who see the moral imperative of contract law as promoting autonomy, self-authorship, and trust in others,[145] or as promoting personal sovereignty,[146] the admission that we have plural modalities of promise—and that vows and oaths are variations on a theme rather than wholly separate from contract—should not be too difficult to accommodate now that they have learned more about their history and foundations. For those promissory theorists who instead see contract law as more instrumental to "promoting, protecting, and policing the social practice of making and keeping agreements and promises,"[147] there is no obvious reason why we can't have a calibrated approach to use contract law to reinforce social

[142]Consider in this regard that patent applications require an oath of invention. *See* 35 U.S.C. §115(b). The law could statutorily require oaths by fiduciaries that they intend to or are comporting themselves in accordance with their duties to pursue the best interests of their beneficiaries. This may give rise to issues about corporate oaths or oaths by AI serving in fiduciary roles, *see, e.g.*, Anna Carnochan Comer, *AI: Artificial Inventor or the Real Deal*, 22 N. Car. J.L. & Tech. 447 (2021), but I will leave that wrinkle for another time. Thanks to Janet Freilich for some guidance on the patent oath.

[143]For a set of reflections on fiduciaries in private law, see generally Stephen R. Galoob & Ethan J. Leib, *Motives and Fiduciary Loyalty*, 65 Am. J. Juris. 41 (2020); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 Yale L.J. 1820 (2016); Ethan J. Leib, *Friends as Fiduciaries*, 86 Wash. U. L. Rev. 665 (2009).

[144]For the argument that fiduciary duties are a species of contract duties, see Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 38 J.L. & Econ. 425 (1993).

[145]*See* Kimel, *supra* note 7, at 96–99.

[146]*See* Jody S. Kraus, *Personal Sovereignty and Normative Power Skepticism*, 109 Colum. L. Rev. Sidebar 126 (2009).

[147]*See* Murphy, *supra* note 119, at 162; Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 Univ. Toronto L.J. 453, 458 (2020).

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practices of vowing and swearing too. It may be true that reinforcing the non-legal force of conscience will mean that contract law should make a choice not to enforce some types of vows of the religious sort. But contract-as-vow-or-oath helps us see that that position needs a better argument, since so many of contract law's defaults may very well track the structure of votive or oath-based institutions rather than promise as such. It is time for private law theorists to devote more attention to the ways vows and oaths can illuminate our theory and practice of contract law. Philosophers have already started to think more about these practices to understand promise itself;[148] lawyers and judges will need to think about whether promise's "siblings" can help us better understand and develop contract.

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[148] *See* Fruh, *supra* note 12 (on vow and oaths); Elizabeth Brake, *Is Divorce Promise-Breaking?*, 14 Ethical Theory & Moral Prac. 23–39 (2011) (on vows); Alida Liberman, *On the Rationality of Vow-making*, 100 Pac. Phil. Q. 881 (2019) (on vows); Alida Liberman, *For Better or for Worse: When are Uncertain Wedding Vows Permissible?*, 47 Soc. Theory & Prac. 765 (2021) (on vows); Thomas Scanlon, *Promises and Practices*, 19 Phil. & Pub. Affs. 199, 223–226 (1990) (an appendix on oaths).

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