The Accidental Promise: Remaking the Law of Misrepresented Intent

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A book review of:

> Ian Ayres and Gregory Klass, Insincere Promises: The Law of Misrepresented Intent (Yale University Press, 2005).

In *Insincere Promises*, Ian Ayres and Gregory Klass begin an academic discussion of the law of misrepresented intent, especially the contract-like torts of promissory misrepresentation and promissory fraud. They explain how those doctrines can facilitate credible representations and thereby promote efficient contracting.[2] Specifically, they show that the doctrines "promote[] 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."[3] Ayres and Klass go on to propose specific reforms to doctrine, spelling out the proper elements of a legal claim for promissory misrepresentation, promissory fraud or false promise; the appropriate evidentiary burdens in each case; and how courts should calculate damages.

Insincere Promises contains numerous insights and the authors are persuasive that the law of misrepresented intent has its place in an economic theory of contract law. However, as I will show in Part I, under their approach, the law of misrepresented intent is not really about intent at all. The exception is their discussion of the doctrine of false promise. Ayres and Klass

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[2] *See* Ian Ayres and Gregory Klass ("A & K"), INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT 60 (2005). *Cf.* Daniel Markovits, *Making and Keeping Contracts*, 92 VIRGINIA L. R. 1325, 1338 (2006) ("An efficient regime of contract . . . would retreat from the law's current preference for reliance on promises over reliance on non-promissory representations.").

[3] *Id.* at 8. Thus, Ayres and Klass demonstrate that the law of misrepresented intent helps solve the "canonical contracting problem" of ensuring efficient ex ante investment. *See* Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 599 (2003).

endorse a relatively narrow definition of the crime, in marked contrast to their somewhat expansionist proposals with respect to the torts of promissory misrepresentation and promissory fraud. I suggest that Ayres and Klass' restrictive approach to false promise, and their reluctance to extend their civil law approach to the criminal context, likely has to do with the still-central role of subjective intent in the criminal law more broadly.

In Part II, I suggest that Ayres and Klass' discussion of the common law of misrepresented intent is more plausible in light of federal securities law governing representations of intent by issuers. Liability for soft information, such as representations regarding corporate plans or intentions, is allocated primarily with an eye to ensuring efficient levels of reliance on those statements by the market. In its relative indifference to actual intent, federal securities law foreshadows the direction of reform proposed by Ayres and Klass. I suggest that there are deep reasons why securities law is less interested in true sincerity than the common law.

Finally, in Part III, I consider how Ayres and Klass' de-emphasis of intention in the civil law of misrepresented intent relates to their underlying approach, and in particular, to their dismissal of the relevance of moral theories of promise. I suggest that if Ayres and Klass succeed in redirecting legal inquiry in cases of misrepresented intent away from subjective intent, they will have worked a radical change, albeit one consistent with economic theories of contract law. The proposed shift is a direct result of the amoral character of legal promise in their proposed regime. Although sympathetic to the move, I discuss why, even in the civil law, legal promise is likely to resist complete disassociation from its everyday counterpart – the morally-binding promise.

I.

The *sine qua non* of Ayres and Klass' theory of misrepresented intent is the observation that anticipated damages in case of breach of contract are usually subcompensatory.[4] Ayres and Klass argue that under these conditions (of incomplete compensation), the law of misrepresented intent can facilitate credible promissory representations. Credible promissory representations help induce a promisee to make efficient investment choices.[5] With credible information about the likelihood of promisor performance, promisees can choose the most efficient contracting partner and invest appropriately in both precautions against nonperformance and performance-dependent profit-generating expenditures.[6] Because liability is not always necessary to induce investment, promisors can contract out of liability for misrepresented intent.[7]

Promissory Misrepresentation and Promissory Fraud

Having identified the role that a law of misrepresented intent can play in an economic theory of contract, Ayres and Klass proceed to elaborate what the doctrines of promissory fraud and promissory representation would look like if animated by efficiency considerations. They identify four stages in the adjudication of a misrepresentation claim. First, in the representation inquiry, courts are to ask what the promise said about the probability of performance.[8] As discussed below, Ayres and Klass introduce a nuanced scheme of possible representations. At the second stage, courts are to ask whether the promise accurately represented the objective probability of performance by the promisor. If the promise was misleading as to the probability

[4] In fact, they concede themselves that "the more likely it is that breach-of-contract damages will fully compensate, the less need there is to disincentive insincere promises." A & K, *supra* note 1, at 212.
[5] *Id.* at 61.
[6] *Id.*
[7] For practical reasons, Ayres and Klass reject a reverse *Hadley* rule, which Richard Craswell has discussed as an alternative to promissory misrepresentation doctrine. *Id.* at 70-72. Under a reverse *Hadley* rule, damages for breach of contract are set at "actual optimal expectation damages," or the value of a promisee's expectation interest had she chosen the socially optimal level of reliance given what she was told by the promisor. Craswell does not endorse the reverse *Hadley* rule either.
[8] *See infra* Part II for a discussion of Ayres and Klass' focus on the representational aspects of promising.

of performance, courts should go on to ask, in the scienter inquiry, whether the promisor knew, or should have known, first, what she was promising, and second, that her performance was unlikely. If a plaintiff can show that the defendant was negligent, she can prove promissory misrepresentation. If a plaintiff can show that the defendant was reckless or intentional in her misrepresentation, she can meet her burden with respect to a claim for promissory fraud. Finally, Ayres and Klass explain what damages are appropriate for each tort.

The representation inquiry at issue in *Insincere Promises* is not the inquiry usually at issue in contract disputes – Ayres and Klass are not concerned here to identify the content of a promise. They wisely leave that well-worn task to the extensive literature on contract interpretation. The unique issue of representation – and therefore, the unique issue of interpretation – specific to the law of misrepresented intent has to do with the probability of performance. Ayres and Klass argue that a promise is fundamentally a representation about the probability that a promisor will do whatever she has promised to do.

Many people may believe that a promise usually represents an intention to perform 100 percent of the time, but that a promise normally makes no particular representation as to the actual probability of performance. In this view, if promises are taken to be moral commitments, the objective probability of performance could turn just on the character of the promisor – even if the promisor were to make a flattering representation about her own character, it would not alter the essence of her promise but would only affirm her commitment to perform. Ayres and Klass show that our ordinary intuitions about promises are somewhat more complex since we would allow (we would not deem it a breach) for a promisor not to perform where performance becomes impossible, or even where performance becomes so costly that we believe that the promisor could not conceivably have intended to commit to performance under such

circumstances. Nevertheless, courts do appear responsive to the initial intuition that a promise necessarily represents an affirmative intention to perform, and the complexity of the representation inquiry in Ayres and Klass' analysis arises because they quickly reject that intuition.

Although the dominant rule of interpretation (what Ayres and Klass call the "categorical interpretation"), by which promises are understood necessarily to imply an affirmative intention to perform, would seem to be the ordinary understanding of a promise,[9] and though Ayres and Klass espouse "the goal . . . to remain true to the ordinary person's reasonable understanding" of a promise, their analysis begins and ends elsewhere.[10] Their analysis places far more emphasis on the effects of interpretive rules on the incentive to transfer information, incentive effects on nonsemantic behavior, and unintended consequences.[11] Their choice of emphasis may not be misplaced since, among the various considerations relevant to the choice of default rules, ordinary understandings alone can be changed by law. The incentive effects of an interpretive rule remain at work even if they are not taken into account by courts; but the ordinary use of language will eventually to realign itself with the meanings endorsed by interpretive rules, especially where promisors and promisees are sophisticated commercial entities, or repeat-players well-acquainted with those rules.

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[9] Ayres and Klass concede that people usually mean a positive commitment to perform when they promise. *Id.* at 102.

[10] *Id.* at 89. Ayres and Klass may give short shrift to still another intuition by summarily dismissing as ontological error the idea that expressions of intent are not actionable because they are not statements of existing fact. *Id.* at 86. They note but do not consider other less "metaphysically ambitious" reasons for refusing to recognize the action for promissory fraud including the worry that intent is difficult to show, and that promisees ought not to rely on misrepresentations. *Id.*

[11] *Cf.* A & K, *supra* note 1, at 83-84 ("rules of interpretations should be chosen in light of four considerations: fidelity to what was intended and understood, incentive effects on the transfer of information, incentive effects on nonsemantic behavior, and unintended consequences." *See also id.* 99 (noting "various considerations to keep in mind when setting contractual defaults, including what the majority of parties would contract for, which defaults tend to have beneficial information-forcing results, the cost to opt out of different defaults, the cost both to parties and to society of failing to opt out of a default, and the costs of judicial gap filling.").

Based primarily on their analysis of incentive effects and the costs of contracting around certain rules for most parties, Ayres and Klass endorse two interpretive defaults: Promises are taken to be "positive," i.e., representing an affirmative intention to perform, i.e., and "semiwarranting," i.e., representing that the promisor does not have any information to cause her to think that the promisee should not rely on her promise.[12] The positive default is not as strong as ordinary use might lead one to believe because Ayres and Klass take an "intention to perform" to mean just that there is "at least a 50 percent chance" that the promisor will perform.[13] Ayres and Klass favor these default characterizations of promises because promisors normally possess information sufficient to make positive and semi-warranting defaults and because most promisors intend to make promises of that character (rendering the rule majoritarian). They also point out that their proposed dual representational default would force idiosyncratic promisors to reveal their irregularity to promisees.[14]

The two proposed defaults are mere defaults, however; a promisor can explicitly opt out of either or both. In particular, a promisor could avoid a positive promise and represent only that she does not intend not to perform (an "opaque" promise). Ayres and Klass show that opaque promises, if accompanied by a fixed penalty for nonperformance, are equivalent to option contracts with delayed payment of the option price, and as such serve a useful purpose in "take or pay" or "alternative performance" contracts.[15] Ayres and Klass would also have courts recognize cases where a promisor has represented a specific probability of performance (a "definite-probability" promise). Alternatively, a promisor may represent in a "fully-warranting" promise that the probability of her performance is so high that that the promise can safely rely on

[12] *Id.* at 84. It seems unclear whether the assessment of the promisee's interest takes into account his opportunity costs.
[13] *Id.* at 104.
[14] *See id.* at 100-01.
[15] *See id.* at 94.

it.[16] Ayres and Klass reject these latter two types of promises – definite-probability and fully-warranting promises – as defaults because of the information-gathering costs to promisors, and the likelihood that promisors will err even after making an effort to gather the requisite information.[17] The only mandatory rule that Ayres and Klass endorse is that a promisor may not make a promise that she does not intend to perform.[18]

Ayres and Klass also spend some time explaining what a promisor must do to opt out of their proposed promissory defaults. It is clear from their discussion that it is not enough to achieve an opt out for a promisor simply to want to opt out; subjective intent is not controlling. The promisor must make a clear statement that objectively represents a low probability of performance if she wishes to make a more limited type of promise than that for which the defaults provide. [19]

Interestingly, though Ayres and Klass emphasize that objective representations about the probability of performance are what count, and not the subjective beliefs of the promisor, they do not import wholesale into the law of misrepresented intent the objectivist approach to contract law. In the latter approach, courts would be reluctant to look to context for aid in interpreting contract terms, instead limiting themselves to the four corners of a contract in all but exceptional cases (i.e., where the contract is ambiguous on its face). By contrast, Ayres and Klass explicitly provide that context not only matters, but may alone defeat an interpretive default.[20] Thus, they would appear to depart from traditional, objectivist approaches to contract law, at least with

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[16] Under certain conditions fully-warranting promises are treated as the default, i.e., when "there is a special relationship of trust between the promisor and promise, especially where this relationship is unbalanced." *Id.* at 108.
[17] *See id.* at 92-93.
[18] *See id.* p. 96 (rejecting "blank" promises because they serve no useful purpose).
[19] *See id.* at 107 ("if opting out of the default either decreases the speaker's own liability or increases the liability of the other party, the court should require that his or her express attempt to contract around the default be objectively ambiguous. Conversely, courts should be more lenient when considering statements against the speaker's liability interest and allow ambiguous statements to be sufficient to opt out of the default.").
[20] *Id.* at 108.

respect to the law of misrepresented intent. They may do so in part because promises, unlike contracts, do not always come in formal, bounded documents. But their willingness to consider context may also reflect the fact that Ayres and Klass are concerned ultimately with the information available to promisees, and the significance of the information conveyed by a promise depends on other information available to promisees. Moreover, while in contracts one can argue that the parties have already decided which information they want courts to consider, no similar argument can be made about promises outside of formal contracts.[21] Ayres and Klass do not say whether they would limit the consideration of context in cases involving formal promises made in bounded contracts. But their willingness to consider context in at least some cases shows that not just a subject intent approach but also an objective approach can justify consideration of context in the interpretation of promises.[22]

After the representational inquiry, the next step in Ayres and Klass' model doctrine is to inquire whether a promise accurately stated the objective probability of performance at the time the promise was made (the veracity inquiry). In predicting the odds of performance, Ayres and Klass ask whether the promisor was likely to be able to do what she promised and whether she was likely to choose to do it.[23] They emphasize that "the issue is not what the promisor knows or intends but just the objective probability of her performance…[A] promisor might not know of conditions likely to render her performance impractical, impossible, or illegal. In these cases, the promisor's misrepresentation as to the objective probability of her performance is a matter of

[21] *Cf.* Schwartz & Scott, *supra* note 2, at 569 ("Typical firms prefer courts to make interpretations on a narrow evidentiary base whose most significant component is the written contract.").
[22] Thus, the choice between objective and subjective intent does not necessarily map onto the choice between "majority-talk" and "party talk." *See id.* at 570 (defining majority talk as "the language that people typically use when communicating with each other" and defining party talk as the language of the particular linguistic community in which parties to a contract operate).
[23] A & K, *supra* note 1, at 127.

mistake. But it is still a misrepresentation—which is the only issue in the veracity inquiry."[24] The fact that intention does no work in the veracity inquiry is evident from the following example: if the objective probability of performance is obviously low but an optimistic promisor nevertheless verbally indicates that she definitely will perform, her promise is misrepresentation. In fact, anticipating the scienter inquiry, Ayres and Klass would hold the unreasonable optimist liable for promissory misrepresentation on a negligence standard.

Ayres and Klass allow that "the objective probability of performance . . . depends on subjective facts about what the promisor intends to do."[25] But in fact the veracity of a promise, under their proposed regime, does not hinge on the promisor's actual intent. Even though Ayres and Klass represent their project throughout as concerned with the law of misrepresented intent, they guide their readers away from any real intent inquiry, advising that it is "more useful to think of [the prediction contained in a promise] as saying not only something about the speaker's beliefs but also something about the objective probability that the event in question will come to pass."[26]

I emphasize, because Ayres and Klass only suggest, how divorced their veracity inquiry is from any meaningful inquiry into intent. Intent does function as an indicator of veracity in that an intention to perform or not to perform makes performance more or less likely, respectively. But the intent with which Ayres and Klass are concerned is not free or open; it is not a variable element, introduced by free will and motivation, in the otherwise externally determined probability of performance. In Ayres and Klass' analysis, intent is itself externally determined, or at least inferred, from a number of objective factors that make subjective intent more or less

[24] *Id.* at 130.
[25] *Id.* at 128.
[26] *Id.* at 147.

likely in a rational actor.[27] I think Ayres and Klass would be quite skeptical about the significance of any evidence of subjective intent that did not comport with objective evidence of incentive and possibility.[28] If the only trustworthy evidence of intent is such objective evidence, the concept of intent is quite disposable, because evidence of incentive and possibility can be understood to speak directly to the probability of performance. While subjective intent mediates between those kinds of facts and the probability of performance – it is the psychological mechanism that gives effect to those causes – in Ayres and Klass' strictly economic account, this subjective intent is drained of any agent particularity. As such, Ayres and Klass could do well enough without the complicating notion of intent. The second prong of their veracity inquiry, asking whether the promisor was likely to choose to perform, is better stated as whether the promisor was likely to perform. It would be cleaner to speak of the probability of performance in purely objective terms without alluding to choice.

After the veracity inquiry Ayres and Klass explain how courts should conduct the scienter inquiry. In the scienter inquiry, courts are to decide whether the promisor appreciated the nature of her promise (e.g., whether she understood that it was positive and not just opaque), and the objective probability of her performance. Ayres and Klass emphasize that the veracity inquiry is separate from the scienter inquiry and chide courts for failing properly to distinguish them. But courts who conflate veracity and scienter, unlike Ayres and Klass, really are interested in intention – those courts' "representation" inquiry seeks out the character of the

[27] The problem of free intent is similar to the problem of mistake identified by Eric Posner. *See* Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 846 (2003) ("From an economic perspective, parties cannot make mistakes: They have probability distributions that reflect information they have about the world."). Posner suggests that if the law treated mistakes as the predictable result of certain transaction costs, and not agent-specific cognitive failures, it would not call for the rescission of contracts based on mistake. *Id.*

[28] A court's assessment of objective evidence at this stage will differ from its review of that evidence in the representational inquiry only in that, in the veracity inquiry, the court may consider not just those objective facts known to the promisee but also the larger set of objective facts known to the promisor.

expressed intent to perform and not the indicated probability of performance. As I think Ayres and Klass would agree, for many courts today the ultimate fact at issue is still subjective intent. If one takes intention seriously, there is no important distinction between the veracity and scienter inquiries because a promisor represents only her state of mind and courts reasonably assume that the promisor believes she will do what she intends to do. The distinction between the two stages is important to Ayres and Klass only because, for them, the target of the entire inquiry is the objective probability of performance – and a promisor can say something false abut the probability of her performance unintentionally.

The significance of a separate scienter inquiry is not great even under Ayres and Klass' model because they propose that "[a]bsent evidence to the contrary, a court should presume that a defendant knew the objectively reasonable meaning of her promissory representation."[29] It is indeed a fair assumption that a promisor normally will grasp both the content of the obligation she has undertaken and the certainty of performance which she has conveyed to her promisee. But the ease with which this scienter requirement is met shows how little it adds under Ayres and Klass' proposed regime. This scienter requirement, the only subjective requirement for promissory misrepresentation, is met whenever one understands what one says to a promisee. It has almost nothing to do with intention per se. Understanding what one is saying is radically different from intending to do what one is saying one will do. The former mental state is sufficient to satisfy the scienter requirement in Ayres and Klass' proposed doctrine of promissory misrepresentation.

In cases of alleged promissory misrepresentation, the second aspect of the scienter inquiry has nothing to do with the promisor's actual state of mind: Courts must ask whether the promisor ought to have appreciated, at the time of promising, any difference between the

[29] A & K, *supra* note 1, at 134.

objective probability of performance and the probability which she represented to the promisee. Since a court that has reached the scienter inquiry will have already determined the represented probability of performance (in the representation inquiry), the actual probability of performance (in the veracity inquiry), and whether there was any discrepancy between those two probabilities (also in the veracity inquiry), a court at this stage need only decide how obvious such a discrepancy would have been to a reasonable promisor.

If the promisor actually knew that the probability of performance was less than the probability which she represented to the promisee, she is liable not just for promissory misrepresentation but for promissory fraud. She is also liable for promissory fraud if the discrepancy between the represented and actual probabilities of performance was so obvious that her ignorance of it was reckless. Thus, where a plaintiff alleges promissory fraud, an additional scienter requirement comes into play. However, as with the requirement that a promisor understand the content of her promise, though this scienter requirement involves the promisor's state of mind, it does not directly implicate her intention to perform or not to perform.

The damages that Ayres and Klass would have courts award varies depending on whether the promisor appreciated of what probability of performance she had advised the promisee, and on whether the promisor should have known, if she did not. Ayres and Klass propose that reasonable or negligent promissory misrepresentation be deterred by a liability rule, forcing promisors to internalize the costs of their actions. But because the optimal quantity of reckless or knowing promissory fraud is zero, Ayres and Klass propose that outright fraud be met with punitive damages. While it is difficult for courts to gage how much negligent representation should be tolerated in an efficient regime, there is no comparable difficulty in assessing the optimal level of promissory fraud (zero). Accordingly, Ayres and Klass propose that courts

guard against promissory fraud with a property rule.[30] They acknowledge the unusual call for punitive damages in a contract setting but self-consciously "call into question the commonplace assumption that the domain of contracts is one of strict liability and is governed only by compensatory remedies."[31]

False Promise

The limited role of intention in Ayres and Klass' account may explain why they do not treat the crime of false promise with the same depth that they treat the torts of promissory misrepresentation and promissory fraud.[32] They do make a number of important points, however, about the proper scope of a crime of false promise.

Ayres and Klass report that, empirically, "criminal prosecution is generally limited to cases where it is alleged that the promisor affirmatively intended not to perform" and they endorse the view those cases reflect.[33] Their endorsement of this standard is striking because it represents a complete departure from the standards that Ayres and Klass recommend in civil cases – it does not merely impose a higher burden on the state as compared with private plaintiffs but rather sets forth a substantively different test which rests entirely on the intentional character of a promise. Ayres and Klass offer two reasons for their endorsement of the narrow test for false promise.

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[30] *Id.* at 74; *see also id.* at 75 (pointing out that "it is cheap to avoid knowing and reckless promissory misrepresentations, relatively inexpensive to avoid negligent ones, and costly to avoid misrepresentations that are a matter of reasonable mistake.").
[31] *Id.* at 204.
[32] *See id.* at 170 ("Why, in addition to the civil actions for promissory misrepresentation and promissory fraud, there should be a crime of false promise is a question we don't consider in any depth. We have no answers other than the familiar generalities—that criminal penalties are necessary to deter otherwise judgment-proof wrongdoers, to address cases in which compensation is impossible, to express society's disapprobation, and so on. Nor do we address how criminal and civil sanctions might intersect in particular cases-for example, whether successful criminal prosecution should preclude a subsequent award of punitive damages.").
[33] *Id.* at 180.

The first reason they give is that the interpretive defaults they recommend in civil cases are "inappropriate in the criminal context, where the burden is on the state to overcome the presumption of innocence."[34] However, this reason is not persuasive. Plaintiffs in civil law cases also bear the burden of proving the elements of an alleged tort, albeit a weaker burden. The relevant difference may lie instead in the kind of innocence at issue in a civil law proceeding as compared with in a criminal proceeding; the latter, at least, has to do with moral culpability. It is likely because the crime of false promise says something about the moral character of the promissory act that Ayres and Klass are reluctant to extend their objective tests, reflected in their default interpretive rules, to the criminal context.

Ayres and Klass offer a second reason in defense of the stringent test for false promise that has to do with the "character of the veracity and scienter inquiries where there is no proof of an affirmative intent not to perform." While they believe "civil liability can be appropriate where there is evidence that the objective probability of performance was less than represented[,] regardless of the promisor's intentions with respect to performance," they "doubt that, as a general matter, proof of probability of performance is as reliable as proof of an intention not to perform."[35] That is, the "extra" cases in which Ayres and Klass would recommend liability in the civil context (where most courts today would not find liability) are ones where a promisor has misrepresented the probability of her performance but not her intent to perform. Ayres and Klass suggest that they would exclude those cases from the conditions under which a promisor may be found guilty of false promise because the available evidence is usually less certain in such cases. This second, stated reason for preferring a narrow doctrine of false promise is no more compelling than the first. If it is more difficult to prove certain kinds of false promise,

[34] *Id.* at 181.
[35] *Id.*

those species of false promise will be prosecuted less regularly and less successfully. The higher evidentiary burden in criminal cases anticipates that claims which could be litigated successfully in civil court will sometimes fail in criminal court. It is a reason to expect, as Ayres and Klass observe in fact, that in practice false promise will usually involve cases of misrepresented intent and not just misrepresented probabilities. It is also a reason to expect that in civil court too, cases involving misrepresented intent and not just misrepresented probabilities, will be more successful. But the evidentiary difficulties associated with proving misrepresentation of the probability of performance are not a reason to narrow the legal definition of false promise.

In their discussion of false promise, Ayres and Klass implicitly acknowledge what makes the crime of false promise essentially different from the torts of promissory misrepresentation and promissory fraud: the indisputably subjective nature of the intent requirement in false promise. I would suggest that the most compelling reason to limit the crime of false promise, i.e., to exclude those cases where liability is divorced from intent, is just that *mal* intent is essential to the criminal nature of false promise. Even if we are eventually coaxed to abandon subjective intent as a relevant concept in certain parts of the civil law, we are not ready to abandon it in the morally-charged realm of the criminal law.[36]

II.

The most distinctive feature of Ayres and Klass' account of the common law of misrepresented intent is its disregard for intent per se. Intention is relevant insofar as it is expressed, and only because of the information it communicates to a promisee regarding the probability of the promisor's performance. However persuasive as an account of the efficient ideal, this approach is jarring because it does not comport with the law's account of itself – at least in the law's repeated and now lamented emphasis on the actual intentions of the alleged

[36] *See generally* Stephen Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003).

liar. Thus, it is worth pausing to consider a related statutory area that has made precisely the shift which Ayres and Klass propose for the common law.

Securities law may be seen as formally derivative from contract law, at least in part, because it regulates the sale and purchase of securities. However, the Securities Exchange Act of 1934 primarily regulates issuers and others who have not directly sold issues to the usual plaintiff. In this respect already, the law does away with the bilateral relation of promisor and promisee that motivates most moral accounts of contractual promise. What matters is that a given shareholder reasonably relied on a representation by the issuer (for example), even indirectly by purchasing in a market which has adjusted to the representation; it is not necessary that the issuer directed the representation to a particular person with the intention that she rely on it. Moreover, the valuable information contained in representations of intent – which value was carefully explained by Ayres and Klass – has been recognized by courts as well as the Securities and Exchange Commission since the 1970s. While they had previously discouraged disclosure of soft information, such as intention, in the late 1970s the SEC "recognized that its prohibition effectively kept valuable data from shareholders who were trying to decide whether to sell their securities."[37] SEC policy became more favorable to forward-looking representations, appropriately qualified and presented.

More important here, since the Private Securities Litigation Reform Act of 1996, it is increasingly clear that courts are uninterested in the dishonest expression of intention per se. They are interested instead in the distortionary effects that certain statements of intention have on securities markets. That is, the focus of securities law is on the representational character of the promise or expression of intention, not on the sincerity of intent. Thus, "soft information" such as that contained in forward-looking statements are actionable where the "speaker does not

[37] *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 642 (3d Cir. 1989).

genuinely and reasonably believe them."[38] From a practical standpoint, it is virtually impossible to show that the speaker did not subjectively believe what it represented; but "and reasonably" implies that it is sufficient to show that objective evidence did not support the probability implied by the expression of intent. This is the rule endorsed by Ayres and Klass for the common law. Speakers are similarly protected by an objective rule in that, where their representation is so qualified as to render reliance on the representation of intent unreasonable, the speaker's actual intention is irrelevant.[39] The House Conference Report on the PSLRA specifically instructs that in applying this part of the safe harbor, "[c]ourts should not examine the state of mind of the person making the statement."[40] The rule precluding liability where forward-looking statement are accompanied by adequate cautionary language also foreshadows Ayres and Klass' recommendations in encouraging issuers to qualify their expressions of intent and thereby communicate more nuanced information about the probability of performance.

Of course, there are some important differences between securities law and the contractual law of misrepresented intent. Notably, the expression of intention in the securities context usually does not take the promissory form. However, the proper legal significance of this difference is not at all obvious, and indeed, on Ayres and Klass' approach, nothing special depends on it. The promissory form does nothing but indicate a higher probability of

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[38] *In re Donald J. Trump Casino Securities Litig.-Taj Mahal Litig.*, 7 F.3d 357, 368 (3d Cir. 1993). *See also Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 486 (3d Cir.1994) ("Misleading statements of intentions or forward looking statements, such as projections, estimates, and forecasts may be actionable if "[they] are issued without reasonable genuine belief [in their accuracy or truth] or if [they] ha[ve] no basis."); *In re Bell Atlantic Corp. Sec. Lit.*, 1997 WL 205709, at *23 (holding that in order to determine whether a forward looking statement can be deemed false or misleading, "the court must examine whether the speaker, at the time it is made, (1) actually believed the statement to be accurate, or whether (2) there is a factual or historical basis for that belief").

[39] Forward-looking statements will not be subject to liability to the extent that they are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." *See* 15 U.S.C. § 78u-5 (c)(1)(A). Indeed, many statements of intention now come with disclaimers undermining reasonable reliance and foreswearing any obligation to update. *See, e.g., P. Schoenfeld Asset Management LLC v. Cendant Corp.*, 47 F.Supp.2d 546 (D.N.J.,1999).

[40] H.R. Conf. Rep.. No. 369, at 44.

performance, as would any other verbal mechanism by which to convey confidence or internal commitment.

Two other differences are more important to explaining why sincerity is of diminished significance in the securities context, while its ongoing appearance in the law of misrepresented intent frustrates Ayres and Klass. First, the persons making the insincere expressions of intent in the securities context are usually corporate persons. Second, securities laws are self-consciously developed with an eye to improving the efficiency of securities markets. Both of these aspects of securities regulation explain why moral concerns about lies and insincere promises have less traction than in contract law.

The sincerity of corporate intent is not important.[41] While the notion of corporate culpability has found a place in not only our political but our legal discourse, the concept of moral culpability simply does not properly extend to entities that are not moral agents, but rather instrumentalities with which other agents pursue their ends.[42] The distinction between corporate and natural persons is especially relevant in connection with expressions of intent. Because corporate agency is not a moral principle, as is human agency, expressions of corporate intent are not importantly different from any number of predictions that a corporation might make about the future. We do not have to commit ourselves to some line between those future events under

[41] Securities liability often does turn on scienter, as under Section 10(b) of the Exchange Act. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Where scienter is an element, plaintiffs must show that the misrepresentation was knowing or fraudulent. This requirement may be justified on entirely instrumental, amoral grounds. My discussion here is limited to alleged misrepresentations of intention, not other facts. Of course, one consequence of the objectivist approach is to diminish the significance of the distinction between representations of intention and other fact. But a comparison of the general common law doctrine of misrepresentation with securities regulation is beyond the scope of this review.

[42] Ironically, political rhetoric that equates moral culpability with legal liability may actually have the effect of shrinking liability by raising scienter standards, thereby making it harder to prove a claim.

a corporation's control and those outside of its control, though we must draw some such boundary for human agency or risk diffusing it altogether.[43]

This relates to the second reason: securities regulation has always been utilitarian. The impetus for regulation was a market collapse and subsequent depression. At least in its origins, the body of law is not plausibly viewed as motivated primarily by a desire to do justice between a particular shareholder and a company with whom she is connected only through a series of distant transactions. Viewed in this way, it is unsurprising that the grounds for liability in the securities context are more likely to be specified with the aim of optimizing investments.[44] By contrast, the common law of misrepresented intent presently evinces a greater concern with intention and moral wrongdoing, Ayres and Klass' reinterpretation notwithstanding.

III.

The practice of promise-making and the phenomenon of promise-breaking abound with moral import. Although acknowledging it as a background fact,[45] *Insincere Promises* eschews discussion of it at the outset. In fact, Ayres and Klass find the law of misrepresented intent interesting precisely because they believe that we cannot rely on moral considerations to justify state enforcement of promises. They cite Holmes for the separation of law and morality:

> [A]s Holmes argues, we need to distinguish between the principles of law and those of morality. That something is a moral wrong does not, in itself, entail that it should be a legal wrong. And we might follow Holmes 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."…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?[46]

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[43] *See generally* Thomas Nagel, "Moral Luck" in MORTAL QUESTIONS; Tony Honore, *Responsibility and Luck*, 104 L.Q.R. 530 (1988).
[44] Interestingly, this is an example of a statutory area more efficiency-minded than a related area of common law.
[45] *See id.* at 203 ("We have taken a functionalist approach to what promises says. [But] [w]e don't want to deny that such representations have a moral dimension.").
[46] *Id.* at 4-5.

Ayres and Klass set out to answer that question. In doing so, they already depart from most of the literature on promising (there is no literature to speak of on the law of misrepresented intent). Those concerned with promises are usually motivated by the moral import of promises, and in most accounts, intention is essential to understanding the moral character and the moral consequences of our actions.

The question (i.e., why should the law care about intention?) is more familiar to contract lawyers. Contract lawyers, after all, have a contract to work with, and a number of rules with which to construct the contract that need not hinge on the intention of those who authored it. Ayres and Klass cite Holmes for this thought too: "no one will understand the true theory of contract or be able to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends 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."[47]

However, in their next move Ayres and Klass depart in their approach from most contract lawyers: they focus not on what promises do, as performative speech acts, but instead on what promises say about the present probability of performance by the promisor.[48] This represents a departure from the bulk of contract law which concerns not what the parties are telling each other but what obligations they owe each other under the terms of a contract. A contract is treated not as a statement by the parties but as a source of obligation for each party. Under that approach, to the extent parties' intentions are relevant at all, they are important as circumstantial evidence of what obligations the parties took upon themselves. By contrast, in Ayres and Klass' account of

[47] *Id.* at 202.
[48] *But see* Brian Langille & Arthur Ripstein, *Strictly Speaking—it went without saying*, 2 LEGAL THEORY 63, 67 (1996) (emphasizing not only the representational aspect of contractual promises but also the objective character of those representations).

promising, to the extent intentions are relevant at all, they speak to the probability of performance.

One might argue that the distinction between the performative and representational aspects of promising is one without a difference.[49] Whether courts are nominally interested in discerning the obligations a party has taken on, or the scope of her representations to a promisee, liability for a promisor will turn on the objective meaning of what she has said – not on any privately intended meaning. In both cases, any evidence of what the promisor subjectively believed she was obligated to do is relevant only inasmuch as it might constitute a kind of admission with respect to the objective meaning of what the promisor has said.[50] But Ayres and Klass are right to emphasize the distinction between performative and representational aspects of promising. Theories focused on the performative aspects of promising are oriented toward understanding how a promise alters the situation of the promisor; they explain how making a promise changes the decision calculus of the promisor with respect to any actions that affect the probability of her own performance.[51] Because a legal promise has an especially positive effect

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[49] *But see* Daniel Markovits, *Contract and Collaboration*, 113 YALE L. J. 1417, 1428 (2004) (pointing out that "the wrongness of the lying promise turns for Kant on the fact that the listener is *deceived* and not on the fact that she is in any separate sense *disappointed*").

[50] *Cf.* P.S. Atiyah, PROMISES, MORALS, AND LAW 184 (1982) ("[A] very common justification for treating promises as binding is that the promise . . . is an admission, of the existence of some other obligation already owed by the promisor.").

[51] For example, a promise may add a new reason or strengthen some reasons in a balance of reasons, it may preclude excuse on the balance of reasons, or it may exclude consideration of certain types of reasons. *See, e.g.,* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 500 (1989) ("a promise . . . seems to add something to the force of the reasons for action over and above the force that can be attributed to the principle of not causing harm to others"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 16-17 (1955) (describing the effect of promises as eliminating the defense that "on general utilitarian grounds, the promisor (truly) thought his action best on the whole"); Joseph Raz, *Promises and Obligations*, in LAW AND MORALITY 210, 222 (P. Hacker & J. Raz eds. 1977) (describing "exclusionary reasons"). Charles Fried has argued that contract law should support the practice of promising precisely because it is a way for promisors to bind themselves and thereby shape their moral world. *See* Charles Fried, CONTRACT AS PROMISE 3 (1981) ("In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself."). Similarly, Joseph Raz has argued that the practice of undertaking of voluntary obligations is valuable and worth protecting because it allows agents to construct their own moral world by obligating themselves to follow some goals but not others, or to create bonds with some people, but not others. *See* Joseph Raz, *Promises and Obligations*, *supra* note 42. On the other hand, some theories cannot

on the probability of performance, the performative aspect of promising explains why a legal promise is more credible to a promisee than a nonlegal promise. But to capture the full effect of a promise on promisee behavior, we must take into account the representational aspects of promising too. The fact that a promise is a promise does not tell a promisee all she needs to know. Even if the performative aspect of a promise explains why a promisee will invest in reliance on that promise, the representational aspect of the promise is necessary to predict how much she will invest.[52]

The evidentiary relevance of intent in most economic theories of contract law thus preshadows but does not predict the creative twist Ayres and Klass put on intent in the context of promissory misrepresentation. As explained above, in their account, intention – what might at first appear to be the ultimate material fact in a suit for promissory misrepresentation[53] – is important only because it is circumstantial evidence of the probability of performance.[54] The

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be classified as either promisor-oriented or promisee-oriented because they concern the relationship between promisor and promisee and see the aim of contract law to facilitate and foster that relationship. *See, e.g.,* Raz, supra note 42, at 227-28; Markovits, *supra* note 40 (characterizing contracts as a collaborative form of community). The special performative effect of a legal promise is that it creates a legal obligation on the part of the promisor and a legal entitlement in the promisee.

[52] Moral theories of promise could also distinguish between performative and representational approaches. On a performative approach, what is important is that the fact of promise makes reliance by the promisee justified, irrespective of whether such reliance is rational from a self-interested point of view. On a representational-moral approach, what is important is that the promise communicates the promisor's commitment to the promisee and thereby creates a special relationship that a uncommunicated promise could not achieve.

[53] *See* Kevin Davis, *Promissory Fraud: A Cost-Benefit Analysis*, 2004 WIS. L. REV. 535, 535 (2004) ("liability for promissory fraud can only be imposed upon a showing that the promisor lacked a particular intention"); *see also* Joseph Raz, *Promises in Morality and Law*, 95 HARV L. REV. 916 (1982). Raz argues that "[p]romissory obligations . . . are positively justified by reference to the state of mind of the promisor. Promises are binding because it is desirable to give effect to the intentions of the promisor. It is essential to the definition of voluntary obligations not merely that the state of mind of the agent is relevant to the justification of his obligations, but that it provides a positive reason for regarding the obligation as valid." *Id.* at 930. Raz goes on to endorse an "objective test of contract formation" because "in order to protect the practice [of undertaking voluntary obligations] from abuse and debasement . . . the law recognizes the validity of contracts that are not voluntary obligations." *Id.* at 936.

[54] *See* A & K, *supra* note 1, at 11 ("intent is material only because it says something about the likelihood of performance"); *id.* at 35 ("A promisor's intention to perform is material only because it entails her being likely to perform, only because it provides the promise crucial information for evaluating [the probably of the promisor's performance]."); *id.* at 51 ("We've argued that what a promisee really cares about is not whether the promisor intends to perform (unless he is interested in something like her moral rectitude) but the chances that she will perform."); *id.* at 126-27 ("while the subjective fact of intent is important in determining the truth of a positive or

only state of mind that really matters is the promisor's facility with the language she speaks – whether she understands the content and character of her promise. It follows that intention as we know it is, as distinct from mere understanding, is neither essential nor dispositive for a claim of promissory fraud. Where the objective probability of performance can be discerned by other means, intention to perform or not to perform is decidedly not the question. If I know of objective facts which make my performance unlikely, but nevertheless am optimistic and invite reliance, under Ayres and Klass' scheme, courts will find that I have made a legally binding promise.[55] In most (but certainly not all) contexts, an accidental promise is unlikely – but its theoretical possibility alone evinces the radical change that Ayres and Klass would work on the doctrine of promissory misrepresentation. The qualities of a promise that make it morally significant in everyday life are disposable in their proposed regime.[56]

This is evident also when we compare promises and threats from a moral perspective, and then from the economic perspective advanced by Ayres and Klass. Even if Ayres and Klass were correct about the broad thrust of the law, they cannot explain why we do not usually impose liability on those who fail to carry through irrational threats, while (we assume here) we do impose liability on those who fail to carry through on promises which they cannot rationally believe they will perform. Both promises and threats are conditional, in that the performance of

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opaque promise, these expressions of intent are material only because they also say something about the probability the promisor will perform.").

[55] *See id.* at 163 ("One of our central theses has been that promissory fraud should apply not just to what a promise says about intent to perform but also to what it says about the probability of performance. Current law is underinclusive for not holding accountable promisors who intend to perform but have reason to believe that the objective likelihood of their performance is so low that it is not worthwhile for the promise to consent to the contract.").

[56] At some points, Ayres and Klass do appear to allow for considerations of fairness to influence the contours of the doctrine, perhaps where those considerations reinforce the demands of efficiency. *See, e.g., id.* at 60 ("while the law of promissory misrepresentation can increase liability beyond the four corners of a written contract, it does so only where efficient and fairness demand—where the promisee was reasonably mistaken as to a basic assumption or where the promisor acted wrongly."); *id.* at 98 (noting that a rule that forces a promisor who believes that the contract is not in the promisee's interest to share that information with the promisee "both provides the promise with the information he needs to determine whether it is in his interest to rely and answers our intuitions about the requirements of good faith and fair dealing.").

either a promise or a threat depends on the fulfillment of certain conditions usually not without the control of the promisor or threat-maker.[57] Both convey information about the likely future conduct of the speaker. These properties shared by promises and threats may justify parallel treatment from an economic standpoint. That is, on Ayres and Klass' approach, just as it is efficient to impose liability for insufficiently grounded promises, it may also be efficient to penalize insincere threats, e.g., threats to breach where it would be economically irrational to carry out the breach under any likely conditions.

The question of insincere threats arises, for example, where a party threatens breach even though it would not be rational for her to do carry it out. By her threat, she is conveying information about her other options and whether breach would be worthwhile. On Ayres and Klass' approach, it could be appropriate to penalize her because she may trigger inefficient renegotiations that have only a redistributive effect. A court might recognize a claim for insincere threat if a party later discovers that she was tricked into renegotiation. Alternatively, courts might indirectly negatively sanction insincere threats by (1) enhancing damages in a subsequent breach of contract claim against the threat-maker, or (2) allowing the insincerity of the threat either to generate a defense or mitigate damages in the event the deceived party later defaults on the modified contract. But courts do none of those things. While courts do allow parties subject to threat to recover damages or rescind contracts that are made under threat, those doctrines do not turn on the sincerity of the threats made, but rather on their legitimacy.[58]

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[57] In principle, both promises and threats can be unconditional. But most promises are implicitly conditional on the nonoccurrence of certain events, or conditional on the occurrence of an event within the control of the promisee. Similarly, most threats depend on the occurrence or nonoccurrence of an event which the threat-maker believes is within the control of the threatened person.

[58] Oren Bar-Gill and Omri Ben-Shahar have criticized the doctrine of duress as it stands and have argued that courts should not rescind contracts where the threats are credible. *Credible Coercion*, 83 TEX. L. REV. 717 (2005). *See also* Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. 391 (2004).

While the efficiency and moral arguments for enforcing representations of promissory intent may point in the same direction, the underlying theories diverge on the question of penalizing insincere threats. However efficient it might be, on moral grounds, we do not penalize insincere threats per se -- presumably because it is never appropriate to penalize a failure to carry out a threat, whether sincere or insincere. It is not inconceivable that there is a moral argument for penalizing insincere threats, but the argument appears weak since the law does not need to preserve the practice of threat-making (in contrast to its possible interest in protecting a meaningful practice of promise-making) and an insincere threat is arguably morally superior to a sincere intent to break a promise. The intuitive difference between promising and threatening lies in their distinct moral character and an economic perspective fails adequately to capture or explain that difference.

The moral character of promising appears to have shaped the doctrine of promissory misrepresentation thus far.[59] What Ayres and Klass characterize as errors or sloppiness in the application of the doctrine of promissory misrepresentation are entirely consistent with promising as a moral practice and the presence of such "errors" in the case law can be explained by the origins of the legal doctrine in the moral practice.[60] Ayres and Klass are almost certainly

[59] Ayres and Klass acknowledge the moral origins of the doctrine. "If promises were originally moral obligations, there have since developed purely legal forms of promissory obligation, where the sanctions for nonperformance do not include moral censure—the most obvious example being the arm's-length business transaction." *Id.* at 30. While Ayres and Klass are right that the doctrine has evolved in application, the development of the doctrine helps explain its present form, and illuminates the choice we are making -- abandoning the project of reconciling legal with moral promise – when we take the doctrinal path Ayres and Klass propose.

[60] *See, e.g., id.* at 47: "The traditional legal actions for insincere promising differ from most other forms of deceit because the alleged misrepresentation concerns the speaker's own intentions. The allegation is not that the speaker lied about the world 'out there' but that she misrepresented something about her own mind 'in here.' This gives rise to the illusion that all promissory misrepresentations, since they concern the 'in here', are knowing misrepresentations—that is, that to make such a misrepresentation is necessarily to know that it is false." That proposition is only "illusory" however if intention is recharacterized as objective. Under a moral theory of promise, subjective intention may very well be more important than objective intention, and courts would not be wrong to indicate that one necessarily is aware of one's subjective intent. (I leave aside the possibility of self-deception.) See *also id.* at 50, where Ayres and Klass observe that though "promisors know 'perforce' their own intent, they do not necessarily know either the objective probability of their performance or the scope of their promissory

right that some of those features of promising are at odds with an amoral, efficiency-oriented doctrine of promissory fraud. Moreover, the amoral character of their proposed law of misrepresented intent, like an amoral law of contract, may be entirely appropriate.[61] But contract law is probably still commonly understood as if applied primarily to relations among real persons engaged in a moral practice of promise[62] and this is even more true of the less theorized law of misrepresented intent. Even if the law of promises should have little to do to with the social and moral practice of promising,[63] we are not there yet.

The proposition for which Ayres and Klass cite Holmes, on the separation of law and morality, is not uncontroversial. There are some who would use the law of misrepresented intent, as others would use the law of contract, to support an ethical practice of promising. Ayres and Klass are right (as is Holmes) that those theories may not successfully explain why the state has the authority to enforce moral obligations.[64] But Ayres and Klass do not themselves attempt

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representations." Again, the gaps they identify in existing doctrine arise from their own objectification of the doctrine.

[61] Notably, Ayres and Klass do not limit their proposed rules to a subset of promisors and promisees. They draw on all kinds of promises in their examples (though they do exclude certain special cases of promising, such as election promises). For the argument in favor of distinguishing between mercantile contracts and others, and for recognizing efficiency as the only goal of commercial contract law, *see* Schwartz & Scott, *supra* note 2. In a future article, I will argue that contract and the moral practice of promising are mutually exclusive by virtue of their defining properties.

[62] See Markovits, *supra* note 40, at 1469 (noting that business transactions among firms are distant from "contract's conceptual core"); *see also* Raz, *Promises in Morality and Law*, supra note 43, at 934-35 ("the predominant purpose of contract law is to support existing moral practices").

[63] It is an interesting but speculative question whether, if the legal and nonlegal practice of promising are somehow untied, they will develop in parallel or whether they will diverge to fulfill their distinct functions.

[64] Ayres and Klass do not state their objection quite this way. They observe that although "[t]here is something anomalous about explicitly undertaking a moral obligation and at the same time intending not to comply with it", this "does not explain why courts should step in to enforce promissory misrepresentations of intent. Here Holmes's thesis about the difference between the law and morality is surely correct: the mere fact that to promise to do something without intending to do it is morally wrong does not suffice as an explanation of why the law should punish it." A & K, *supra* note 1, at 29-30. But Ayres and Klass also acknowledge other normative accounts supporting a doctrine of promissory misrepresentation. Noting that their argument is an economic one, they deny the claim that "there aren't other reasons for imposing liability. [F]raudulent (that is, knowing or reckless) promissory representation is an excellent candidate for what Jean Hampton has called 'expressive retribution.' And nonfraudulent promissory representations, while not necessarily culpable or wrongful in the sense of deserving punishment, infringe on the rights of the promisee in a way that implicates the principles of corrective justice described by Jules Coleman. But the application of these and other deontological theories to the special case of insincere promising seems to us more straightforward than the argument from efficiency. Thus, while we don't doubt that there are interesting things to be said about how these theories might also support legal liability for

to explain the source of the state's authority to pursue those economic aims which they assume should be pursued. There is little doubt that the state is entitled to facilitate the accumulation of wealth; my point is only that Ayres and Klass do not provide an objection to moral accounts of contractual promise that, in principle, could not also be asserted against their own amoral account. While showing that moral theories are inadequate is not the project they undertook, they do assume that the doctrine of promissory misrepresentation should pursue the welfare-enhancing goals that prevailing accounts of contract law assume contract law should pursue, and their proposals aim to bring the law of misrepresented intent in line with that aim.[65] If the consequences of that assumption sometimes appear peculiar, it is not because their proposals are not well-argued and sensible – but because the doctrine of promissory fraud, in its very name, wears its origins in moral theory on its sleeve. The law of misrepresented intent sounds like it has something to do with intent. Not objective intent – that oxymoronic (but very useful) concept that makes more palatable and appear less radical the abandonment of real intent – but actual, subjective intent. Like the doctrine of good faith, the law of promising is not easily emptied of moral import.

None of this is likely to take Ayres or Klass by surprise. They have already accommodated the intuition in their account of false promise, which effectively limits the crime to cases where a promisor has morally blameworthy intent. Even in their civil law discussion,

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promissory representations, we limit ourselves to the economic argument." *Id.* at 61. Given their ready acknowledgement that there are any numbers of reasons why it might be a good idea for the state to enforce promises, I construe their objection to "moral theories" of promissory misrepresentation as one against the basis for state authority, and not merely against the desirability of state involvement. *Cf.* Thomas Scanlon, *Promises and Contracts*, in THE THEORY OF CONTRACT LAW 87 (Benson ed. 2001) ("the fact that some action is morally required is not, in general, a sufficient justification for legal intervention to force people to do it"). I note in passing that the problem of enforcement of promises is distinct from, and may raise separate objections from, the problem of enforcing contracts. *See* Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 LEGAL THEORY 313, 328 (2002).

[65] A & K, *supra* note 1, at 103 ("Throughout our analysis we have adopted a strongly antiessentialist stance. Promissory practices are not written in stone. What a promise says is subject to change.").

they may have anticipated the queasiness with which courts are likely to react to a wholly objective approach by using the language of intent to make their approach less alien to existing law.[66] Moreover, while they largely assume a certain relationship (or lack thereof) between morality and contract law, they claim innocuously that their account is but one aspect of a problem which can also be understood from a moral standpoint. Ayres and Klass may avoid confronting the relevance of the moral practice of promising because practitioners are in their audience, and practitioners are unlikely to take up arms in this long-standing debate in order to remake the doctrine of promissory fraud.

But there is another possibility. It may be that Ayres and Klass are able to side-step these quarrels in modern contract theory because, at this point, the burden is on those who favor a moral reading of contract law, concerned with subjective intent, to show why the philosophical foundations of an economic theory of contract law are wanting (if, indeed, they are). In other words, Ayres and Klass' silence on these issues may just be gracious – their team is already winning. If their ideas gain force outside the academy, they will have fundamentally remade what they ostensibly set out to reform.[67]

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[66] Here I hypocritically escape to an objective notion of authorial intent – I am not claiming that Ayres and Klass actually had these considerations in mind. *Cf.* Posner, supra note 27, at 853 ("The doctrinal structure of contract law exerts force on scholarly analysis. That is why so many authors try to rationalize the doctrine, or propose incremental changes, rather than coming to . . . austere conclusions. . . . Courts and legislatures are more likely to pay attention to scholarly recommendations that follow naturally from the logic of contract law, than those that float down from the ether, for courts and legislatures have no good reason . . .to think that there is anything wrong with the system of contract law that we have.").

[67] *See* A & K, *supra* note 1, at 2-3.