

*BALFOUR V BALFOUR* AND THE SEPARATION OF CONTRACT AND  
PROMISE

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1. INTRODUCTION

In recent times, the central question preoccupying contract theory has been the relationship between contract law and the moral practice of promising. It is now known as the ‘contract and promise’ debate, and it has led to a resurgence of interest in contract theory.<sup>1</sup> Few comment on this, but this debate has many echoes of the ‘Hart-Fuller’ debate on the relationship between law and morality.<sup>2</sup>

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<sup>1</sup> Reflected in this recent collection of essays in the field: G Klass, G Letsas and P Saprai (eds) *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014).

<sup>2</sup> It took place on the pages of the Harvard Law Review: HLA Hart ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 593; L Fuller ‘Positivism and Fidelity to Law - A Reply to Professor Hart’ (1958) 71 Harvard Law Review 630.

Interest in general jurisprudential questions such as those that concerned Herbert Hart and Lon Fuller has waned in recent decades.<sup>3</sup> Those questions have not gone away. They have resurfaced in other areas. So we have debates about whether contract law is based on promise,<sup>4</sup> tort on corrective justice,<sup>5</sup> unjust enrichment on property,<sup>6</sup> and so forth. What is the relationship between legal rules, doctrines and categories and moral theories and principles? The terrain may have shifted, but the battle between positivists and natural lawyers is the same.

In this paper, I want to focus on just one aspect of the contract and promise debate. It has to do with the intent to contract doctrine, which requires for a promise or agreement to be enforceable that the parties manifest an intention to create a legal relationship. That doctrine, somewhat surprisingly, has received relatively little attention in the contract theory literature.<sup>7</sup> It is puzzling because the existence of the doctrine has played a central role in the arguments of those who claim that contract is *not* based on promise.<sup>8</sup> Following Seana Shiffrin, I shall call these arguments ‘separatist’ or ‘divisionist’ in nature, and contrast them with the view she calls ‘reflective’, according to which contract law mirrors, or at least

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<sup>3</sup> There are complicated reasons for this, which I won’t speculate on here. Not least of them though must be that some of the leading players in this drama have now left the stage.

<sup>4</sup> S Shiffrin ‘The Divergence of Contract and Promise’ (2007) 120 *Harvard Law Review* 708; J Kraus ‘The Correspondence of Contract and Promise’ (2009) 109 *Columbia Law Review* 1603.

<sup>5</sup> E Weinrib *The Idea of Private Law* (Oxford: Oxford University Press, rev edn, 2012).

<sup>6</sup> C Webb *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford: Oxford University Press, 2016).

<sup>7</sup> Gregory Klass’s work is a notable exception, see his ‘Three Pictures of Contract: Duty, Power, and Compound Rule’ (2008) 83 *New York University Law Review* 1726, and ‘Intent to Contract’ (2009) 95 *Virginia Law Review* 1437.

<sup>8</sup> See for example: R Barnett ‘A Consent Theory of Contract’ (1986) 86 *Columbia Law Review* 269 at 304; R Barnett ‘Contract Is Not Promise; Contract is Consent’ in G Klass, G Letsas and P Saprai (eds), above n 1, p 42 at pp 48-50; D Kimel *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003) pp 136-142.

should mirror, the moral norms of promising.<sup>9</sup> For the divisionist, the aim of contract law is not to enforce promissory morality, but rather to achieve other ends or goals, such as promoting efficient exchange.<sup>10</sup>

The intent to contract doctrine is important for divisionists, because, they argue, it provides a portal between promise and contract. If contracts *are* promises, why have the portal? The doctrine suggests the existence of separate domains.

In what follows, I set out the doctrine and show how *Balfour v Balfour*, the case that brought intent to contract into existence, encouraged divisionist thinking, with, as feminists have shown, damaging consequences for women.<sup>11</sup> I shall explore the arguments of Dori Kimel, who has offered a particularly sophisticated defence of the role that intent to contract plays in separating contract from promise. I hope to show some of the weaknesses in his view. They rest, I believe, on a mistaken understanding of freedom, according to which the value of freedom resides in detachment.<sup>12</sup> Following Fuller, I will show that the exact opposite is true; freedom depends on *attachment* to others. With this view of freedom in

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<sup>9</sup> See Shiffrin (2007), above n 4, at 713, and S Shiffrin ‘Are Contracts Promises?’ in Andrei Marmor (ed) *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012) p 241 at pp 250-256. These views do not necessarily entail particular commitments about the nature of law. So, for example, a positivist could take a reflective approach by claiming that contract law *should* (not necessarily does) aim to mirror the norms of promissory morality. Likewise, a natural lawyer might take a divisionist approach, by arguing that although moral norms play a role in identifying contract law, they are not promissory in nature. Nevertheless, positivism tends to gravitate towards the divisionist position, and natural law towards the reflective.

<sup>10</sup> See Shiffrin (2007), above n 4, at 713.

<sup>11</sup> *Balfour v Balfour* [1919] 2 KB 571.

<sup>12</sup> Tangled up in the contract and promise debate are questions not only about the nature of law, but also debates about the proper limits of the state and the enforcement of morality. See Shiffrin (2007), above n 4, at 713; Barnett (2014), above n 8, p 47: ‘... by justifying contract as a species of enforcing purely moral commitments, it seems tantamount to enforcing virtue’.

place, it is possible to see how intent to contract might fit within a reflective view of the relationship between contract and promise. The doctrine does not separate contract from promise. Rather, it provides a unique way for us to involve ourselves with others *through* promise.

In the course of my critique of the divisionist view, I will make two central claims. First, *contra* the divisionist, the promise theory *can* accommodate the intent to contract doctrine. Second, that it does so in a way that avoids some of the operational pitfalls of the divisionist picture, in particular that the divisionist view supports an evidential presumption against the enforcement of promises made in the social or domestic context, particularly between spouses, which is unfair on women. In light of this, I argue that judges should embrace the reflective interpretation of the doctrine, and repudiate their use of the evidential presumption.

How the intent to contract doctrine is interpreted has other potentially far reaching doctrinal implications. So for example many argue that consideration is merely evidence of the existence of an intent to contract.<sup>13</sup> The view we take about intent to contract, might affect what we think about consideration. It goes beyond the scope of this paper to explore all of these ramifications; my aims are primarily theoretical. However, we should keep in mind that debates about intent

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<sup>13</sup> This view achieved considerable traction after the publication of Lon Fuller's paper 'Consideration and Form': (1941) 41 Columbia Law Review 799. There are good reasons though to doubt the link between consideration and intent to contract, in particular as Mindy Chen-Wishart has argued consideration is neither a necessary nor a sufficient condition for the existence of intent to contract: 'Consideration and Serious Intention' [2009] Singapore Journal of Legal Studies 434 at 441. Furthermore, I tend to agree with Chen-Wishart argument in the same paper that consideration has its own rationale in notions of reciprocity (at 450-455).

to contract go to the heart of debates about the nature and purpose of contract law and doctrine in general.

## 2. *BALFOUR V BALFOUR*

According to intent to contract, an agreement is not legally enforceable unless the parties intended for it to be legally binding. The test for intention is an objective one, ie, whether a reasonable person would conclude there was such an intention:

The court has to consider what the parties said and wrote in the light of all the surrounding circumstances, and then decide whether the true inference is that the ordinary man and woman, speaking or writing thus in such circumstances, would have intended to create a legally binding agreement.<sup>14</sup>

There is a rebuttable presumption in English law that there is no such intention in the case of social or domestic agreements between, for example, friends, parents and children, husbands and wives or co-habiting partners.<sup>15</sup> The opposite is presumed in commercial cases.<sup>16</sup>

The doctrine entered English law in the Court of Appeal decision in *Balfour v Balfour*, decided in 1919. The case concerned a married couple. They

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<sup>14</sup> *Jones v Padavatton* [1969] 2 All ER 616 at 621; Klass (2009), above n 7, at 1447-1448; J Beatson, A Burrows and J Cartwright *Anson's Law of Contract* (Oxford: Oxford University Press, 29th edn, 2010) p 71.

<sup>15</sup> *Balfour v Balfour* at 578-580; *Jones v Padavatton* at 620; *Gould v Gould* [1970] 1 QB 275 at 281; E Peel *The Law of Contract* (London: Sweet & Maxwell, 13<sup>th</sup> edn, 2011) pp 176-177.

<sup>16</sup> *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 at 288.

both lived in Ceylon where the husband worked as Director of Irrigation. In November 1915, the husband was granted a period of leave from his work, and the couple moved back home to England. The leave ended in August 1916, but due to a health condition the wife was unable to return to Ceylon with her husband. Before leaving for Ceylon, the husband promised his wife that he would pay her £30 per month maintenance until he returned. While away, he wrote to say that it would be better for them not to get back together. They divorced, and the wife obtained an alimony award. She also sought to enforce the husband's promise to provide maintenance.

Sargant J upheld the wife's claim, finding consideration for the husband's promise in the commitment implicitly given by the wife not to rely on his credit for necessities. However, a unanimous Court of Appeal reversed that judgment. Warrington LJ and Duke LJ did so mainly because they doubted that the wife gave consideration. Atkin LJ, on the other hand, invoked the intention to create legal relations doctrine to decide the case, a doctrine that up to that point could only be found in the textbooks.<sup>17</sup> He reasoned that it was routine for spouses to make arrangements such as the one in issue in the case, and that even with consideration such agreements should not be legally enforced 'because the parties did not intend that they should be attended by legal consequences'.<sup>18</sup> Atkin LJ did not, however, conduct a detailed investigation of the facts to ascertain whether

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<sup>17</sup> S Leake *The Elements of the Law of Contracts* (London: Stevens and Sons, 1<sup>st</sup> edn, 1867) p 9; F Pollock *Principles of Contract* (London: Stevens and Sons, 1<sup>st</sup> edn, 1876) p 2; W Anson *Principles of the English Law of Contract* (Oxford: Clarendon Press, 1<sup>st</sup> edn, 1879) p 14.

<sup>18</sup> *Balfour v Balfour* at 579.

such an intention was present.<sup>19</sup> Rather, he presumed there was no intention, because of the nature of the relationship between the parties:

Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.<sup>20</sup>

Although *Balfour* and many of the subsequent cases involved disputes between husbands and wives, the presumption, as I have mentioned, covers not only marital relations, but the domestic or social context more generally, including arrangements made between co-habitees, family members and friends.

As Salmon LJ made clear in the later case *Jones v Padavatton*, this is a factual, not legal, presumption: 'It derives from experience of life and human nature which shows that in such circumstances men and women usually do not

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<sup>19</sup> Klass (2009), above n 7, at 1491.

<sup>20</sup> *Balfour v Balfour* at 580.

intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection'.<sup>21</sup>

Whatever the exact status of Atkin LJ's presumption, and indeed this is an issue on which there has been some controversy,<sup>22</sup> its effect has been to reinforce the sense that contractual and personal relations, like Venice and Belmont, are different realms. I allude of course to Shakespeare's *The Merchant of Venice*, which brings out beautifully the contrast between the worlds of commerce and intimacy. Making the same analogy, Roberto Unger describes the difference:

In Venice people make contracts; in Belmont they exchange wedding rings. In Venice they are held together by combinations of interest, in Belmont by mutual affection. The wealth and power of Venice depend upon the willingness of its courts to hold men to their contracts. The charm of Belmont is to provide its inhabitants with a community in which contracts remain for the most part superfluous. Venice is tolerable because its citizens can flee occasionally to Belmont and appeal from Venetian justice to Belmontine mercy. But the very existence of Belmont presupposes

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<sup>21</sup> [1969] 2 All ER 616 at 621.

<sup>22</sup> Feminists for example have argued that the purpose of the presumption is not evidential, but reflects a policy choice by the courts to keep family life private. See M Freeman 'Contracting in the Haven: *Balfour v Balfour* Revisited' in R Halson (ed) *Exploring the Boundaries of Contract* (Farnham: Ashgate/Dartmouth, 1996) p 68 at p 70; M Keyes and K Burns 'Contract and the Family: Whither Intention' (2002) 26 Melbourne University Law Review 577 at 595: 'Reference to the intentions of the parties in order to determine the enforceability of an agreement, ... makes no sense as the parties are unlikely to have considered the question. Quite clearly, the requirement of intention is based on a judicial policy that contract is "unfamiliar and undesirable" in the family context' (citing S Hedley *Restitution: Its Division and Ordering* (London: Sweet and Maxwell, 2001) p 76). See similarly S Wheeler and J Shaw *Contract Law: Cases, Materials and Commentary* (Oxford: Oxford University Press, 1994) p 150.

the prosperity of Venice, from which the denizens of Belmont gain their livelihood.<sup>23</sup>

Though opposed, Venice and Belmont – commerce and intimacy - depend on each other. Commerce makes family life possible, and the family provides a refuge from the ‘heartless world’ of the market, where the pursuit of self-interest runs wild.<sup>24</sup> As Frances Olsen says: ‘The market is the area for work and the production of goods; the family is the arena for most forms of play and consumption’.<sup>25</sup> In *Balfour*, Atkin LJ endorsed this division of labour. The result was a vision of contract law that regulated trade, but largely stayed out of private and family life.<sup>26</sup>

### 3. THE FEMINIST CRITIQUE

The feminist critique of the *Balfour* doctrine has been trenchant. The problem is with the implications of the doctrine for women, who are still associated with roles at home and in family life; in contrast to men, who are identified with the market and the world of work.<sup>27</sup> In the past, privacy has been used to justify non-

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<sup>23</sup> R Unger ‘The Critical Legal Studies Movement’ (1983) 96 Harvard Law Review 561 at 622-623. For further reflections on the contrast drawn by the play and the implications for contract theory see A Brudner ‘Reconstructing Contracts’ (1993) 43 University of Toronto Law Journal 1.

<sup>24</sup> I rely here of course on Christopher Lasch’s famous metaphor. C Lasch *Haven in a Heartless World: The Family Besieged* (New York: Basic Books, 1977).

<sup>25</sup> F Olsen ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 Harvard Law Review 1497 at 1564.

<sup>26</sup> Unger, above n 23, at 623.

<sup>27</sup> Olsen, above n 25, at 1576; M Thornton ‘Intention to Contract: Public Act or Private Sentiment?’ in N Naffine, R Owens and J Williams (eds) *Intention in Law and Philosophy* (Aldershot: Ashgate, 2001) p 217; Keyes and Burns, above n 22, at 578.

interference by the state to remedy injustice in the domestic context. As Michael Freeman says: ‘The rhetoric of privacy has insulated the female world from the legal order and, in doing so, has sent an important ideological message to society. It devalues women by saying that they are not important enough to merit legal regulation’.<sup>28</sup>

This leaves women vulnerable to the exploitation and distributive unfairness that result when men break important promises (particularly when women rely or confer benefits on the basis of these assurances).<sup>29</sup> For reasons of economic dependency and social pressure women are often the weaker party in intimate relationships.<sup>30</sup> These vulnerabilities exist *both* in the context of marriage and co-habitation. Seana Shiffrin has argued that promises perform a role of preventing exploitation in situations of power imbalance. Clearly then if the courts

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<sup>28</sup> Freeman, above n 22, p 74. For similar arguments see N Taub and E Schneider ‘Women's Subordination and the Role of Law’ in D Kairys (ed) *The Politics of Law: A Progressive Critique* (New York: Basic Books, 3<sup>rd</sup> edn, 1998) p 328 at pp 333-334; and Keyes and Burns, above n 22, at 578, arguing that the presumption against contract in domestic settings ‘performs a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, privileging the former over the latter’.

<sup>29</sup> Arguably the injustice in cases of detrimental reliance or the conferral of benefits may be mitigated to some degree by the application of reliance or restitution principles. Even though the promisee in these cases may not be able to enforce the agreement, and therefore protect her expectation interest, she may in cases where she has suffered losses or conferred benefits in reliance on the agreement claim compensation for losses suffered or restitution for the gain made by the promise-breaker (See Kimel, above n 8, pp 140-141). However, the availability of these remedies in English law is severely restricted. Promissory estoppel cannot be used as a cause of action (*Combe v Combe* [1951] 2 KB 215). See J Wightman ‘Intimate Relationships, Relational Contract Theory, and the Reach of Contract’ (2000) 8 *Feminist Legal Studies* 93 at 95. For an unjust enrichment claim to succeed in this context, there has to be a ‘total failure of consideration’, see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 64-65; P Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) pp 242-248; F Wilmot-Smith ‘Reconsidering “Total” Failure’ (2013) 72 *The Cambridge Law Journal* 414.

<sup>30</sup> Olsen, above n 25, at 1519-1520.

refuse to enforce those promises that may deprive women of what would otherwise be an important source of assurance.<sup>31</sup>

One might argue that the intent to contract doctrine does not prevent women from entering into contracts, and of course that is true, but that does not take into account the extent to which the doctrine privileges men over women. As Stephen Hedley has pointed out, in most cases, whether in the domestic or commercial sphere, parties will not have actively contemplated whether their agreement should be legally binding.<sup>32</sup> And yet, commercial parties are given a presumption that such an intention was present, while the opposite presumption applies in the domestic context.

That presumption against the existence of a contract creates a problem in those cases where the parties *did* intend to create a legal relationship. It places a burden on the promisee to show ‘clear and convincing’ evidence that there was a manifest intention to be legally bound when the agreement was reached.<sup>33</sup> This rule puts pressure on the promisee to be as clear as possible at the time of agreement that she intends legal enforceability.<sup>34</sup>

The trouble is that it may be very difficult for the promisee to achieve this level of clarity, and hence satisfy the manifest intent requirement, because being

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<sup>31</sup> S Shiffrin ‘Promising, Intimate Relationships, and Conventionalism’ (2008) 117 *Philosophical Review* 481 at 502-510.

<sup>32</sup> S Hedley ‘Keeping Contract in Its Place - *Balfour v Balfour* and the Enforceability of Informal Agreements’ (1985) 5 *Oxford Journal of Legal Studies* 391 at 393-395. See also Keyes and Burns, above n 22, at 581, 586-587 and 595.

<sup>33</sup> *Gould v Gould* [1970] 1 QB 275 at 281.

<sup>34</sup> Gregory Klass distinguishes between rebuttal of the presumption against contract on the basis of showing the manifest intention to be legally bound and a rule that requires, as a formality, an express statement of an intention to create legal relations: Klass (2009), above n 7, at 1468 and 1473-1475. He is right to say that from the point of view of legal design these are two different ways of opting out of the presumption, with different costs and benefits. However, in practice, I suspect that the burden of the manifest intent requirement is so strong that it leads *de facto* to significant pressure on the promisee to make an express statement.

clear may involve a relational cost, incurred by the indication to the other party that they are not trusted by the promisee to perform.<sup>35</sup> This may happen even though the parties are operating on the assumption that they are making a legally enforceable agreement. As Gregory Klass says, ‘Even where expectations or preferences regarding legal liability are mutually understood, those attitudes are often better left unspoken’.<sup>36</sup> Explicit articulation of those attitudes may evidence distrust or an overly litigious tendency that may harm the relationship and scupper the agreement.<sup>37</sup> Therefore, the promisee is placed in a dilemma by the law. Does she make explicit her preference for legal enforceability and risk the relationship and the agreement altogether, or does she stay silent and run the risk that the agreement is not legally binding? The likelihood is that she will take her chances and stay silent, but the danger of that course is that the agreement will not be legally binding, and the intentions of the parties not respected by the law.

A good example of the unfairness that results is the Court of Appeal decision in *Gould v Gould*.<sup>38</sup> The case concerned a husband who had separated from his wife, leaving her to look after their two children. On breaking up, he promised to pay his wife £15 per week maintenance, with the proviso ‘as long as he had it’. He failed to keep up with the payments, and his wife sought to enforce the promise. The Court of Appeal (with Lord Denning MR dissenting) held that there was a presumption against the legal effect of social and domestic

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<sup>35</sup> Ibid, at 1473-1474.

<sup>36</sup> Ibid, at 1474. See also R Gilson, C Sabel and R Scott ‘Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine’ 110 (2010) Columbia Law Review 1377 at 1401.

<sup>37</sup> Cf Wightman, above n 29, at 108-109, making the point that it may be a feature of intimate relations that agreements are not explicitly spelt out; this may also reflect the presence of economic dependency: ‘... the backdrop to the day to day informality may be the power that a breadwinner can exert’ (at 109).

<sup>38</sup> [1970] 1 QB 275.

arrangements, and that the onus was on the claimant to present ‘clear and convincing’ evidence of an intention to create a legal relation to rebut it.<sup>39</sup> The Court held that the husband’s proviso that he would only pay the maintenance on condition that he was able to pay, created a lack of clarity about the terms of the agreement, which itself gave the strong indication that the parties did not intend legal relations.<sup>40</sup>

It is difficult to see here how the Court arrived at the conclusion that there was no intention to create a legal relationship.<sup>41</sup> The agreement related to a serious matter, the parties had separated (unlike in *Balfour* where the parties were still in amity at the time of agreement),<sup>42</sup> and there was nothing about the husband’s proviso that was particularly unclear or could not have been made clearer by the implication of further terms. For example, in his dissent, Lord Denning MR implied the term that ‘if the husband found that he could not manage to keep up the payments, he could, on reasonable notice, determine the agreement’.<sup>43</sup>

Of course one might reply that all this shows is that sometimes courts fail to apply the law correctly; in this case, the facts suggest that the presumption should have been rebutted. However, the worry is that the intent to contract doctrine, or more specifically, the justification given for it in *Balfour* reinforces the existence of a dichotomy between the role of women in family and

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<sup>39</sup> Ibid, at 281.

<sup>40</sup> Ibid.

<sup>41</sup> Freeman, above n 22, pp 71-72.

<sup>42</sup> Usually where the parties have separated the courts are quick to find an intention to contract. *Peters’ Executors v Inland Revenue Commissioners* [1941] 2 All ER 620; *Merritt v Merritt* [1969] 2 All ER 760 at 762: ‘It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations’ (Lord Denning MR), and 762-763 (Widgery LJ).

<sup>43</sup> *Gould v Gould* at 280.

commercial life, which prejudices the judiciary in favour of the kind of unfairness we see in *Gould*.

By not recognising the legal validity of the promise, the Court left the wife vulnerable. Furthermore, the judicial reluctance to enforce agreements made in domestic settings leads to damaging distributive consequences for women. So for example women suffer disproportionality when agreements to perform domestic labour are not legally binding, because it is still women predominantly who carry out this work.<sup>44</sup> Non-intervention perpetuates existing inequalities, and leaves men with the power to dominate women.<sup>45</sup>

Feminist critiques have shone a light on how this dualism, and the domination that results from it, affects the possibilities for human association. Women are left dependent on men, and feminists have questioned whether this ‘makes true love between the sexes difficult, perhaps impossible’.<sup>46</sup> Love after all depends on relationships of equality, sharing and respect.<sup>47</sup>

These economic and social inequalities that afflict women in particular are the source of the vulnerabilities that make the evidential presumption against legal enforcement problematic. It goes beyond the scope of this paper to investigate whether similar inequalities exist in the context of other relationships covered by the presumption, such as gay marriage or those between parents and children. However, if it does, then the presumption is likely to have similarly damaging

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<sup>44</sup> J Hasday ‘Intimacy and Economic Exchange’ (2005) 119 *Harvard Law Review* 491 at 518-519; Klass (2009), above n 7, at 1494; R Siegel ‘The Modernization of Marital Status Law: Adjudication Wives’ Rights to Earnings, 1860-1930’ (1994) 82 *Georgetown Law Journal* 2127 at 2209; Thornton, above n 27.

<sup>45</sup> Olsen, above n 25, at 1510; S Firestone *The Dialectic of Sex* (New York: William Morrow, 1970) pp 142-164.

<sup>46</sup> Olsen, *ibid*, at 1572.

<sup>47</sup> C Fried *Right and Wrong* (Cambridge, MA: Harvard University Press, 1978) pp 29-30.

effects in these contexts too. Therefore, the feminist critique of the doctrine may extend beyond the injustices experienced by women.

It might be objected that the feminist critique of the doctrine that I present here is aimed at case law that has been gathering dust. Few cases in recent times raise intent to contract issues, and it may be that through developments in family law and changes in social and judicial attitudes the kinds of injustices that have arisen as a result of the presumption in the past are now of only theoretical interest and need no longer detain us. There are reasons though still to worry. First, it is not clear that the lack of case law is due to the lack of injustice, or whether the existence of injustice is the cause of the lack of case law. Arguably women and other vulnerable groups are deterred from bringing cases because of the presumption against enforcement and how it has been applied in cases like *Gould*. Second, the existence of the doctrine in the textbooks may carry symbolic or expressive significance, reinforcing gender stereotypes and roles, and potentially making exploitation by dominant parties more likely. These are genuine costs which flow from the failure to repudiate the presumption, and the false dichotomy between the domestic and commercial spheres which it both reflects and reinforces.

#### 4. THE DIVISIONIST DEFENCE

The feminist critique of the *Balfour* doctrine has shown how it might unfairly impact women, and risk the possibility of intimacy between the sexes. In this section, I want to explore a sophisticated divisionist defence of the doctrine.

The existence of the doctrine supports the central tenet of the divisionist position, which is that contracts and promises are different things. Charles Fried famously claimed that contracts *are* promises.<sup>48</sup> But if that is the case, it is difficult to explain why making a promise isn't a sufficient condition for making a contract. Why does contract law require, *in addition* to the making of a promise, a *separate* intention that the parties intended to create a legal relationship? Contract law seems to *diverge* from promise here.<sup>49</sup>

Fried's response seems to be that the requirement exists to ensure that promises are made sincerely or seriously: 'The promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised'.<sup>50</sup> The thought appears to be that if the promisor contemplated legal enforcement, he must have made his promise seriously. The trouble is that if we consider cases like *Balfour* and *Gould*, it stretches reality to say that when the courts ruled that the parties lacked an intention to contract, they doubted the seriousness of the promises that were made.<sup>51</sup>

It is of course open to the promise theorist to repudiate the *Balfour* doctrine altogether, which is the strategy that Fried adopts with the consideration

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<sup>48</sup> C. Fried *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981).

<sup>49</sup> Barnett (1986), above n 8, at 304-305; Barnett (2014), above n 8, p 47 arguing that Fried's theory 'commits courts to enforcing promissory commitments that the parties themselves may never have contemplated as "contractual" or legally enforceable...?'

<sup>50</sup> Fried (1981), above n 48, p 38. I follow Kimel's reading of Fried here. Kimel, above n 8, pp 137-138. Fuller gave a similar explanation for the doctrine of consideration, by claiming it performed a cautionary function. See his 'Consideration and Form' (1941), above n 13, at 816-817.

<sup>51</sup> Cf Kimel, above n 8, pp 137-138.

doctrine.<sup>52</sup> The suggestion may not be as radical as it first appears. Although the matter is controversial, there seems to be no intent to contract requirement in US contract law. Section 21 of the Second Restatement of Contracts says: ‘Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract’.<sup>53</sup> In England, the operation of the factual presumption that intent to contract exists in commercial transactions led Patrick Atiyah to the view that in the majority of cases ‘no positive intention to enter into legal relations needs to be shown’.<sup>54</sup>

The difficulties for the reflective position are not then necessarily doctrinal. Rather, the greater difficulty is that divisionists provide credible explanations for the doctrine. Consider for example the arguments of Dori Kimel.

Kimel claims that the doctrine promotes two types of valuable freedom, by giving parties the right to decide whether to create a legally enforceable obligation, rather than a purely moral obligation.

First, there is freedom *from* contract, which is valuable because legal enforceability might change the relational significance of compliance with voluntary undertakings. The making and keeping of promises normally conveys the existence of trust and respect in relationships. However, those messages get disrupted when promises are made legally enforceable, because promisors are given independent reasons to perform, which may either corrupt their motives or

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<sup>52</sup> Fried (1981), above n 48, ch 2.

<sup>53</sup> Randy Barnett rejects the standard interpretation of this section, arguing that it only applies in cases where consideration is absent. For Barnett, consideration is evidence of the existence of an intent to contract. R Barnett *The Oxford Introductions to U.S. Law: Contracts* (Oxford: Oxford University Press, 2010) p 165. See also Klass (2009), above n 7, at 1438, setting out the various exceptions to section 21.

<sup>54</sup> P Atiyah *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 5<sup>th</sup> edn, 1995) p 153. Cited by Klass (2009), above n 7, at 1438.

create the impression of corruption in the mind of promisees: ‘The availability of remedies seriously and manifestly reduces the likelihood that, and at any rate the extent to which, a party would benefit from a breach, significantly undermining the expressive potential of contractual fidelity’.<sup>55</sup> As a result, promise won’t convey the attitudes of trust and respect, on which personal relationships hinge.<sup>56</sup> Therefore, parties might choose to do without the added reassurance that legal enforceability brings, so as to create an opportunity to express these attitudes, and to foster and deepen their relationships.<sup>57</sup>

Second, freedom *to* contract is promoted, in particular where there is an absence of trust between the parties. In that context, contract through the mechanism of legal enforcement enables the parties to enter into a mutually beneficial exchange without being, or having to enter into, a personal relationship with one another, thus promoting their freedom to remain *detached*.<sup>58</sup>

Thus, the *Balfour* doctrine promotes *both* the values of personal *attachment* and *detachment*, by giving parties the right to decide whether to steer clear of law and depend instead on their personal relationships to secure the benefits of co-operative activity, or alternatively to invoke the law and thereby avoid having to rely for reassurance on the presence of existing or future personal ties. The resonance with Atkin LJ’s justification in *Balfour* is clear.

There are problems with both of Kimel’s arguments for the doctrine, and with the underlying dichotomy between contract and promise that they reflect and defend.

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<sup>55</sup> Kimel, above n 8, p 75.

<sup>56</sup> Ibid, p 29 and pp 74-77.

<sup>57</sup> Ibid, p 138. See similarly Chen-Wishart (2009), above n 13, at 452-453.

<sup>58</sup> Kimel, *ibid*, pp 78-80 and 141-142.

### **(a) Freedom from Contract and the Value of Personal Attachment**

Kimel's first argument relies on the damage done to personal relationships and the value of personal attachment, by the effect that legal enforcement has on corrupting the motives of promisors, or by giving promisees the impression that the promisor is acting out of self-interest. The danger is that the expressive quality of making, relying on, and keeping promises will be lost, or 'crowded out'.<sup>59</sup> The argument has a distinctly 'empirical cast'.<sup>60</sup> It focuses on the *effect* that legal enforcement has on personal relationships.

I follow Shiffrin in finding this type of argument unconvincing. There are at least two problems. First, Kimel does not present any empirical evidence which supports his claim that moral motivations would be displaced by legal incentives, or the claim that promisees would have this impression. Certainly, our experience of other legal domains suggests the contrary. As Shiffrin says:

In the case of tort, there is little serious concern that legal regulations on bodily contact have come to dominate the motives of citizens or that citizens believe their safe passage across the

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<sup>59</sup> Ibid, p 29. Cf M Sandel *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012) who relies on this notion of corruption and crowding out to justify ethical limitations on the market.

<sup>60</sup> Shiffrin distinguishes between empirical and expressive versions of this type of argument. Shiffrin (2012), above n 9, pp 251-252. According to the expressive view, the damage is done by the message that the law sends out about the type of norms that should govern these relationships, rather than the effects of that message. Aditi Bagchi makes this type of argument in 'Separating Contract and Promise' (2010) 38 Florida State University Law Review 709.

streets is generally a matter attributable to law and not to basic civic decency.<sup>61</sup>

It is quite possible that the law is only providing a ‘backstop’ to reassure promisees, in case the motivations that normally govern the practice of promising fail.<sup>62</sup>

It is beyond the scope of this article to review the empirical evidence that does exist. Although there is some empirical support for the existence of crowding out,<sup>63</sup> there are studies that go in the other direction, and which show that notions of fairness and reciprocity play a significant role in explaining contractual performance.<sup>64</sup>

Even if, *arguendo*, the empirical effects Kimel describes are shown to exist, there is a second problem. It might be possible, Shiffrin argues, to manage these effects. So, for example, to prevent the corruption of motives, or the perception of such corruption, the courts could make clear that the purpose of

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<sup>61</sup> Shiffrin (2012), above n 9, p 253.

<sup>62</sup> Ibid. Cf L Fuller *The Law in Quest of Itself* (Boston: Beacon Press, 1966) p 137: ‘... the effective deterrents which shape the average man’s conduct derive from morality, from a sense of right and wrong’; and S Macaulay ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55 at 65-66.

<sup>63</sup> G Charness ‘Responsibility and Effort in an Experimental Labor Market’ (2000) 42 *Journal of Economic Behavior & Organization* 375 at 375; I Bohnet, B Frey and S Huck ‘More Order with Less Law: On Contract Enforcement, Trust, and Crowding’ (2001) 95 *American Political Science Review* 131 at 132; U Gneezy and A Rustichini ‘A Fine is a Price’ (2000) 29 *Journal of Legal Studies* 1 at 3; C Mellström and M Johannesson ‘Crowding Out in Blood Donation: Was Titmuss Right?’ (2008) 6 *Journal of the European Economic Association* 845.

<sup>64</sup> E Fehr, S Gächter and G Kirchsteiger ‘Reciprocity as a Contract Enforcement Device’ (1997) 65 *Econometrica* 833; M Dufwenberg and G Kirchsteiger ‘A Theory of Sequential Reciprocity’ (2004) 47 *Games and Economic Behavior* 268 at 290-291; D Levine ‘Modeling Altruism and Spitefulness in Experiments’ (1998) 1 *Review of Economic Dynamics* 593 at 595; Macaulay, above n 62, at 64.

contractual remedies is merely to provide a backstop, and not to displace relational motives.<sup>65</sup>

As well as the assumptions that Kimel makes about the effects of contract on promise, he also makes assumptions about the effects of the moral practice of promising on individual acts of making, relying on, and keeping promises. He assumes that *social* pressure, unlike *legal* pressure, *won't* ordinarily affect the relational motivations and attitudes that should govern promising. It is unclear that this is true, or at least that there should be an asymmetry in this context between legal and social pressure. Depending on the community, there may be significant social pressure to keep one's word.<sup>66</sup> Moreover, there is empirical evidence showing that the reputational damage done by breach, and the chance that future co-operation will be endangered, are significant reasons motivating

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<sup>65</sup> Shiffrin (2012), above n 9, pp 253-254.

<sup>66</sup> A Schwartz and R Scott 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541 at 557: 'reputations work best in small trading communities, especially those with ethnically homogenous members, where everything that happens soon becomes common knowledge, and boycotts of bad actors are easy to enforce'. Citing J Landa 'A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law' (1981) 10 The Journal of Legal Studies 349. There are no doubt cultural differences at play too. The importance that the French attach to keeping one's promises may be one of the reasons for the significant divergences that exist between English and French contract law. French contract law attaches enormous importance to upholding the agreement, which is reflected in key doctrines, such as the greater availability of specific performance and damages for cost of cure and non-pecuniary loss, the enforceability of penalty clauses, restrictions on the right to terminate and the absence of a duty to mitigate loss. See S Rowan *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford: Oxford University Press, 2012); L Miller 'Specific Performance in the Common and Civil Law: Some Lessons for Harmonisation' in P Giliker (ed) *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Leiden/Boston: Martinus Nijhoff Publishers, 2007) p 281; L Miller 'Penalty Clauses in England and France: A Comparative Study' (2004) 53 International and Comparative Law Quarterly 79.

performance.<sup>67</sup> In such a context, it may be that people keep their promises for fear of the negative reactions others have towards breach, or at least it may be that this is the perception of promisees. This might displace relational motives and attitudes, just as much as Kimel argues that legal pressure does.

In conclusion, Kimel does not show that legal enforcement necessarily undermines the expressive quality of promising, and nor is it clear that absent legal enforcement promise has this expressive quality anyway. Therefore, Kimel's claim that the *Balfour* doctrine promotes freedom *from* contract is unconvincing.

### **(b) Freedom to Contract and the Value of Personal Detachment**

There are problems too with Kimel's argument that the *Balfour* doctrine promotes freedom *to* contract and the value of personal detachment. There are three interconnected difficulties. First, it is not obvious that it offers a plausible interpretation of contract law. Second, I doubt that personal detachment has value. And, third, it is unclear that personal detachment is even possible in the contractual context.

#### *(i) Is contract based on personal detachment?*

First, it is unclear that contract law is a realm of detachment. My point is not the same as that which has been made by relational contract theory, according to

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<sup>67</sup> B Klein and K Leffler 'The Role of Market Forces in Assuring Contractual Performance' (1981) 89 *The Journal of Political Economy* 615 at 616; L Bernstein 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765 at 1787-1788; Macaulay, above n 62, at 55 and 64.

which some, many or even most contracts involve relationships, with the result that relational norms might in certain cases displace, or at least shape (qualify, defeat, reinforce, supplement, and so forth) contractual norms.<sup>68</sup> Kimel deals with relational contract theory not by doubting how many contracts have relational elements, but rather by insisting that contract gives parties the freedom to allow relational norms to play these roles if they want them to. Parties can insist that contractual norms govern, and in some cases, the existence of that freedom may actually facilitate the emergence and success of close relationships:

[I]t is the very fact that the contract provides for some more or less certain, enforceable fundamentals, that liberates the parties from dependence on the creation or maintenance of personal relations for the realisation of such fundamentals; and this liberty, in turn, is often indispensable in enabling the parties to develop, possibly over time, a relationship that far transcends that set of legally binding rights and duties which the contract constituted or recorded in the first place.<sup>69</sup>

So, for example, in the context of academic employment:

A dean, for instance, or head of department, would likely find herself rather inhibited in her efforts to develop an informal

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<sup>68</sup> See I Macneil 'The Many Futures of Contracts' (1973) 47 *University of Southern California Law Review* 691; C Goetz and R Scott 'Principles of Relational Contracts' (1981) 67 *Virginia Law Review* 1089; M Eisenberg 'Relational Contracts' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) p 291.

<sup>69</sup> Kimel, above n 8, p 83.

friendship with a new appointee, if she knows that their interactions invariably lead to understandings or expectations pertaining to those issues that formal contract settles.<sup>70</sup>

Kimel's response to relational contract theory is fine as far as it goes, but it fails to address a related but altogether more radical critique. It is problematic to claim that detachment is the prevalent mode of contract law, not because relational norms *displace* or *supervene* on contractual norms, but rather because it is unclear that *contractual* norms uphold the value of detachment.

This is a deeper point that emerged from Lon Fuller's work in the 1950s and 1960s, and in particular his broader response to Herbert Hart's *The Concept of Law*.<sup>71</sup> Its significance was blurred in the 1970s by Ian Macneil's work, and the ensuing runaway success of relational contract theory.<sup>72</sup> Fuller's central claim was that *contract* norms, ie, the rules, doctrines, principles, and so forth, that govern the practice of making and keeping promises and agreements are *driven* by relational considerations, and far from promoting detachment, actually promote attachment.

This connects with the scepticism expressed earlier that contractual enforcement necessarily disrupts the expressive quality and relational significance

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<sup>70</sup> Ibid, p 85.

<sup>71</sup> HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 1961); L Fuller 'Freedom: A Suggested Analysis' (1944) 68 *Harvard Law Review* 1305; L Fuller *The Morality of Law* (New Haven, CT/London: Yale University Press, rev edn, 1969); L Fuller 'Human Interaction and the Law' (1969) 14 *The American Journal of Jurisprudence* 1. For a recent articulation of the implications of these views for debates in general jurisprudence see N Simmonds *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

<sup>72</sup> See his seminal paper 'The Many Futures of Contracts': Macneil, above n 68. Fuller's point was not completely submerged; it resurfaced and found its clearest expression in Charles Fried's *Contract as Promise* in 1981, above n 48.

of promising. It may merely provide a backstop of reassurance for the promisee, in case the ordinary motivations that should preside over the practice fail.

Other structural features of contracting support this relational interpretation of the practice. Fuller placed particular emphasis on the centrality of negotiation or bargaining in contract. Successful negotiation requires an accommodation of potentially conflicting interests. Parties have to be prepared to engage sympathetically with each other, and indeed to reveal to one another something about their interests and desires, and the weight that each attaches to them. Agreement will not be reached without at least some degree of give and take:

[T]he creation of a complex contractual relationship through explicit negotiations requires a certain attitude of mind and spirit on the part of the participants... Each must seek to understand why the other makes the demands he does even as he strives to resist or qualify those demands... Explicit bargaining involves, then, an uneasy blend of collaboration and resistance.<sup>73</sup>

By engaging in this process, the parties do not of course become friends, but nor are they strangers. They become Fuller said 'friendly strangers'.<sup>74</sup> Similarly, Fried

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<sup>73</sup> L Fuller 'The Role of Contract in the Ordering Processes of Society Generally' in K Winston (ed) *The Principles of Social Order: Selected Essays of Lon L Fuller* (Oxford: Hart, rev edn, 2002) p 187 at p 203. And see: Fuller (1969) 'Human Interaction and the Law', above n 71, at 28-29; Fuller 'Irrigation and Tyranny' in K Winston (ed), p 207 at pp 220-221.

<sup>74</sup> Fuller (1969) 'Human Interaction and the Law', above n 71, at 27.

says that contracting parties are ‘neighbors rather than strangers’.<sup>75</sup> There is a type of association here that is not captured by the dichotomy between close relations (friends, intimates, etc) and strangers.<sup>76</sup>

This spirit of cooperation does not cease when bargaining comes to an end. When parties reach agreement, they repose trust in one another and embark on a joint project whereby to achieve their aims each has to *assist* the other.<sup>77</sup> This feature of the practice creates room for seriously doubting the relevance of personal detachment. How can parties be said to be detached from one another, when, *first and foremost*, they have to *trust* and *depend* on one another for the pursuit of their respective ends?<sup>78</sup> Trust is essential for assurance and reliance; otherwise the agreement is based merely on predictions about what the other will do.<sup>79</sup>

These relational norms and moral attitudes play a central role in explaining not only how contracts are formed, but also how they are interpreted, vitiated and remedied when they are broken. So, for example, even business transactions, Fuller argued, might involve relations of ‘heavy and complex interdependence’.<sup>80</sup> Parties may have to make reasonable adjustments in the light, for example, of technological advancements: ‘Here fidelity to explicit contractual commitments must be tempered by a sense of reciprocal dependence and a willingness to meet unexpected developments in a spirit of cooperation’.<sup>81</sup>

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<sup>75</sup> C Fried ‘The Convergence of Contract and Promise’ (2007) 120 Harvard Law Review Forum 1 at 8.

<sup>76</sup> Fuller (1969) ‘Human Interaction and the Law’, above n 71, at 27-28.

<sup>77</sup> Fried (1981), above n 48, p 8; Fried (2007), above n 75, at 8.

<sup>78</sup> Fuller (1944), above n 71, at 1313; Fried (1981), above n 48, p 13.

<sup>79</sup> Fried (1981), above n 48, pp 8 and 13.

<sup>80</sup> Fuller (2002), above n 73, p 200.

<sup>81</sup> *Ibid*, p 201. See also Fried (1981), above n 48, p 89.

The efficacy of contract as a mechanism of social order depends on a recognition of these realities, and indeed they are reflected in the canons of contractual interpretation.<sup>82</sup> I cannot go into the details here, but plausibly, these relations of trust and mutual dependency explain other central contract doctrines, such as undue influence,<sup>83</sup> unconscionability, and economic duress,<sup>84</sup> the duty to mitigate (which Fried has argued is an altruistic duty triggered by the relationship between the parties),<sup>85</sup> and restrictions on the right to affirm for repudiatory breach.<sup>86</sup>

In conclusion, it is unclear that the institutional features of contract law, such as legal enforcement, and contractual rules and doctrines support Kimel's claim that the mark of contract is personal detachment.

*(ii) Is personal detachment a value?*

The purpose of the last section was interpretive: to cast doubt on Kimel's claim that the best way to understand contract law is through the prism of the value of personal detachment. In this section, I shall make a more radical claim. I doubt that an interpretation of contract law in terms of personal detachment even gets off

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<sup>82</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 All ER 98 at 114-115 (Lord Hoffmann); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251; *Pink Floyd Music v EMI Records* [2010] EWHC 533 at [55].

<sup>83</sup> M Chen-Wishart 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 CLP 231.

<sup>84</sup> A Burrows *Remedies for Torts and Breach of Contract* (Oxford: Oxford University Press, 3<sup>rd</sup> edn, 2004) p 664.

<sup>85</sup> Fried (2007), above n 75, at 8. Explaining the altruistic nature of the duty, Fried says: '[A] promise may call for sacrifices far in excess of what residual, background nonpromissory principles of fairness and decency require'. Fried (1981), above n 48, p 131.

<sup>86</sup> *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (imposing a good faith restriction on the right to affirm).

the ground, because it is far from clear that personal detachment has any value at all.

Kimel says that, in the contractual context, the value of personal detachment consists in the ability to enter into exchanges with other people, without having to be in a pre-existing relationship with them, and without having to commit to entering such a relationship in the future.<sup>87</sup> He says that it is a value that is ‘diametrically opposed’ to the value of personal relationships, which is the value that animates promising. Like the value of personal relationships, personal detachment has intrinsic value, which he argues is ‘easy to see’.<sup>88</sup>

*Contra* Kimel, that value is far from being easy to see. The difficulty is related to Fuller’s concerns about Mill’s theory of freedom:

Mill seems to assume that the ideal condition would be one in which, unhampered by social arrangements of any kind, the individual would, in effect, choose everything for himself – his satisfactions, his mode of life, his relations with others. Only the unfortunate circumstance that his actions may impinge harmfully on others makes it necessary to qualify this ideal.<sup>89</sup>

This is a negative, distinctly English, conception of freedom, according to which ‘freedom means primarily privacy’, or ‘the right to be let alone’. Fuller contrasted

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<sup>87</sup> Kimel, above n 8, p 78.

<sup>88</sup> *Ibid*, p 79.

<sup>89</sup> Fuller (1944), above n 71, at 1310. Fuller’s works on freedom are largely forgotten. Thank you to Dan Priel for bringing them to my attention. D Priel ‘Lon Fuller’s Political Jurisprudence of Freedom’ (2014) 10 *Jerusalem Review of Legal Studies* 1.

it with the American, more positive, version, where freedom entails involvement in social and political life.<sup>90</sup>

Fuller could not see the value in being left totally alone. He calls this ‘freedom in a void’, deriding its ‘worthlessness’. He used Chester Barnard’s example of a solitary rower adrift in the centre of a foggy lake to make his point:

Such a man is utterly free to row in any direction he sees fit. He is even free from the burden of decision, since he is in a situation where it is impossible to reach any intelligent decision as to the direction he should take. Completely without shackles, duties or obligations, such a man ought to feel free – if to be free is to be unfettered by restraints.<sup>91</sup>

But of course he is not free in any meaningful way.<sup>92</sup> Freedom, Fuller argued, of the kind we value requires ‘effective participation in the affairs of the family, the tribe, or the nation’.<sup>93</sup> It depends on background social institutions, which channel our creative energies. He used the right to vote as an example. A freedom which depends on ‘a machinery of election’:

This machinery will in turn carry with it its own compulsions, for instance, against voting twice. Not only that, but the forms through

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<sup>90</sup> L Fuller ‘The Case Against Freedom’ in K Winston (ed), above n 73, p 315 at p 323, citing Hart who brought out the contrast after his visit to Harvard between 1956-1957; HLA Hart ‘A View of America’ (16 January 1958) *The Listener* 89; L Fuller ‘Freedom as a Problem of Allocating Choice’ (1968) 112 *Proceedings of the American Philosophical Society* 101 at 103.

<sup>91</sup> Fuller (2002), above n 90, p 321.

<sup>92</sup> Fuller (1944), above n 71, at 1312.

<sup>93</sup> Fuller (1968), above n 90, at 103; Fuller (2002), above n 90, p 320.

which choice is channeled by an election law will of necessity exclude other forms of choice. Thus, if the election is to be by the system known as proportional representation (PR), the electorate must necessarily forego the form of choice involved in election by a simple majority.<sup>94</sup>

For Fuller, there are a battery of social forms behind the exercise of any valuable freedom. Kimel does not endorse a negative conception of freedom, preferring instead Joseph Raz's view of freedom as personal autonomy, or the 'ideal of self-creation, of people exerting control over their destinies', by freely choosing and pursuing valuable 'activities, goals and relationships'. As a matter of political philosophy, government should create the conditions for autonomy, by making such options available, and respect the decisions that citizens make about how to live.<sup>95</sup>

Nevertheless, Kimel does support making personal detachment available as a valuable option in people's lives. In doing so, he links detachment to the value of freedom, and opens himself up to Fuller's critique of Mill. Absent restraint, freedom is not worth the candle.<sup>96</sup> Thus, far from being dependent on personal detachment, the value of freedom is inimical to it.

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<sup>94</sup> Fuller (1944), above n 71, at 1312.

<sup>95</sup> Kimel, above n 8, p 126.

<sup>96</sup> Fuller (2002), above n 90, pp 319-320; Fuller (1944), above n 71, at 1311-1312: 'The complex network of institutional ways by which the bulk of our energies is directed and channeled is not an unfortunate limitation on freedom. It is essential to freedom itself'; Fuller (1968), above n 90, at 102-103; L Fuller 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) 89 *Brigham Young University Law Review* 89 at 89-90; Priel, above n 89, at 23.

*(iii) Is personal detachment possible?*

It follows from what I have said above that I doubt whether personal detachment in any meaningful sense is actually possible. One might reply that though this appears to be true in the case of the solitary rower, there are other cases that plausibly indicate that personal detachment has value. Timothy Macklem has argued that privacy or personal detachment has value in the context of artistic expression, such as the writing of poetry. It enables certain forms of creativity, which shape and express character:

It is in isolation from other people, and the supports they offer and the freedoms they make possible, that a person is forced to confront the constraints of his or her circumstances, as best he or she can, with whatever resources, personal and practical, he or she cannot only call upon but develop, through the exercise of his or her imagination, strength and will, in short, through the exercise of creativity.<sup>97</sup>

It sounds plausible that detachment has value in this context. However, it is important to bear in mind a point that Fuller made, which is that due to over familiarity, we have a tendency to take for granted, or overlook, the presence of social forms.<sup>98</sup> Indeed, Macklem is quick to uncover some of these relations:

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<sup>97</sup> T Macklem *Independence of Mind* (Oxford: Oxford University Press, 2006) p 67.

<sup>98</sup> Fuller (2002), above n 90, pp 323 and 325. There are ways though to bring the centrality of those forms to the fore. Samuel Scheffler asks us to imagine the implications of knowing that the entire human race would be wiped out soon after

Even poetry... one of the purest expressions of individual consciousness and endeavour, is a recognized social form in itself and relies upon structures that are intelligible and accessible to its audience, be they sonnet forms or free verse. Poetry also depends upon a literary culture, in the form of publishers, reviewers, booksellers and readers, for the achievement of its purpose, and full realization of its value.<sup>99</sup>

Poetry depends on social forms. However, it may be that the background existence of these forms means that there is space for a form of personal detachment in poetry, and perhaps other forms of artistic expression. Whatever the case might be in these contexts, it's clear there is no such possibility for detachment in contract. Contracts are inherently relational. As I have argued, contractual parties depend on each other to achieve their ends. Unlike poetry, that dependence is upfront and of immediate concern to both of the parties. *Contra* Kimel, it is the relation and not the threat of legal enforcement, which merely provides a backstop, which is central.

*(iv) Summary*

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we die. Many activities such as music or academic research would lose their value he argues because they presuppose the persistence of human institutions and practices. S Scheffler *Death and the Afterlife* N Kolodny (ed) (New York: Oxford University Press, 2013).

<sup>99</sup> Macklem, above n 97, p 37.

In summary, I have challenged Kimel's divisionist defence of the *Balfour* doctrine. I doubt that a contracting party's right to decide whether a promise should be legally binding promotes attachment or freedom *from* contract, because it is not clear legal enforcement would necessarily disrupt the expressive quality of promising. Nor is it evident that the intent to contract doctrine promotes personal detachment or freedom *to* contract. It is far from obvious, for the reasons Fuller gives, that this is a value worth serving, or that contract law does or even could serve it.

The underlying problem with Kimel's approach is that it reinforces the *Balfour* contrast between the personal and commercial sphere. The assumption is that personal relations involve attachment, and a lack of constraint, whilst in the commercial realm people are detached, and constrained by the mechanism of legal enforcement. The contrast is false, and, as feminists have shown, potentially highly damaging. It is based on a mistaken conception of freedom. As Fuller argued, the value of freedom involves attachment and that depends on a morality of constraint. Social forms facilitate valuable human interaction by subjecting the pursuit of our ends to the recognition of our common humanity.<sup>100</sup> There is no separation between contract and promise. They are both forms of attachment, and they both involve constraint. The divisionist obscures this reality, and crudely restricts the possibilities for human association.

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<sup>100</sup> As Fried says, this is a principle of natural law: '[B]y the norm of human nature a person in his dealings with others may not deny either his own or any other person's capacity for free and rational action. To do so is always to act irrationally – that is, a failure to make a true judgment of reality the ground for one's acts – and therefore to act contrary to one's nature'. C Fried 'Natural Law and the Concept of Justice' (1964) 74 *Ethics* 237 at 248. See also Fried (1978), above n 47, p 29; Fuller (1975), above n 96, at 89.

Fuller saw that there exists a spectrum of human relations: ‘running from intimacy, at the one end, to hostility, at the other, with a stopping place midway that can be described as the habitat of friendly strangers’.<sup>101</sup> That realm of friendly strangers includes contractual relations. It is a different kind of relation to friendship or love, but nevertheless it is premised on trust and attachment. We lose sight of this at our peril. Commenting on this divisionist picture, Unger says: ‘The most remarkable feature of this vision is its exclusion of the more morally ambitious models of human connection from the prosaic activities and institutions that absorb most people most of the time’.<sup>102</sup> Contract is, *primarily*, an opportunity for human association, rather than an escape from it.

The dichotomy threatens *both* the possibility of intimacy, by, as feminists have argued, creating relations of dependency and need rather than equality and respect, *and* the neighbourly relations that underpin contract. For these reasons, it should be rejected. Does this mean abandoning the intent to contract doctrine too? It does not. That doctrine can be accommodated within the framework of the reflective view of contract.

## 5. THE REFLECTIVE VISION

### (a) Kimel’s Challenge

The promise theory or reflective view of contract seems, as I have said, to struggle with the intent to contract doctrine. If contracts are promises, it is unclear why

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<sup>101</sup> Fuller (1969) ‘Human Interaction and the Law’, above n 71, at 27. Fried (1978), above n 47, p 30. Cf C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94 Yale Law Journal 997 at 1098-1100.

<sup>102</sup> Unger, above n 23, at 623.

seriously intended promises should not be contracts, whether or not there was a *further* intention to create legal relations. Kimel puts the challenge in the following way:

For the “separate requirement” of an intention to create legal relations to be significant or even explicable, it should be possible to think of a reason why not to have such an intention in the relevant circumstances, or at least why not to ascribe it systematically to rational agents (in these circumstances)... And if it is thought that there is no pertinent difference between contractual and promissory relations, and even more so if the former are thought to be but an improved version of the latter – if contracts are understood to offer all the benefits of promises (or exchanges of promises) with the additional bonus of enforceability – then the chances of finding such reasons look rather slim.<sup>103</sup>

In other words, Kimel asks what does the reflective view have to lose? If contracts *are* promises, there seem to be only upsides to legal recognition, ie, the additional assurance provided by legal enforcement. In this section, I want to respond to Kimel’s challenge. As well as the upsides, there are downsides to contracts, even if contracts are indeed promises.

### **(b) Pluralism and the *Determinatio***

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<sup>103</sup> Kimel, above n 8, p 137.

Historically, it has been a feature of positivist thinking about the nature of law to focus on its coercive nature. This, together with the idea of the sovereign, creates a ‘top down’ model of the law, which loses sight of the moral value of the relations that the law facilitates.<sup>104</sup> As Fuller said, the law is not just ‘a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man’.<sup>105</sup>

In the contractual context, Kimel too focuses on the reassurance that legal enforcement provides, and the detachment this creates between the parties. What this misses is the moral quality of the relations that contract law structures. There are two in particular: the relations between the contracting parties and those between the parties and the state.

The relations between the contracting parties are based on promise and trust. As Fried said, when we make a promise we invite trust, and when that promise is accepted we are *trusted* to do what we say. Breaking a promise is an abuse of trust, which shows a lack of respect for the promisee.<sup>106</sup> The sense that relations based on trust are what are at stake here is brought out by a homely example used by Seana Shiffrin:

It is not uncommon, as many of us know, for plumbers or contractors to commit to appear to do a job but then fail to appear. You wait for hours, they don’t call, and then you must reschedule and wait again, apprehensive that the scene will recur. Most people

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<sup>104</sup> There are of course positivist thinkers, like Hart, who are exceptions, but the claim here has Hobbes, Austin and Kelsen in mind. C Fried *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge, MA: Harvard University Press, 1970) pp 249-250; Fuller (1966), above n 62, p 137.

<sup>105</sup> Fuller (1966), above n 62, p 137.

<sup>106</sup> Fried (1981), above n 48, pp 16-17.

who are subject to this sort of treatment are enraged. I find those who are not enraged a little alien: they seem either sedated or to have made a heavy investment in honing their meditative techniques.<sup>107</sup>

The source of that anger is not just the fact that you have not received the service you were promised and the inconvenience this causes. Imagine for example that the plumber called in advance to warn you that he was not going to make it, he got a better job elsewhere, but that quite fortuitously at that very same moment another plumber knocks on your door to say that he can do the job for the very same price. You might feel less angry, but I suspect that for most people there would still be some residual resentment towards the first plumber. Although you receive the service you were expecting, you do not receive it *from* the first plumber. *He* has let you down; *abused* your trust. You might be less likely to hire that plumber again, regardless of whatever assurance legal enforcement provides. This is because trust provides a firmer ground for acts of reliance, than the shifting sands of self-interest.<sup>108</sup>

This is why Fried says ‘a contract is first of all a promise’.<sup>109</sup> Note though, Fried does not say that a contract is *only* a promise.<sup>110</sup> The claim is that contracts

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<sup>107</sup> Shiffrin uses the example to illustrate that usually when we make promises they are not promises to perform or pay the monetary equivalent of performance, rather the expectation is that we will perform what we promised. So the example continues: ‘If the no-show plumber were to appear next time matter-of-factly presenting you with a check or a discount reflecting the value of your time that was wasted, I suspect that, after emerging from shock, the resentment would not fully dissipate’. S Shiffrin ‘Could Breach of Contract be Immoral?’ (2008) 107 Michigan Law Review 1551 at 1564.

<sup>108</sup> Fried (1981), above n 48, pp 8 and 13.

<sup>109</sup> Ibid, p 17. Similarly Shiffrin says that promise is ‘the fundamental component of a contract’. See Shiffrin (2008), above n 107, at 1551-1552.

are promises, not that all promises are contracts.<sup>111</sup> The two practices, contract and promise, are both based on promise, but it is possible to differentiate them. This creates space for choice. There may be reasons for preferring one practice over the other and *vice versa*. Here are the seedlings of a response to Kimel's challenge.

How are they differentiated? Promise, unlike contract, is what I shall call an 'open' or largely underdetermined system of norms. This is due to the existence of what I call 'interpretive' and 'value pluralism'.<sup>112</sup> By interpretive pluralism, I mean that there is an irreducible plurality of ways in which to interpret values. Values that bear on promising include promise, altruism, fairness, corrective justice, and so on. When we make a promise, it is fairly clear what we should do. Having made a promise, we now have an obligation to keep it, or to do what we said we would do. The existence of this fundamental norm of promising is pretty uncontroversial. However, due to interpretive pluralism, many of the other requirements of the practice are much less clear, and to a large degree dependent on context.

So, for example, it is far less clear what the promise principle requires when a promise is broken. To a fairly large degree it will depend on the nature and history of the relationship we have with the promisee and the context. If I promise my daughter that I will go to the cinema with her on Tuesday, but end up breaking that promise, because, say, I get stuck in traffic, it is not obvious what promissory logic now requires. Some people say promise or the interests it protects require

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> I argue for the relevance of these concepts for debates about the legitimacy of transnational contract law in my paper 'The Convergence of Contract Law in Europe and the Problem of Legitimacy: A Common Lawyer's Perspective' (2016) 12 *European Review of Contract Law* 96 at 102-111.

me to perform my promise at the next available opportunity.<sup>113</sup> I am far less sure. What if instead of offering to go to the next showing of the movie, I buy a DVD of another movie for us to watch together at home, or I suggest we go for dinner, or I say ‘I am really sorry’ and leave it at that? Although promise requires me to do something when I breach, it is not clear that any of these potential responses necessarily has priority over any of the others.<sup>114</sup> Instead, the parties have to decide between themselves which response is most appropriate.

This is not to say promissory morality exerts no influence on which option to take. So, for example, it might rule out some obviously inappropriate responses to my breach, such as agreeing to take my daughter on an all expenses world trip. The point is only that there is no uniquely appropriate response, but rather a range of rationally defensible courses of action.<sup>115</sup>

Another source of indeterminacy in promise is value pluralism. According to value pluralism, there are an irreducible plurality of moral values and no single correct way of resolving conflict between them. Rather, there exist a multiplicity of legitimate rankings.<sup>116</sup> So, for example, imagine I promise to drive my friend to the airport tomorrow so he can make a flight. However, I forget to set my alarm clock and my friend misses the flight. When I failed to turn up, my friend could easily have taken a taxi to the airport, but instead chose to stay at home and wait for me. How should I feel about my friend missing the flight? Should I feel

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<sup>113</sup> Shiffrin (2007), above n 4, at 724; Rowan, above n 66, pp 118-120; Kimel, above n 8, p 95; J Gardner ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1 at 28-29.

<sup>114</sup> Cf J Tasioulas ‘Human Rights, Legitimacy, and International Law’ (2013) 58 *The American Journal of Jurisprudence* 1 at 20; A Buchanan ‘The Legitimacy of International Law’ in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) p 95. Discussing the multiple ways in which human rights might be interpreted.

<sup>115</sup> Thank you to Fred Wilmot-Smith for helping me to clarify this point.

<sup>116</sup> For a general discussion of the thesis see Tasioulas, above n 114, at 19.

guilty? Or perhaps angry that he did not call a taxi? What should I do? Say ‘sorry’? Tell my friend off? Offer to pay the cost of the flight?

These and many other normative questions arise. There are a multiplicity of values that bear on the situation, including promise, corrective justice, fairness, altruism, friendship, and so on. Those values might conflict. So, for example, corrective justice might require me to compensate my friend for missing the flight. However, fairness might require my friend to take some share of the responsibility.<sup>117</sup> According to value pluralism, there is no single correct answer.

How the parties interpret these values, and how they navigate and resolve conflicts between them, will say something about the weight they attach to the values at stake and the character of their relationship; indeed, it will shape it. As Fried says:

It is clear enough that after we have taken care to render to others their fair share and have taken care also to avoid doing wrong, there remains during the whole course of our lives a large measure of discretion. In filling this discretionary space we make a life which is characteristically our own.<sup>118</sup>

The source of that ‘discretionary space’ is the existence of interpretive and value pluralism. In contrast to promise, contract manages pluralism in a different way. It is a ‘closed’ or largely determined system of norms. By this I mean that the decisions about the interpretation and ranking of values that are left to the parties

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<sup>117</sup> For an argument that it does see G Letsas and P Saprai ‘Mitigation, Fairness and Contract Law’ in G Klass, G Letsas and P Saprai (eds), above n 1, p 319.

<sup>118</sup> Fried (1978), above n 47, p 167.

themselves in the context of promise, are authoritatively settled for the parties by legal institutions, such as courts and legislatures.

For natural lawyers, this is *the* key function of law.<sup>119</sup> On account of interpretive and value pluralism, many of the requirements of natural law are too vague to provide practical guidance. They have to be concretised by systems of positive law. They call this role the *determinatio*.<sup>120</sup>

In the context of promise, it is contract law that fleshes out the requirements of natural law. As I have said, there are a number of perfectly eligible ways that those requirements might be interpreted and balanced. So, for example, English law embraces the requirement that on breach of contract, the promisee has a duty to take reasonable steps to mitigate the loss by for example obtaining substitute performance. In doing so, English law attaches priority to non-promissory values, such as altruism, loss avoidance or fairness.<sup>121</sup> In contrast, French law eschews the existence of such a requirement, thus attaching greater weight to the duty to perform one's promises.<sup>122</sup> Neither interpretation of the practice is necessarily wrong. They are both rationally defensible interpretations and rankings of the values at stake.

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<sup>119</sup> Fried (1970), above n 104, p 122: '[T]he function of concretizing the constraints of justice is the most characteristic function of law'.

<sup>120</sup> J Waldron 'Torture, Suicide and *Determinatio*' (2010) 55 *American Journal of Jurisprudence* 1 at 2 and 9-10; J Finnis 'On "The Critical Legal Studies Movement"' (1985) 30 *American Journal of Jurisprudence* 21 at 43; Fried (1970), above n 104, pp 121-122.

<sup>121</sup> For a critique of this choice see Shiffrin (2007), above n 4, at 725. For a defence of the English position see Letsas and Saprai, above n 117, p 319 (relying on the principle of fairness); Fried, above n 75, at 7-8 (relying on altruism); C Goetz and R Scott 'The Mitigation Principle: Toward a General Theory of Contractual Obligation' (1983) 69 *Virginia Law Review* 967 at 973 (defending loss avoidance as the rational).

<sup>122</sup> See Rowan, above n 66, pp 147- 151.

Whichever way the law chooses to interpret the practice, it facilitates or provides a framework for a new type of relation. Participants are given the choice, through the intent to contract doctrine, of having their relation governed or structured by the largely open or underdetermined practice of promising, or the relatively closed or determinate system of contract law. How they choose depends on the circumstances and what sort of relation they want. Do they want greater flexibility and room for manoeuvre or would they prefer the certainty and predictability of bright line rules?<sup>123</sup> Do they want greater control over the rules that govern their interaction, or would they prefer for this to be out of their hands?<sup>124</sup> And so on. There are advantages and disadvantages here that need to be weighed up. So, for example, flexibility is preferable where the future is difficult to predict. Flexibility avoids the costs of renegotiating contracts due to change of circumstances. However, flexibility has its drawbacks too, such as lack of predictability, and the risk of moral hazard arising from the tendency of parties to interpret their agreements in ways that suit their own interests.<sup>125</sup>

The value of this choice is all that the promise theory needs to respond to Kimel's challenge. Despite the advantages of legal enforcement, the parties might quite reasonably prefer to have their relation structured by the practice of promising rather than contract, because of the flexibility, freedom and opportunity for moral development that it provides. None of this means that contractual

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<sup>123</sup> See Gilson, Sabel and Scott, above n 36, at 1391-1392. See also R Scott 'The Death of Contract Law' (2004) 54 University of Toronto Law Journal 369 at 372 and 374.

<sup>124</sup> Robert Scott reports that in the US context, parties increasingly opt for less costly and more flexible informal enforcement: 'The result is that *the law* of contract is suffering from stagnation and, even more embarrassingly, from irrelevance'. Scott, *ibid*, at 370.

<sup>125</sup> Gilson, Sabel and Scott, above n 36, at 1391-1392; Scott, above n 123, at 372, 374 and 385-386; Macaulay, above n 62, at 64-65.

relationships are not based on promise or trust. In the same way that the framework provided by the legal institution of marriage hardly indicates that those who marry do not love or trust one another.<sup>126</sup>

### **(c) The Citizen and the State**

There is potentially another advantage to avoiding contract. For contract law, as well as providing a different kind of framework for the relationship between the parties themselves, one that is governed by a more rigid and determinate set of norms, also involves the parties in a relationship with the state.<sup>127</sup>

That relationship, like any other, has its own distinctive set of what Fuller called ‘interactional expectancies’.<sup>128</sup> In other words, it creates rights and duties for both parties. The state has authority over the contracting parties. It decides how to interpret and balance the values that govern their interaction. However, that power has to be exercised legitimately.<sup>129</sup> In particular, the state must ensure that it treats its citizens with equal concern and respect in its decision-making, which includes a duty to publish its decisions and rules, and to act with principled consistency.<sup>130</sup> In other words, the state must comply with the rule of law. In return, citizens have an obligation to obey the law.<sup>131</sup> The relationship depends on reciprocity. As Fuller says: ‘If the lawgiver wants his subjects to accept and act by

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<sup>126</sup> See Fried (1970), above n 104, pp 118-119.

<sup>127</sup> M Rosenfeld ‘Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory’ (1985) 70 *Iowa Law Review* 769 at 880-881.

<sup>128</sup> Fuller (1969) ‘Human Interaction and the Law’, above n 71, at 24

<sup>129</sup> Priel, above n 89, at 26.

<sup>130</sup> On the importance of the publication requirement for contracting parties see Scott, above n 123, at 379-380.

<sup>131</sup> See R Dworkin *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) ch 7; Fuller (1969) ‘Human Interaction and the Law’, above n 71, at 24-25.

his rules, he must himself display some minimum respect for those rules in his actions toward his subjects'.<sup>132</sup> Despite its benefits, citizens might legitimately, at least in the context of promise, want to avoid this morally charged relationship; preferring instead to make decisions themselves.

## 6. CONCLUSION

In this paper, I have explored how the *Balfour* doctrine and the sophisticated defence of it given by Kimel has reinforced a damaging separation between contract and promise, which threatens *both* relationships of intimacy between the sexes, *and* the neighbourly relations which should underpin contract.

The divisionist defence is based on a mistaken conception of freedom, according to which the value of freedom resides in the right to be let alone, and an undue focus on the coercive aspects of contract law, at the expense of the moral quality of the relationships that contract law structures.

Freedom does not depend on an absence of constraint, but rather on social forms, such as promise and contract, which provide a framework for human interaction. Both of these practices are based on promise, but due to the different ways that they manage the pervasive influence of interpretive and value pluralism on our lives, they sustain different kinds of relation. Promissory relations are open and flexible, providing greater room for moral development. Contractual relations on the other hand are closed and relatively rigid, due not least to the constraints

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<sup>132</sup> Fuller (2002), above n 73, p 190. See also J Boyle 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form Private Jurisprudence of Substance' (1992) 78 Cornell Law Review 371 at 377.

that the principle of fairness imposes on the relations between the citizen and the state that they necessarily involve. The difference in the moral quality of the relations that these two practices facilitate creates room for the promise theory to justify the existence of a separate intent to contract requirement, without having to let go of the view that promise is the foundation of contract.

My aim has been to set out this alternative vision of contract. The values that underpin and sustain it, promise, trust, respect, attachment, human association, are the polar opposite of those that motivate the divisionist view. I have shown that the reflective view can accommodate the intent to contract doctrine. This does not yet though deal with the objections made by feminists about how the doctrine operates in practice. This is true, but it is important to see that the answer to the operational question depends on how the doctrine is justified in the first place. I cannot spell out all of the doctrinal or practical implications of the reflective view here. Instead, I have chosen to focus on the broader philosophical issues. I will though mention one very important implication.

The dichotomy between contract and promise supports the evidential presumption against intent to contract in the context of promises made in the domestic or social sphere. If these promises were legally enforced that would, Kimel argues, threaten the expressive quality of promissory relations. I have questioned the plausibility of these claims. Moreover, this presumption is one that, as the feminist critique has shown, creates the risk of unfairness, distributive injustice, and relationships of dependency. Given these effects, that presumption is clearly incompatible with the values of trust, equality and respect that I have argued underpin *both* promise and contract. In light of this, whatever practical

benefits the presumption may have (resolving evidential difficulties, saving judicial time, and so on), they cannot justify interference with the principles of a morality of contract based on promise. It should go.