12

The Conceptual Foundations of Contract Formation

*Crescente Molina**

The aim of this essay is to analyze the basic concepts that underlie contract formation. I start from one axiom about the nature of contracts. Contracts, that is, the set of deontic relations (i.e., rights, obligations, etc.) that constitute a contract, are necessarily a product of both parties' assents. Thus, contracts presuppose some kind of *agreement*: We simply cannot acquire a contractual right or obligation against or towards another person unless we and that person in some form agree to us having such a right or obligation. Accordingly, this axiom (the 'Necessity of Agreement Axiom' or simply 'NOA') entails that one cannot *unilaterally* create or assume a contractual right or obligation, namely create or assume a contractual right or obligation against or towards another person without the assent of one's obligor or obligee. Contractual rights are, necessarily, those that are formed, created or brought about by agreement.

I will explore NOA's implications for our understanding of contract formation. I maintain that if we adopt NOA, there are at least two different ways through which two persons can enter into a contract, that is, two mechanisms by which one may form contractual agreements. One is well known to anyone familiar with any modern system of positive contract law: 'offer and acceptance'. The other, interestingly neglected by most contract lawyers and theorists, is what I call 'contractual subscription'. I develop the concept of contractual subscription, and then proceed to discuss the notions of offer and acceptance. Drawing on Reinach's idea of a 'social act', I provide an account of 'juridical acts'.[1] Juridical acts, I argue, are a type of

* Assistant Professor of Law; Rutgers Law School; crescente.molina@rutgers.edu. Many thanks to Felipe Jimenez, Manuel González and the participants of the 'Reinach and The Foundations of Private Law' conference in Frankfurt for their helpful comments. I'm especially grateful to the editors of this volume, Marietta Auer, Paul Miller, Henry Smith and James Toomey.

[1] Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847. Unlike other

social act, and contractual offers are a kind of juridical act. Finally, I analyze the role of another important notion in contract formation, that of a 'promise'.

Many writers have argued that contractual relations are necessarily constituted by promises. Here I contend that promises are not only not necessary to enter into a contract but that, in their elementary form at least, promises are never sufficient to form a contract. I distinguish between what I call a 'basic promise' and a 'promissory offer'. Developing a Reinachian insight, and against other philosophers and jurists, I argue that promises in their basic form produce their deontic effects immediately once they're apprehended or known by the promisee. They thus bind without the promisee's assent mediating. Therefore, if we remain committed to NOA and basic promises can create rights without the promisee's agreement intervening, these rights cannot be contractual rights. We shall see that promissory offers (and offers more generally) are not essential to the process of contract formation. But only promises that are promissory offers and not basic promises can begin the process of contract formation.

This chapter is about the basic theoretical architecture of contract formation, and thus proceeds at a relatively high level of abstraction. It should, however, shed light on some traditional topics in contract law doctrine, such as the discussion about the structure of so-called 'unilateral' contracts, the problem of the moment of contract formation, and the status of the power to revoke an offer. Furthermore, I do not explore the related yet largely independent issue of the morality of contract formation, namely the moral principles that should (and typically do) inform our views about contract formation. I hope, however, that the views I defend about the conceptual structure of contract formation will clear up the territory for new forms of moral or normative inquiry in the domain of contract law. Our examination of the conceptual bases of contract formation will motivate normative questions such as: is there any value that requires contracts to be formed only by offer and acceptance and not by what I refer to as contractual subscription? Are we morally better off endorsing or rejecting NOA? What is the moral significance of the distinction between basic promises and promissory offers? I briefly elaborate on only one of these questions (Section 12.4), but I do hope that the account I offer of the rich landscape of concepts that govern contract formation will set up a framework for the careful study of these and other questions in the morality of contract. Let's begin by exploring NOA.

essays in this volume, my main focus here is not on Reinach's work. Yet the present essay is Reinachian in spirit in three central ways. First, it assumes that a fundamental form of legal theory consists in exploring the basic conceptual structure of legal notions such as right, obligation, promise, contract, property, etc. Second, it assumes that the basic structure of such notions is, to a significant extent at least, determined by facts different from the mere dictates of the positive law. Third, it draws on important insights, concepts and distinctions developed by Reinach to elaborate an account of contract formation. Reinach himself left out of the *Foundations* the '[. . .] interesting and difficult phenomenology of contract'. Reinach, 'Foundations' (n 1) 50 (n 26). Here I undertake part of the task.

12.1 THE NECESSITY OF AGREEMENT AXIOM

The NOA axiom holds that a contract binds only if all the contracting parties agree or give their mutual assent.[2] One may identify at least two versions of NOA by distinguishing different forms of ontological dependence of contractual rights upon the parties' assents.

One of them, which we may call 'modal-dependence', holds that contractual rights' existence or bindingness is simply conditional upon the parties' mutual assent, that is, that their mutual assent is *necessary* for the existence or bindingness of their contractual rights. This view, however, leaves open the question of whether the parties' mutual assent is what ultimately *grounds* their contractual rights, that is, whether such rights ultimately obtain *because of* or *in virtue of* the parties' mutual assent. For instance, according to the modal-dependence version of NOA, contractual rights' ground may be a legislative act which in turn makes the parties' mutual assent an enabling necessary condition for the bindingness of such rights. If this is the case, contractual rights' bindingness is conditional upon the parties' assents, yet they are grounded in an act of legislation (i.e., in a law that makes the parties' mutual assent necessary for contract formation). By contrast, according to a version which we may call 'ground-dependence', all contractual rights necessarily obtain because of or in virtue of the parties' mutual assent: a right is contractual in kind only if it is grounded in, and not merely modally dependent upon, the parties' mutual assent. Later I further elaborate on this distinction and contend that these two different ways of understanding NOA have important implications for our views about the structure of contract formation. For the moment, however, we should stress that according to both the ground-dependence and modal-dependence versions of NOA, a person cannot hold a contractual right against another unless both parties have given their assent to the creation or bindingness of such right.[3] Therefore, under either of these versions, NOA entails that persons simply cannot bring about a binding contractual right *unilaterally*, that is, without their contracting party's assent mediating.[4]

[2] Throughout the chapter, I refer to the parties' 'agreement', their 'mutual assent' or their 'assents' as synonyms.

[3] There is an even more inclusive understanding of NOA, which holds that it is sufficient for a right of content A to be contractual in nature that such right's existence or bindingness depends upon the parties' assents to a contractual right of content A, *or* B, C, D, etc. For instance, according to this version of the NOA, a statute may impose a right of content A to parties who agree to the creation of a contractual right of content B, and the right of content A may still be contractual in nature even if the parties never agreed to it. In this case, right A's existence is still conditional upon the existence of a right-modifying agreement between both parties, even if of a different content. I argue for this way of understanding the relationship between contractual agreements and some kinds of contractual obligations and rights in 'Contracting Without Promising' (University of Toronto Law Journal, forthcoming).

[4] The reader must distinguish this sense of unilaterality (i.e., the idea that one person can form a binding contract without their contracting party's assent mediating) from the notion of a *unilateral contract*, which standardly refers not to a contract created by just one of the parties'

Though widely accepted, I do not think NOA is what we may call a 'commonsense truth' about the nature of contracts, that is, an undeniable fact about their nature that we can know by simple observation of the pre-theoretical phenomenology of contracting. Indeed, we will see that some legal systems appear to consider what below I call basic promises (which are unilaterally binding) as sufficient grounds for legal liability, and contract theorists have offered serious arguments in favor of their contractual character. Thus, if NOA is not a commonsense truth about contracts, it requires justification: a theory of contract must make the case for (or against) the agreement-dependency of contractual rights. In this essay, I will assume the soundness of NOA and focus primarily on analyzing some of its implications for our understanding of the structure of contract formation. However, at the end of Section 12.4 I sketch the beginnings of a thesis regarding NOA's justification.

Once we endorse NOA, we can think of different possible mechanisms of contract formation, that is, different ways through which persons can reach a contractual agreement. Let's explore two of these contract formation mechanisms.

12.2 CONTRACT FORMATION AND CONTRACT-ENABLING NORMS

We can think of at least two ways in which persons can give their mutual assent to a contractual relation. First, they can form a contractual agreement through the process standardly known as 'offer and acceptance'. Second, they can reach a contractual agreement by assenting to a set of contractual terms (i.e., rights, obligations, etc.) that are not fixed by a contractual offer in the first place. In this case, they form their contract through what I call 'contractual subscription'.[5] Though some recognize the limits of the offer and acceptance model of contract formation,[6] contract law scholars have neglected the task of providing a theoretical analysis of other possible ways of reaching contractual agreements.[7] Consider the case of contractual subscription.

assents but to the fact that only one of the involved parties assumes an obligation towards the other. *See e.g.*, the French *Code Civile*, art. 1106; and the canonical case *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256. Yet some contract theorists argue that unilateral contracts must be understood precisely as contracts formed unilaterally by one of the involved parties. Thus understood, unilateral contracts would constitute an exception to NOA. See below at note 49.

5 I am grateful to Paul Miller for suggesting the term.

6 *See e.g.*, Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 Columbia Law Review 217, 219; Andrew Burrows, A *Restatement of the English Law of Contracts* (Oxford University Press 2016) 52–53. Yet contrast, *e.g.*, Marvin Chirelstein, *Concepts and Case Analysis in the Law of Contracts* (7th edn, Foundation Press 2013) 36.

7 It is likely that the dominance of offer and acceptance as a model for understanding the structure of contract formation is a product of the shift from thinking of contracts as constituted by the broader idea of *consensus* (i.e., agreement) to the idea, started in the late scholastic period but consolidated in the work of early modern thinkers like Grotius and Pufendorf, that

If A and B are contracting parties to a contract C, they formed such contract through contractual subscription and not offer and acceptance if: 1) they both agreed to being subject to the terms of C (i.e., to the rights and obligations C constitutes) *and* 2) the terms of C were not fixed, in the way I specify below, by an offer from A or B. Though below I will offer another example, we may first use the case of entering into a marriage contract as a way of illustrating contractual subscription.

Marital relations entail a cluster of legal obligations and rights that spouses owe towards, and have against, each other. Spouses have no or little power to determine the content of many of these obligations and rights. Yet in modern societies at least, legal marital rights and obligations are contractual in the sense we identified above: their bindingness is conditional upon the involved parties' assents. However, even if marital rights and obligations are in this sense contractual, it would be mistaken to hold that spousal assent must be preceded by a process of offer and acceptance. It is not that it is merely odd or counterintuitive to portray spouses as making reciprocal offers and acceptances when manifesting their spousal assent, the point is that we need not think of their assent to form a marriage contract as mediated or constituted by the process of offer and acceptance. To see why, we must abstract out of the example of marriage for a moment.

Consider the following thesis: The formation of a contractual agreement necessarily presupposes an antecedent 'legal norm'[8] which fixes the content of certain rights and obligations and makes their bindingness conditional upon the parties' mutual assent. We may call this type of norm a '*contract-enabling norm*'. Contract-enabling norms have roughly the following structure: they make it the case that if A and B assent to being subject to terms C (i.e., rights and obligations of content C), then they are thereby bound by C. In themselves, contract-enabling norms do not constitute contractual relations (i.e., contractual obligations or rights), yet they are, according to this thesis, necessary to enable the creation of contractual relations by way of establishing conditional rights and obligations whose bindingness holds upon two persons' assents. Thus, there must be *conditional* rights or obligations in the first place for even the possibility of contractual assent. This is because, according to this view, assenting or agreeing *to a contract* is precisely fulfilling the condition stated by a norm which fixes a right or obligation which *would bind* the parties if they give their assent.

I think a thesis along these lines informs the widespread view that contracts must be formed by the two-step process of offer followed by acceptance. Offers, according

contracts are made of *accepted promises*, which are constituted by two acts: a promise (offer), and the acceptance of the promise by the promisee (the offeree). *See* Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 567–69. I discuss the role of promising in contract formation below (Section 12.4.1).

[8] A legal norm is broadly any fact (e.g., the issuing of a statute, the existence of a custom, etc.) which the officials of a given legal system take to make it the case that someone is under a certain legal obligation or acquires certain legal right (power, etc.) in such legal system.

to this view, are precisely contract-enabling norms, which acceptances turn into fully fledged, binding contractual relations. Therefore, the view goes, since contract-enabling norms are necessary for contract formation, offers are of the essence of contract formation too. One may of course dispute this way of understanding the nature of contractual agreements and hold that persons can reach contractual agreements, that would bring about contractual rights, without anything like a contract-enabling norm mediating. But let's assume, *arguendo*, that the thesis is sound, and thus that contractual agreements, which constitute contractual relations, necessarily presuppose the existence of contract-enabling norms in the first place. The point I wish to stress here is that there are different legal facts that may create or constitute contract-enabling norms. Offers, as I argue below, are *just one of them*. Offers are thus not necessary for contract formation even if contract-enabling norms are. To flesh out this idea, let's go back to the case of marriage.

For the case of the modern contract of marriage, we can think of a marriage contract-enabling norm as established by civil *legislation*. For instance, Section 1312 of the *BGB* (German Civil Code) states that: '[o]n the occasion of the marriage, the registrar as a rule is to ask the parties contracting the marriage separately whether they intend to enter into marriage with each other and, after the parties contracting the marriage have answered this question in the affirmative, state that they are now, by operation of law, lawfully joined spouses [. . .]'.[9] Thus according to this provision, if the spouses declare to the relevant legal official their assent to getting married, they become lawful spouses and thus acquire a series of reciprocal legal obligations and rights. Among them, for example, they acquire the obligations and rights established by Sections 1353, 1356–59, or 1360 which holds that: '[t]he spouses are reciprocally obliged to appropriately maintain the family through their work and with their assets. If the household management is left to one spouse, that spouse as a rule performs their duty of contributing to family maintenance through work by managing the household.'[10] Section 1312, in conjunction with the other cited and other provisions, constitute a contract-enabling norm: they fix a set of conditional legal obligations and rights that two persons render reciprocally binding by providing their assent in the legally required form. Since in this case legislation already establishes a contract-enabling norm for the contract of marriage, such contract may be formed by the parties by subscription, namely by manifesting their mutual assent in the form required by the legislated contract-enabling norm established in the *BGB*. No offer is needed in this case.

Marital rights and obligations are not the only type of legal right and obligation that persons may incur by contractual subscription. Another prominent example is the case of some forms of fiduciary duty. For instance, in many legal systems, corporate directors acquire a set of legal obligations, notably duties of loyalty and

[9] §1312 *BGB*.
[10] ibid §1360.

care towards the shareholders of the corporation which appointed them. These duties and their correlative rights are conditional upon both the appointed directors and shareholders' assent: a director A is only under a fiduciary duty towards the shareholders of corporation B if both A and the shareholders of B assented, in the legally specified way, to A becoming a director of B.[11] Thus, if this is the case, directors' fiduciary duties are contractual in kind: their binding force is conditional upon both parties' assents. However, as in the case of marriage, to a large extent the content of such duties is fixed by contract-enabling norms created by judicial precedents (typically in common law jurisdictions) and legislation (in civilian jurisdictions). These legislative or judge-made contract-enabling norms establish such fiduciary duties while rendering their binding force conditional upon the reciprocally bound parties' assents. In this case the parties, corporate shareholders and directors, bind themselves through the mechanism of contractual subscription and not offer and acceptance.[12]

Contractual offers constitute *one* distinct class of contract-enabling norms. As I contend later in more detail, a contractual offer is a contract-enabling norm created by a contracting party, that is, by one of the at least two persons whose rights will be modified by entering into the contract. In preliminary terms, we may hold that a person A makes a contractual offer to person B if she creates an obligation or right of content C, whose bindingness is conditional upon B giving her assent to C (i.e., to the bindingness of C). Thus, revisiting the definition provided above, we can maintain that a contractual agreement is formed by contractual subscription if both parties have assented to being subject to the terms fixed in conditional form by a contract-enabling norm *different from an offer* (i.e., a contract-enabling norm not

[11] On the mutual assent dependency of some fiduciary duties see Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 74. For the case of corporate directors see ibid 81–82.

[12] It is worth thinking about the connection between the idea of contractual subscription and the operation of some legal *statuses*. In most modern legal cultures, the obtaining of some legal statuses (e.g., being a 'spouse') is conditional upon the status holder's assent. It is the law (e.g., legislation, precedents) that shapes the obligations and rights attached to these statuses, yet their binding force is conditional upon the status holder's assent. However, we must be careful in noting that not all cases of contractual subscription are ones in which persons assent to a change in their legal status. Think, for instance, of all the detailed default and mandatory terms (i.e., rights, obligations, etc.,) that modern sale of goods legislation imposes on those who enter sales agreements. These terms are not the product of an offer by the buyer or seller, but of a set of legislated provisions. *See e.g.*, arts. 30, 35, 53 of the widely adopted United Nations Convention on Contracts for the International Sale of Goods. Plausibly, those who enter sales agreements incur these obligations and rights through contractual subscription, and not offer and acceptance. Yet when doing so, they have not changed their legal statuses. On the notion of legal status, *see* Paul Miller, 'The Concept of Personality in Private Law' in Samuel L. Bray et al (eds) *Interstitial Private Law* (Oxford University Press 2024). Particularly relevant is the connection between Miller's notion of 'nominate' statuses, and the idea of contractual subscription.

created by any of the involved contracting parties). Conversely, as we will see later in more detail, if the agreement is ultimately formed by the assent of one of the parties to the conditional obligations and rights fixed by a contract-enabling norm created by the other contracting party, the contractual agreement is formed by the process of offer and acceptance. Thus, contractual agreements need not be preceded by an offer, which is just one type of contract-enabling norm. As we saw in the case of marriage and corporate directors' fiduciary duties, legislative enactments and judicial precedents can also constitute contract-enabling norms. Furthermore, not only legislation, judicial precedents and offers are capable of constituting contract-enabling norms. We should remain open to the idea that other legal norm-creating facts such as, in certain circumstances, customs or social practices may also constitute contract-enabling norms.

I have mentioned different possible sources of contract-enabling norms (i.e., legislation, judicial precedents, offers and, arguably, customs), which in turn lead to at least two different possible mechanisms of contractual agreement formation, namely offer and acceptance, and contractual subscription. Some may dispute this claim by arguing that in certain jurisdictions the law recognizes only offers and not legislation, judicial precedents or customs as facts that may create contract-enabling norms, and thus that in such legal systems contractual agreements can only be formed through offers followed by acceptances and not by contractual subscription. Others, perhaps invoking the value of contractual freedom, may contend that the moral value of contract law requires that only offers, which are contract-enabling norms created by the parties, and not those created by legislation, judicial precedents or custom should be capable of producing genuine contractual agreements. I think both views are mistaken. The first one is descriptively flawed, for all the jurisdictions at least I am familiar with comprise legislated, judge-made and, or customary contract-enabling norms. The second one ignores the plurality of values that may justify different aspects of our contractual practice.[13] Yet in any case, these queries are not our concern here. My aim is to lay out the basic *theoretical possibilities* of contract formation and not the ways in which such possibilities are instantiated in particular legal systems, or the limits on such possibilities imposed by our preferred theories about the morality of contract.[14] The key points we should take away for our subsequent discussion are the following: 1) contract-enabling norms, I have assumed, are necessary for persons to reach contractual agreements; 2) offers are just one way of establishing contract-enabling norms; and 3) if a contract-enabling

[13] I discuss in detail the sense in which legislation and customs can constitute sources of contractual obligations and rights, and argue against 'monistic' approaches to morality of contract law in 'Contracting Without Promising' (n 3).

[14] Yet, as I said at the outset, later (Section 12.4) I will venture a thesis about the connection between NOA and the morality of contract.

norm is constituted by a legal source (e.g., legislation, judicial precedents or custom) different from an offer, the parties subject to that norm reach their contractual agreement, and thus form a contract, by contractual subscription and not by offer and acceptance.[15]

Let's now explore in more detail offer and acceptance as a mechanism of contractual agreement formation. Later on, I will move on to analyzing offers' relationship with another notion that has been central to the development of the law of contracts: promise.

12.3 OFFERS AND ACCEPTANCES

We are not concerned here with all kinds of offers. The offers that are relevant in the domain of contract formation are what we may call 'juridical' offers. People *offer* to others their condolences, their advice, etc. Yet these offers, or at least some of them, need not have juridical effects: they need not bring about any modification in the offeror's or offeree's *rights*.[16] Offers, in our sense, are a type of *juridical act*, that is, belong to the class of acts that necessarily have an *immediate effect in the world of right*. Thus, before exploring offers, we must take a slight detour and look at the notion of a juridical act.[17]

[15] What if our power to make contractual offers is ultimately conferred on us by the positive law, and thus that, at a certain level at least, *all* contract enabling norms emanate from law (e.g., from legislation or judicial precedents)? Here I cannot discuss the interesting and difficult question of what makes a power (or an obligation or right) legally created or conferred in kind by contrast to nonlegally created or 'prelegal'. For our purposes, it suffices to make clear that even if ultimately our power to make contractual offers derives from the positive law, we must still draw the distinction between: 1) forming a contract by the process of offer and acceptance, in which one of the contracting parties, by exercising her (arguably) legally conferred power to offer, is the one who fixes the content of the parties' contractual rights and obligations; and 2) the process of contractual subscription, in which both parties assent to certain reciprocally owed rights and obligations whose content was fixed not by them but by legislation, judicial precedents or custom. The importance of distinguishing these two mechanisms of contract formation holds regardless of the answer we give to the question of whether the power to offer is an artifact of the positive law or a prelegal power. I thank Marietta Auer for pressing me to clarify this point.

[16] Indeed, many offers have 'moral' effects (e.g., they change the aptness of some morally significant emotions and dispositions) yet do not impact our rights. Other offers have no juridical *or* moral effects. Here I am interested only in offers that have an effect on our rights, that is, juridical offers.

[17] The notion of juridical act I propose here is meant to be an elaboration of the one (*actus iuridicus* or *negotium iuridicum*) that has for a long time been present in European legal thought. For a helpful historical account of this notion *see* Alejandro Guzmán Brito, 'Para la historia de la formación de la Teoría General del Acto o Negocio Jurídico y del Contrato, IV: Los orígenes históricos de la noción general de Acto o Negocio Jurídico' (2004) 26 *Estudios Histórico-Jurídicos* 187. Although, to my knowledge, no express references are made in the *Foundations*, it would be surprising if Reinach's account of 'legal power' was not influenced by this idea. *See* below at n 23.

12.3.1 *Juridical Acts*

As I will understand it here, a juridical act is *any (intentional) public act which, at least under one true description, produces an immediate effect on our rights*. The concept of a juridical act has three important components.[18]

First, juridical acts are 'intentional' acts. Unlike what we may call mere juridical *facts*, juridical acts are constituted by intentional acts, that is, by what persons *intentionally do* rather than by what simply happens to them or by what they inadvertently do. An example of a juridical fact is, for instance, the fact of being born. The fact of a person being born has some immediate effects in the domain of right, that is, it makes it the case that such person acquires various rights. Yet such rights (i.e., the ones that hold in virtue of being born) are obviously not grounded in any intentional act by such person, for, we may assume, being born is not an intentional act. Juridical *acts*, by contrast, are made of intentional acts and this, among other things, means that one cannot (genuinely) perform a juridical act (e.g., make a contractual offer) inadvertently, that is, without one knowing that one is doing so.[19]

Second, juridical acts are constituted by (intentional) *public* acts, that is, they are at least in part made of acts that are not purely mental in kind. I thus cannot perform a juridical act (e.g., make a contractual offer) *merely* by thinking. In order to perform a juridical act, a person must (intentionally) perform an act which is external in kind (e.g., pronounce some words, sign a document, etc.). The public character of juridical acts derives from a more basic aspect of their nature: they are *social* in kind. As Reinach puts it, social acts are necessarily *other-directed*. They are necessarily *addressed to others*, and, accordingly, they are completed as acts insofar as they can imprint themselves in their addressees' experience.[20] Since these acts can only imprint themselves in their addressees' experience if the addressees are capable of *knowing* or *apprehending* these acts in the first place – and, we may assume, we cannot know each other's thoughts but through external facts – juridical acts, like all social acts, must be at least in part constituted by public facts.[21]

Although all juridical acts are, in Reinach's sense, social acts, not all social acts are juridical acts in our sense. Acts such as to threaten, warn, insult, congratulate, etc.,

[18] I elaborate in detail on the claims presented in this subsection in 'The Power in the Law' (unpublished MS, available upon request).

[19] Of course, the positive law deals with cases in which juridical acts (e.g., offers) appear to have been intentionally made but the (putative) juridical agent declares to have not made them intentionally but by mistake. The answer to the question regarding how the law should decide on this and other related issues (e.g., coercively extracted juridical acts, etc.) will depend on multiple factors besides our views about the nature of juridical acts.

[20] '[T]he one who performs them and *in the performance itself*, are as it were cast towards another person in order to fasten themselves in his soul'. Reinach, 'Foundations' (n 1) 20.

[21] Reinach seems to grant that if this limitation would not exist (e.g., if we could read each other's minds) purely *in foro interno* social acts would be possible. See ibid 20.

are also social in kind: they are necessarily addressed to others and are thus completed as acts once they can be apprehended by their addressees.[22] Yet unlike these social acts, social acts that are juridical acts have *immediate effects in the domain of right*.[23] This leads us to the third element of our definition.

The fact that juridical acts have what I call immediate deontic effects means, first of all, that juridical acts (if validly made) *necessarily* produce certain deontic effects (i.e., a right, obligation, etc.). This is what distinguishes them from other social acts, like congratulating or threatening someone, which can but do not necessarily produce any deontic effect. Furthermore, this feature of juridical acts entails that there is a special kind of *constitutive explanatory relationship* between a juridical act and its immediate deontic effects: the obtaining of juridical acts' immediate deontic effects is, in a distinctive way, explained by such juridical acts. Elsewhere I argue that this kind of special explanatory relationship, which I call an *essential explanatory dependency*, holds because juridical acts metaphysically *ground* their immediate deontic effects.[24] For instance, (validly made) promises – which we will see below are a kind of juridical act – essentially explain the obtaining of promissory rights and obligations, and they do so because (validly made) promises ground promissory rights and obligations. This way of understanding the relationship between juridical acts and their immediate deontic effects allows one to draw an important distinction between the immediate deontic effects of a juridical act and those deontic effects whose obtaining is merely conditional upon, yet not grounded in, such acts. For instance, in many legal systems, those who enter sales contracts (which are often made of juridical acts) incur an obligation towards the government to pay sales taxes. However, though its bindingness is conditional upon the making of a sales contract, such an obligation is not grounded in the contract as, we may assume, the seller's obligation to deliver the goods or the buyer's obligation to pay the price are. The tax obligation, we may say, *modally depends* on the existence of the parties' sale agreement (i.e., the agreement is necessary for the tax obligation to become binding on the buyer and seller), yet it is not grounded in it, namely it is not an immediate deontic effect of the juridical acts that constitute the parties' contract.[25]

[22] Some juridical acts are not completed once they *can* be apprehended by their addressee, but once they are *indeed apprehended* by their addressee. One may hold that offers belong to the latter class of acts.

[23] *See* Reinach, 'Foundations' (n 1) 66, using this formulation to characterize the notion of legal power. He holds that a legal power '[. . .] reveals itself in the fact that the action to which it refers, produces an immediate effect in the world of right [. . .]'. Perhaps we could say that legal powers in Reinach's sense are abilities to perform a subclass of social acts, namely juridical acts.

[24] 'The Power in the Law' (n 18). For a helpful recent survey on the relationship between grounding and explanation, see Alexander Skiles and Kelly Trogdon, 'Should Explanation Be a Guide to Ground?' (2021) 178 Philosophical Studies 4083.

[25] To be sure, the point is that the parties' tax obligation is not grounded in *the parties*' juridical acts even if its bindingness is conditional upon their contractual agreement. Yet of course, the parties' tax obligation is an immediate deontic effect of a juridical act of the legislature, that is, of the juridical act of *legislating*.

After these remarks on the nature of juridical acts in general, we are ready to turn to offers.

12.3.2 *What Is an 'Offer'?*

In broad, preliminary terms, we may characterize an offer as a juridical act in virtue of which a person (i.e., the offeror) creates or modifies a right, or assumes an obligation towards, another person whose assent is a condition for the bindingness of such right or obligation. The 'offeree' is the person to whom the offer is addressed and whose rights (in addition to the offeror's) will be bindingly changed if she gives her assent. The assent given by the offeree to an offer is her 'acceptance'.

As juridical acts, offers have all the basic properties of such acts: they are intentional public acts which have certain immediate deontic effects. What distinguishes offers from other juridical acts is the peculiar structure of the deontic effects they generate, namely the fact that they create rights whose bindingness is conditional upon the offeree's assent. Yet before focusing on offers' distinctive deontic effects, a remark on the (intentional and public) *acts* that may constitute the juridical act of an offer is needed.

It is, to an important extent, a task for social conventions and the positive law to specify the intentional public acts that may count as capable of producing certain immediate deontic effects, that is, the public acts whose intentional performance by a person constitutes a juridical act. And, of course, such conventional or legal act-specification admits a large range of possible acts counting, by virtue of law or convention, as constituents of juridical acts. Some may be tempted to maintain that contractual offers (and arguably other juridical acts too) are necessarily constituted by a special kind of public act: *speech acts*.[26] Yet this view should be rejected. It is certainly possible to make an offer by the offeror saying, using verbal or written words, to the offeree that she thereby grants the offeree a certain right under the condition that she assents. But even if we hold that we always have the power to make offers by using words, it is mistaken to hold that we can only make offers in this way. For instance, in many legal systems (silently) taking a good from a shop's shelf to the counter counts as an offer, that is, as an intentional public act whereby a person assumes an obligation to pay for the good under the condition that the seller accepts the deal and transfers possession over the good to the purchaser. It would be implausible to hold either that such acts cannot constitute offers, or to understand them as necessarily involving some kind of hidden speech act. Though there is certainly more to be said about the relationship between offers made through speech

[26] For an analysis of offer and acceptance along these lines see e.g., Peter Meijes Tiersma, 'The Language of Offer and Acceptance: Speech Acts and the Question of Intent' (1968) 74 California Law Review 189. *See* also Robert A Samek, 'Performative Utterances and the Concept of a Contract' (1965) 43 Australasian Journal of Philosophy 196.

acts and through other acts,[27] what distinguishes offers from other juridical acts is primarily the structure of the deontic effects that offers generate. It is this aspect of offers that will occupy us in what follows.

As mentioned before, an offer produces a right (or obligation, etc.) whose binding force is conditional upon its addressee's (the offeree's) assent. This broad formulation of the concept of an offer, however, comprises different possible kinds of offer. We may at least distinguish offers by the specific *type of deontic entity they generate* and by the *mode of acceptance* they require. Let's consider the first distinction.

By making an offer, a person may be aiming at (and succeed in) creating different types of conditional rights. For instance, A may offer to B a property right over an object that he owns, O. In this case, we may understand A as creating in B an *in rem* entitlement or right over O, only in case B assents to the acquisition of such right.[28] Other offers do not purport to modify our property or *in rem* relations but only our *in personam* or *obligational* relations. For instance, A may assume an obligation to perform an act under the condition that B assents. In this case, A creates a claim-right or *in personam right* in B that A performs said act, whose bindingness is conditional upon B's assent. Furthermore, offers can create other types of deontic entities. For instance, A may create in B a *power* (e.g., a power to act on A's behalf or 'power of attorney'), whose bindingness is conditional upon B assenting to the acquisition of such power. Many contemporary legal cultures operate under the idea that contracts only involve a modification in the parties' obligations or *in personam* rights, and thus assume that only obligational or *in personam* offers are distinctively contractual in kind.[29] I think this view is mistaken. Contracts often modify *in rem* rights, powers, and other deontic incidents that cannot be reduced to obligations or *in personam* rights. A conceptual framework for analyzing contracts that confines contracts to the purely obligational domain overlooks the richness of the landscape of possible contractual agreements.

There is, however, a narrower conception of contractual offers that deserves careful scrutiny. According to this view, contractual offers necessarily create one distinctive type of deontic entity in the offeree, namely the *legal power of acceptance*. The identification of this view of what it is to make an offer leads us to a second form of classifying offers and, as we will see, to two possible ways of understanding the role of acceptance in contract formation.

[27] For instance, we should remain open to the idea that some juridical acts are less sensitive to conventional or legal act-specification mechanisms, and perhaps there is a more fundamental connection between these juridical acts and speech acts.

[28] *In rem* rights are, using Reinach's terminology, a type of 'absolute right'. They are rights of persons over things. See Reinach, 'Foundations' (n 1) 12–14, 52–53. For a persuasive defense of the notion of absolute rights *see* Olivier Massin's contribution, Chapter 8 in this volume, 'The Ontology of Liberties: Reconciling Reinach and Hohfeld'.

[29] Though just in passing, a broader sense of offer (i.e., one that it is not exclusively obligational in kind) is acknowledged by Arthur L Corbin, 'Offer and Acceptance, and Some of the Resulting Legal Relations' (1917) 26 The Yale Law Journal 169, 171.

12.3.3 *What Is an 'Acceptance'?*

I have so far characterized offers as juridical acts whereby persons create rights whose bindingness is conditional upon the offeree's assent. I will call this way of understanding offers the 'mutual assent' conception of an offer. Contrast now this conception of an offer with what we may call a 'power-conferring' conception of offers. According to the power-conferring conception, for A to make a contractual offer to B it is not sufficient that she merely creates a right or obligation in or towards B whose bindingness is conditional upon B's assent. This view holds that offers must grant the offeree a *legal power to accept* A's offer, that is, the ability to bind the offeror to the terms of her offer by the offeree performing a special kind of *juridical act*.[30] The performance of such juridical act is what constitutes the offeree's acceptance. There are several important differences between these two conceptions of contractual offers.

According to the power-conferring conception, an offer must create in the offeree a legal power to bind the parties to the terms of the offer. A legal power, as I shall understand it here, is the ability to perform a juridical act, namely, as we saw, a public (intentional) act which has certain immediate deontic effects.[31] An offer is thus a juridical act that confers on its addressee, the offeree, the power to perform another juridical act, namely the act of accepting an offer. By contrast, it is not necessarily a juridical act, but an act of what we may call 'mere assent', that is sufficient to constitute an acceptance for the mutual assent conception of an offer.[32] Again, according to this conception, to make an offer is simply to create a right in the offeree whose bindingness is conditional upon the offeree's mere assent, assent which may well be a purely mental act. Of course, this view, which entails that one may in principle accept an offer *in foro interno*, is compatible with the fact that offerors may qualify their offer and make part of the offer's terms that the offeree's assent must be, even if not constituted by public acts, *manifested* or *expressed through* specifically defined public means (e.g., by sending a letter to the offeror, by signing a document, etc.). Furthermore, the mutual assent conception of offers is compatible with the view that holds that the positive law should use objective standards to *ascertain* or *discover* the parties' assents, and thus that, from the point of view of the positive law, the offeree accepts an offer when it is reasonable for an external observer to believe that she has done so. Yet as a conceptual matter, the mutual assent conception states that, whilst offers in themselves are juridical acts,

[30] Seemingly adopting this conception see Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press 1964) 56 and Corbin, 'Offer and Acceptance, and Some of the Resulting Legal Relations' (n 29) 171.

[31] Reinach, 'Foundations' (n 1) 66. See also n 23.

[32] Making a similar distinction regarding the notion of acceptance, see ibid 28–33. See also n 42.

acceptances need not be so and thus they may well be made of the offeree's purely internal or private assent.

Different sorts of considerations may militate in favor of the positive law adopting a set of rules about offer and acceptance that come closer to a mutual assent instead of a power-conferring conception, or vice versa, and it's not my aim to explore these considerations here. We must note, however, that the soundness of one of these conceptions or the other is intimately connected to our understanding of the nature of the Necessity of Agreement axiom, that is, to our views about the type of ontological dependence that holds between contractual rights and the parties' agreement. Let's see.

If we adopt what I called the modal-dependence version of NOA, rights and obligations are contractual in kind insofar as their binding force is conditional upon the parties' assent. Assuming this way of understanding NOA, I have proposed that it is sufficient to form a contractual agreement that there is what I called a contract-enabling norm, that is, a norm which creates a certain deontic effect whose bindingness is conditional upon the parties' (mere) mutual assents. We saw that offers, if we adopt the mutual assent conception, are a way of creating contract-enabling norms. By contrast, if we adopt what I called the ground-dependence view of NOA, contractual rights and obligations are those that necessarily obtain in virtue of the parties' agreement. Therefore, if we follow this version of NOA, contractual rights and obligations must be necessarily *grounded in*, and not merely conditional upon, *both* parties' assents. Hence such 'assents' must be constituted by *juridical acts* and not by what I referred to as mere assents; and, accordingly, the only type of legal norm that can make possible the creation of contractual agreements are precisely norms that confer or regulate legal powers; legal powers to contract either created by offers, or created or recognized by other kinds of legal source (e.g., legislation). By contrast, if we adopt the modal-dependence view of NOA, *both* offers that constitute mere contract-enabling norms and those that confer the legal power of acceptance are capable of creating a contract if acceptance follows.

I believe the modal-dependence view of NOA provides a better theoretical model for analyzing contract formation than the ground-dependence view. Whilst committed to the necessity of mutual assent for contract formation, it gives us a more malleable way of conceiving the relationship between contractual rights and obligations and different sources of law, and between different types of juridical acts (offers qua power-conferring or qua contract-enabling) and the formation of contractual agreements. This more nuanced and flexible understanding of the relationship between contractual agreements and different legal sources and juridical acts may be needed to make sense of the complexities of the modern social practice of contract. My aim here, however, is not to offer a defense of this claim (for this obviously requires separate, careful treatment), but to reveal different possible ways of thinking about the connection between the nature of contractual agreements and

the rich array of notions that comprise the structure of contract formation. Let's now finalize by discussing another important notion in contract formation.

12.4 PROMISES AND CONTRACT FORMATION

There are of course many ways of modelling the act of making a promise. Yet maintaining the theoretical framework used so far, we may define promising as a juridical act whereby a person (the promisor) assumes an obligation to act or refrain from acting in a given way towards another person (the promisee), who in turn acquires a claim-right to performance, namely an *in personam* right to performance directed towards the promisor. A great deal of contemporary contract theory, mostly in the Anglo-American context, is devoted to the examination of promising, assuming perhaps that the notion of a promise constitutes the most basic element contracts are made of.[33] Under this view, promising is necessary for contracting; one simply cannot enter into a contract without making or accepting a promise. There are, however, good reasons for rejecting this view.

From our previous discussion, we may quickly infer that there are at least two ways in which, under the proposed framework, we may form a contractual agreement without making a promise. First, promises' immediate deontic effects are exclusively *obligations* and their correlative *in personam* rights. Yet as we saw, and as I argue elsewhere in detail, some contracts only modify the parties' *in rem* or property rights: their immediate deontic effects are only *in rem* and not *in personam* in kind.[34] Thus, if there are contracts of this kind, they cannot be made of promises, for again all promises, even when they constitute contractual offers (as I discuss below), have only *in personam* effects as their immediate deontic effects. Thus, when made of the parties' juridical acts, *in rem* contracts must be made of juridical acts which have *in rem* effects, and again, promises cannot be such acts.[35] Second, we saw that if we adopt the modal-dependence version of NOA, the parties may enter into a contractual agreement without any of them performing any juridical act: they may enter into a contractual agreement by what I called contractual

[33] *See, e.g.*, Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981); Stephen A Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 Modern Law Review 360; Seana V Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708; Daniel Markovits and Alan Schwartz, 'The Myth of Efficient Breach: New Defenses of the Expectation Interest' (2011) 97 Virginia Law Review 1939.

[34] 'Contracting Without Promising' (n 3).

[35] Of course, other juridical acts (e.g., legislation) or other sources of norms such as customs may attach different deontic effects to our promises (e.g., in rem effects). The point is that deontic effects different from obligations and claim-rights cannot be *immediate* deontic effects of promises. I can promise to give you a property right over O, and thus assume an obligation and grant you a claim-right that I do so. But I cannot *give you property* over O (i.e., an *in rem* right over O) by *simply promising* to give you property over O. Again, such a property transfer must be grounded in another juridical act or norm.

subscription. If there is a contract-enabling norm created by legislation, judicial precedent, custom or by any other legal sources different from an offer (like we saw for the case of marriage and corporate directors' fiduciary duties), the assenting persons enter into a contractual agreement by giving what I called their *mere assents* (and, if applicable, by complying with the formalities established by the contract-enabling norm). If this is correct, contracting parties may enter into contractual agreements and assume contractual obligations and rights without any of them performing any juridical act, either a promise or of another kind. Yet even if not necessary for contracting, is the making of a promise ever *sufficient* for contracting?

When formulating this question, we are of course not concerned with whether according to the positive law a promise is sufficient for contracting, because it is well known that in many legal systems the law adds other conditions than promising for contract formation (e.g., consideration, certain formalities, etc.); and furthermore in other legal systems, mostly in the civilian tradition, the notion of a promise is largely absent in the law of contract formation. Our question is theoretical in kind. We are asking whether the juridical act of a promise creates obligations and rights in the form required by NOA, namely whether promissory obligations and rights' bindingness depends upon the promisor *and* promisee' assents. The answer to this question, however, depends on our views about the nature of promising. Since at least the seventeenth century, the question of whether a promise requires acceptance or uptake by the promisee in order to bind has received significant attention. Some theorists have argued that promises are binding only insofar as the promisee assents to the bindingness of the obligation and right proposed by the promisor's promise. According to this view, promises are essentially a kind of offer, a juridical act whereby the promisor (the offeror) creates in the promisee (the offeree) an obligation and correlative claim-right only if the promisee assents to the bindingness of such obligation and right. By contrast, others hold that promises are not offers, their bindingness is not conditional upon the promisee's assent. According to this view, promises bind *unilaterally*, that is, without the promisee's assent mediating, even if the promisee may, once the promise is formed, waive his right to performance thereby terminating the promisor's obligation.[36]

These opposing views are still well represented in contemporary work on the philosophy of promising. Joseph Raz, for instance, argues that it is a mistake to claim that someone has accepted a promise if, upon receiving it, she simply remains 'stone-faced, saying nothing and not moving a muscle'. It is clear to Raz that there is no acceptance in this case and yet the promise binds the promisor once made, even if the promisee may immediately waive her claim-right to performance.

[36] On the history of the problem of the necessity of the promisee's acceptance see Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca.1500–1650)* (Martinus Nijhoff 2013) 187–92; and TB Smith, 'Pollicitatio – Promise and Offer' (1958) *Acta Juridica* 141.

He concludes then that there is no reason to hold that promises need to be accepted in order to bind.[37] The opposite conclusion is reached by Charles Fried, who invokes the example of a group of people who, without any request by Fried mediating, send him a letter promising they won't have more than two children. This promise, according to Fried, is not binding, and the reason is that promisees must have the capacity to decide whether to acquire a right to performance against promisors. Therefore, according to Fried, promisees must always accept the promises made to them for such promises to create any binding obligations or rights.[38] I believe both Raz and Fried's views capture important elements of the phenomenology of promise-making. We need a theory of the nature of promising that can make sense of cases in which promises appear to bind even if there is no acceptance by the promisee mediating *and* cases in which promises appear to bind only if the promisee gives her acceptance. In this respect, Reinach's account of promising proves helpful.

According to Reinach, a promise is a kind of social act. Therefore, as we saw, as a social act the act of promising must necessarily have an addressee (the promisee); and such act is completed once the promisee can apprehend the promise in her experience. As he puts it, the promisee '[. . .] *must take cognizance of the act of promising itself*, he must, as we would put it somewhat more exactly, *consciously take in the promising*'.[39] Moreover, as we saw, promises have certain immediate deontic effects. According to Reinach, such effects are an obligation to act as promised, and a correlative claim-right to performance (a claim-right which, once created by the promise, can of course be waived by the promisee).[40] Yet Reinach's account of the nature of promising suggests that the promisee's acceptance is not required for promises to produce their immediate deontic effects. A promise creates an obligation and claim-right once the promisee apprehends it in her experience, that is, once she knows of the promise and its central elements (i.e., the identity of the promisor, and the content of the obligation and claim-right created by it). Thus, if the promisee cannot apprehend these elements about a promise made to her, she

[37] Joseph Raz, 'Is There a Reason to Keep a Promise?' in Gregory Klass et al (eds) *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 72. Holding a similar position *see* James Penner, 'Voluntary Obligations and the Scope of the Law of Contracts' (1996) 2 Legal Theory 325, 328–29; and Seana V Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117 Philosophical Review 481, 491.

[38] Fried, *Contract as Promise* (n 33) 43 ff.; also maintaining this view *see* David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012) 223–26.

[39] Reinach, 'Foundations' (n 1) 28 (emphasis added). See also ibid, Reinach's technical sense of 'hearing' a promise: '[i]f the promise is simply heard *(vernomen)* there arises a claim in the one who hears and an obligation in the promisor'. I believe Reinach's sense of 'hearing' means simply to *(consciously) apprehend by perception*. And of course, in this broader sense the promisee may 'hear' the promisor's promise without hearing the sounds of the words 'I promise' or indeed any other sound if, for instance, the promise is made silently, e.g., exclusively in writing.

[40] ibid 31–32.

cannot acquire any promissory right against the promisor. Therefore, according to Reinach's account, if the promise in Raz's example was appropriately apprehended by the promisee, the promisor is obliged. The same applies to Fried's example. The promise will indeed be binding if the promisors (i.e., the group of people who sent him the letter) know the identity of the promisee (i.e., Fried) and the promisee knows the identity of the promisors, and the content of the obligation and claim-right created by the promise. Reinach's theory, however, can accommodate cases in which promises bind only insofar as accepted by the promisee.

Reinach acknowledges that some promises are made under the condition that the promisee accepts the promise.[41] Promisors have the power to render their promise into what we may call a 'promissory offer'. Here again one may identify a power-conferring conception of promissory offers, that is, one which holds that promissory offers are juridical acts that besides creating a conditional obligation and claim-right to performance, confer a legal power to accept on the promisee, and thus that become unconditionally binding only if the promisee performs the juridical act of acceptance. Yet, as we did before, one may instead adopt a mutual assent conception of a promissory offer, according to which a promissory offer is a juridical act whereby a person (the promisor/offeror) only creates an obligation to perform and a correlative claim-right in another person (the promisee/offeree) whose bindingness is conditional upon the promisee giving her (mere) assent.[42] Promissory offers have in common with what I will call 'basic promises' the type of deontic effect they purport to ultimately generate, namely a fully fledged obligation in the promisor and correlative claim-right to performance in the promisee. Yet they are still offers, for the obligations and claim-rights they create bind only if their addressees assent to their bindingness. Thus, according to Reinach, among the different juridical acts that persons may choose to perform, they can make basic promises, which as we saw bind once apprehended by the promisee, and promissory offers, which bind once apprehended *and* accepted by the promisee. Furthermore, there is another important difference between basic promises and promissory offers.

As we saw, it is in the nature of promises to create a claim-right to performance in the promisee. The fact that promises create claim-rights to performance means that the promisee acquires a form of *personal authority* or *exclusive deontic control* over the promisor in the matter of the promise: it is exclusively up to the promisee to demand performance or to release the promisor from his obligation by waiving her promissory right. Among other things, the relationship of exclusive deontic control that promises generate entails that promisors do not have the unilateral power *to revoke their promise*, for again, if promises grant the promisee entitlements to

[41] ibid 29.

[42] Reinach makes an equivalent move by distinguishing acceptance as a social act and acceptance as an act of 'inner assent' by the promisee, inner assent which may well be expressed or communicated by the promisee to the promisor, but that, even when expressed, it does not amount to the social act of acceptance. See ibid 29–30.

exclusive deontic control over the promisor in the matter of the promise (i.e., a claim-right to performance), only the promisee and not the promisor can have the power to release the promisor.[43] To be sure, by mutual agreement, the parties to a relationship of obligation can entitle *both* the obligee and the obligor with the power to revoke such relationship.[44] Yet this type of deontic relationship differs from that created by promises which, as I have characterized them here at least, necessarily amount to relationships of right or exclusive deontic control by the promisee over the promisor in the matter of the promise.[45] The essential irrevocability (by the promisor) of promissory relationships helps us to further distinguish basic promises from promissory offers. Unlike a basic promise, there is nothing in the concept of a validly made promissory offer that prevents it from being revoked by the promisor before accepted by the promisee. This is because offers, once apprehended by the offeree, do not constitute binding relationships of right (i.e., of exclusive deontic control) until accepted. Yet once accepted, a promissory offer produces a relationship of exclusive deontic control and therefore the promisor lacks the ability to revoke the promise (unless, as we said, the promisee has agreed to the promisor having such capacity and in such case their relationship is not a promissory deontic relationship any longer but one of a different kind).[46]

Let's now conclude by analyzing the consequences of this way of understanding the nature of promises for the problem of contract formation.

12.4.1 *Promises and the Necessity of Agreement*

If we remain committed to NOA, promises in their basic form are not in themselves sufficient to initiate the process of contract formation, since basic promises produce obligations which are not conditional upon both involved parties' assents. Thus only promises that constitute promissory offers can count among the facts that can get contract formation started.[47] A theory of contract that purports to give promises an essential role in the process of contract formation must thus either propose an

[43] Of course, other cancelling factors besides the promisee's release (e.g., the promisee's death) may liberate the promisor of her promissory obligation, but she cannot have a power to liberate herself by sheer fiat or choice.

[44] *See* Reinach, 'Foundations' (n 1) 33–34.

[45] I explore our power of self-release and its bearing on the idea of obligation in 'Promises, Commitments, and the Nature of Obligation' (2023) 25 Journal of Ethics and Social Philosophy 59.

[46] To be sure, this claim about the inherently revocable nature of promissory offers is compatible with the fact that the offeror may indeed render his promissory offer 'irrevocable' by making a (basic) promise not to revoke his promissory offer. Here, the offer *becomes* irrevocable, but only because the offeror has performed an *additional* (irrevocable) juridical act (i.e., a basic promise not to revoke his offer) which purports to alter the revocable nature of his offer.

[47] Basic promises, like many other facts, can *causally* contribute to the formation of a contract (e.g., your basic promise to marry someone, may motivationally contribute to you and that person afterwards entering into a marriage contract). Yet this kind of contribution is not

alternative conception of promising whereby promises bind only insofar as the promisee gives her assent,[48] or simply abandon NOA and endorse the view that at least some contracts may bind unilaterally.[49] To be sure, the idea that basic, unilaterally binding promises do not constitute the foundations of contractual liability is of course compatible with holding that the positive law may consider them as capable of generating a *sui generis* or a merely legal, noncontractual form of liability. Indeed, this seems to be the case in the legal systems in which unilateral promises' binding force is legally recognized.[50] At this stage, however, one may wonder why we should remain committed to NOA. Is there any reason we should maintain that only those rights whose bindingness depends on both parties' assents should be deemed contractual in nature? In this chapter, my aim has been to map out some of the relevant notions that make up the conceptual landscape of contract formation if we assume NOA to be true. A defense of NOA, however, should amount to explaining the *normative* point, function or value of the fact that contractual rights and obligations can only be a product of both parties' assents. It therefore entails getting into the terrain of the moral or normative foundations of contract, and I, of course, cannot embark on such an enterprise here. Let me finish, however, by outlining a thesis regarding where the justification of NOA may lie.

One may defend the soundness of NOA by invoking a view regarding the justification of the *enforceability* of contracts. According to this view, both basic

juridical in kind, that is, it doesn't even partially constitute the grounds in virtue of which contractual rights may obtain. Basic promises, as such, are never contract-enabling norms.

[48] See n 38.

[49] Arguing for this alternative, *see* Peter M Tiersma, 'Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise' (1992) 26 U.C. Davis Law Review 1, 24–41. Following Tiersma on this point see Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 183–84.

[50] For a helpful general overview see Martin Hogg, 'Promise: The Neglected Obligation in European Private Law' (2010) 59 International & Comparative Law Quarterly 461. A clear illustration of the role of unilateral promises as a source of legal and not contractual liability is provided by the Italian *Codice Civile*, which contains a title (IV) on unilateral promises, and states that 'a unilateral promise to a performance *only* produces obligatory effects in the cases *stated by the law*'. Art. 1987 (emphasis added). Articles 1988–89 enumerate these cases, which include a unilateral promise made in recognition of a previous debt and, in certain circumstances, a promise made to the public (e.g., a reward promise). Some cases of so-called promissory estoppel may fall into the category of noncontractual, legally imposed liability too. However, in the paradigmatic case of promissory estoppel, although there is no consideration, the promisee has accepted the promise, for it is plausible to hold that otherwise she wouldn't rely on it. Perhaps a more accurate example in American contract law is the case of irrevocable or firm offers. An irrevocable offer is one made together with the offeror's basic promise not to revoke the offer (*see* note 46). In this case, the law appears to dictate the legal enforceability of such promises (i.e., to legally bind the offeror to keep his offer open) under a special regime, for it enforces these promises only if they comply with certain legal formalities that are typically not required for contracts (e.g., being in writing). *See* Uniform Commercial Code, art. 2. § 205. In other words, in this case an offeror is *legally obliged* to maintain his offer open, yet the offer becomes *a binding contract*, and he incurs distinctively contractual obligations, only once the offeree accepts the offer.

promises and contractual agreements entail the parties immediately affecting (i.e., creating, modifying, terminating) their rights by choice or fiat. However, the view goes, there is a basic principle in the morality of rights which holds that one cannot, by sheer unilateral choice, change the basic principles that determine the *permissible use of force*, that is, produce a change in our *enforceable rights*. According to this principle, whilst I can unilaterally make it the case that I simply owe it to you, by making a basic promise, to give you $10, I cannot without your assent mediating grant you a claim *to enforce such right* against me – namely a claim that entitles you to exercise necessary and proportionate force (either directly or through institutional mechanisms) to extract performance or compensation upon my breach.[51] If this moral principle is sound, contractual agreements but not unilateral juridical acts can create enforceable rights. Of course, a just legislature can also create enforceable rights and thus *render* a unilateral promise, which is in principle unenforceable, legally enforceable.[52] Yet individuals, under this view, without the backing of such an additional collective juridical act (i.e., legislation) cannot create enforceable entitlements unless all the parties involved (i.e., obligors and right-holders) have assented to the creation of such entitlements. Thus, if it is in the nature of enforceable legal rights that they cannot be unilaterally created *and* validly made contracts create not merely binding but enforceable rights, then NOA must be sound.

BIBLIOGRAPHY

Bray et al (eds). *Interstitial Private Law* (Oxford University Press 2024)

Burrows A, *A Restatement of the English Law of Contracts* (Oxford University Press 2016)

Chirelstein M, *Concepts and Case Analysis in the Law of Contracts* (7th edn, Foundation Press 2013)

Corbin A, 'Offer and Acceptance, and Some of the Resulting Legal Relations' (1917) 26 The Yale Law Journal 169

Decock W, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca.1500–1650)* (Martinus Nijhoff 2013)

Farnsworth A. 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 Columbia Law Review 217, 219

Fried C, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981)

Gold, A. and P Miller (eds). *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014)

Guzmán Brito A. 'Para la historia de la formación de la Teoría General del Acto o Negocio Jurídico y del Contrato, IV: Los orígenes históricos de la noción general de Acto o Negocio Jurídico' (2004) 26 *Estudios Histórico-Jurídicos* 187

[51] The reader will identify the Kantian ring of this idea, yet of course a defense of it need not be committed to the Kantian theoretical apparatus. See Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1996) 6: 231, 261, 263, 271, 274.

[52] See n 50.

Hogg M, 'Promise: The Neglected Obligation in European Private Law' (2010) 59 International & Comparative Law Quarterly 461
Hohfeld W, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press 1964)
Kant I, *The Metaphysics of Morals* (Cambridge University Press 1996)
Klass et al (eds). *Philosophical Foundations of Contract Law* (Oxford University Press 2014)
Markovits D and A Schwartz 'The Myth of Efficient Breach: New Defenses of the Expectation Interest' (2011) 97 Virginia Law Review 1939
Miller P, 'The Fiduciary Relationship' in A Gold and P Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 74
'The Concept of Personality in Private Law' in SL Bray et al (eds) *Interstitial Private Law* (Oxford University Press 2024)
Molina C, 'Promises, Commitments, and the Nature of Obligation' (2023) 25 Journal of Ethics and Social Philosophy 59
'Contracting Without Promising' (2025) 75 *University of Toronto Law Journal* 203
'The Power in the Law' (MS)
Owens D, *Shaping the Normative Landscape* (Oxford University Press 2012)
Penner J, 'Voluntary Obligations and the Scope of the Law of Contracts' (1996) 2 Legal Theory 325
Reinach A, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1–142, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847
Samek R, 'Performative Utterances and the Concept of a Contract' (1965) 43 Australasian Journal of Philosophy 196
Shiffrin S, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708
'Promising, Intimate Relationships, and Conventionalism' (2008) 117 *Philosophical Review* 481
Skiles and K, Trogdon 'Should Explanation Be a Guide to Ground?' (2021) 178 Philosophical Studies 4083
Smith S. 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 Modern Law Review 360
Contract Theory (Oxford University Press 2004)
Smith TB 'Pollicitatio – Promise and Offer' (1958) Acta Juridica 141
Tiersma, PM 'The Language of Offer and Acceptance: Speech Acts and the Question of Intent' (1968) 74 California Law Review 189
'Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise' (1992) 26 U.C. Davis Law Review 1
Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996)