

Part I

Clearing the ground

The thesis of this book is that the core task of the law of contract is to support commercial transactions, and that the best way to do this is through a clear and minimal set of hard-edged rules. In later chapters, we will defend both this goal and the means of achieving it. First we must consider a more fundamental critique. Many scholars contend that contract law is to be justified by its inherent moral value, as an end in itself. In short, it should be approached non-instrumentally. If correct, this argument would peremptorily rule out our thesis. It is accordingly necessary to engage the non-instrumental school of contract theory, to clear the ground for the main argument of the book.

Should contract law be understood *instrumentally*, as a means to an end (e.g. economic efficiency, or European integration), or *non-instrumentally*, as an end in itself (perhaps as a self-evident aspect of moral goodness, or some Platonic form of justice)? Few contract lawyers would contest the proposition that a contract creates positive legal ‘rights’ (claim-rights in a true, Hohfeldian sense). But this hardly exhausts the controversy. What *justifies* the legal recognition of such rights (and correlative duties)? The first question for any contract theorist – indeed any contract lawyer – should be the choice between these two ways of thinking.

Part I rejects the non-instrumental approach. The methodology is ‘interpretive’. Chapter 1 examines the ‘fit’ of the instrumental and non-instrumental approaches with extant English contract law. Chapter 2 inquires which provides the better ‘justification’ for it. We aim to show that an instrumental vision better fits the existing legal rules (and underlying attitudes) and that the justification for a moral-promissory law of contract is unpersuasive.

We are not hunting paper tigers. The dominant tradition of English contract scholarship might appear black-letter – notoriously so – and accordingly atheoretical.¹ But in recent years, the courts have proved receptive to moral-promissory approaches that have borne fruit of questionable taste, in a growing crop of ‘performance oriented’ remedies for breach of contract.² The

¹ Potentially multi-theoretical: cf. Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press, 2011).

² Cf. pp. 15–16 and 250–2 below.

best-known theoretical defence of the promissory approach remains Fried's *Contract as Promise*,³ with powerful reinforcement from Smith's *Contract Theory*.⁴ The renewed interest in non-instrumental theories of contract reflects moves throughout private law. English tort law has seen a striking renaissance of rights-focused reasoning.⁵ Yet more influential are the wide-ranging theories of Weinrib and Birks.⁶ Weinrib's insistence on corrective justice and 'formalism' as the basis for an 'immanently rational' private law, and Birks's heroic project to impose conceptual taxonomy upon English private law, drive a powerful anti-instrumental intellectual current.⁷ Most portentous of all are the recent moves towards a pan-European contract law in the 'Draft Common Frame of Reference'. All these developments require to be discussed, meaning a lengthy preamble to prove what many will accept without further demonstration – that commercial contract law's purpose is to provide a suitable framework for commercial relations.

³ C. Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981).

⁴ S. A. Smith, *Contract Theory* (Oxford: Clarendon Press, 2004). See further Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press, 2011).

⁵ A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007); R. Stevens, *Torts and Rights* (Oxford University Press, 2007).

⁶ Cf. pp. 24–36 below.

⁷ Cf. further J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2005).

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Does instrumentalism ‘fit’ contract law?

The first and most obvious task in clearing the ground for the minimalist thesis is to show that an instrumental approach fits the existing rules of contract law. For an account of any legal institution to count as a valid interpretation, it is necessary to achieve a degree of descriptive accuracy. We will argue that treating contract law as a tool of social policy, as opposed to an instantiation of the morality of promise-keeping, describes it more accurately. This is true both at the general level (the characteristic attitude of contract lawyers, especially judges developing the common law) and in the detailed rules.

In particular, this chapter will address three distinctive phenomena of the English law of contract: the strictness of liability; the position of corporations; and remedies for breach of contract. The first two questions have been little discussed, which is itself of significance. In areas of law that are (fairly universally acknowledged to be) concerned with the moral status of agents and their actions, liability varies sharply with the degree of fault of the defendant. *Strict liability* is seen by tort and criminal lawyers to require careful justification.¹ The role of fault is prominent in the definition of different crimes and torts, for the extent of tortious liability, and in criminal sentencing. Yet contractual liability is usually very strict – virtually absolute² – drawing no major distinctions between unavoidable, careless and deliberate breach. Moreover, this seems uncontroversial. These are uncomfortable truths for the moral-promissory school, in which deliberate promise-breaking attracts greater condemnation.

Similarly, the legal fiction of *corporate personality* proves troubling in areas (predominantly the criminal law) where culpable states of mind are taken seriously. Hence the difficulty of prosecuting corporate manslaughter at common law, and the need for a new statutory offence tailored to the

¹ Cf. *Sweet v. Parsley* [1970] AC 132, 148 (‘there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did’, Lord Reid).

² Cf. D. J. Ibbetson, ‘Absolute liability in contract: The antecedents of *Paradine v. Jane*’ in F. D. Rose (ed.), *Consensus Ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (London: Sweet & Maxwell, 1996).

artificiality of attributing *mens rea* to a non-natural ‘legal person’.³ Yet contract lawyers experience no difficulty in holding corporations to be principal bearers of contractual duties. If making a contract is *really* a matter of promising, gaining some or all of its force from a moral obligation to keep one’s promises, it is surprising that contract lawyers and theorists find corporate contracting so unproblematic, indeed unworthy of comment. An instrumental approach, being indifferent to the morality of promising, does not suffer this embarrassment.

If these first two areas are significant silences – dogs that didn’t bark in the night⁴ – the third (*contract remedies*) has suffered from the very opposite of neglect, namely, extensive scholarly (and judicial) attention. The avid interest dates back at least to Oliver Wendell Holmes’s provocative statement about the nature of contractual obligation, based on the remedies for breach of contract.⁵ For this reason, it is impossible to ignore the subject of remedies.⁶ To the extent that the Holmesian critique is valid, it is a firm rebuff to the ‘moral obligation’ school of contract law: as it was intended to be. But there are certainly counter-examples: some recent (the debates over the ‘performance interest’ and ‘restitutionary damages’), others dating from Holmes’s time (the tort of inducing breach of contract). It will be argued that the modern English law on remedies for breach of contract bears out Holmes and his ‘cynical acid’⁷ – but in a victory on points rather than a knockout.

Before turning to these three specific areas of the law – illuminating because of their distinctiveness – we consider the attitude of English contract lawyers more generally. It is necessary first to meet the challenge of Stephen Smith’s *Contract Theory* which provides a lucid guide to the competing theoretical approaches to the law of contract, concluding in favour of the moral-promissory school.

Characteristic attitudes and transparency: questioning S. A. Smith

Arguably Smith’s most significant contribution is a clear and explicit theory-of-theories: what is it that makes a good contract theory?⁸ It should be

³ Corporate Manslaughter and Corporate Homicide Act 2007.

⁴ Cf. Sir Arthur Conan Doyle, *Silver Blaze* (1937).

⁵ ‘Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract . . . The duty to keep a contract means a prediction that you must pay damages if you breach it – and nothing more . . . But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.’ O. W. Holmes, ‘The path of the law’ (1897) 10 *Harvard LR* 457, 462.

⁶ S. A. Smith, *Contract Theory* (Oxford: Clarendon Press, 2004), 115, focuses on remedies as the area that has received the most attention from efficiency theorists.

⁷ Cf. Holmes, ‘The path of the law’, n. 5 above: ‘[T]he vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.’

⁸ Smith, *Contract Theory*, n. 6 above, ch. 1.

coherent. It should fit the legal rules. These *desiderata* are surely uncontroversial. Smith also requires that the theory should have 'moral' appeal. This sounds like question-begging in the current context, but it is made clear that this is a very easy criterion to satisfy: the theory need not actually satisfy any preferred theory of morality so long as it shows a sense in which moral appeal could be claimed for it. So, utilitarian theories (of which this book may be an example) satisfy the morality requirement since, even if not ultimately convincing, they are still recognizable as moral principles.

More interestingly, Smith stresses the importance of accounting for the attitudes of lawyers and judges towards contract law, or the 'internal point of view'.⁹ Smith derives from this the criterion of 'transparency', which 'evaluates contract theories according to how well they account for what may be called the "legal" or "internal" explanation of contract law'.¹⁰ So, a theory which takes seriously the reasons given by judges and lawyers in arguing and deciding cases scores highly for transparency. A Legal Realist who maintains that these reasons are not the 'real reasons', or a feminist who complains that contract law is actually the product of male hegemony, would fail the transparency test. Such theories, argues Smith, may have a crucial role in evaluating the law, or in proposing reforms of it, but they are not *interpretations* of the law as it stands, since they fail to take the internal point of view seriously.¹¹ Thus, they are incomplete as theories of contract law.

Having exhaustively analyzed contract doctrine, Smith concludes that moral, promise-based theories are the best fit with the law as a whole, although he admits that the fit is not perfect.¹² However, that would be true of any conceivable rival theory, also. Moreover, he argues, while lack of fit is typically an objection only in certain areas of the law, for a theory to lack *transparency* is a more serious flaw, because it is a general failing, across the board.¹³ It is on the basis of transparency, then, that Smith condemns instrumental accounts of contract law.¹⁴ We reject the criticism. On the contrary, instrumental reasoning is thoroughly characteristic of English contract law. Therefore, the transparency criterion does not provide a reason to reject instrumental accounts of contract law outright for want of 'fit'.

Smith objects that judicial reasoning in contract cases, as elsewhere in the law, is concerned with individual rights and responsibilities, rather than economic efficiency: "To be sure, judges sometimes explicitly consider the effects that their rulings will have on commercial activities, social welfare, and contracting activity generally. But in the main this is not the way judges reason."¹⁵ And the difference is said to be a difference in kind, not a mere

⁹ Cf. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994), 77–99.

¹⁰ Smith, *Contract Theory*, n. 6 above, 24. ¹¹ *Ibid.*, 30–2.

¹² The absence of punitive remedies for breach of contract presents a particular 'puzzle' for such theories: *ibid.*, 156, 418–20.

¹³ *Ibid.*, 162. ¹⁴ Or, as Smith prefers, 'utilitarian' theories: *ibid.*, 132–6. ¹⁵ *Ibid.*, 133.

matter of degree. Damages are awarded not to provide incentives for potential contracting parties in the future, but to compensate a particular plaintiff for the harm that has been done to him by a particular defendant. Efficiency theories, on the other hand, would view the court's orders as signals, rather than 'remedies' in the true sense. Such a theory requires no necessary linkage between the parties: damages could be paid by defendants into a state fund, and plaintiffs compensated from the fund. Giving the right of action to the plaintiff is then a matter of 'administrative convenience' only; the equivalent of a public prosecutor, with incentives to enforce the law.¹⁶ Legal arguments, conversely, 'are essentially about individual rights and individual responsibilities'. Smith concludes: 'There is virtually no point of contact, then, between the legal explanation and the efficiency-based explanation.'¹⁷

These are serious charges. An economist might dismiss the transparency criterion altogether, concerning himself only with the rules and their effects and ignoring the reasons proffered by the courts – a wholly external perspective. But this book, at least, wishes to account for the internal understanding of the law, and to take seriously the reasoning of judges and lawyers.¹⁸ There are various responses to Smith's peremptory use of 'transparency' to reject instrumental approaches in favour of moral ones. The first is to emphasize the decidedly instrumental and pragmatic orientation characteristic of English judicial reasoning, in contract cases especially. It is not that judges 'sometimes' explicitly consider the effects of their rulings, as Smith puts it, but that they *consistently* do so. This claim will not be defended in detail, since it is submitted that any English contract lawyer would recognize the truth in it.¹⁹ Great judges have consistently kept the needs of commerce before them, from Atkin LJ's purge of equity from the Sale of Goods Act,²⁰ to Lord Wilberforce's overt manipulation of contract doctrine in *The Eurymedon*.²¹

Such characteristic instrumentalism should not come as a surprise. In deciding cases, common law judges are all too aware that as well as settling the dispute before them, they are creating a precedent which will govern future

¹⁶ *Ibid.*, 397 and 133, n. 36. ¹⁷ *Ibid.*, 33.

¹⁸ So if the present author is a Legal Realist he is a fairly soggy one.

¹⁹ For some older examples, cf. *Anon* (1467) YB M. 7 Edw. IV. f. 21 pl. 24: fears that widening duress defence would lead to 'the avoidance of all the obligations in England'; *Lumley v. Wagner* (1852) 1 De GM&G 604: specific performance has 'a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other'. See further S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003), ch. 10.

²⁰ *Re Wait* [1927] 1 Ch 606: 'I feel bound to repel the disastrous innovations which in my opinion the judgments under review would introduce into well settled commercial relations.' See also Robert Goff LJ in *The Scaptrade* [1983] 1 QB 529: a 'credo' of commercial law reasoning (F. M. B. Reynolds, 'Maritime and other influences on the common law' [2002] *LMCLQ* 182).

²¹ [1975] AC 154, 167: 'English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.' Cf. *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446.

litigation. The 'Janus faced' nature of adjudication means that the courts cannot do other than consider the effect of their decisions on the conduct of future parties. Waddams, for example, agrees that this is to some degree 'inevitable' and finds extensive historical evidence that courts have 'often taken account of social, economic and political considerations'.²² Waddams's extensive historical survey finds such 'policy' reasoning pervasive in the common law of contract, albeit (importantly) constrained by the need to be acceptable as 'principle' (i.e. in a form sufficiently stable to be applied by judges).²³ Waddams cogently argues that principle and policy have a complex relationship of mutual interdependence; the implied dichotomy between them is oversimplified.²⁴ It is not enough to conclude (as Smith seems to) that, because courts do not reason instrumentally in a direct fashion unmediated by law, instrumental concerns therefore have *no* influence. Legal reasoning is practical and instrumental, within the constraints of the law's historical categories, rules and principles.

The forward-facing or *ex ante* perspective stressed by, for example, economists²⁵ is then an intrinsic part of the common law. Moreover, *pace* Smith, the backward-facing aspect can be readily explained by instrumental accounts. Rules might, indeed, exist as incentives for economically efficient behaviour but the *application* of those rules to an individual dispute obviously requires the court to look back to the facts of the case.²⁶ If judges are mostly involved in this kind of reasoning, as Smith asserts, then that is no doubt because most cases involve the application of law to facts, rather than development of the law, when a forward-facing, consequence-examining stance must be (and is) taken.

The characteristic pragmatism of the common law is thrown into relief by a comparison with civilian contract law. An Anglo-French colloquium on contract remedies revealed evident Gallic distaste for the 'rather immoral' attitude of the 'commercially inspired' English lawyers, in their ready acceptance of breach-and-pay-damages (as opposed to compulsion of performance).²⁷ Smith's slightly desperate argument that the common law's terminology of 'promisor and promisee' is fraught with morality when compared with the typical civilian 'creditor and debtor' is, in fact then, precisely wrong.²⁸ English commercial lawyers are well aware of the difference in attitudes, and promote

²² Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press, 2011), 217.

²³ *Ibid.*, 223. ²⁴ *Ibid.*, xv.

²⁵ E.g. Frank H. Easterbrook, 'The Supreme Court: 1983 Term – Foreword, the Court and the economic system' (1984) 98 *Harvard LR* 4.

²⁶ Cf. Nathan Oman, 'Unity and pluralism in contract law' (Review of Smith, *Contract Theory*) (2005) 103 *Michigan LR* 1483, 1493–4.

²⁷ D. R. Harris and Denis Talon (eds.), *Contract Law Today: Anglo-French Comparisons* (Oxford: Clarendon Press, 1989), 298.

²⁸ Smith, *Contract Theory*, n. 6 above, 58, n. 11.

it – in the global ‘market for law’ the formalist English law of contract is believed to be particularly well suited to the resolution of commercial disputes.²⁹ It is anyway hard to see what ‘cultural values’ are in play in litigation between multinational corporations.³⁰

Following on from these rather general introductory remarks, identifying the good ‘fit’ between English contract law and instrumental attitudes, it will be argued that the relatively neglected questions of strict liability and corporate contracting are considerably easier for instrumental than for moral-promissory theories to explain – including the neglect itself. In the key battleground of contract remedies, the instrumental approach remains dominant although, a full century after Holmes’s famous ‘thought experiment’ of the Bad Man, moralism is now fighting a counter-attack.

Fault in the law of contract

Contractual liability is usually strict.³¹ Liability once established is not broadened by fault – even deliberate breach. Nobody minds. That such axioms are rarely questioned or barely discussed is problematic for the promissory theory.³² If breach of contract were a moral wrong one would expect liability to depend intimately upon the degree of culpability. But it clearly does not.³³ Kimel notes the ‘obvious feature’ that both liability and remedies are ‘largely insensitive to questions concerning fault on the part of the party in breach’.³⁴ Contract lawyers devote little attention to fault and the standard of liability, questions ‘with which tort lawyers are so familiar’.³⁵

Moreover, this strictness dovetails with another characteristic feature of the common law of contract (discussed below), that damages are the primary remedy for breach of contract whereas specific performance is theoretically the starting point in civilian systems.³⁶ Of course, culpability of breach has to be taken into account when courts routinely order parties to perform on pain of

²⁹ Cf. Chapter 9 below.

³⁰ Cf. E. McKendrick, ‘Traditional concepts and contemporary values’ 10 *European Review of Private Law* 95 (on *Bunge v. Tradax* [1981] 1 WLR 711). But cf. Catherine Mitchell, ‘Obligations in commercial contracts: A matter of law or interpretation?’ (2012) 65 *Current Legal Problems* 455.

³¹ Cf. *Rainieri v. Miles* [1981] AC 1050, 1086 (Lord Edmund-Davies).

³² Cf. now O. Ben Shahr and A. Porat (eds.), *Fault in American Contract Law* (Cambridge University Press, 2010).

³³ Cf. S. V. Shiffrin, ‘The divergence of contract and promise’ (2007) 120 *Harvard LR* 708, 710: ‘Contract law’s stance on the wrongfulness of promissory breach is equivocal at best, manifested most clearly by its general prohibition of punitive damages.’

³⁴ D. Kimel, ‘The morality of contract and moral culpability in breach’ (2010) 21 *King’s LJ* 213.

³⁵ G. H. Treitel, ‘Fault in the common law of contract’ in M. Bos and I. Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (Oxford: Clarendon Press, 1987), 185. There are, of course, exceptions to this rule (e.g. Sale and Supply of Goods Act 1982, s. 13).

³⁶ Cf. H. D. Lando and C. Rose, ‘On the enforcement of specific performance in civil law countries’ (2004) 24 *International Review of Law and Economics* 473; DCFR III – 3:302.

punishment.³⁷ But the common law gives the 'promisor' (according to Holmes) a free election to perform or pay damages³⁸ – providing therefore he pays, he has not really done anything wrong and fault does not come into it. The point may be clearer still (and psychologically more appealing) with liquidated damages, viewed as the price to be paid for not performing.³⁹ Strict liability and the election conferred by the damages remedy are of a piece.

The typical reaction of a promissory theorist when confronted with these (irrefragable) data is to call for contractual liability and remedies to be 'moralized' – radically reformed to reflect the culpability of the defendant through both the standard of liability and the remedies for breach once established. There are examples of this tendency in English contract scholarship.⁴⁰ It may be questioned whether such commentators satisfy the 'transparency' and 'fit' criteria to be good accounts – rather than external critiques – in accordance with Smith's methodological injunction.

Kimel's criticisms of that position do not depend on an outright objection to moral considerations, for he defends a particular kind of 'moral law of contract'.⁴¹ But he points out that using law to enforce moral obligations *per se* contravenes the tenet of classic liberal thought – the state should intervene only to prevent harm to others.⁴² Harm from breach of contract, as Kimel crucially points out, 'tends to be *entirely insensitive to fault*; its occurrence as well as magnitude doesn't usually correspond to the moral quality of the conduct that has brought it about'.⁴³ Thus, as contract remedies are justified only for redressing harm, but harm is insensitive to fault, *ergo* fault is irrelevant.

Kimel's argument based on Mill is a brilliant attempt to justify the strictness of liability in contract. But it runs into problems when we examine tortious liability. Of course, tort law is shot through with fault – but, *pace* Kimel's implied suggestion, not because intentional wrongs necessarily do more harm. Fraud has always been actionable whereas for many years negligent misstatements were not,⁴⁴ and fraud liability still remains more extensive.⁴⁵ Yet

³⁷ R. A. Posner, 'Let us never blame a contract breaker' in Ben-Shahar and Porat (eds.), *Fault in American Contract Law*, n. 32 above.

³⁸ Holmes, 'The path of the law', n. 5 above; D. Markovits and A. Schwartz, 'The myth of efficient breach: New defenses of the expectation interest' (2011) 97 *Virginia LR* 1939.

³⁹ T. Wilkinson-Ryan, 'Do liquidated damages encourage breach? A psychological experiment' (2010) 108 *Michigan LR* 633.

⁴⁰ Cf. N. J. McBride, 'A case for awarding punitive damages in response to deliberate breach of contract' (1995) *Anglo-American LR* 369; Ralph Cunnington, 'The border between compensation, restitution and punishment' (2006) 122 *LQR* 382.

⁴¹ Kimel, 'The morality of contract and moral culpability in breach', n. 34 above.

⁴² J. S. Mill, *On Liberty* (1859). Cf. pp. 22–4 below.

⁴³ Kimel, 'The morality of contract and moral culpability in breach', n. 34 above (emphasis added).

⁴⁴ *Le Lievre v. Gould* [1893] 1 QB 491; cf. *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465.

⁴⁵ Cf. *4 Eng Ltd v. Harper* [2008] EWHC 915 (Ch); *Parabola Investments v. Browallia Cal Ltd* [2010] EWCA Civ 486.

negligent mistakes can be every bit as damaging as deliberate deception. The loss caused depends on the severity of the error and its context, rather than the defendant's state of mind. Despite Mill's (and Kimel's) argument, it is clear that tort lawyers do condemn fraud *morally* (at least in part).⁴⁶

The contrast with the insouciant amoralism in contract is striking.⁴⁷ Contract lawyers robustly ignore the morality, or wrongfulness, of breach of contract. Promissory theorists do not generally consider the customary strictness of liability in contract, its fault-insensitivity. But it remains an important challenge. Kimel's Harm Principle argument – although initially appealing in its contractual setting – does not account for the fluctuating attention paid to fault, across the law of obligations, i.e. the *difference* between contract and tort. An instrumental approach to contract, on the other hand, suggests a number of plausible explanations for the fault-insensitivity of contract. An obvious point is that strict liability eliminates the factually difficult question of fault from the inquiry into whether there has been a breach of contract. This promotes the clarity, certainty and predictability to which English contract law characteristically aspires. Fuller-blooded is to defend the positive desirability of deliberate breach of contract in certain circumstances ('efficient breach').⁴⁸ Therefore, an instrumental defence is available for a prominent and characteristic feature of the law of contract which is, by contrast, a serious embarrassment for the moral-promissory school.

Corporations in contract law

Corporate contracting also undermines promissory theories of contract – i.e. those that justify the law of contract by the moral obligation to keep one's promises. Corporate defendants are omnipresent in contract litigation. Accordingly, some obvious (but difficult) questions arise: in what way can corporations meaningfully make promises, and does the moral obligation to keep one's promise apply to corporations? That such questions are rarely discussed strongly suggests that contract lawyers do not consider them important; this suggests in turn that the law of contract is not generally believed to rest upon any meaningfully moral foundations.

In the leading modern account of the rules whereby acts are attributed to corporations, Lord Hoffmann noted that the difficult areas are those in which 'the general rules by which liability for the acts of others can be attributed to natural persons' (e.g. agency or vicarious liability) do not apply.⁴⁹ This is 'generally true of rules of the criminal law'.⁵⁰ The question for promissory

⁴⁶ Cf. *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 280 (Lord Steyn).

⁴⁷ Cf. *Smith v. Hughes* (1871) LR 6 QB 597; *The Sine Nomine* [2002] 1 Lloyd's Rep 805, [9]–[10].

⁴⁸ Cf. pp. 44–50 below.

⁴⁹ *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500, 506.

⁵⁰ *Ibid.*, 507.