

## UNEQUAL PROMISES

*Aditi Bagchi\**

This essay explores the nature and implications of a type of inequality that is widespread, but largely ignored. Promises deliver important ethical value, and commercial promises, because they are our most common experience of promise with strangers, are of special value; but not all commercial promises generate that value equally. This paper makes the following claims: (1) while some retail promises are promises either to deliver a good or service, or to pay some compensation, other retail promises are simple promises to deliver a good or service; (2) retail promises in high-end markets are more likely to have the simple form, while retail promises in low-end markets are more likely to be conditional; (3) bifurcated promises that create less certainty and less entitlement are inferior to simple promises to deliver a good or service; and (4) inequality in the quality of retail promise has implications for how members from different social backgrounds relate to others in their political and economic community.

Most legally enforceable promises between strangers take place in the commercial arena. While the promises that mean the most to us often take place within private relationships, most of the promises we make and receive occur in our transitory relations with people we do not know and with whom we are transacting for circumscribed purposes. Although retail promises may seem less important than those of a more personal nature, the totality of these impersonal promises are as, if not more important to our experience of the institution of promise as are those that arise out of personal relationships.

In this paper, I explore one consequence of the fact that we experience promise primarily in the marketplace: we do not all experience promise in the same way. In fact, the practice of promising is systematically segmented by purchasing power. Not all promises are equal, and individuals will tend to repeatedly experience promise of the inferior or superior variety.

How do promises vary? Clearly, they vary along multiple dimensions, but the systematic difference between “high” and “low-quality” promises that concerns us here is the degree to which a promise (1) creates certainty for its promisee, and (2) creates an obligation in the promisor that may require it to modify its course of conduct for the benefit of the promisee. Whatever other

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\* Assistant Professor, University of Pennsylvania Law School. A.B. Harvard College 1999; M.Sc. Oxford University 2000; J.D. Yale Law School 2003. Thanks to participants in the Contracts and Promises workshop at Georgetown Law School for comments and suggestions.

values are served by the practice—and no doubt there are several—the ability to form expectations and plan for the future, and the related sense of control over one's own life, is one of the primary values created by promise, especially contractual promises between strangers. Promises also create in promisees a reason for, or even a partial authority over, their promisors in a way that is rare among strangers and also potentially important for promisees' sense of agency.

Several authors have noted that the value of the promise lies in the relationship it enables between promisors and promisees.<sup>1</sup> But the value of the relationship between consumers and the retailers that promise them goods or services is not obvious. Daniel Markovits and Dori Kimel have both explained the value of contractual relations with reference to their arms-length nature.<sup>2</sup> Consistent with both accounts is a recognition of the value to contracting parties of being able to form expectations about the way in which others will deal in contract, how to plan with whom one will deal, and in what way.<sup>3</sup> Contract is a mechanism of control, not just over others, but more importantly, over one's own life. This control is important because our lives are intertwined and dependent on the conduct of strangers. One of the reasons the value of contractual promise to consumers differs from the value of ordinary promises, is because consumers have different reasons to value the ability to plan the course of dealings with retailers than they do for valuing certainty in relations with friends and family.

The importance of a promise to the relationship between a commercial promisor and promisee may also have to do with the value to the promisee of having a claim on the promisor, and on the value of presenting a reason that the promisor must do something that she otherwise would not. Most obligations that individuals have toward people they do not know are obligations that they have toward everyone. For example, the obligation to drive carefully so as to avoid injuring others reflects a duty toward many discrete persons simultaneously. No single person is a but-for reason to drive carefully. Even less general obligations, if they are involuntary, are usually toward all those with whom one deals in a certain way—e.g., all the

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1. See, e.g., DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004); Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916 (1982).

2. KIMEL, *supra* note 1, at 28–31; Daniel Markovits, *Solidarity at Arm's Length*, available at <http://www.law.upenn.edu/academics/institutes/ilp/2008papers/MarkovitsSolidarityatArmsLength.pdf>.

3. Cf. TIM SCANLON, WHAT WE OWE TO EACH OTHER 304 (1998) (locating the value of promising in the value of assurance).

passengers in one's boat, all the patients that one treats, or all the students that one teaches.

The scope of obligation in these contexts is usually determined by the range of characteristics likely to be present in a group of passengers, patients, or students. While damages in the event of a breach in our duty toward these potential victims will depend on the unique characteristics of the unlucky person who is injured, what we are obligated to do in the first place does not similarly turn on the individual circumstances of any single person to whom our duty is owed. Our most unique obligations may be toward friends and family, but among strangers, contractual promises create the most tailored obligations. Some—but not all—retail contracts, even standard form contracts, create an obligation on the part of promisors to do things for particular promisees in the event certain contingencies arise.

Contractual promises differ in the extent to which they serve either or both of these values. First, contractual promises differ in their ability to deliver certainty with respect to the course of contract. One basic way in which contracts differ in this way is that some contractual promises do not obligate a promisor to perform in a determinate way, but rather provide promisors with options as to how they might fulfill their contractual obligation. For example, a promise might obligate a promisor either to deliver a specific good or to compensate the promisee. Performance of other contractual promises might not have this bifurcated structure; performance might entail delivery of the good. Any compensation delivered under the latter contracts is remedial.

Relatedly, contractual promises differ in whether the promisor may have to undertake some performance that deviates from its ordinary course of conduct. Retail contracts that allow promisors either to deliver a good or compensate the promisee will not usually require the promisor to undertake tailored performance beyond issuance of some compensation, which may just be a fixed refund leaving the promisor as she was before ever encountering the promisee. Conversely, simple contractual promises for delivery of a good may obligate the promisor to go out of its way for the promisee. The promisee (i.e. promissory obligations to the promisee) may be a reason that the promisor does something it would not otherwise do.

Most promises to deliver a good or service are not accompanied in contract by a term providing for specific performance. The result is that, with some exceptions, contract law does not discriminate between a bifurcated promise to deliver or pay expectation damages, and a simple promise to

deliver.<sup>4</sup> Promisors who breach contracts are liable for expectation damages irrespective of whether the underlying contractual promise has a “deliver or pay” structure. The best justification for calling on the defendant-promisor to compensate the plaintiff-promisee may be different for each type of promise, but because the appropriate judicial response in either case may be the award of monetary damages in the same amount, there may be little cause to separate them into different species of contract. Many retail contracts will specify the remedy for breach (again, usually not specific performance), and if, in the absence of either delivery or payment, breach has been established, in these cases too, there are few grounds for launching into an inquiry of what kind of promise was broken. Courts do not fruitfully distinguish between the two types of retail promise in the course of adjudicating contractual disputes and awarding remedies to parties who establish that their promisors have delivered neither conventional performance nor adequate compensation.

Contract law’s relative silence on this distinction has been interpreted in various ways. Most have not found the law blind to a difference in promissory structure. Instead, some have argued that contract law fails to recognize that most, if not all, promises are promises to deliver. By effectively permitting promisors to breach ordinary contracts and pay expectation damages, contract law diverges from the ordinary norms of promise, which obligate promisors to deliver the promised goods or services.<sup>5</sup> Others have implicitly or explicitly argued that contract law simply recognizes that contractual promises just are promises either to deliver or pay.<sup>6</sup> As such, a failure to deliver under a contract

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4. I will usually refer to “deliver or pay” contracts rather than “perform or pay” since the question is precisely whether provision of compensation is also a form of performance. “Simple” promises to deliver do not give the promisor an option to pay instead.

5. In a widely acclaimed article, Seana Shiffrin has made the provocative but intuitive claim that contract law diverges from the moral practice of promise. Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007). Perhaps the most fundamental way in which the two diverge, in her view, is that contract law traditionally limits damages for breach of contract to plaintiff’s expectation. *Id.* at 723. Neither specific performance nor punitive damages are normally available. *Id.* The law thus fails to condemn breach; indeed, it encourages it, inasmuch as the expectation damage award is defended in part because it motivates efficient breach. Shiffrin argues that this feature of contract law may not adequately accommodate the moral obligation to perform one’s promise. *Id.* at 719. While contract law need not simply reflect or enforce moral obligation, in a liberal regime, the law should facilitate individuals’ ethical flourishing, not pose obstacles and generally cramp our pursuit of a moral life. *Id.* By refusing to condemn breach, and by virtue of scholarly rhetoric that justifies the expectation remedy by way of the theory of efficient breach, the law indirectly encourages behavior that morality would discourage. *Id.* at 732–33, 740. In this way, Shiffrin argues, it makes more burdensome and indeed less likely, the moral choice to perform one’s promises in the context of contract. *Id.*

6. See Avery Weiner Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2188 (2004) (“[I]t has long been recognized that a contract that is enforceable only through monetary liability operates

is not a breach of either the contract or the underlying promise. If almost all promises are really promises to deliver or pay, then the law adequately distinguishes the two types of promises just by treating differently those few cases in which a contract provides for specific performance as the remedy.

On both these views, whether contracts are “deliver or pay” is mostly treated categorically. Contract law either misperceives the nature of contractual promise, or it accurately captures contractual promise. Either most contractual promises are “deliver or pay,” or hardly any are. There is little attention to a potentially basic fracture in the nature of contractual promise. Even those who acknowledge that not all contracts need to take the same form have directed their argument toward identifying the form that most contracts take, rather than explaining how we might discern which form any given contract takes.<sup>7</sup>

Both of the dominant views purport to trace their picture of contractual promise to contractual intent. The view that contracts offer parties a morally neutral choice to perform or pay stems from the availability of expectation damages, which are the default remedy in most contracts not for land. Since parties know in advance that expectation damages are the default rule, their failure to specify some alternative remedy suggests that they intend their contract to permit promisors either to deliver or pay. The generally opposing view holds that most promisees expect promisors to deliver and that promisors are aware of that fact. Indeed, a consumer-promisee would not enter into a retail contract unless she believed it would result in delivery of a good or service; the practice depends on delivery as the usual course of performance because parties would not otherwise be motivated to contract.

Each of these accounts of contractual intent and its relation to the content of contractual promise fails to give one type of retail promise its due. On the one hand, even if parties are aware of a legal default providing for expectation damages in the event of breach, they might intend to undertake more rigorous

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in practice as an option, because as a legal matter the promisor retains the power either to perform or to breach and pay damages.”); Paul G. Mahoney, *Contract Remedies and Options Pricing*, 24 J. LEGAL STUD. 139, 139 (1995) (“The ability to breach and pay money damages is analogous to granting the breaching party an option to buy back his performance for a strike price equal to the damages award.”); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978) (characterizing damages for breach of contract as “liability rule” protection for contractual entitlements); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (same). See also Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004); IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005).

7. Seana Shiffrin, *Could Breach of Contract be Immoral?*, 107 MICH. L. REV. 1551, 1561 (2009).

obligations, but not intend to make them contractually enforceable.<sup>8</sup> While admittedly not central to the fundamental question of what damages should be available, commercial parties may make promises to each other that are not the equivalent of the legal obligations they assume. On the other hand, the argument that parties almost always intend to promise delivery rather than an option to deliver or pay conflates parties' intentions regarding the obligations they assume with their expectations as to what will occur. Parties surely enter into contracts expecting that actual delivery is likely, if not almost certain. But that may reflect their belief that the promisor will probably be motivated to deliver rather than pay, not their intention to impose an obligation on the promisor to deliver irrespective of a wide range of improbable events.

I argue here that both types of promise are well-represented in the marketplace. Commitments for simple delivery are expensive and affordable for only some promisees. I further argue that not just the goods and services to which a promise is connected, but also the "deliver or pay" promise itself is inferior in certain respects, and that the result is an abiding inequality in the experience of promise with strangers. Because promise is an institution of greater ethical import than many goods and services available on the market, inequality in promise is of special consequence. In the final part of this paper, I begin to explore those consequences.

The argument proceeds as follows. Part I will show that retail contracts sometimes entail promises to deliver a specified good or service, and that any compensation for breach of those promises is remedial. However, the promises underlying other retail contracts have a deliver or pay structure, and failure to perform in a conventional sense does not entail breach of a moral duty created by promise. In Part II, I will argue that this difference is best understood as a difference in the quality of promise. Last, in Part III, I will discuss the significance of this inequality of retail promise in a political-economic community.

## I. THE HETEROGENEITY OF RETAIL PROMISES AND CONTRACTUAL COMMUNITIES

Contract scholars disagree as to whether most commercial contracts can appropriately be understood as promises either to deliver a good or service, or to pay for the failure to do so. If a contract entails such a bifurcated promise,

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8. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 404 (1990) (detailing reasons sellers may have for not making quality commitments legally enforceable).

expectation damages are not a remedy for breach of a duty; they represent one option available to contracting parties. Damages do not compensate for a wrong but create a choice for promisors.<sup>9</sup> On this view, the principle of efficient breach and its widely-acknowledged role in justifying the expectation remedy may go further than simply allowing payment instead of performance; it may invite it.<sup>10</sup> Moreover, on this view, contract rules track underlying moral obligations because promisors never promised to do anything other than *either* to deliver *or* to pay.<sup>11</sup>

On an alternative view, it is inconsistent with common sense to construe ordinary purchases in this manner. Upon ordering an item of furniture, one receives not a promise either to deliver the furniture or pay any particular amount, but a simple promise of furniture. Performance of that promise may be excused on various grounds, and sometimes the obligation to deliver will give way to an obligation to pay some amount of damages, but the initial promise does not place delivery of the furniture on a par with any monetary payment; rather, any compensation paid upon failure to deliver is remedial.<sup>12</sup> The entire exercise in contract, after all, is motivated by a desire to obtain some furniture, not its monetary equivalent.<sup>13</sup> The institution of contract requires that most promisors deliver their good or service rather than compensate in the usual case.<sup>14</sup>

Neither picture perfectly captures the retail promise generally. This is because retail promises, as a subclass of promises, vary considerably and, while in some consumer markets they are indeed of a deliver or pay form, in higher end consumer markets they are not. No single characterization of retail

9. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 235–36 (Transaction Publishers 2005) (1881) (“The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.”); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 191–92 (2002); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”); Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1351 (2009) (“The promise is to perform or to pay damages, and so if you choose not to perform—even if you are prevented from performing by circumstances beyond your control—you *must* pay damages.”).

10. Shiffrin, *supra* note 5, at 732 (describing the view).

11. Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 440 (2006) (“Performance is morally required in a contingency if and only if the parties did specify, or would have specified, performance in that particular contingency.”).

12. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 1 (1989) (“[T]he weakness of Holmes’s approach lies in its conclusion that the remedy provides a perfect substitute for the right, when in truth the purpose of the remedy is to vindicate that right, not to replace it.”).

13. Shiffrin, *supra* note 7, at 1565.

14. *Id.* at 1566.

contract is uniformly applicable. In this Part, I argue that (1) whether a contractual promise should be understood as deliver or pay depends on the understanding of the parties; (2) due to the centrality of intention to the content of promise, well-publicized practices in connection with retail promises are self-justifying; and (3) because prevailing practice differs at the high and low ends of a retail market, the substance of retail promises differs systematically as well.

*A. Whether a Promise Is to Deliver or Pay, or Only to Deliver Depends on the Understanding of the Parties*

Promises are quintessentially voluntary commitments. They do not exhaust the field of voluntary obligation, but they have been especially puzzling precisely because it has been difficult to explain how the bare communication of an intention to assume an obligation could bring that obligation into reality.<sup>15</sup>

The voluntariness of promise, and contractual promise in particular, is so deeply entrenched as a normative matter that contract scholars have been more concerned with debunking any exaggeration of the point.<sup>16</sup> While a promise may be essentially voluntary, not all aspects of the practice are voluntary. We are obligated beyond that to which we specifically commit, and there are exceptional cases where we may be treated as having made a promise that we never intended to make, especially in a contractual context.<sup>17</sup> Ultimately, “the voluntariness of obligations is a matter of degree inasmuch as the awareness of the precise content of the obligation undertaken and the ease with which the obligating behavior can be avoided are matters of degree.”<sup>18</sup> Similarly, the voluntariness of promissory obligation will depend on the extent to which a promisor is fully aware of the normative implications of her promise and her

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15. My discussion here focuses on promise, but the voluntary character of promise underwrites the voluntary nature of contract. See Raz, *supra* note 1, at 938 (“The distinctive mark of contract law is that the harms it protects against are harms to the practice of undertaking voluntary obligations and harms resulting from its abuse.”).

16. See, e.g., Glanville L. Williams, *Language and the Law—IV*, 61 L.Q. REV. 384, 402–03 (1945) (“It is common form among judges to deny that they ever read into a contract or other document anything other than what, in their view, the parties actually intended; and occasionally they have even gone so far as to say that the implication must be collected from the words of the document itself. These statements cannot be taken seriously.”).

17. Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 430 (2004).

18. Raz, *supra* note 1, at 929.



ability to avoid making the promise. The latter may depend on the relational, social, and economic costs of avoiding a given promise.

Sometimes a promisor does not seek to assume some content of her promissory obligation and that particular obligation arises for reasons unrelated to her intention to assume it. However, to the extent the obligation is nevertheless deemed promissory, it is the ultimately voluntary nature of the overarching promise which justifies imposition of the obligation.<sup>19</sup> That is, her act of promise is a but-for condition of the ancillary obligations that she did not specifically intend to assume.

Judicial exaggeration of the voluntariness of contract, even in the face of increased willingness to add terms and otherwise depart from contractual intent, may have lead some to suggest that voluntariness of the institution of promising has been overrated as well. Scholars have pointed to the mandatory character of promissory obligation, the presence of default rules in promise interpretation, the principle of objectivity, and the impossibility of certain kinds of promise as evidence of the limits of voluntariness.

Some scholars have suggested that one does not control the scope of one's promissory obligations in the context of contract any more than one does in any other context.<sup>20</sup> That is, just as having befriended a friend, one cannot renounce the obligations of friendship, one also cannot, having assumed the position of promisor, renounce the obligations of promise. If contractual obligations belong to a larger set of promissory obligations, one cannot extract oneself from that moral space simply by declaring, let alone intending, to relieve oneself of moral obligation. Shiffrin suggests that this conceptualization of the boundaries of promise may imply that, in a commercial context, one party may not promise to deliver a product or good, or otherwise pay—that is, it may rule out interpreting ordinary commercial promises as deliver-or-pay promises.<sup>21</sup> This early variant of her argument against the deliver-or-pay promise does not work. Whether promises give rise to a moral obligation to perform may very well be outside the control of the parties. But this level of involuntariness does not compromise the voluntary nature of a promise because the content of a promise, i.e., what a promisor

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19. *Id.* at 932.

20. *Id.*

21. Shiffrin, *supra* note 7, at 1567. In an earlier article, Shiffrin argued that it is implausible to interpret contracts as promises to either perform or pay because damages are extractable by way of legal coercion. She maintains that a promise to perform or pay damages upon legal action fails as a promise. Shiffrin, *supra* note 5, at 728. However, this argument does not defeat the view that voluntary compensation is properly regarded as performance of ordinary commercial contracts.

promises to do, is within her control. Once she assumes the obligation to do X, she may not specify the normative consequences of her failure to do it; however, she can refrain from assuming that obligation, or she may assume a lesser obligation to do X or Y.

Most promisors do rely on background norms to fill out the content of their promises, since their promises rarely detail implicit conditions.<sup>22</sup> For example, a promise to drop someone off after a party implies a promise to do so in a sober state, but probably does not imply an obligation to drop off that person at some unforeseeably remote location. Similarly, the content of a promise must be interpreted with reference to a promisee's reasonable understanding of that promise, even where that understanding is not what the promisor really intended to impart.<sup>23</sup> For example, one might promise to help someone move, assuming that a moving company has been hired and that one will only need to help direct the movers. However, if an offer to help move a friend is, under certain circumstances, reasonably interpreted to entail a promise to actually move the contents of one apartment to another, then the promisor is bound by that more onerous commitment.

Both the presence of implicit background terms and the principle of objectivity demonstrate the boundaries of a voluntary picture of contract, but neither of these aspects of promising compromises its voluntary character. With some deliberate effort, one can avoid the assumption of most background ancillary obligations, as well as most misunderstandings by promisees. More importantly, both default rules and objectivity in the institution of promise reflect the need to ascertain the promisor's intentions in some way. Without some tools with which to make an assessment, would-be promisors would be incapacitated *qua* promisors. Those who seek to invoke the convention of promise must implicitly endorse those necessary trappings of the convention that they do not affirmatively avoid.

One might argue that promissory obligation is still more loosely tethered to voluntary commitment. If the obligation that a promisor chooses to assume is highly unusual in its structure, it might fall outside of the recognizable

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22. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490 (1989).

23. See 17A AM. JUR. 2D CONTRACTS § 3 (1994) ("A promise demonstrates a party's intent to act or not act in a specific way; this demonstration of intent, in turn, justifies the promisee in understanding that a commitment exists and binds the promisor to the happening of the future promised event."); RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."). See also Andrew Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 33-34 (2009).

practice of promise.<sup>24</sup> That is, at some point, a promise simply fails as a promise and it is not what it purports to be. A promisor is unsuccessful if her commitment lacks certain features essential to promise as a conventional practice.

The failed promise is familiar to contract law in the form of the illusory promise.<sup>25</sup> In cases failing for lack of mutuality of obligation, one party can never be said to have breached.<sup>26</sup> This is usually because her promise kicks in only upon the fulfillment of a condition which she herself controls.<sup>27</sup> Mutuality of obligation cases are now usually handled—the lack of mutuality “cured”—by implying a duty of good faith that removes enough discretion from the promisor that she cannot be said to control unilaterally the entire scope of her own obligation; a promisor who disavows even that duty of good faith fails to enter a legally effective contract.<sup>28</sup> This convenient trick of judicial interpretation merely demonstrates that even contract law itself insists that a promisor does not get to determine completely what she promises. A promise that fails to create some minimum, breachable, legal obligation is not a legally binding promise.

More generally, a promise that fails adequately to commit the promisor, fails as a promise, irrespective of how the promisor may view that commitment. If the promisor disavows the moral obligation of promise but specifically characterizes her obligation as promissory, she has contradicted herself, and whether the moral obligation associated with promise attaches to her commitment just depends on which element of her communication prevails—i.e., which element would be reasonably taken to dominate the other.

However, these are the outer boundaries of promise, which test the voluntary aspects of the practice. Within wide bounds, the common

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24. See Shiffrin, *supra* note 5, at 728 (doubting that “the contents of promises are indefinitely plastic and utterly up to their makers”).

25. See 17A AM. JUR. 2D CONTRACTS § 130 (1994); RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981).

26. See *Torncello v. United States*, 681 F.2d 756, 769 (1982) (“[A] route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract.”); 3 WILLISTON ON CONTRACTS § 7:7 (4th ed. 1999) (an illusory promise “would impose no obligation, since the promisor always has it within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee”).

27. See *supra* note 26.

28. See, e.g., *E.I. Du Pont De Nemours & Co. v. Claiborne-Reno Co.*, 64 F.2d 224, 89 A.L.R. 238 (8th Cir. 1933). Cf. *Pacific Pines Const. Corp. v. Young*, 477 P.2d 894 (1970) (stating that because there was no express provision reserving unrestricted right of cancellation, requirement to use best efforts would be imputed).

understanding between a promisor and promisee determines what the promisor will be obligated to do and under what circumstances.<sup>29</sup> Most retail promises, whether characterized as simple promises to deliver or as promises to deliver or pay, successfully obligate the promisor without contradiction.

The voluntary character of promissory obligation is its distinctive feature. Similarly, the relatively voluntary character of contractual obligation continues to distinguish it from tort under the broad umbrella of private legal obligation. It is now commonplace that neither contractual nor promissory obligation is completely voluntary.<sup>30</sup> Just as promises must be construed in the light of background norms, contractual obligations are construed with the aid of default rules. However, the substantive core of contractual obligation arises only upon voluntary entry into a contract and courts are still loathe to revise contractual obligation in unpredictable ways.<sup>31</sup> Similarly, while moral norms expand and constrict promissory practices in various ways, an obligation can only be characterized as promissory to the extent the promisor sought out the substantive core of that obligation.

In the same way that the parties' shared understanding is important to ascertaining the content of contractual obligation, their shared understanding is essential to understanding the content of the related promise. Thus, whether the ordinary commercial promise is one to deliver the specified good or service, or whether it is a merely a promise to deliver or pay some

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29. See *Geary v. Wentworth Laboratories, Inc.*, 60 Conn. App. 622, 760 A.2d 969, 972 (2000) (quoting *L & R Realty v. Connecticut Nat'l Bank*, 53 Conn. App. 524, 732 A.2d 181) ("To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties. . . . To constitute an offer and acceptance sufficient to create an enforceable contract, each must be found to have been based on an identical understanding by the parties. . . . If the minds of the parties have not truly met, no enforceable contract exists."); *Blinn v. Beatrice Community Hosp. and Health Center, Inc.*, 270 Neb. 809, 824, 708 N.W.2d 235, 248 (2006) ("[A] contract requires that the promisor intend to make a binding promise—a binding mutual understanding or 'meeting of the minds' . . . .").

30. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569, 576–77 (1933); William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 863 (1982); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1265 (1998); Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203 (2002); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 778 n.15 (1992); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113 (1996) ("The requirement to form a contract is not that parties *actually* assent to its terms. The requirement is that they take actions . . . ."); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

31. See, e.g., Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 118–19 (2008) (discussing courts' reluctance to revise noncompete clauses in order to render them enforceable).

compensation, depends on what form commercial retailers intend their promises to take, and on what their promisees believe them to be promising.

Default rules that we use in interpreting retail promises do not render them involuntary; they are usually our best guess as to what parties intended. The principle of objectivity does not imply that the scope of retail promises does not depend on the understanding of retailer and consumer; rather, it means that we look to their common understanding rather than the beliefs and expectations subjectively held by either side. And while some promises may fail as promises, it is surely within the power of promisors to promise either simple delivery, or to retain the option of compensation. Some promises fail as promises because they do not effectively obligate a promisor to do anything—but that is not the case in a deliver or pay promise. Other promises may contradict themselves if they at once purport to assume and deny some obligation. But while a deliver or pay promise denies the obligation to deliver where it is more profitable to pay some fixed rate of compensation, it is not an internal contradiction because nothing in the promise purports to assume that obligation. The practice of promising has involuntary elements and involuntary boundaries, but ordinary retail promises of both the types that concern us here fit comfortably within its voluntary core.

#### *B. Well-Known Prevailing Practices Are Self-Justifying*

There may have been a time when retail consumers expected consistent delivery of goods and services from retailers. But that moment has surely passed. Now, most consumers recognize the risk that many retailers will not deliver the goods or services contemplated by contract. They are fully aware that compensation—sometimes substantially below expectation damages, often contractually specified—is all that they can expect should something go wrong in the automated process of delivery. If a good is out of stock or suffers from some substantial defect, the consumer does not expect that the retailer will necessarily correct delivery. If a service becomes burdensome for whatever reason, the consumer realizes that the seller of those services may choose not to complete the job as initially contemplated. Again, compensation may be limited below legal defaults.

The low expectations created by widespread experience redeem these retailers of goods and services. If retailers and consumers share an understanding about the conditional nature of retail promises, a failure to deliver is unlikely to constitute breach of those promises.

In unnegotiated contracts, shared expectations about what each party is prepared to do merge with intentions regarding the scope of the parties'

obligations. Expectations arise from multiple sources, but especially prevailing market practices and legal defaults. Parties will look to the normal operation of similarly-priced contracts to understand what their respective rights and obligations will be. In addition, *well-publicized* default rules will rarely contradict the intentions of contracting parties because the parties will either accept them or explicitly reject them.

Discussion of whether we should construe commercial contracts as deliver or pay contracts has sometimes appeared to turn on whether we should interpret contractual obligation in a manner consistent with the moral obligation that attends contractual promise. But a large part of the promissory obligation generated by a given promise turns on the intention of promisor and promisee. Prevailing practices in both the market and the law will significantly determine parties' intentions in standard form retail contracts. Thus, while law and morality may or may not diverge on matters of excuse and on the consequences of breach, the substantive core of moral obligation under any retail promise—i.e., what the promisor is obligated to do—is likely to track legal and market practice.<sup>32</sup>

In the first instance, the result is a convergence of contractual promise around a few viable models. Consumers and retailers sign onto one of a few different packages of terms that are readily available to them.<sup>33</sup> The transaction costs that drive this pooling are not primarily ones relating to the limits of judicial interpretation.<sup>34</sup> It is not the law but the market that orchestrates convergence. In the commercial context, the costs of offering unique terms and the cost of navigating an infinite number of retail possibilities render most retail contracts more or less replicas of each other. However, in sufficiently large markets, market forces do not usually push toward a single equilibrium for any transaction type. There is more than one kind of contract available for the purchase of any type of good or service.

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32. Cf. Raz, *supra* note 1, at 933–34 (Contract law supports relevant promissory norms rather than directing them. But because it is not perfectly but just predominantly supportive, it has a conservative force. For example, it extends the practice, as in contractual promises between strangers.).

33. Cf. EMILIE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 161 (W.D. Halls trans., 1984) (“Most of our relationships with others are of a contractual nature. If therefore we had each time to launch ourselves afresh into these conflicts and negotiations necessary to establish clearly all the conditions of the agreement, for the present and the future, our actions would be paralysed. . . . We can only depart from [contract law] in part, and by chance.”); Kreitner, *supra* note 17, at 456 (“[C]ontract law will offer potential contracting parties a series of set types of relations . . .”).

34. Cf. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1752–53 (1997) (“[T]he meaning of the contract is determined by the law, except for matters in which the parties are allowed—under certain conditions and limitations—to deviate therefrom, and to the extent they usually do so.”).

Goods on the market may be segmented along lines of quality. But contracting parties, at least on the consumer side, are segmented along socioeconomic lines. In each pool of patterned retail promises, buyers and sellers understand their mutual obligations similarly, but differently from those contracting on some other pattern.

It is worth noting that my argument is not that the conventions that dominate within a given contractual community are self-justifying because of the conventional character of promise. In that case, one might resist deferring to consumers and retailers' understanding of their respective obligations by denying the fully institutional character of promise and of contract. A transcendental account of promise, in which the obligation to perform promises is more than conventional, would seem conducive to a more restrictive account of what follows from the apparent undertaking of obligation irrespective of affirmative attempts—let alone passive understandings—that purport to contain those normative consequences.<sup>35</sup> Even if promise is not a transcendental practice, the concept of obligation at least transcends the practice of promising. How obligations attach to the words and acts that we associate with promise may not correspond to how those obligations are recognized by those within the practice.<sup>36</sup> However, my argument is not that the content of retail promising is self-justifying because it is repetitive across numerous contracts. The patterned aspect of retail promising is relevant here because it helps determine how any one contractual pair will understand their particular obligations. It is the intention of the parties to contract on either a deliver or pay, or simple delivery model that determines which form of retail contracting they undertake.

*C. The Parties' Understanding as to the Form of Retail Promise Will Systematically Vary*

Not all consumers and retailers share a common expectation about whether the retailer retains an option to compensate rather than deliver. Some consumers expect delivery, and some retailers are prepared to commit to delivery.

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35. See, e.g., Michael H. Robins, *The Primacy of Promising*, 85 MIND 321 (1976).

36. See SCANLON, *supra* note 3, at 296 (arguing that the wrong in promise-breaking does not depend on the social practice); Dolores Miller, *Constitutive Rules and Essential Rules*, 39 PHIL. STUD. 183, 188 (1981) (“Obligation is not an intra-institutional term—something defined or constituted by certain behavior regulated by certain rules. Obligation is a concept or value which exists above and beyond promising—it is logically independent of promising, although promising may not be logically independent of it.”).

In some cases, there may be a mutual understanding that the custom-ordered, heirloom-quality product will be delivered to exacting standards, irrespective of how many initial errors the manufacturer makes; he may simply be required, by that mutual understanding, to correct them, at whatever cost. In other cases, a standard, competitively priced product may be purchased with the understanding that if it fails to meet even commonly accepted standards, it may be returned, but no additional effort to deliver the good as initially presented would be intended by the retailer or expected by the purchaser. In still other circumstances, a promise to provide services at low cost may be accompanied by a mutual understanding that the service provider will respond or accommodate complaint only if the service fails to meet a far lower standard than either really expects the service to approach; thus, the initial contractual promise is to deliver only to some minimum extent. Finally, in some cases, a contractual promise to perform some service is highly conditional—more conditional even than the terms on which that same service might be provided by some other provider in the same economic community.

The variety of forms that commercial promise might take exists in both the contexts of the moral and legal practice—that is because both the moral and legal practice assign critical, albeit not dispositive, weight to the mutual understanding of promisor and promisee. Whatever the outer limits on promise as a moral practice, it is still sufficiently flexible to accommodate a diverse range of promises with respect to any single substantive exchange.

Retailers who undertake more rigorous commitments are paid accordingly, making it possible to remain competitive with lower cost retailers who promise their goods or services more conditionally. Retailers whose goods or services are of superior quality, or whose operations are more streamlined or otherwise more efficient, will be able to offer more security behind what they sell at lower cost than less competitive retailers. Thus, the market will naturally separate into those who offer lower quality goods or services with minimum commitment at a low price, and those who offer higher quality goods and services accompanied by more stringent commitments to their customers, but at a higher cost. Parties' expectations will be shaped by their knowledge of contracts at a similar price point. Thus, the mutual expectations of the parties will differ systematically in high- and low-end consumer markets. The result is separate contract communities with distinct promissory norms.

Commercial promisors operating in high-end markets are more likely to promise delivery of a specific good or service; promisors to low-end consumers are more likely to promise either delivery or compensation. Because it is commonly accepted that you "get what you pay for," high-



spending consumers will expect actual delivery, and will bring this expectation to their understanding of the commercial promises they receive. Low-spending consumers will understand that the promises they receive are conditional in various ways, and will not expect full compensation when delivery is not forthcoming.

Retailers will self-sort into high- and low-end markets based on their relative cost structure. Of course, there is nothing inevitable about the pairing of high-quality goods with more rigorous contractual commitments. That is to say, a retailer could, in principle, sell services and goods that are of average high quality, but not commit to each particular good or service sold meeting that high standard. There is also nothing inevitable about the pairing of high-quality service with other aspects of performance, such as punctuality or the certainty of the service being provided (at whatever quality) as promised. Similarly, one could offer goods or services that are of average low quality, but commit contractually to that low standard, and to delivering the good or service at whatever the average quality, come what may. However, what we actually see is that higher end goods are usually accompanied by more rigorous contractual commitments, while low-end good or services are also accompanied by what I will characterize as low-quality promises. In these low-quality promises, failure to provide even the low-quality good or service, either at an ever lower standard or not at all, results in a refund or credit. There is no commitment to replacement at no cost to the consumer, or to delivery at all in the event of some shortage or other condition that makes delivery of the good or service difficult or costly at a particular time.

Why do we see high-end products and services paired with high-quality promises, and vice versa? In some markets, it is commercially advisable to offer more than a promise to deliver or pay. In these markets, consumers are willing and able to pay a premium for assurance that they will obtain the desired good or service. Unsurprisingly, these are the consumers with higher purchasing power who are also able and interested in purchasing more expensive goods to begin with. These consumers are willing to pay to avoid the inconvenience of having to find a substitute, or having to wait for delayed delivery. In these markets, it is also advisable to specify a standard of performance higher than that imposed as a legal default. Consumers in this market are willing to pay for something approaching perfect tender.

Of course, not all consumers are so willing and able to pay. Markets that cater to those who will not pay for the luxury of a more pointed promise will be characterized by promises that are inferior in the sense that, all else (i.e. price) being equal, everyone would prefer these promises to the more conditional promises that are normal in all but the most expensive markets.

Delivery of a good or service in a more conditional contract depends on circumstances aligning such that delivery is not unexpectedly burdensome for the retailer-promisor; in particular, whether delivery occurs in a “deliver or pay” contract depends on whether delivery is cheaper than paying. These conditional promises should be regarded as inferior because the value of a promise to the promisee usually lies in the solidity of the commitment undertaken, and the outcome of a bifurcated promise like other conditional promises, is generally less certain.

The result of this heterogeneity is the co-existence of separate communities for retail promise. We are familiar with the idea that contracts must be interpreted in light of the particular communities out of which they arise: Courts regularly defer to trade usage and contractual communities are usually delineated by trade and profession. Courts are interested in trade usage and the ways in which parties normally employ certain terms because they indicate how parties to any given contract intended to use those terms. Because social context is relevant to deciphering contractual intent, it helps supply the content of contractual promises. But trade and profession are not always the most relevant markers of social context. Other dimensions of status are important for delineating the appropriate boundaries of a contractual community.

Because the legally enforceable terms of the contracts in which retail promises are embedded may not systematically differ, the divisions between those who make and receive highly conditional promises, and those who make and receive more pointed promises, is relatively unfamiliar to contract law. However, as a general matter, the relevant status boundary is quite familiar. Those who have the means are able to obtain more certainty and are entitled to make more burdensome claims on their contractual partners in the marketplace. Others must make do with promises that deliver less predictability, and because they bear a greater share of the burden when negative contingencies arise, they generate fewer reasons for their contractual partners to deviate from their normal course of conduct.

## II. QUALITY OF PROMISE

My claim is not only that promises are different in distinct socioeconomic communities, but also that some are better than others. One might resist the idea that promises vary in their quality. One might argue that a promise is a promise, and that while the content of some promises may be more valuable than others, the promises themselves are formally equivalent, and the notion of quality simply does not apply to promises. But we are better off

understanding promises to vary in quality. One might treat the concept of a promise like the concept of a square, such that anything that formally meets the requisite properties is a square (or a promise). But we would do better to regard the concept of promise like the concept of water. There is a sense in which something is water or it is not—either it is H<sub>2</sub>O or it is not. But once we think of the purposes for which water is normally used, notably for drinking, it is natural to think of water varying in quality. We all regard water that is more pure, with fewer contaminants or foreign particles as superior water.

For those who reject the idea that there is even a natural concept of promise, a better analogy might be to animal taxonomy. There is, of course, a sense in which an animal either is a cat or is not a cat. But some cats are more cat-like—or some cats of a particular breed better exemplify the traits of that breed—and in this sense, one can say they are better examples of a cat, or better examples of that breed. It may seem peculiar to engage in this kind of normative ranking with respect to cats, but that is because cats do not serve a function as such, and therefore it is generally of no consequence whether a cat is more or less cat-like. But if one thinks of taxonomy in a context where the object in question does serve a function, we can further push the idea of normatively-driven notions of quality. For example, while a vegetable is perhaps either a leafy green vegetable or not, if we are interested in whether a vegetable is leafy green because of its nutritional properties, we might deem a certain leafy green a better leafy green vegetable than another. In this case, we would not just be remarking that the vegetable is better generally (indeed, it may be inferior in some respects), but specifically noting that the property most relevant to its classification as a leafy green is relatively lacking.

All of these examples go to show that while many concepts, including promises, may be conceived of as either/or concepts where the concept is normatively motivated, or where the object is at least associated with some particular function, it is possible and actually useful to speak of inferior and superior species of that concept. Thus, we can sensibly speak of superior promises as ones that better serve the ethical function of promises, or that better demonstrate the ethical value that we associate with promises. Inferior promises, by contrast, are less valuable because they do not serve that function, and are relatively lacking in that quality which we associate with the practice of promise.

What is the ethical function or value of promise? Most writings on promise emphasize certain related dimensions of the practice such that, for the most part, we need not choose between them in order to distinguish the superior from the inferior variety. Some scholars emphasize that the value of promising lies in planning. The certainty that promises provide with respect

to at least some future events, namely the conduct of the promisor, is valuable to promisees as they make minor and major decisions about how to live their lives in the interim.<sup>37</sup> Other authors emphasize the relational value of the practice. In one view, by promising we delegate authority over our future conduct to another.<sup>38</sup> In still another view, by promising we bind ourselves to involvement with the other so long as the promise is outstanding; the act anticipates and perhaps forces a degree of cooperation and deference that might not otherwise evolve.<sup>39</sup> In my view, we commit to giving the other's interests a certain weight in our future decision-making.<sup>40</sup>

It is not necessarily the case that the relevant value of promise is constant across different domains in our lives. Promises made in a private context likely have a different value to us than promises in a commercial context. While there must be some constancy that justifies our inclusion of both types of promises under an umbrella practice of promise, this commonality does not require us to collapse private and commercial promise and their distinct ethical functions and values. Even if the various values and functions of promise noted above are present in most kinds of promise, they may be present to different degrees in different contexts. For example, the relational values of promising may be more important in the private sphere. The opportunity for planning and associated sense of entitlement to which promise gives rise is more important in promise among strangers, as in the commercial retail context.

Once we have established the value of promise within a given domain, we can then further characterize specific promises of that type as demonstrating that value to a higher or lower degree. That is, we can say that a commercial promise is superior in the sense that it fulfills especially well, the ethical function that we associate with commercial promise. This would not indicate anything one way or the other as to how this promise would fare by the standards we should apply in another domain, as in the context of promises between friends. But it means that, so long as every promise belongs to some domain with respect to which we can identify the domain-specific value of promise, we can speak of the quality of any given promise.

Promises thus vary in their quality, and in particular, commercial promises in consumer markets vary systematically in quality. Not just

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37. See David Owens, *A Simple Theory of Promising*, 115 PHIL. REV. 51, 51 n.1 (2006) (labeling these views as "information-interest theories").

38. *Id.*

39. Markovits, *supra* note 1.

40. Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. L. REV. (forthcoming 2011).

promisors, but also promisees in low-end consumer markets understand the promises that they normally give and receive on the market to be of an inferior variety because of their past experiences in the market and general knowledge of its operation. As argued above, their mutual understanding as to the content of these promises is largely determinative of the content of their promises. Their shallow content, namely their failure to generate predictability and to secure a sense of entitlement in those consumers vis-à-vis the retailers with whom they transact, renders those promises inferior to those of high-end counterparts.

One might dispute that these promises have the content I suggest above; they may be as solid as other promises, and capable of generating the same predictability and entitlement as do their high-end counterparts. What I regard as a mutual understanding regarding their inferior content might be characterized instead as a mutual understanding as to the probability of performance. In that case, one could argue, the promises are not inferior per se, they are just not believed in or trusted.

However, we cannot dismiss promisees' understanding that promisors commit only to deliver or compensate (to some limited extent) as mere disbelief that the promisors will perform their promises. If promisees took contractual promises to be "lying promises," they would fail as promises. Lying promises are not real promises because the promisor does not successfully bind himself to the promisee. The promisor may be obligated by virtue of the commitment he purports to assume, but that obligation is not promissory unless the promisee accepts that commitment and is prepared to recognize and rely upon it. One cannot unilaterally engage in the practice of promising any more than one can "communicate" with oneself. The value to the promisor of promising lies in the capacity to change one's normative world, i.e. one's normative relations with others, by virtue of one's voluntary communication.<sup>41</sup> That aspect is not merely diminished, but simply absent in a lying promise. The various values of a promise to the promisee, as discussed above, all also turn on the promise meeting some threshold level of credibility. Thus, if low-end retailers promise their consumers perfect tender but the consumers do not believe it, we can say that they have only attempted to make that promise.

We have still another reason to reject these so-called lying promises as instances of promise. Promises are intentional acts. The intentionality refers

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41. See Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 227–28 (P.M.S. Hacker & J. Raz eds., 1977).

not just to the expression of the intention to perform, but also the intention to assume the promised obligation. In a lying promise, by definition, the promisor does not so intend. Therefore, as a conceptual matter, it is again incongruous to regard these types of insincere communications as promises at all. If promises by low-end retailers have the same conditions with respect to delivery that are common in high-end consumer markets, but both low-end retailers and consumers understand at the outset that those promises will not be kept, then these would-be promises are not promises at all.

Surely, promisors in low-end markets understand their retail contracts to be some kind of promissory undertaking, and promisees take the commitments they receive in exchange for their own commitments to pay as promissory in nature. Certainly, the law regards these transactions as legally-binding contracts, and as such, takes them to be successful as promises of a particular kind and content. Thus, it is inconsistent with the self-understanding of the parties as well as the existing legal framework to dismiss these transactions as nonpromissory.

We would do better to understand them as promises without reconstructing the notion of promise and without revisiting its essential features. We need only allow for variety in the quality of promise. It is more productive to regard them as promises and compare them as such, with what are also promises of a similar type, but superior quality in high-end consumer markets.

The fact that low-income persons are likely to be on the receiving end of inferior promises is not surprising, since one would expect the quality of most things purchased on the market to vary with price. But note that the contrast between the consumer experiences of high-end and low-end purchasers of retail goods and services is not reducible to a difference in the quality of the actual goods and services they purchase. A few illustrative examples are in order.

Consider two sofas for sale, one at Low-End Retailer and one at High-End Retailer. The first sofa, at Low-End Retailer, is less plush, less soft, and less durable than that sold at High-End Retailer. These contrasts pertain to the product sold—they do not reflect on the quality of the promise to deliver the sofa that each retailer sells. But Low-End Retailer also has a number of store policies relevant to the purchase of its sofa. Should the sofa fail to be delivered at the arranged time, the customer can reschedule, but cannot expect any priority in scheduling. Should the sofa that arrives appear slightly damaged in some way, but not substantially so—rendering it inferior to the store model but not unusable—the store may offer replacement only at the customer's own cost. And should the store simply run out of these sofas prior

to the time of delivery, the customer can only expect to have her money back—Low-End Retailer will not order a new sofa from the manufacturer. These aspects of the purchase reflect on the quality of Low-End Retailer's promise.

Similarly, consider two plumbers. Local Plumber is self-employed and charges substantially less than Plumbing Inc., which is a reputable company operating over a large metropolitan area. Local Plumber charges less to have a drain unclogged than does Plumbing Inc. Local Plumber is also a worse plumber than any of the plumbers employed by Plumbing Inc. When Local Plumber unclogs the drain, she does a less thorough job, resulting in another clog within a short period of time. Local Plumber also tracks dirt into the bathroom and leaves the bathtub dirty; the plumbers dispatched by Plumbing Inc. know not to do either of those things. These differences pertain to the quality of the service sold and not to the contracts governing those sales.

But Local Plumber is also less reliable in other ways that do relate to the quality of her promise to fix the drain. Local Plumber frequently cancels appointments as other more lucrative jobs come up. Even if she does show up, the quality of Local Plumber's work varies considerably, depending on whether she must rush to another job. By contrast, Plumbing Inc. never cancels and its plumbers have a strict checklist that they must go through with each job. Moreover, Plumbing Inc. guarantees their work for a minimum number of days, irrespective of whether a new clog is traceable to any shoddiness in their plumbers' work. These differences between the retailers pertain to the quality of their respective promises to consumers of their services. Analytically, it is possible to locate the difference elsewhere, but if the salient resulting differences are in certainty and entitlement values associated with promise, it is most illuminating to characterize this variety of retail promise as an inequality in the quality of promise that prevails in distinct markets.

### III. RELEVANCE OF UNEQUAL PROMISE: UNEQUAL CONTROL, UNEQUAL ENTITLEMENT

Why separate out differences in the quality of promise from differences in the quality of the actual goods or services sold? This is a relevant exercise because many goods and services do not have a special ethical value. To be sure, the fact that some people can purchase more and better things is of moral interest, but there is no moral problem with disparity in the items people possess in itself. Even in a society characterized by social justice, we would expect people to spend their resources differently, and thus we would observe

discrepancies in the quality of the consumer goods and services they purchase. Promises, however, may play a special role in our society. Private promises play a special role in our private relationships. Similarly, commercial promises play a distinct but important role in how we relate to others in our political and economic community.

While many goods and services are not of inherent ethical import, some are. We can borrow from the debates regarding the moral acceptability of inequality in those goods and services to better understand the moral import of unequal consumer promises. The question in the context of critical goods and services that are deemed, within a given community, as essential to the pursuit of a good life, is whether contract or consumer law should homogenize the market (to some extent) through mandatory legal rules. We can and should ask this of commercial promise just as we can ask this of other things bought and sold on the market. With healthcare, most people believe that we should limit the inequality that results from operation of the market. With jewelry, few people feel that way. Are promises more like healthcare or jewelry?

In answering that question, we should bear in mind the underlying question: whether contract (or consumer) law should be used to make uniform the market for promises. Is the impoverished quality of promise that is available to many, if not most, consumers morally unattractive? We can ask this of commercial promise just as we can ask this of other things bought and sold on the market. With healthcare, many people believe we should limit the inequality that results from operation of the market. With jewelry, few people feel that way. I would argue that in some respects, at least, promises are more like healthcare than jewelry.

It is worth noting that the concern I raise here is not with the very conditional nature of certain retail promises, or even the prevalence of such conditional promises, but rather the difference in the nature of promise that individuals within a single political community typically experience with strangers. One might object to the absolute quality of retail promises in certain consumer markets in the same way one might deplore the poor standard of healthcare available in certain communities. The difficulty common to both of these complaints is identifying an absolute standard of acceptability. The cost of higher mandatory standards in healthcare competes with the cost of providing other valuable—and incommensurable—goods and services. While we might be tempted to conclude that we know an unacceptable level of care when we see it, this approach offers little guidance for policymakers. Nor is it helpful to observe that, in all likelihood, even if we strive to achieve the highest standard politically possible, we are unlikely to reach the morally acceptable minimum, making the identification of that minimum unnecessary.



Concerns regarding levels of healthcare are difficult to translate into viable policy programs. Similarly, concerns regarding the appropriate level of conditionality, or conversely, the ethically desirable level of security present in retail promise, do not translate readily into a concrete program of consumer protection. At some point, one might conclude that a retail promise is actually illusory, and therefore, should be disallowed in contexts where both parties appear to intend to contract. One might also speculate about the kinds of promise that most consumers would accept with a full understanding of their terms. But in light of the income disparity that drives unequal retail promise, it is likely that even correcting for these extremes, which may reflect potential defects in contractual process, there will remain considerable disparity in the kinds of promises that low- and high-income consumers normally experience in the marketplace.

The unique concerns raised by the disparity in the quality of retail promise stem from the special ethical value to individuals of their participation in the practice of commercial promise. Commercial promise plays an important role in a political community and that role is undermined by the market phenomenon of unequal promise. One possibility is that its value lies in its cultivation of trust between contracting parties. If its value lies in the promotion of trust, the practice may be undermined by the prevalence of conditional promises regardless of the distribution of that conditionality. If we expect and desire even commercial promise to help cement trust in a political community, then we might be concerned that the prevalence of an impoverished form of promise would prevent the practice of promise from fulfilling that function.

But trust is probably not the most important thing to come out of our commercial experiences with strangers. Commercial transactions will not consistently lead individuals to trust the particular persons with whom they engage, especially because so many of our commercial dealings are with corporate or otherwise anonymous entities. Given the numerous layers of legal and social norms, as well as economic pressures, that constrain commercial behavior, we are also unlikely to attribute good behavior in the marketplace to personal qualities in those with whom we transact.<sup>42</sup>

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42. It may be that promise-breaking is wrong at least in part for reasons that have to do with abuse of trust. For example, promising followed by promise-breaking may constitute misleading conduct that is wrong for non-institutional reasons similar to those that make straightforward misrepresentation wrong. See SCANLON, *supra* note 3, at 298. This is not inconsistent with the idea that the value of the practice of promise, at least from the standpoint of law and policy, is its value to the promisee—whether the general value of assurance, or what I describe here as its marginal contribution to a promisee's sense of control over

The value of commercial promise lies elsewhere. It has more to do with empowerment. It is the unequal sense of control and entitlement reinforced by unequal promise that should be most disconcerting. Promise generates a sense of control in promisees by virtue of mitigating the uncertainties that we must otherwise navigate as we plan for the future. Most retail promises will affect future plans in only small ways. But the debilitating effect of uncertainty in individual contracts is cumulative. Every contractual promise that results in something other than delivery, where the inferior promise was purchased due to financial constraints, reinforces one's sense that one has little control over the series of small events that comprises each day.

Commercial promise generates another value that is lacking in promises to deliver or pay. Individual consumers are largely passive in the marketplace. Together, their level of demand sets prices, but as individuals, they take prices without negotiation. Together, their preferences determine the range and quality of products; individually, they must choose among the available options. The basic features of a retail contract are not responsive to the needs and wishes of individual consumers. However, those retail contracts that do promise delivery create the possibility that the retailer will have to be responsive to the circumstances of an individual consumer in order to fulfill her obligations. The promisor might have to do something that she otherwise would not or something that she was not already going to do, such as manufacture or sell the product. Whether it is repairing an item or adjusting one's schedule to ensure the service is complete, the retail promisee in these cases is in the position of making demands on someone with concrete, immediate consequences for how that promisor allocates his time and effort. Where the retail promise carries no such commitment, it is the consumer-promisee who must adjust her allocation of time and effort to the reality that performance of the contract will not take the form of delivery.<sup>43</sup>

Those who regularly experience high-quality promises from strangers, develop a set of expectations regarding how others will behave toward them even outside the context of retail contracting. These expectations are likely to be met because if others are obligated to treat them respectfully and predictably in contract, they are likely to continue this pattern of behavior even when it is not mandatory; after all, often such conduct is not especially

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her relations with others, and ultimately, over her own life.

43. Cf. Shiffrin, *supra* note 7, at 1564 ("When the plumber opts not to show . . . she has still made a decision for you about how *your* time, attention, and labor must be devoted. One might exaggerate the point by saying she has made you an involuntary employee of hers. She has usurped your ability to make independent, voluntary decisions about the use and form of your time, attention, and labor.").

costly, and it is in any case usually a matter of habit. Individuals' expectations regarding how others are to interact with them and others' habits with respect to how to treat such individuals, are mutually self-reinforcing in a virtuous circle. By contrast, those who have little expectations regarding the reliability of others' conduct will interact with others as if their conduct is unpredictable and often oriented against one's own interests. And they will be right, because it is so often evident from the kind of retail experience a person usually has, that others will conform to her low expectations, even where cost or contractual obligation is not at issue.

Broadly speaking, the value of commercial promise lies in its empowerment of consumers who value their ability to navigate the retail world and exercise their choice and discretion. Commercial promise is also valuable because it cultivates a sense of responsibility toward those to whom one has assumed contractual obligations. In light of these essential values, unequal promise reinforces a class-based sense of entitlement, both experienced and perceived.

The disparity in the sense of entitlement that results from these diverging experiences in the consumer marketplace is problematic because it affects not just any of the primary goods utilized by individuals in their pursuit of the good life, but one of the most fundamental of the primary goods: individuals' sense of self. It is of greater concern than disparities in other resources that might be useful in the pursuit of one's conception of the good because sense of self motivates the formation of such a conception.

Moreover, because politics in a large political community are anonymous in much the same way that retail transactions are in a large economy, a differential sense of entitlement among different classes is likely to spill over into distinct expectations toward one's government. Because expectations of government are critical to motivating a type of public discourse that values democratic accountability, reinforcing and weakening expectations of strangers in different classes fuels political inequality.

Notwithstanding this potentially malignant heterogeneity in the conditionality of retail promise, it may be futile, or at least ill-advised, to attempt to avoid it by making commercial promise more uniform. We might attempt to address this by more vigorously enforcing commercial promises made in that large segment of the consumer market that caters to a wide range of consumers. In this way, high-quality promises will at least become a regular part of low-income consumers' experience of the market. However, our ability to remedy this dynamic with contract rules is ultimately quite limited. The phenomenon of unequal retail promise may instead offer just another ground for complaint against gross inequality of wealth and income.