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Insincere Promises:

The Law of Misrepresented Intent

by

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To Oliver Wendell Holmes Jr., whose seemingly conflicting views on this topic spurred us to write this book

Preface

This book began in our experience studying and teaching first-year Contracts. The results of many canonical cases – from *Red Owl* and *Peeveyhouse* to *Bailey* and *Lefkowitz* – seemed to turn at least in part on the whiff of misrepresented intent. But our contracts and torts professors and the casebooks they assigned gave short shrift to the tort of promissory fraud (not to mention the crime of false promise). This book is an attempt to revive scholarly thinking about an area of the law of contracts that is much litigated but little theorized. We also hope to provide practical advice on the contours of the doctrine, both for advocates and for judges, who must struggle to put the law's condemnation of promissory insincerity into practice.

Readers who are impatient for the real-world payoff might want, after reading Chapter One, to skip to our analysis of evidentiary issues, starting especially in the last section of Chapter Five and on through Chapter Six, to Chapter Seven's description of the dizzying range of situations where promissory fraud can arise or to Chapter Eight's discussion of the crime of false promise. Our Appendix "Prestatement" of the law presents our normative bottom-line in a nutshell. For the more theoretically inclined, Chapters Two, Three and Four present an analysis of just what insincere promising is and of why the law should concern itself with it.

In our emersion to the case law, we have been aided by a number of able Yale law students, including David D'Addio, Benjamin Alarie, Susanne Augenhofer, Ryan Bergsieker, Sara Van Dyke, Jordan Factor, Sydney Foster, Benjamin Hance, Winter King, Praveen Krishna, Alex Lee, Ying Ying Li, Kevin Reed, Blake Rohrbacher and Steven Wu. We thank both Tony Kronman and the Olin Foundation for financial support. Over the years we have repeatedly benefited from the comments of Dick Speidel, Carol Rose, Rob Gertner, and Lea Brillmayer and we are also grateful for the helpful comments on this manuscript that we have received from Barry Adler, Richard

Craswell, Kevin Davis, Jason Scott Johnston, George Triantis as well as participants from the Wisconsin Conference on Freedom from Contract and the Yale Summer Olin seminar series. The Office of the New York Attorney General graciously permitted Greg Klass to publish this book while employed there, on the condition that we make clear that the views expressed in the book are not necessarily those of that office. Finally, we must thank our families, without whose many forms of support this book would not have been possible.

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Chapter I. Introduction

You sit down in a diner, peruse the menu for a few minutes and, when the waiter arrives and wishes you a good morning, you respond in kind and then say, "I want two eggs over easy with hash browns and rye toast." According to the dictionary meaning of your words, you have just reported to a fact about your appetitive state. But of course what you have really done is order breakfast. The salient question in the situation is not your feelings towards this or that item on the menu, but what the waiter shall bring. Your words decide that. What you've said is also a type of promise. In context, the statement works as an implicit conditional promise: If you bring me these things, I will pay for them. Such implicit promises are standard fare in the first-year Contracts curriculum. Students similarly learn that by representing a fact, a contractual promisor implicitly warrants that the representation is true. The dictionary meaning of the words is correct, and perhaps even intended, but it does not reveal the complete use to which those words are being put.

While legal thinkers are well acquainted with the idea that statements of fact can be implicit promises, not much attention has been paid to the converse – that often enough, the act of promising not only puts the speaker under an obligation, but represents something to be the case. A central thesis of this book is that to promise to do something is, in most cases, a multidimensional act, and that the law of contracts would do well to recognize its different meanings. The dictionary meaning of the words "I promise to…"

is that the speaker, by uttering them, puts herself under a certain obligation – an obligation to do the act promised. Philosophers of language sometimes refer to such speech acts as "performatives," since by the very uttering of the words one performs some act.[1] But just as the dictionary meaning of "I want two eggs over easy" masks those words' performative force when uttered to a waiter, so the obvious performative force of a promise can obscure what it says about the world. In most (though not all) contexts, a promise to do something also represents that the promisor intends to do that thing. And, we will argue, many promises say even more than this about the likelihood that the speaker will do the act promised. As the statement to the waiter both says something about one's dietary preferences and does something about ordering breakfast, so a promise can both do something, by putting the speaker under an obligation, and say something, by representing that she intends to do the act promised, that there is a certain probability that she will perform, and perhaps more.

Most legal and philosophical accounts of promising emphasize what promises do at the expense of what they say. This is not surprising, since it is their performative force that sets promises apart as particularly interesting sorts of speech acts. Philosophers find it endlessly fascinating that by the mere act of uttering certain words one can create a duty for the speaker. Legal thinkers are faced with the more pressing practical problem of whether, why and how the law should take cognizance of such duties.

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[1] Most influentially, J.L. Austin, *How to Do Things with Words* (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975). Austin distinguishes performatives – thanking, naming, apologizing, promising – from constatives, which are assertions about the world and which we generally refer to as the "representational" dimension or as what a speech act "says."

The representational dimension of promises has not been completely overlooked. Legal theorists who have attempted to reduce the law of contracts to the principles of torts, including Grant Gilmore and P.S. Atiyah, have characterized promises as predictions about what the speaker will do in the future.[2] But these accounts generally make the opposite mistake, emphasizing what promises say at the expense of what they do. As such, they are as philosophical accounts of promising deeply unsatisfactory. And as attempts at legal reforms they have generally failed.

This book examines the legal relevance of the representational dimension of promising – the fact that promises often say something about the world. But it doesn't deny the primacy of a promise's purely performative aspect – the fact that by promising, one puts oneself under a certain obligation. We are not revolutionaries. We accept that most of the law of contracts is best viewed as playing a supporting role in the way that promises create obligations and we believe that this is proper. But we are reformers. Promises also convey information – especially information about the promisor's intentions with respect to performance and, more generally, about the probability of her performance. The law can and should be structured to support such transfers of information.

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[2] Grant Gilmore, *The Death of Contract* 61-93 (1974); Patrick Atiyah, *Promises, Morals, and The Law* 138-215 (1981). Farnsworth, who does not fall into such reductionism, also observes that the act of promising has two separate dimensions:

> First, a promise represents that the promisor has made an initial decision to do what is promised. A promise to do thus-and-so says: "I have decided to do thus-and-so." … Second, a promise expresses the promisor's commitment to carry out the initial decision by doing what is promised at some future time despite a subsequent change of mind. A promise to do thus-and-so also says: "I will carry out my decision to do thus-and-so when the time comes even if I later change my mind and regret my decision to do it."

E. Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* 29 (1998). Farnsworth's emphasis in his book, however, is on the second dimension he identifies – the way that a promise expresses (or creates) a commitment – and he doesn't have much to say about the first.

A. Holmes and the curious doctrine of promissory fraud

It is no doubt wrong to conflate promise breaking and lying.[3] What parent hasn't heard a child say with no small degree of indignation, "You lied to me; you said you would (take me to the park, buy me an ice cream cone…)." Accusations of this kind can be evidence of conceptual confusion: You might be a scoundrel for breaking your promise, but you are not thereby a liar – someone who knowingly misrepresents an existing fact. The act of promising to do (or to refrain from doing) something in the future does not, by itself, give the promisor even the opportunity to lie.

But if a promise not only puts the promisor under an obligation, but also says that such-and-such is the case, then it too can be a lie. The idea is familiar in literature and popular culture. Consider the following episode from *The Frog Prince*:

> "I don't want your clothes, your pearls and jewels, or your golden crown," the frog replied. "But if you would love me and let me be your companion and playmate, and let me sit beside you at the table, eat from your little golden plate, drink out of your little cup, and sleep in your little bed – if you would promise all that, I'll dive down and retrieve your golden ball."
>
> "Oh yes," [the king's daughter] answered, "I'll promise you whatever you want if only you'll bring back the ball!" However, she thought, What nonsense that stupid frog talks! He just sits in the water croaking with the rest of the frogs. How can he expect a human being to accept him as a companion?[4]

The princess has lied to the frog – she has misrepresented her intent to be his friend. Her perfidy is not so different from Penelope's towards the suitors. During Odysseus's long absence, Penelope promised to announce her choice among them after she finished

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[3] Fried analyzes the mistake of viewing a broken promise as a type of lie in the first chapter of *Contract as Promise*. *See* Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 9-10 (1981).

[4] *Complete Fairy Tales of the Brothers Grimm* 2 (Jack D. Zipes trans., Bantam Books 3d ed. 1992).

weaving her father's funeral canopy, though every evening she undid the work of the previous day.[5] Another example can be found in *The Producers*, where Max Bialystock knowingly sells more than one-thousand percent of the interest in *Springtime for Hitler*. Bialystock used his promises to deceive his investors, since he could not have intended to give each a full return on the investment in the event the play made a profit. And finally, as one of our children pointed out, in *Jurassic Park III*, the Kirbys never intended to keep their promise to fund Dr. Grant's research in exchange for an aerial tour of Isla Sorna, but meant all along to use the opportunity to rescue their teenage son Eric, who was stranded on the treacherous island after a paragliding mishap.

We call this category of falsehoods "promissory misrepresentations" or "insincere promises." (They are also sometimes referred to as "lying promises."[6]) Anglo-American law does not ignore the idea of promissory representations. An oft forgotten corner of the law, the doctrine of promissory fraud, provides an entry into the idea that promises can say things. The doctrine recognizes that a promisor, by the very act of promising, typically communicates that she intends to perform her promise. That representation concerns an existing fact – as Bowen put it in an early promissory fraud case put it, "the state of a man's mind is as much a fact as the state of his digestion."[7] By saying

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[5] And don't forget Homer's description of Autolykos, Odysseus's grandfather, "who surpassed all men in thievery and the art of the oath." *Odyssey* XIX: 395-96.

[6] *See, e.g.*, T.M. Scanlon, *Promises and Contracts*, in *The Theory of Contract: New Essays* 86, 88-93 (P. Benson ed. 2001). The term "lying promise" is most often used in connection with Kant's question, "May I, when hard pressed, make a promise with the intention not to keep it?" Immanuel Kant, *Groundwork of the Metaphysics of Morals* 15 (Mary Gregor trans., Cambridge Univ. Press 1998). It is not so clear, however, that Kant's negative answer to this question rests on the fact that such a promise is a lie and thus "lying promise" may not be the most perspicacious way to characterize Kant's example. In order to avoid invoking Kant or provoking Kant aficionados, we generally eschew the term.

[7] Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (Ch. App. 1885).

something about the promisor's present intent, the act of promising creates the opportunity to lie. If a court finds that a defendant-promisor did not intend *ab initio* (at the time of promising) to perform her promise, it can subject her to both compensatory and punitive damages under the doctrine of promissory fraud or even sentence her to prison under the corresponding crime of false promise.[8]

But the doctrines of promissory fraud and false promise are not without their difficulties. For one thing, it's notoriously difficult to figure out what a defendant-promisor's intent was at the time of promising. Did the promisor breach because she never intended to perform or did she simply change her mind? Did the townspeople intend to stiff the Pied Piper when they hired him, or did they hit on the idea only after the rats were gone? When Vice President Bush said "Read my lips: No new taxes," did he misrepresent his present intent, since he knew that the fiscal situation might well require new taxes, or did an unexpected downturn in the economy cause him to change it?

More deeply, the teachings of Oliver Wendell Holmes suggest that the *legal* act of promising might not imply an intent to perform. We can give Kant and the moral philosophers their due and allow that, as a general matter, it is morally wrong to make a promise one does not intend to perform. But as Holmes argues, we need to distinguish

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[8] In order to avoid confusion, we use feminine personal pronouns to refer to promisors and masculine personal pronouns to refer to promisees. Because promissory fraud can be claimed as an affirmative defense, we generally speak of the party claiming promissory fraud as the "claimant," rather than the "plaintiff." We refer to the party alleged to have made a promissory misrepresentation as the "defendant," with the *caveat* that, as we use it, the term does not denote the party's position relative to the case as a whole, but only relative to a claim of promissory misrepresentation.

between the principles of law and those of morality.[9] That something is a moral wrong does not, in itself, entail that it should be a legal wrong. And we might follow Holmes even further and argue that, while considerations of "a state of the individual's mind, what he actually intends," are essential to morality, they are often irrelevant in the law.[10] A contract, for instance, is not so much a matter of the parties' intentions as the objective meaning of their words and "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."[11] Such observations raise serious questions about the legitimacy of the action for promissory fraud. If matters of intention are the province of morality, not law, why should the law care about a promisor's intention at all? And if, in the eyes of the law, a promise is no more than an agreement to perform or pay damages,[12] how can we conclude that it implies an intention to perform, rather than an intention to perform or pay damages? It seems that a Holmesian would be unlikely to embrace the doctrine of promissory fraud.[13]

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[9] *See, e.g.*, Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), *reprinted in* 110 Harv. L. Rev. 991, 993 (1996-1997) ("Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."). The Colorado Supreme Court seems to have at one time employed something like the Holmesian distinction between moral and legal wrongs to reject the action for promissory fraud. Farris v. Strong, 48 P. 963, 965 (Colo.1897) ("[A]lthough it is admitted that [the promises] were unfulfilled, and made with an intention on the part of Strong not to perform, whatever may be said of his conduct from a moral point of view, they do not, as we have seen, afford a ground for the relief sought.").

[10] Holmes, *supra* note 9, at 996.

[11] For the former proposition, *see id*. ("In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depend not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties' having *meant* the same thing but on their having *said* the same thing."). For the latter, *see id*. at 995; *see also* Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903).

[12] This is how a number of commentators have understood Holmes's dictum. *See, e.g.*, Fried, *supra* note 3.

[13] Thus Simpson and Duesenberg write: "On the theory that a party to a contract assumes the alternate duties of performing his promise or paying damages, it is logically arguable that there is not necessarily implied a promise of performance." Lawrence B. Simpson & Richard Duesenberg, 7 *Encyclopedia New*

But Holmes the jurist did, and with a vengeance. In *Bailey v. Alabama*,[14] Justice Holmes voted alone in dissent to uphold an Alabama statute criminalizing insincere promises: "[W]hat it purports to punish is fraudulently obtaining money by a false pretense of an intent to keep the written contract . . . . It is not necessary to cite cases to show that such an intent may be the subject of a material false representation."[15] Giving callously short shrift to Alabama's tendency to enforce this statute exclusively against African-Americans,[16] Holmes justified the vote with the argument that "[b]reach of a legal contract without excuse is wrong conduct."[17] What could be further from the Holmesian notion of contract? If a promise to the scholar Holmes authorizes the promisor either to perform or to pay damages, how can breach be conceived as "wrong conduct"? And here Holmes the jurist seems to be recurring to the very moral precept of *pacta sunt servanda* (agreements are to be kept) to justify the crime of false promise that Holmes the scholar would seem to reject. Holmes the scholar presents a view of contracts that appears to preclude such moralistic arguments and even the very doctrine

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York Law Contracts § 2116 (1963). But they also properly recognize that this argument does not capture the reality that "[f]rom the perspective of the promisee, he contracts for performance, not for a law suit through which he may collect damages." *Id*. *See also* Note, *Fraud – Promissory Misrepresentation – Contract without Intent to Perform*, 38 Yale L.J. 544, 545 (1929).

[14] 219 U.S. 219 (1911).

[15] *Id*. at 247-48 (Holmes J., dissenting). *See also id*. at 249 ("[A] false representation, expressed or implied, at the time of making a contract of labor, that one intends to perform it, and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other.").

[16] *See* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161, 1166-68 (1984), *reprinted in Labor Law and the Employment Market* 217 (Richard A. Epstein & Jeffrey Paul eds., 1985).

[17] 219 U.S. at 246 (Holmes J., dissenting). *See also* Commonwealth v. Rubin, 43 N.E. 200 (Mass. 1896) (Holmes, J.) (affirming conviction for larceny based on the defendant's false promise); Sweet v. Kimball, 166 Mass. 332, 335 (1896) (Holmes, J.) ("The fraud intended is not… the failure of the defendant to keep his promise…. Probably it is meant… that there was a fraudulent misrepresentation of the defendant's intention to keep his promises.").

of promissory fraud, while Holmes the jurist employed such arguments to justify his vote to uphold a statute criminalizing false promise.

Now there are almost certainly ways to resolve this seeming contradiction in the Holmesian corpus.[18] Nonetheless, the *prima facie* tension should give us pause. Promissory fraud is universally understood as occurring only when a promisor enters into a contract without intending to perform. But why should we require an intent to perform? Why shouldn't it be enough if a promisor intends to perform or pay damages? Or more generally, why should the law care about the promisor's intentions at all? If the road to hell is paved with good intentions, then bad intentions may lead to value-creating contracts. The doctrinal answer is that every promise *says* that the promisor intends to perform – the law requires that a promisor intend to perform because her very act of promising represents that to be the case. But this answer begs the question. If every promise represents an intention to perform, this is at least in part because the law insists that it does. The existing doctrine of promissory fraud doesn't allow a promisor to say anything else, for it threatens those who might with punitive damages. Why not allow a promise to say no more than that the promisor has an intention to perform or pay

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[18] Holmes's statement that a contractual duty is a prediction that one must perform or pay damages probably was formulated with an eye more to dramatic impact than to precision. Elsewhere Holmes makes it clear that he doesn't view a legally binding promise as a promise to perform or to pay damages. For instance, he writes in *The Common Law*: "the statement that the effect of a contract is the assumption of the risk of a future event does not mean that there is a second subsidiary promise to assume that risk, but that the assumption follows as a consequence directly enforced by the law, without the promisor's cooperation." Oliver Wendell Holmes, *The Common Law* 302 (1881). Similarly, in a letter to Sir Frederick Pollock of December 11, 1928, Holmes takes issue with "the impression that I say that a man *promises* either X or to *pay damages*. I don't think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just like his act in tort makes him liable *simpliciter*." 2 *Holmes-Pollock Letters* 233 (Mark D. Howe ed. 1941). *See also id.* at 177, *and generally*, Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 Fordham L. Rev. 1085 (2000).

damages, or that she doesn't affirmatively intend not to perform? Or why not allow some promises to say nothing about the promisor's intentions?

These are questions that almost never get asked, either by courts or by commentators.[19] While a fair amount of intellectual energy has been expended on doctrines like mistake and impossibility, contract theorists have, in recent years, had very little to say about promissory fraud.[20] Similarly, promissory fraud receives relatively

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[19] The exception to this statement has been courts in those jurisdictions that do not recognize promissory fraud. These courts often discuss the considerations which speak against a legal assumption that every promise represents an intention to perform. We discuss their arguments in both Chapters Four and Five.

[20] While the lack of recent publications on promissory fraud and related topics can be explained in part by the demise of the case note and the academy's discovery of new topics that did not involve it in black-letter law, the difference between the number of publications in the first 60 years of the twentieth century and the last fifty years is nonetheless marked. A partial bibliography is as follows: Solon D. Wilson, Note, *Fraud – Deceit – Purchase of Goods on Credit not Intending to Pay for Them – Implied False Representations*, 43 Cent. L.J. 266 (1896); William C. Dennis, *Notes on a Disputed Point in the Law of Deceit*, 2 Tulane L. Rev. (So. L.Q.) 287 (1917); Francis M. Burdick, *Deceit by False Statement of Intent*, 3 So. L.Q. 118 (1918); Note, *Torts – Deceit – Misrepresentations as to Intention*, 1 Wash. L. Rev. 218 (1926); Harold J. Sporer, Note, *Fraud – To What Extent Fraud May Be Predicated upon a Broken Promise*, 3 Wis. L. Rev. 346 (1926); Note, *Criminal Law – Larceny – Distinction Between Common Law Larceny and Obtaining Money by False Pretenses Notwithstanding Statute Treating Both as One Crime*, 27 Col. L. Rev. 737 (1927); Note, *Criminal Law – Owner's "Intent" to Pass "Title" Precluded Conviction for Larceny*, 36 Yale L.J. 1020 (1927); Note, *Larceny – By Trick or Device*, 22 Ill. L. Rev. 779 (1928); Note, *Larceny – Common Law Larceny by Trick and Device – Necessity for Parting with Title*, 13 Va. L. Rev. 655 (1928); Note, *Larceny Generically, and the Office of a Bill of Particulars in Respect to an Indictment*, 1 St. Johns L. Rev. 176 (1928); Note, *Fraud – Promissory Misrepresentation – Contract without Intent to Perform*, 38 Yale L.J. 544 (1929); Note, *Fraud – Misrepresentation of Intention as Actionable Fraud*, 78 U. Pa. L. Rev. 788 (1930); Herbert Horn, *Misrepresentation of Intention to Pay*, 35 Dickinson L. Rev. 27 (1930); Note, *Fraud – Promise with Present Intent not to Perform*, 18 St. Louis L. Rev. 166 (1932); Note, *Bankruptcy – Non-Dischargeable Debt – Purchase of Goods with No Intent to Pay Therefore as Obtaining Property by False Pretense or False Representation*, 17 Minn. L. Rev. 658 (1933); Note, *Fraud – Promise without Intention to Perform as Constituting Fraud*, 17 Minn. L. Rev. 668 (1933); Note, *Sales – Fraud – Lack of Reasonable Expectation of Ability to Pay*, 46 Harv. L. Rev. 1344 (1933); Note, *Contracts – Fraud – Implied Representation of Solvency*, 32 Mich. L. Rev. 407 (1934); W. Page Keeton, Note, *Fraud – Statements of Intention*, 15 Tex. L. Rev. 185 (1937); Note, *Deceit – Defenses – Action on False Promissory Representation not within Statute of Frauds*, 50 Harv. L. Rev. 694 (1937); John Hamshaw, Note, *Fraud and Deceit – Promissory Statements – Present Intent not to Perform*, 3 Mo. L. Rev. 69 (1938); Note, *Fraud – Misrepresentation of Intention – Promise Unenforceable as Such*, 16 Tex. L. Rev. 407 (1938); Note, *Fraud – Promissory Representations – Parol Evidence Rule*, 16 Tex. L. Rev. 408 (1938); Note, *The Legal Effects of Promises Made with Intent not to Perform*, 38 Colum. L. Rev. 1461 (1938); Margaret C. Johnson, Note, *Contracts – Fraud – Misrepresentation of State of Mind – Parol Evidence*, 17 N.C.L. Rev. 32 (1938-1939); Clarence C. Kunc, Note, *Fraud – Misrepresentations of Intent*, 19 Neb. L. Bull. 39 (1940); Note, *False Pretenses – Obtaining Services by Fraudulent Promise of Compensation Made a Misdemeanor*, 53

little attention in the typical first-year contracts (or torts) text books and is almost never taught in first-year torts or contracts courses.[21] Yet in many jurisdictions, claims of

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Harv. L. Rev. 893 (1940); Walter Bliss, Note, *Fraud Predicated on a Promise Made with Present Intent not to Perform*, 13 Rocky Mountain L. Rev. 263 (1941); R. I. Lipton, Note, *Torts – Actionable Fraud – Promissory Representation*, 24 N.C.L. Rev. 49 (1945); Weymouth G. Lowe, Case Note, *Promises Relating to Future Conduct as Misrepresentations of Fact in the Law of Fraud*, 15 J. of the Bar Assoc. of Kan. 305 (1947); Herve Racivitch, Jr., Comment, *False Statement of Intention as an Element of Fraud in Criminal Case*, 21 Tulane L. Rev. 639 (1947); Claude B. Brown, *State of Mind – A Material Fact*, 1 Ark. L. Rev. 156 (1947); W. David Curtis, *A State of Mind: Fact or Fancy?*, 33 Cornell L.Q. 351 (1948); Thomas H. Galey, Note, *Fraud: Promises Made without Intention to Perform*, 2 Okla. L. Rev. 365 (1949); J.S. Sellingsloh, Note, *Fraud – Misrepresentation of Intention to Perform Contractual Promise*, 27 Tex. L. Rev. 389 (1949); Robert Wm. Garland, *Is Insolvency at Time of Entering into a Contract Fraud in Esse?*, 11 U. Pitt. L. Rev. 666 (1950); Rene Pastorek, Comment, *Obtaining by False Promises: Proposed Statute*, 5 U. Fla. L. Rev. 63 (1952), reprinted in 6 Loyola L. Rev. 145 (1952); Gerald H. Goldberg, Note, *Does a Promise Made without Intent to Perform It Constitute Fraud in Pennsylvania?*, 57 Dickinson L. Rev. 143 (1953); Note, *The Case for a Law of Promissory Fraud*, 53 Colum. L. Rev. 407 (1953); Arthur R. Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967 (1953); Elliot D. Pearl, Note, *Criminal Law: False Promise as False Pretenses*, 43 Cal. L. Rev. 719 (1955); Justin Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 Cal. L. Rev. 877 (1961); Evan M. Zuckerman, Note, *Promissory fraud in Tennessee: A Wrong without a Remedy*, 10 Memph. St. U. L. Rev. 308 (1980); Michael J. Polelle, *An Illinois Choice: Fossil Law or an Action for Promissory Fraud?*, 32 DePaul L. Rev. 565 (1983); George N. Stepaniuk, Note, *The Statute of Frauds as a Bar to an Action in Tort for Fraud*, 53 Fordham L. Rev. 1231 (1985); Raymond R. Nolasco, *Promissory Fraud in Illinois: What Is a Scheme to Defraud?*, 8 N. Ill. U.L. Rev. 485 (1988); R. Alston Hamilton, Comment, *Tennessee's Long-Awaited Adoption of Promissory Fraud:* Steed Realty v. Oveisi, 59 Tenn. L. Rev. 325 (1992); Joe Manuel and Stuart James, *Tennessee's Theories of Misrepresentation*, 22 Memph. St. U.L. Rev. 633 (1992); Lynn C. Tyler, *Promissory Misrepresentations: Are they, and Should they Be, Actionable as Constructive Fraud*, 39-OCT Res Gestae 17 (1995).

[21] The following casebooks fail to discuss promissory fraud: James A. Henderson et al., *The Torts Process* (6th ed. 2003); Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* (4th ed. 2001); Marc A. Franklin & Robert L. Rabin, *Tort Law and Alternatives* (7th ed. 2001); Arthur Best & David W. Barnes, *Basic Tort Law* (2003); Dominick Vetri, *Tort Law and Practice* (2d ed. 2002); Aaron D. Twerski & James A. Henderson, Jr., *Torts* (2003); John D. Calamari et al., *Cases and Problems on Contracts* (3d ed. 2000); Steven J. Burton, *Principles of Contract Law* (2d ed. 2001); Randy E. Barnett, *Contracts* (3d ed. 2003).

The following casebooks give a cursory discussion of promissory fraud: Harry Shulman et al., *Law of Torts* (4th ed. 2003); Robert E. Keeton et al., *Tort and Accident Law* (3d ed. 1998); Victor E. Schwartz, et al., *Prosser, Wade, and Schwartz's Torts* (10th ed. 2000); Dawson et. al., *Contracts* (7th ed. 1998); Farnsworth, et. al., *Contracts* (6th ed. 2001); Brian A. Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law* (7th ed. 2001); Arthur Rosett & Daniel J. Bussel, *Contract Law and Its Application* (6th ed. 1999); Charles L. Knapp et al., *Problems in Contract Law* (5th ed. 2003); Brian A. Blum & Amy C. Bushaw, *Contracts* (2003).

Of four Yale Law School professors surveyed who teach first year contracts, only two mention promissory fraud. Of three professors who teach first year torts, none teach it.

Further evidence of inattention to the action is the fact that only around half of promissory fraud cases get classified under the correct West Key Number. The following Boolean search in the ALLCASES and ALLCASES-OLD Westlaw databases, run in the spring of 2001, produced 283 cases, approximately 279 of which concerned promissory fraud: "sy,di(evidence /s "intent not to perform" "without intent to perform" "no intent to perform" "intention not to perform" "without intention to perform" "no intention to perform" "promissory fraud")". Running the same search, but excluding the promissory fraud Key Number (i.e.,

promissory fraud are more common than invocations of either the mistake or the impossibility doctrines. Among the 44 states that between 1992 and 2002 unequovically recognized the action for promissory fraud,[22] there were more reported cases of promissory fraud than of impossibility in 34. In ten of those states – Alabama, Arkansas, California, Connecticut, Illinois, Kentucky, Michigan, North Dakota, South Carolina and Tennessee – there were more cases involving claims of promissory fraud than those involving mistake or impossibility combined. And the empirical prevalence of promissory fraud is hardly surprising. Alleging promissory fraud is one of the few ways that an aggrieved promisee can seek punitive damages for breach of contract. It is also one of the few ways to enforce promises that would otherwise be unenforceable because of the statute of frauds or the parol evidence rule. Promissory fraud is an important cog in the apparatus of contract law, yet no one has stepped back to examine its function in and effects on the workings of the mechanism as a whole.

B. Why care about insincere promises?

Having noticed that promises *can* say something about the promisor's intention to perform or the probability of performance, the first Holmesian question is why the law should take notice of such representations. The action for breach of contract protects a promisee's entitlement to the promisor's performance by ensuring him compensation in

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adding "% 184k12" to the Boolean search) resulted in 135 cases. This would indicate that approximately 48% (135 of 279) of promissory fraud cases are not classified under the most relevant key number.

[22] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa , Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

the case of her nonperformance, typically in the form of expectation damages. The action for promissory fraud and the crime of false promise protect the promisee's entitlement to the promisor's initial intent to perform by threatening insincere promisors with punitive damages and even criminal sanctions. Why do we need this additional protection for the entitlement to promisor sincerity? Indeed, why do promisees even care whether or not a promisor intends *ab initio* to perform her contract? Chapter Four explores these questions in depth. Our main conclusions are these.

If a promisee's entitlement to performance were truly protected by fully compensatory damages, then at the time of promising he would not care whether the promisor intended to perform, for he would expect to be made whole in the case of nonperformance.[23] The primary reason why promisees care about promisor initial intent – and the reason why the law correctly protects the promisee's entitlement to truthful representations of that intent – is that breach-of-contract damages are not fully compensatory.[24] It is a familiar fact that contract damages in the United States typically do not compensate for litigation costs, for speculative damages, for emotional and other nonpecuniary damages, and that they don't compensate at all if the promisor is judgment proof. And, of course, there is always the chance that a meritorious breach-of-contract claim won't prevail in court. In the real world, where disappointed promisees often are not made whole, a promisee who at the time of promising must decide whether or not to

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[23] In fact, we argue in Chapter Four that it is enough that the promisee be protected by full reliance damages. So long as he knows that his reliance interest is protected, the promisee will generally be indifferent, at the time of promising, as to whether or not the promisor intends to perform.

[24] Indeed, legal protections against all fraud in the inducement play this role. If expectation damages were fully implemented, promisees would be indifferent whether promisors intentionally misrepresented facts as a precursor to contracting.

undertake the costs of reliance has a natural interest in the probability of performance. That's why information about the promisor's intentions is material. In this world of sub-compensatory damages, promisees care about promisor intent because it is crucial for determining the probability of performance.

From this perspective, the doctrine of promissory fraud is a close cousin to the law of bad faith modification.[25] Were there true expectation damages, a promisor could not press for more favorable terms by threatening to breach. Her threat would not be threatening, since in a world of fully compensatory damages, the promisee would be indifferent as to whether or not the promisor performed. It is only because damages in the real world are likely to be subcompensatory that promisees worry about the prospect of breach. And it is for this reason that the law properly grants heightened protections against bad faith modification. In the same way, subcompensation causes promisees, when they are deciding whether or not to rely, care about whether or not the promisor intends to perform. And this is the reason the law grants them an entitlement to truthful statements as to the promisor's initial intent. Both promissory fraud and the prohibition on bad-faith modification substitute for the real-world shortcomings in implementing true expectation damages.

But that is not the only use a promisee can make of credible information about promisor intent. A promisee can also use it to determine how much to invest in precautions against the possibility of nonperformance and to spend in ways that will

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[25] In fact, the two doctrines are jointly raised in one species of promissory fraud: where the promisor enters an initial contract only with the intent later to extort a bad faith modification. *See infra* Chapter Seven, pp. ____.

increase his profits if the promisor does perform. The more likely a promisor is to perform, the fewer precautions a promisee needs to take against her nonperformance and the more he should invest in actions that will increase in the case of performance. Breach-of-contract remedies alone do not secure these benefits.

In this way, the law of promissory fraud corrects for shortcomings in the structure and implementation of contract remedies. Promissory fraud is not a doctrine where tort principles just happen to overlap on contractual behavior. Rather, legal liability for insincere promising has a well-defined function within the apparatus of the law of contracts. It promotes the credible transfer of information about the promisor's intentions, information that can tell a promisee whether it is in his interest to enter into the contract, with whom he should contract, and how much he should invest in reliance. In all these ways, the law of promissory fraud works to increase efficiency in contracting.[26]

C. The law of insincere promising

To say that the law should back up what promises say by holding insincere promisors liable for their falsehoods is not yet to say just how that should be done – how legal institutions should determine what a given promise said, whether it was false, whether the promisor acted culpably in making it, and what the appropriate remedy is. A major project of this book is to answer these questions as well. While we think it is a good thing that Anglo-American law generally recognizes the representational dimension

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[26] Our argument is therefore consonant with Richard Craswell's observations about the hidden property rules that can be found in a variety of contract doctrines and how they usefully substitute for expectation damages. *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. Chi. L. Rev. 1, 32-34 (1993).

of promising – both in the civil action for promissory fraud and in the crime of false promise – we believe that the existing regime suffers from serious deficiencies. As a matter of semantics, courts have failed to recognize the many things that a promise can say or not say. As a matter of proof, insufficient attention has been paid to the evidentiary basis for legal findings of promissory misrepresentation. And as a matter of policy, more thought should be given to the appropriate sanctions.

1. Problems with current law of insincere promising

In order for a court properly to conclude that a promisor made a material promissory misrepresentation for which she should be held liable, it must make three key inferences: first, it must decide what the promisor said with her promise, explicitly or implicitly; second, it must ascertain whether, at the time of promising, that representation was true; third, it must determine whether the promisor made the promissory misrepresentation in question recklessly or knowingly, that is, with the scienter necessary for punitive sanctions. We call the investigation into what a promisor said the "representation inquiry," into the truth of her representation the "veracity inquiry," and into whether she acted culpably in making it the "scienter inquiry." Courts have generally failed to appreciate the complexities that underlie each.

Difficulties in determining what a promise says have been papered over by adopting a simple (and, we will argue, simplistic) mandatory rule that, in the words of the

Second Restatement of Torts, "a promise necessarily carries with it the implied assertion of an intention to perform."[27] We call this the "categorical interpretation."

There are three problems with the categorical interpretation. The first is that its exclusive emphasis on what a promise says about the promisor's intent to perform tends to obscure other things that promises say, particularly about the probability of performance. While a promisor can say something about the probability of her performance by saying something about her intention to perform, this is not the only way she can do so. For instance, in some contexts the act of promising can also represent that the promisor is so likely to perform that the promisee can reasonably rely on her doing so. This can be the case where there is a special relationship of trust between the contracting parties and where the promisee risks a great deal in the case of nonperformance. Think about a grown child's promise to care for an elderly parent in exchange for title to his house. Such a promise implies not only that the promisor intends to perform, but that she is so likely to do so that it is in the parent's interest to rely on it. Such promises represent more than the categorical interpretation would attribute them. In this respect, the categorical interpretation is underinclusive.

The second problem is that, in adhering to the categorical interpretation, courts assume that there is only one thing a promise can say about promisor intent. Here we return to the Holmesian[28] idea that some promises might represent an intention to perform or pay damages, or even say nothing about the promisor's intent. Both

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[27] Restatement (Second) of Torts § 530 cmt. c (1976). *But see* Restatement (Second) of Contracts § 171(2) (1981), which we discuss in Chapter Two, *infra* pp.___.

[28] We have already expressed our doubts about whether this idea of a contractual promise should be attributed to Holmes. Thus our use of "Holmesian" in the text that follows should be read with implicit scare quotes.

alternatives suggest that a promise can say less than the categorical interpretation would allow. Thus a law-school applicant who has not yet heard from her first choice but pays a non-refundable deposit to her safety school does not misrepresent her intent to enroll, for her promise does not say that she presently intends to perform. This can be viewed as a promise that does not say that the promisor intends to perform. Because the categorical interpretation would lump it together with promises that do represent an intent to perform, it is also overinclusive.

Finally, the categorical interpretation's lack of a nuanced understanding of what promises say can lead to a failure to see the possibility of insincere promising in pure option settings. Suppose Leona enters into an express option contract with Donald whereby she agrees that at year's end she will either buy Donald's land for $100,000 or pay him $5,000. Notwithstanding the categorical interpretation, no court would find that Leona's promise implicitly represented a present intent to buy the land, for the agreement expressly gives her the Holmesian option of taking or paying. One might therefore conclude that such "take-or-pay" contracts foreclose the possibility of promissory fraud liability. But this result is underinclusive. What if Leona enters into the option contract with an affirmative intention *not* to buy the land and only wants the option to prevent a competitor from buying it. Even though Leona doesn't represent that she intends to exercise her option, her take-or-pay promise seems to imply that she doesn't intend not to exercise it. On the basis of this latter representation, Leona should be subjected to promissory fraud liability. Because the categorical interpretation doesn't recognize the

distinction between not intending to perform and intending not to perform, it cannot capture this situation.[29]

In addition to oversimplifying the representation question, courts have tended to neglect important aspects of the veracity inquiry, which asks whether or not the promissory representation was true. If we assume the categorical interpretation, the key question is whether, at the time of promising, the promisor intended to perform. Courts frequently observe that breach is insufficient to prove that the promisor never intended to perform,[30] but one searches in vain for a general account of what other types of evidence are relevant to determining a promisor's initial intent or wherein the probative value of that evidence lies. While the cases demonstrate a visceral understanding that facts like lack of changed circumstances, repeated similar breaches and the promisor's knowledge of impossibility can all evince an initial intent not to perform, they have failed to articulate the broader principles that govern the veracity inference.

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[29] For a good example of how courts can miss such subtleties, *see* Blake v. Paramount Pictures, Inc., 22 F. Supp. 249 (S.D. Cal. 1938) ("It is elementary that, if one promises to do one thing, or, failing, do another, no fraud can result if he made the original promise only without the intention to perform; for even if he did, he protected himself by the substitution."). The court's error in *Blake* was nicely diagnosed in a 1938 anonymous note in the Columbia Law Journal.

> In answer it may be said that the promisee has agreed to accept something else for an original bona fide promise, that is he may reasonable [sic] expect a *bona fide* attempt to [perform that promise]. It would seem that he may very well complain of the defendant's fraud in making the first and main promise without intending to perform it, and that recovery ought to be allowed.

Note, *The Legal Effects of Promises Made with Intent not to Perform*, *supra* note 20, at 1456.

Put options might also give rise to promissory fraud concerns. Imagine the promisor who buys formal wear (with a satisfaction guaranteed return policy) with the intent of returning the garment after wearing it to the prom. While the call option fraud concerned a promisor who intended not to exercise, the put option fraud concerns a purchaser with a put who never intends not to exercise.

[30] *See, e.g.*, Yoon v. Alaska Real Estate Comm'n, 17 P.3d 779 (Alaska 2001); H & H Distrib., Inc. v. BBC Intern., Inc., 812 P.2d 659 (Colo. Ct. App. 1990); Bulbman, Inc. v. Nevada Bell, 825 P.2d 588 (Nev. 1992); Beckendorf v. Beckendorf, 457 P.2d 603 (Wash. 1969).

In their adherence to the categorical interpretation, courts have also tended to neglect other questions relevant to determining the truthfulness of the representation – like whether at the time of promising the promisor was so likely to perform that it was in the promisee's interest to rely and, more generally, what the objective probability of performance actually was. We argue that the latter is significant even where a representation of an intent to perform is at issue, since intent is material only because it says something about the likelihood of performance. Thus a purchaser who, unbeknownst to the seller, is insolvent might overoptimistically intend to pay for the goods, even though the actual chance of her doing so is considerably less than her represented intent to perform suggests. The seller has been misled, yet we find some courts saying that intent is all that matters and concluding that there was no misrepresentation.[31]

Finally, as to the question of whether the promisor acted culpably in making her promissory misrepresentation – the scienter inquiry – many jurisdictions simply fail to impose any scienter requirement at all. When it comes to the generic action for deceit, courts are clear that not every misrepresentation counts as fraud. In order to incur the most significant legal liability, a promisor must make her misrepresentation knowingly or recklessly. But courts tend to get confused when asked to apply this principle to allegations of insincere promising, since intent to deceive is so closely related to intent not to perform. We thus find a running together of the scienter and the veracity inquiries,

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[31] *See, e.g.*, Wolk v. Churchill, 696 F.2d 621, 626 (8th Cir. 1982) (Under Missouri law, uncertainty as to the likelihood of future performance is not enough to sustain a claim of promissory fraud.); *German National Bank v. Princeton State Bank*, 107 N.W. 454 (Wis. 1906). We discuss such cases further in Chapter Three, *infra* pp. ___.

based on the assumption that if a promisor misrepresents her intention, that misrepresentation must be intentional.

The problem is that, while it is virtually axiomatic that a person knows what she does and does not intend, it is not true that every misrepresentation of intention is perforce an intentional misrepresentation. To think otherwise is to overlook cases where a speaker is mistaken as to the meaning of her own words. Suppose, for example, that in Connecticut a promise to build a swimming pool legally implies a promise to install a filtration system. Imagine Melita, a Massachusetts contractor, does not know this default interpretation and does not realize that by promising to build for Joe a Connecticut pool, she is also promising, and therefore representing her intention, to install a filter. If Joe then sues for failure to install the filter, we might expect Melita to testify that she did not intend to install a filter in order to argue for a different interpretation of the terms of the contract. But if Joe has also claimed promissory fraud, then her testimony is evidence of a promissory misrepresentation – her actual intent didn't correspond to what (according to Connecticut law) her promise said she intended. Sensitivity to the separate scienter requirement indicates why Melita should not be held liable – this is a case of mistake, not fraud. Yet we find courts treating such defendant admissions of no intent as sufficient, on their own, to prove promissory fraud.[32] Failure to demand separate proof of scienter is a final way that the current practice is overinclusive, threatening innocent promisors with liability for promissory fraud.

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[32] *See, e.g.*, Leisure Am. Resorts, Inc. v. Knutilla, 547 So.2d 424 (Ala. 1989). We discuss such cases further in Chapter Three, *infra* pp. ___, and Chapter Six, *infra* pp. ___.

2. Recommended reforms

The current contours of civil liability for insincere promising are deeply unsatisfactory. The categorical interpretation as the dominant mode of resolving the representation inquiry is too simplistic a picture of what promises say. The veracity inquiry is undertheorized and incomplete. The scienter inquiry is largely ignored. We recommend the following core reforms.

a) <u>The representation inquiry</u>

When it comes to interpreting what a promise said, we reject the categorical interpretation and propose a system of default representations that allow promisors, by using appropriate words, to send stronger or weaker signals both about their intent and about the probability of their performance. But there should be a mandatory minimum representation: every promise says at least that the promisor does not have an affirmative intent not to perform (which is not to say that she intends to perform).

Once we give up on the immutable categorical interpretation, we have to ask how courts should go about interpreting what a promise says about the promisor's intentions and the probability of her performance. We argue for a dual representational default – unless the promisor opts out, the act of promising implicitly represents something about both the promisor's intent and the likelihood of her performance. Absent evidence to the contrary, courts should assume that a promise represents an intention to perform. What the categorical interpretation takes as a mandatory interpretive rule, we read as an interpretive default. But we would go further. First, unless there is evidence otherwise, courts should interpret the representation of an intention to perform as meaning that there

is at least a fifty-percent chance of performance. Cashing out the intent representation as "more likely than not" both simplifies the veracity inquiry and highlights what is material in a representation of intent, which is what it says about the objective probability of performance. Second, unless the promisor expressly warns otherwise, courts should assume that a promise says that the promisor does not believe the probability of her performance is so low that it is not in the promisee's interest to rely. This is not to require every promisor to guarantee the promisee a benefit from the bargain. But it is to insist that, unless the promisor indicates otherwise, her promise says that she does not have information that it is not in the promisee's interest to rely.

These additional default representations tie promissory fraud more directly to what promisees care about – the probability of performance. Still, if we left the representation inquiry at this, we would not be too far from the categorical interpretation. By changing that mandatory rule into a default, however, we give promisors the ability, within certain bounds, to say either more or less than our default representations.

First, some promises say more. At times, it is valuable for a promisor to assure the promisee that there is an especially high probability of performance. Witness the old Federal Express ad: "When it absolutely positively has to get there overnight." Or consider Fed-Ex's current assurance that its "Custom Critical" service delivers 96% of its packages within fifteen minutes of the promised time.[33] These promissory representations are especially relevant when the promisee will incur significant uncompensated damages in the case of nonperformance, so that he requires greater

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[33] http://customcritical.fedex.com/us/about/whentouseus.shtml (last visited Aug. 28, 2001).

assurance than the default representation provides. Where this is so, we would back up either a promisor's express statement of the probability of performance ("96% on time") or her assurance that the probability is so great that the promisee can safely rely on it ("When it absolutely, positively…") with a legal guarantee.

Second, courts should allow promisors to say less than the representational defaults. In particular, it is essential that courts allow promisors to make Holmesian promises (we will later call these "opaque" promises), which allow that the promisor may intend to perform or pay damages. More precisely, we would allow promisors to opt-out of the default representation of a simple intention to perform and permit them to promise even when they have a conditional intention (an intention to perform if such-and-such is the case) or a disjunctive intention (an intention to perform or to do so-and-so). Such promises are similar to option contracts and can be mutually beneficial.

Thus, in contrast to the categorical interpretation, we would have the law facilitate promisors' ability to say different things about her intentions and the probability of her performance. In doing this, we find ourselves somewhat at odds with one reading of the gospel according to Matthew. In his sermon on the mount, Jesus advised: "Do not swear at all, either by heaven . . . or by earth . . . . Simply let your 'Yes' be 'Yes,' and your 'No,' 'No'; anything beyond this comes from the evil one."[34] Under the categorical interpretation, it is redundant to "swear to God (that you'll perform) and hope to die (if you don't)." We will show that, at least between humans, there is social value in

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[34] *Mathew* 5:33. *See also James* 5:12.

facilitating a greater representational diversity about a promisor's intent to perform and her assessment of the likelihood of her performance.

There is, however, an important limit to how little a promisor should be allowed to say with her promise. We suggest that courts impose as a mandatory minimum that every promise says that the promisor does not presently intend not to perform. This mandatory floor would expose even explicitly Holmesian promisors (who may have conditional or disjunctive intentions to perform) to potential promissory fraud liability. Recall our above take-or-pay hypothetical, in which Leona promises either to buy Donald's land for $100,000 or pay him $5,000 at year's end. Imagine that the contract included the disclaimer: "Leona makes absolutely *no* representation with regard to her intent to exercise the option." Such a clause attempts to opt-out of all promissory fraud liability and would, under our rule, be ineffective were Leona to make a Holmesian promise rather than purchase the option. Leona would still be liable for misrepresentation if a court subsequently concluded that, at the time of contracting, she had an affirmative intent not to perform. Our reason for this rule is that contracts in which the promisor affirmatively intends not to perform unnecessarily tax the courts and create no social value that cannot be realized in less costly ways.

b) <u>The veracity inquiry</u>

The second crucial step in establishing a promissory misrepresentation is the veracity inquiry. Here courts need to be attuned to the content of the representation – implicit or explicit – whose truthfulness is being tested. Because by default the act of promising says something both about the promisor's intent and about the objective

probability of her performance, courts should seek to discover both. Of course these two questions are closely linked and, we will argue, the same evidence often tends to answer both. Our primary contribution here is in providing a critical taxonomy of the types of evidence that count toward an inference that the promisor never intended to perform or that the probability of her performance was particularly low.

In *Changing Your Mind*,[35] Allan Farnsworth excavates the role that changes of heart play in structuring contractual commitments. Our analysis explores the converse: When does a promisor breach without changing her mind – because she never intended to perform in the first place? Evidence that a promisor breached without any reason for changing her mind provides an important heuristic for assessing whether the promisor had an initial intent to perform her promise.

Thus the most common form of evidence as to the promisor's initial intent is the presence or absence of changed circumstances between promise and nonperformance. Breaching promisors accused of promissory fraud normally defend themselves by arguing that changed circumstances cause them to alter their intent to perform. And where there has been no significant change in the promisor's situation between the time she promised and when she breached, it is natural to infer that she never intended to perform in the first place.

The logic of changed circumstances accounts for other sorts of evidence as well. Thus, for instance, a short time between promise and breach is also highly suggestive that the promisor never intended to perform – the less time before breach, the less time for a

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[35] Farnsworth, *supra* note 2.

change of heart (and for something to happen to cause such a change). Repeated assurances of performance are evidence of the same sort, since they shorten the time between the last promissory representation and breach. And where a promisor makes absolutely no attempt to perform, this can indicate that she decided early against fulfilling her commitment.

Whether or not nonperformance was the result of a post-promise change of heart can also be shown by evidence that directly pertains to the promisor's initial intent. A promisor, for example, who knows her performance is impossible and ultimately breaches her promise because it continues to be so did not breach because of any relevant changed circumstance. A pattern of similar breaches can also be powerful evidence that changed circumstances did not cause a breach in the case at hand. Evidence that Harold Hill in the *Music Man* never trained a boys band, or that a Georgia funeral home never performed any of its three-hundred cremation promises gives one the strong impression of an intent not to perform regardless of the circumstances in a particular case.

Finally, because most promises also say something about the actual chances of performance (in addition to what they about an intent to perform), evidence of the objective probability of performance at the time of promising will also be relevant. Here we return to the credit purchaser, whose initial insolvency shows that even though she intended to pay, her promise misrepresented the chances she would do so. The veracity inquiry must consider evidence not only of the subjective fact of the promisor's intentions, but also of objective circumstances relevant to the likelihood of her performance.

c) The scienter inquiry

The law should carefully distinguish the veracity inquiry, which is about what the promisor actually intended or the objective probability of her performance, from the question of scienter, which concerns whether she acted culpably in making the misrepresentation. This said, the two do overlap, since evidence of an intent to deceive can serve as evidence of an intent not to perform and vice versa.

Scienter is a place where motive evidence can be particularly relevant. We have been surprised to find defendants being found liable for promissory fraud, even though they had no reason to make the alleged promissory misrepresentation. Thus for instance, where a representative of the seller of timeshares misrepresents the company's buy-back policy to an owner who has already purchased, this is most likely a case of mistake – perhaps negligent or even reckless, but probably not a knowing lie. Because the owner has already purchased, the company has nothing to gain from the misrepresentation. Yet such defendants have been found to have committed promissory fraud.[36]

A promisor has a reason to make a promise she does not intend to perform – or that she believes she is unlikely to perform – only if, at the time of promising, she expects to gain more from breaking her promise (factoring in the risk that she might have to pay breach-of-contract damages) than from performing and when she thinks that the promisee will not rely unless she misrepresents the chances of performance. Evidence of motive (or the lack of it) should be more systematically exploited in promissory fraud cases. In fact, it is probative as to all three of the central elements: the objectively reasonable

[36] Leisure American Resorts, Inc. v. Knutilla, 547 So. 2d 424 (Ala. 1989).

meaning of the promisor's words, the promisor's intent with respect to performance and thereby also the probability of performance, and the promisor's purpose in making the promissory misrepresentation.[37] Strong evidence of motive minimizes the risk of fact-finder error, such as the possibility of mistaking a promisor's true intent at the time of promising.

d) The measure of damages

The scienter inquiry also points to a valuable distinction for setting appropriate damages. The size of damages should turn on whether a promisor's misrepresentation was made knowingly or recklessly, as opposed to innocently or through mere negligence.

At this point we need to take into account the possible secondary effects of liability. Because promissory fraud imports punitive damages into contract law, it threatens to have a chilling effect both on value-creating contracts and on efficient breaches. We therefore do not want to threaten promisors with supercompensatory liability for their reasonable, or even negligent, mistakes. That is, a promisor should be held liable for the most severe forms of damages only if her misrepresentation was either reckless or knowing. Fixing the scienter requirement here both creates a relatively high evidentiary bar, minimizing possible chilling effects, and targets those promisors who can avoid misrepresentation at the lowest cost.

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[37] We recognize that motive evidence, while potentially probative and sometimes necessary, should not suffice to satisfy the representation, veracity or scienter inquiries. As a matter of principle, proving motive can only be a step on the way to proving intent, for individuals often have a motive to do wrong without intending to do so. In addition, motive evidence is considerably less probative in cases in which the promisor allegedly misrepresented the probability of performance (rather than her intention) and where the misrepresentation in question is alleged to have been reckless, rather than intentional.

We thus propose that, when a promissory misrepresentation was made knowingly or recklessly, the promisee be given a choice between compensatory and punitive damages, where the latter are measured by the amount necessary to deter the promisor from engaging in such conduct (her expected gain from the misrepresentation multiplied by the reciprocal of the probability of enforcement). Since the promisee will choose the higher award, both compensation and deterrence are assured.

Where a promissory misrepresentation was neither knowing nor reckless, we would still give the promisee the choice of rescission or fully compensatory damages. The option to rescind follows from the analogy to mutual mistake: where both promisee and promisor were mistaken as to what the promise said, their misunderstanding should make the contract voidable by the disadvantaged party, here the promisee. Where the promisor has already breached, we also propose fully compensatory consequential damages, set at what might be called true expectation. Under this standard, the plaintiff is entitled to compensation for nonpecuniary and speculative damages, her attorney's fees and all other reliance costs, whether reasonably incurred or not – greater recovery than is usually available in an action for breach of contract.

D. Road map

So ends our introduction to what we take to be the core contributions of this book. Our proposed law of insincere promising would simultaneously expand and contract legal liability. Where current practice is underinclusive we would expand liability – subjecting, for example, even explicit take-or-pay and Holmesian promises to scrutiny for an affirmative intention not to perform and recognizing that in some contexts a promise

says that the promisee can safely rely on performance. Where current practice is overinclusive we would contract liability – insisting, for example, on an independent scienter inquiry and extending the use of motive evidence to reduce fact-finder error. Structurally, we seek to make the law of insincere promising more flexible and more functional. Flexibility can be achieved by moving from mandatory to default representations. Courts should not simply assume that every promise represents an intention to perform and nothing else. We propose to make the doctrine more functionalist by tying the cause of action more directly to what promisees actually care about – the likelihood of performance, as opposed to promisor intent. The law should not care about intent for its own sake, but only as a handmaid to an inquiry into the probability of performance.

The rest of the book is structured as follows. We begin with some theory and in Chapters Two and Three lay out an analytic framework for thinking about the different things that promises can and do say, about how promises can be false, and about when promisors should be held responsible for such falsehoods. We then turn to legal issues and, in Chapter Four, provide a detailed analysis of why the law should care about insincere promising and of what form legal liability should take. Chapters Five and Six critically discuss the sorts of evidence that courts should use to establish what a promise said, whether what it said was false, and whether the promisor acted culpably in saying it. In Chapter Seven we explore related civil wrongs, which include nonpromissory misrepresentations of intent and false predictions, pre-and post-formation promissory insincerities, and insincere promises where there is no enforceable contract. Chapter Eight provides an empirical account of the use and abuse of the crime of false promise.

Chapter Nine contains some ideas about teaching promissory fraud. And we summarize what we consider the most important theoretical results in the Conclusion. An overview of our nuts-and-bolts reform recommendations can be found in Appendix A, "A Draft Prestatement of the Law of Insincere Promising." In Appendix B we put our toes in the comparative law waters and suggest some hypotheses about how other legal traditions might approach the problem of insincere promising.