What is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises"

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What is contract law "about"? One way of looking at it is to conceive of the subject-matter of contract law in terms of promises – somewhat like tort law revolves around the concepts of accident or harm.[1] Much like accidents -- first-year law students are taught -- promises are "out there" in the world, to be classified and distinguished so as to privilege some with legal enforceability. There is a language/world of promises, this approach seems to indicate, and a language/world of contracts.[2] It is a main function of contract law to perform translations from the one to the other. Not all promises are translatable into contracts, and the rules and conditions for translation are what is otherwise known as the law of "formation" of contract.[3] Thus tort or contract law do not create the occurrences they subsequently apply to – the world/language of accidents or promises. Unlike some areas more intensively laden with legal constructs – corporate law comes to mind – this "aboutness" approach considers contract law as initially regulative in its relation to promises.[4] It regulates pre-legal promises, ascribing to some – constitutively –

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[1] Although this simplified position is not identical with neo-Kantian contract scholarship, that is an obviously good place to explore the interrelations of promise and contract. Charles Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981).

[2] For the notion of a language-game and of language as a "form of life" see Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1953) §§7,47, 49, 61,83,136,261,669, pp.188,200,224-5; *The Blue and Brown Books* (Oxford: Blackwell, 1958) 81,108,172.

[3] James Boyd White, *Justice as Translation*.

[4] While constitutive in relation to contracts.

the status of a contract, a privileged, legally binding, enforceable promise.[5]

In the next section, an argument of P.S. Atiyah's is applied toward a critique of the "aboutness" approach; Atiyah is "extremely dubious about the possibility of understanding contract law in terms of a set of rules 'about' promises".[6] The point that I wish to make prior to that is that the "aboutness" approach is rationalized by a widely-held linguistic theory, known as standard speech act theory (SAT), and that this presents critics of the "aboutness" approach -- such as Atiyah (and myself) -- with the challenge of applying their critical insights to SAT, as well.[7]

Although this is certainly not the place to elaborate on SAT, a few principles relevant to the present discussion may be glossed over. First, it is important to locate SAT's discussion of promises in the general discourse of performative language. Theories of performative language all share the basic insight that rather than being primarily about meaning (in the traditional, semantico-referential sense associated with standard structural linguistics) language is primarily about action – that speech and texts are *acts*, that they perform things in the world and bring about different kinds of performative effects.[8] Some of these performances are those more traditionally associated with language, such as claims to represent or at least effectively denote extra-linguistic reality (whether it is ever true that language represents extra-linguistic reality is a question in hot dispute; however, surely some speakers using some language segments – in particular,

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[5] "Enforceability" is used here in the broadest possible sense: that, other things being equal, courts will generally consider such promises as reasons for acting in such ways as will bring about the effect referred to by the promise (in SAT terms, its "propositional content") or an equivalent supplement based on the court's theory of exchange and representation (e.g. monetary "damages").
"Binding" and "enforceable" are commonly used interchangeably, following the realist approach. A problem with this language is that it approaches contracts solely from the point of view of the prospective dispute, somewhat ignoring other aspects – societal, psychological, cultural, moral -- on both functional and symbolic levels.

[6] p. 4.

[7] Rationalized....
SAT: *How To Do Things With Words*, *Speech Acts*, more...

[8] Jürgen Habermas speaks even more generally of "communicative acts" as the basic units of linguistic interaction in *The Theory of Communicative Action (vol. 1)*; see below.

semantico-referential structures -- *claim* to represent facts. From quite another direction, rhetoric is associated with another recognized loosely-grouped field of linguistic performance, including complex forms of oral and textual manipulations.) However, the particular illocutionary act that Searle and Austin refer to as performative is that which does not, e.g., report action but *is* the action: as Austin puts it, "When I say 'I do' (sc. take this woman to be my lawful wedded wife) I am not reporting on a marriage, I am indulging in it."[9] Lawyers should think of performatives as those communicative acts that generate moves on the dynamic branch of the Hohfeldian matrix, changing the in-personam arrays of powers, subjections (or "liabilities" in Hohfeld's terms), immunities, liberties, duties etc.[10] Promises, especially for Searle, are the paradigmatic performative acts.[11] As such, SAT regards them as constituted solely by and through linguistic rules: they are the "skeleton" of social interaction around which the rest -- namely, culture -- envelops. Searle adopts a particular interpretation to the Wittgensteinian concept of language as a "rule governed practice", namely the insistence that the rules in question are constitutive in relation to any language-game played: one plays a language-game by the act of following its rules; deviation from the rules is not-playing the game, thus producing nonsense in relation to the language-game in question.[12] Promises, for Searle,

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[9] J.L. Austin, "Performative Utterances". By "illocutionary act" Austin meant "performative" in the sense of functioning through a performative force, distinct (functionally but not morphologically) from the speech act's propositional content, otherwise denoted the "locutionary act".

[10] Welsley Hohfeld*, Fundamental Legal Conceptions as Applied in Juridical Reasoning*. The distinction becomes less clear when one deals with assertions, a class of speech act whose distinctive illocutionary force is, in effect, locutionary (the act of representing *is* doing something with language) . Austin has never quite worked this problem out, which has prompted Searle to define a class of illocutionary acts, namely "performatives", in much narrower terms: self-executing linguistic devices that indeed "do" something in the world other than claim to represent facts -- that bring about changes in normative relations (promises, commands, and other commissives are paradigmatic). It is the stricter sense that is employed here. Austin, *How To Do Things With Words*. For Searle's clearest iteration of the distinction between "performative" and "illocutionary" see John Searle, "A Response to Habermas" in Ernest Lepore, Robert Van Gulick (eds.) *John Searle and His Critics* (Oxford: Blackwell, 1991).

[11] John Searle, *Speech Acts.*

[12] constitutive/regulative -- elaborate; cite Wittgenstein, too.....

are any linguistic constructs that are performed according the linguistic rules of promising – rules that *presuppose* promising, much like John Austin's "felicity conditions" of illocutionary acts.[13] Those rules are intimately related to the phenomenon of intentionality – of something being *about* something else – of language as a device or tool (a favorite Wittgensteinian image) used by an intentional mind. (In Searle's later writings performatives are particular linguistic devices that *manifest* performative intention; the nuances are important but may be overlooked here.) Much of Searle's efforts were devoted to taxonomies of speech acts. As speech acts, promises are constituted only inasmuch as they abide by the linguistic rules that prescribe how promising must be performed – other speech acts, say orders or curses (the latter not being strictly performative in the Hohfeldian sense) are constituted by other sets of rules. *Normative* questions, such as how should a society regulate or otherwise approach promises, are then a matter of law or policy and beyond the scope of linguistics. What linguistics does claim to tell us, however, is what speech acts are promises – we may denote them "skeletal promises" – to be subsequently dealt with as they may.[14]

SAT purports to be a theory about how the social world works and, as such, it rationalizes the "aboutness" approach to promises, depicted above. Such a union indeed seems a most desirable thing: a common-sensical, perhaps even standard jurisprudential approach finds ample support in a social-scientific theory of social language. What is the

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[13] By "felicity conditions" Austin termed the presupposed set of "procedures" that a language act must comply with in order to carry a performative function – in intentionalistic terms, to succeed. He insightfully noted that of the different types of speech acts only assertions may properly respond to truth functions; other performances were not about speech act being true, even when they contained a propositional content (e.g., questions).

[14] In a strict sense, "linguistics" doesn't prescribe anything -- it is a descriptive system of usage. However, by having grammar define and delineate normal usage (in relation to any society or practical community) it supplies the substantive content and form to the prescriptions of linguistic practice. It is Searle's contention that SAT is not relative, but rather supplies the "skeleton" of performative language on which cultural layers build, in any language. Silverstein critically included such notions in his concept of "language ideology"; for applications of such critiques see Michelle Z. Rosaldo, "The Things we do with words: Ilongot Speech Acts and Speech Act Theory in Philosophy", *Language in Society* 11: 203-237 (1982); Kathryn A. Woolard, "Language Ideology: Issues and Approaches", *Pragmatics* 2(3): 253-249.

nature of this alliance? If one of its components is shaken, does this affect the other? Rather than offering an alternative comprehensive construction to the "aboutness" conception of promises, the following discussion will offer a critique of SAT's notion of skeletal promises toward a richer, perhaps more relational-inclined understanding of promises in their linguistic and normative components.

In "The Modern Role of Contract Law"[15] Atiyah offers a prominent opposition to the "aboutness" conception of contracts.[16] The issue that troubles Atiyah is indeed what he identifies as the conception of contract law as being "about" something, such as "promises" or "agreements" that are initially shaped independently of legal, or perhaps even of any normative discourse (as SAT suggests). To begin with, "about" is a notoriously mercurial concept, as J. B. White, that "gentle deconstructionist" warns us,

> 'I want to talk to you next about justice and translation'... But what kind of a sentence is that? It makes "justice" and "translation" nouns, or nomens, as if there were entities in the world that could be named -- pointed out and referred to -- by these words, which of course they are not. And I say I want to talk "about" them as if "talking" were one kind of thing, "justice" and "translation" another, and as though the first took the second in some sense as its object.
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> 'There is a world of talk, and the world beyond talk,' I seem to say; the relation between them is that the first is "about" the other. But translation is a form of talk, as perhaps justice is too, and there may be important continuities among these three practices that the formula "talk about" obscures or denies.[17]

Atiyah, whose interests are generally different than White's, nevertheless seems to work from a similar intuition. He argues that the notion that law is in any referential sense "about" something presupposes a conception of social reality that is formable exclusively in non-legal terms. He then proceeds to examine the tenability of the concepts

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[15] Patrick .S. Atiyah, "The Modern Role of Contract Law" in Atiyah, *Essays on Contracts* (Oxford, Clarendon Press: 1986) 1-9.

[16] At a first look, his argument bears a perplexing relation to SAT: Atiyah cites Searle as an authority on the matter of analyzing the "non-legal aspects" of promises while launching an attack on the possibility of that very project. Also, although his argument seems to perfectly accommodate the Searlian notion of constitutivity he refrains from using it directly.

of promise and agreement as based on this presupposition -- as being "objects" for the language of law to be "about" -- and finds them unintelligible. His main claim is that there is no point of talking about anything being a promise other than in terms of enforceability, because that is what the concept of promise entails: that it yields enforceable obligations, otherwise it is not distinguishable from other speech acts.[18] If we recall Searle's extensive efforts to explain the concept of promise on a purely linguistic basis, it seems that Atiyah is engaging in a straightforward critique. Methodologically, however, that is not strictly the case as instead of supplying a comprehensive theoretical argument Atiyah relies mainly on situational analysis and on "intuition". He stops short of the hermeneutical argument that legal language constitutes, or at least partly constitutes, such concepts as promise and agreement (indeed the term "constitutive" is wholly absent from his discussion). Second, even though Searle's earlier project seems an attempt at constructing illocutionary acts wholly in intentionalistic terms, his later project is in fact more sophisticated than that. The examination of the debate in its components will allow us, I propose, to build on mutual critique toward a more satisfactory understanding of promises than those proposed by either approach.

In order to better understand to difficulties of skeletal promises and the "aboutness" conception, professors Searle and Atiyah will excuse me, I hope, if I take the liberty of staging them in a brief *tableau vivant*, making use of that most time-honed of philosophical styles, the dialogue.[19] Let us then imagine two cozy common-room

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[17] J.B. White, *Justice as Translation* 229.

[18] Those familiar with Atiyah's piece will appreciate the difficulty of extracting general claims from a methodology of situational analysis. What must on all accounts be avoided is the pitfall of taking Atiyah's claim too far. For instance, it is not the case that he claims that, absent legal discourse, the concept of promises is nonsensical. The claim is only that non-normative, "purely linguistic" frameworks alone cannot generate or account for promises.

[19] Such consent is not obvious: Searle is known to have refused to take part in at least one prior "debate" -- with Derrida -- thus perhaps indirectly illustrating Habermas' point (which he otherwise rejects) that the practices of discussion and debate are intimately connected with consensus, at least as concerning validity claims of communicative acts. See introduction to Jacques Derrida, *Limited, Inc.* (This is an anecdote of intellectual culture: that volume contains three pieces by Derrida and a short (2.5 pages) summary of John Searle, "Reiterating the Differences: a Reply to Derrida". The editor chose not

armchairs in Atiyah's Oxford or a cool spot on Searle's Berkeley campus lawns, and begin.

Professor Atiyah: Professor Searle, from reading your essays I understand that you claim that one can form a coherent theory of promises without recourse to anything that resembles a legal system or indeed the concept of a norm, other than those norms -- "rules" in your terminology -- that "constitute" and "regulate" language itself. What kind of a thing can a promise be that is not normative?

Professor Searle: As to the assertion you make, the short reply is that your understanding is correct, yet must be qualified. As to your question, it supposes that I argue that illocutionary acts are constructed without appeal to norms, which is not at all my view. On the contrary, it is my view that language is a rule-governed practice, and for that matter I have labored to explicate the distinction between the concepts of "constitutive" and "regulative" rules that came under such fire from your colleague Joseph Raz.[20] But before we proceed, Professor Atiyah, allow me to state that I did not understand your objection to the project of defining what such linguistic concepts as promises consist in.

A: Let us begin then with this issue, for it will convey us to the threshold of the second, which is a refinement of what *kinds* of norms govern linguistic interaction; I believe us to be in disagreement over that matter too, albeit somewhat shadowed by our different understanding of "normative".

There is a specific legal ontology according to which law regulates practices that exist independently of law. For instance, there is a sense of possession (albeit perhaps not of propriety) that precedes legal discourse; people kill other people whether it be murder to

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to discuss Searle's reasons for declining both to include his article in the volume and, in any direct way, continue to engage in this "debate" (presumably on the basis that he owes Searle nothing of the kind once the latter declined to speak out on the substantive matters. Yet conditioning one upon the other would render Searle's silence paradoxical.) Perhaps significantly, that volume does not even contain the full *citation* of "Reiterating the Differences" (the page numbers are never mentioned), a fact that Derrida himself would urge us not to overlook (it does contain numerous other citations to various works, mostly by Derrida, which invariably do contain precise page references).

do so or not, and events that we may call accidents, with which such legal areas as torts deal with, happen as matters of factual occurrence in the world (I think that you once referred to these as "raw facts").[21] In other words, there is a social reality which law is "about". Now, I make no claim to whether this ontology is tenable in general. However I do claim that it is not tenable inasmuch as the terminology of contract law suggests, unlike, by the way, the premise that standard legal education relies on. In other words, *contra* standard legal education, there are no "promises" or "agreements" out there that the law either enforces or not, because whether anything is considered a promise or not must already be dealt with in legal language. The reason for this is that what makes any communicative act a promise is not any linguistic property but the way in which the courts will deal with its normative effects. When we tell first-year law students that contract law is about which promises to enforce and which not to (there are corollary questions but this is the main one) we presuppose a wrong ontology and thus mislead them.

S: I must say that I don't see your point. A promise is a linguistic entity, constituted by intentionality in accordance with linguistic norms and in view of language's illocutionary forces. What makes such illocutionary acts as promises possible is that language has the pragmatic capacity of manifesting a cognitive state, namely the performative intention to promise by a given speech act.[22] I have analyzed the components of promises thoroughly and I think that this is the fallacy of your argument: you mistake the identification of some speech acts as constituting promises -- something which is purely a linguistic matter, because we are not yet saying how society deals or should deal with these illocutionary acts -- with questions of morality or policy as to which promises should be enforced by the legal system or other social institutions. These are quite distinct matters, and I really see no problem here at all.

A: Nevertheless, let me then try to convince you that there is one. The point is, that the question of what constitutes a promise and the question of enforceability are

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[20] import from....

[21] Speech Acts....

[22] John Searle, "How Performatives Work?"

interconnected. The reason is that a promise is something that means enforceability (in any manner we perceive of that), and *that* is what makes it a promise. I'm surprised that one so involved with taxonomies of speech acts as you are does not see that any other conception will make it impossible for us to determine which illocutionary act should count as promises.

S: My dear professor, you completely overlook the simple fact that promises are performatives, and as such dependent on a felicitous manifestation of performative intentionality. To use my own terminology, although intentional speech acts have "conditions of satisfaction", these are distinct from the constitutive elements of any illocutionary act. It is a condition of satisfaction of promises that they be kept, but they are promises notwithstanding. To quote myself in a response to a critique similar to yours (made by Habermas),

> I am not rejecting the idea that actual institutional structures, such as the social structures of making promises, or making assertions, require systems of constitutive rules. Rather, what I am trying to do is to locate the most fundamental forms of intentionality which are expressed in different institutional structures in different societies... I am trying to show the skeleton that underlies the skin and clothing of the illocutionary organism. I do not say that the skeleton is all there is, but, I do say that there is a skeleton... It seems intuitively obvious.[23]

There you have it. The performative illocutionary act (for not all illocutionary acts are performative in the strict, Hohfeldian sense, recall) that constitutes a promise is one thing; how you want to treat it is another, contingent and "normative" issue. That I leave to lawyers and such.

A: Far be it from me to label you an "essentialist", and I know that I, personally, shall resent the label "functionalist". I shall therefore refrain from name-calling but, if citing one's own words is called for, let me repeat that,

> [T]here are many difficult problems at the borderline of the concept of promising. For example, it is unclear whether a promise is "really" a promise if it is not communicated to anyone. If someone writes down a promise and sticks the document in the drawer without showing it to anyone, is that a promise? Or again, even if a promise is communicated, suppose it is not accepted by the person to whom it is addressed, does it then no longer "count" as a promise? Or was it never a

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[23] John Searle, "Response to Habermas" 91.

> promise before the acceptance?... This problem concerns the question whether a putative promise "really" is, or "counts as" a promise, when there seems no good reason *other than the promise itself,* for recognizing that the promise creates an obligation.[24]

I am happy that you invoked Habermas, for indeed I see my line of argument as similar to his. Promises, dear professor, like agreements, are communicative constructs. We cannot *identify* them in the world as a matter of fact in the early Wittgensteinian sense: a promise or an agreement is a social or moral or legal construct and is therefore necessarily already imbued with our social or moral or legal ideas and language. Thus a promise cannot be a linguistic phenomenon that the law deals with as a matter of "raw fact", and is not intelligible through a reduction to intentionality or any other cognitive factor.

This seems a time for the moderator to intervene. The parameters of the disagreement reached are clear, for even as they speak Searle sends for a copy of his celebrated essay "How to Derive 'Ought' from 'Is'"[25] to provide an argument for promises being "a matter of fact", while a the reader may think that there is a sense in which neither Atiyah nor Searle present a complete argument, as follows.

Lawyers are of course rather prone to consider most anything they deal with as a matter of construct. They are used to highly structured narrative forms that govern factual reconstruction in the courtroom and accept that such concepts as, e.g., "life", "death", "person" etc. Are comprehensible primarily as interpretative constructs, so that different constructs are called for in different contexts (such as "alive" in criminal law and in the law of estates or of naturalization).[26] However, they do teach future lawyers that contract law is a system of privileging some promises over others, which means that promises are conceivable in non-legal language. Which way then?

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[24] *Supra* note 15, 2-3. Here Atiyah has in mind such factors as reliance or consideration.

[25] *Philosophical Review* Jan. 1964.

[26] Various laws of inheritance recognize a person's right to inherit even in fetus form; criminal law may regard fetuses as persons or not (obviously, where abortions are allowed it does not), while laws of naturalization generally look into events of actual birth (as opposed to inception) to determine citizenship rights.

The legal realist approach must at least qualify Atiyah's argument.[27] According to it, courts are introduced to and subsequently translate commercial practices (referred to as "conduct") that are, at least partially, not constituted by legal language. A court may recognize that in a certain industry suppliers are considered bound, or at least constrained, by some customs of supply, even if those do not and cannot (unless great artificiality is involved) comply with standard constitutive elements of legal doctrine, such as actual communicative acts amounting to "offer" or "acceptance".[28] Contract formation models that insist on traditional narratives of formation will be hard pressed to accept that an "agreement" or "promise" or indeed "contract" can be identified in such cases; if the court grants remedies this must be by way of policy reasons imposed *ex post facto*.[29] According to the "aboutness" approach, courts do not necessarily deny that certain language-games are perceived by practitioners to constitute obligatory relations. They will, however, claim that their particular function is to privilege certain language-games only. Courts have limited means of understanding social interactions. If one wishes to secure the law's protection in transactional matters, this model implies, one would be advised to play the courts' language-games rather than rely on perfect

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[27] The general designation "legal realist approach" is somewhat misleading, in this context and in others. Generally, Atiyah's emphasis on eventual enforceability sits well with the Holmsian approach to norms in general and the courts' role in particular; it sits less well with Llewellyn's more careful approach to normative translatability and the relation between norms of conduct and legal norms, as expressed in the UCC Art. 2. These are nuances, but significant ones: Holmes emphasizes the courts, Llewellyn a culture of transaction where law is a privileged but not exclusive system of reference. In this sense Llewellyn is a true precursor of the relational approach to contracts, as convincingly argued by Robert W. Gordon "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law", 1985 *Wis. L. Rev.* 565

[28] Supply and other long-term contracts are paradigmatic examples of relational contracts missing the constitutive elements of standard formation narratives; see Richard Speidel, "Court-Imposed Price Adjustments in Long-Term Agreements", 76 *Nw. U. L. Rev.* 369 (1981); John P. Esser, "Institutionalizing Industry: The Changing Forms of Contract", 21 *Law and Social Inquiry* 3, 593 (1996).

[29] Hence "implied contracts". Atiyah's position would be to question the utility of such a construct on the grounds that the policy reasons that generate it are directly applicable to most relevant situations. P.S. Atiya, The Rise and Fall of the Freedom of Contract (Oxford: Oxford University Press, 1979).

translations.[30] The argument from efficiency may follow such linres: that courts grant contractual protection on a limited basis due to transaction costs (here: the costs of translating any pre-legal language-game to the standard contractual one). It will be a relational requirement that courts, at least to an extent, agree to contextualize and "open up" to intersubjective language games different than those mandated by standard doctrine.[31]

Searle, unable to identify in some relational situations the scenario of distinct performative speech acts, will also claim that no promise has been made, although there may be considerations of policy to enforce the practice anyway. Legal realists are bothered by this because they want to claim that the concept of contract is broad enough to allow history (and the market) to devise ways and manners of forming contractual relationships, and that, aside from a few exceptions owing to policy considerations[32] it is

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[30] J.B. White is undoubtfully correct to point out that no translation -- least of all in law -- is in any sense "perfect", a recurrent theme in *Justice as Translation*. When lawyers translate their clients' concerns into the language of legal claims much is undoubtfully lost; the problem seems, however, less acute in the commercial context of repeat players.

[31] Such practices are intersubjective, inter alia, because they depend on reciprocal mutual communication and are interpreted by the social agents that engage in them. As far as courts go, any practice is preinterpreted – this is a crucial point made by Habermas – by the relevant sets of practitioners; the court does not approach a non-interpreted phenomenon, or one in relation to which its preinterpretation is an insignificant fact. Relationalists will typically demand for initial respect to the ways in which practitioners interpret and understand their own practices. The Marxian view will be to expose the actual economic reality underlying the symbolical interaction, sometimes explaining the discrepancy by "false consciousness". See Pierre Bourdieu, *An Outline of a Theory of Practice.*

[32] The Statute of Frauds is one, recognizing both the mystic of the written word and its probative value. Yet Statutes of Frauds vary from jurisdiction to jurisdiction. The original British Act for Prevention of Frauds and Perjuries, 1677, extended the rule that "no action shall be brought... unless the agreement..., or some memorandum or note thereof, shall be in writing" to land deals, suretyship, and performances expected to take place more than a year after formation, among others. The statute's probative function was never regarded as exclusive: the ominous acts of writing and signing (two different acts, both required by the 1677 statute) were considered to assure against impulsive and unpremeditated acts, in particular concerning suretyship and, at the time, marriage promises. "People are so likely to be led into such promises inconsiderately, that the law has wisely required them to be manifested by writing", Warden v. Jones,

not the business of the law to impose either form nor language on parties.[33] There is then a sense in which promises and agreements pre-exist, for legal purposes, as subjects for translation. "I promise" or any equivalent narrative reconstruction are not necessarily

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44 Eng. Rep. 916, 919 (1857). The UCC 2-201 may seem rather wide in range of application: subsection (1) demands "some writing sufficient to indicate that a contract between the parties has been made" for any sale price that exceeds $500, but it allows for various relational exceptions in subsections (2),(3) (note the limitation to sales of goods; see UCC 2A-201 for leases). Note that the matter of primacy of written terms as opposed to external evidence (of prior oral interactions) has, in common law, been treated under a different principle, the parol evidence rule (see UCC 2-202). (See also UCC 2-209 concerning later modifications, including oral ones; note that the UCC differs from traditional common-law on the subject of subsequent (as opposed to prior) oral modification of a written clause (which does not fall under the parol evidence rule), in that under UCC 2-209(2) clauses barring oral modifications require special evidence of assent to be enforceable (except between merchants). (In common-law modifications are permissible in general, as a result of general freedom of contracts, so a clause barring oral modifications is not enforceable; subsection 209(2) is intended to protect from unwarranted claims considering subsequent modifications, not to disallow them). Under UCC 2-209(4) an attempt at oral modification can operate as a waiver of the parol evidence rule's protection, which seems to be another relational influence.

[33] In his monumental, lovely, and obscene *Gargantua and Pantagruel* Rablais makes the most of the legal "battle over language" -- but in ironic reverse, as the learned and sagacious Pantagruel is called upon to decide a legal matter that has occupied, in vain, the best contemporary legal minds. (The case concerned such a "rare and difficult points of law... [that] they had been unable to get their teeth into it or to gain a clear enough understanding of the case to settle any aspect of it whatever.") Although pompously claiming all law to be "based on essential philosophy both moral and natural", Pantagruel's practical approach is to completely submit to the parties *language*, whereupon the dispute, almost by magic, dissolves to both parties' content. This was no mean feat, as to the plaintiff's claim that "There passed between the two tropics the sum of three pence towards the zenith... all night they did nothing but keep their hands on the pot, and dispatch bulls on foot and bulls on horseback to hold back the boats, etc. etc.," the defendant smartly replied, "Now that the world is all out of joint from the tufts of Leicester fleeces: one becomes debauched, the other five... when the sun sets all beasts are in the shadow, etc. etc." The point is playing the game by its rules, and accordingly Pantagruel translates backwards, yielding to language instead of attempting to translate it or dismissing it as nonsense: "The court declares that, in view of the quaking of the bat, declining bravely from the summer solstice to woo the trifles which have checkmated the pawn through the wicked vexations of the light shunners that are in the meridian of Rome, etc." The judgment of "codpieced curds" is payable at "mid-August in May... with costs, damages, and interest." Rablais, scornful of the linguistic power-games that constituted trial practices, gives jurists somewhat of a humbling lesson. Fran⊓ois Rablais, *Gargantua and Pantagruel* (trs. John M. Cohen,

about law, even if they may subsequently be dealt with it. On the other hand, it is by no means the case that a "skeletal" model of promising or of reaching an agreement underlines the realist approach, because societal factors are not conceived by realists to be "add-ons" to an essentialist nucleus – they do not "ride" on "pure", context-free semantico-referential language, to paraphrase Frederick Schauer's position and Silverstein's critique.[34] The realist approach is typically Wittgensteinian in that it refuses to identify a practice with any given set of constitutive conditions -- be they Searlian "manifestation" of performative intentionality or Austinian "felicity conditions".

An intersubjective model of language that responds to the realist concern is the intersubjective model of *normative importation*.[35] According to importation, social (and in particular, performative) meaning is always created at the junction of word and norm. Importation begins with a phenomenological insight: that the social universe is normatively saturated, that no norm-free or neutral medium for "pure reference" ever exists.[36] It is language's particular effect to import normative content from the normative context into which it has been launched in particular speech events, to create social meaning.[37] (Importation thus rejects the reduction of performativity to intentionality,

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Oxford: Oxford University Press, 1982 [1534-1567]) 182-190, *passim*.

[34] Schauer speaks of language's "semantic autonomy" and the ability to engage in normative playing -- namely, to follow rules -- "simply by speaking English". Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Oxford University Press, 1991). For a critique of this position see Jonathan Yovel, "Overruling Rules?" *Pragmatics and Cognition* 4(2): 347-366 (1996).
Silverstein's is, inter alia, a critique of the influential "indirect speech act" theories according to which commissive speech acts are primarily assertions – so determined in a semantico-referential scheme – that may be "used" performatively "indirectly", e.g. for creating or assuming obligations. Michael Silverstein, "Metapragmatic discourse and metapragmatic function", in John Lucy (ed.) *Reflexive Language: Reported Speech and Metapragmatics* (Cambridge: Cambridge University Press, 1993) 33.

[35] *Supra* note 31.

[36] Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1984). While not employing the term "importation", Habermas nevertheless present the strongest case for the inherent normative dimensions of language and communication.

[37] "Speech event" here is a term of art that is not limited to oral communication. There seems, however, that an easier-to-establish, less interpretative and less manipulative (although by no means not at all) relation exist between oral speech-event and their

among other things.)[38] Language may be a rule-governed practice as Searle (and Wittgenstein) claim, but the rules in question are not limited to the narrow scope of grammar or to presupposed "felicity conditions". According to importation, those rules are dynamic: what constitutes a promise in any intersubjective space is determined by the actual -- and the history of -- practices performed by social agents. Contract formation may be an array of alternative communicative language-games only according to a specific conception of the concept of a game. Namely, Unlike such games as chess, where stipulated rules are constitutive (deviate from the rules and you are not playing chess, deviate from the grammar and instead of constructing meaning you are talking nonsense), language – and contract formation – are histories of alternative performative modes. Deviate from a standard speech mode (such as stipulated by SAT) or from a standard practice of contract formation -- both communicative acts conceived as rule-governed -- and you are in effect making a claim by way of offering an alternative practice. In language, such alternatives may catch on according to unpredictable histories of use. In common law, the alternative practice – in the form of a claim – may be recognized or adopted or translated or modified or rejected by the relevant institutional agents, namely courts. Playing such games, then, is not just playing by presupposed rules. It is also the possibility of putting forth alternative practices, alternative "rules" to face whatever lot they may in markets and histories of practice. This is, I argue, not only a valid reading of Wittgenstein -- a full discussion cannot be made here -- but an approach supported by contemporary juresprudential canons as well. Consider the conception of rules not as exclusionary reasons for action (as Raz analyses them) but as presumptions

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contexts as opposed to texts and "their" contexts. For Derrida, the particular performance of textual medium is the obvious divorce from a particular context of origin. Jacques Derrida, "Signature Event Context", 1 *Gylph* (1977), reprinted in Derrida, *Limited Inc.* (Evanston: Northwestern University Press, 1988). When composing legal documents such as contracts (in the textual sense that is at times confused with the normative concept) drafters typically must internalize contextual elements -- or tactically avoid them -- when planning for possible future interpretations. "Interpretative anchors" will be coded, to be deciphered in future contexts.

[38] For an illuminating debate on this point featuring contributions by Habermas, Apel and Searle see Lepore et al., *supra* note 10.

(as Schauer does):[39] As such, it is the nature of rules to face constant challenges – not to exclude competing reasons but critically work and be shaped through them, not merely on the level of application but on that of formation of the rule as well. Unlike traditional legal-positivist views that see a rule as either applicable to a case or not, Schauer's presumptive positivism allows for rules' dialectic with cases to which they are claimed to apply (thus defining a rule's practical and historical development and modification in response to challenges).[40]

Importation rejects Searle's essentialist approach also on the question of what should properly be understood as language -- namely, there is a sense in which importation conceives of contingent social norms *as linguistic norms* in the sense that they constitute the social meaning of speech acts. This is opposed to SAT's view according to which societal norms only govern pre-conceived, "skeletal", fully meaningful speech acts.[41] Atiyah's approach, however, seems too narrow: according to importation, language absorbs normative content from its very inception (e.g., in the form of speech acts) because it appears in a normatively saturated universe. But it is not necessarily a *legally* saturated universe.[42] The law is one normative system among several, more or less institutionalized.[43] Atiyah is correct, in my view, to claim that there is no tenable "purely linguistic" conception of promise independent of a social normative context. (As an

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[39] Schauer, *supra* note 34. Joseph Raz, *Practical Reason and Norms* (London: Hutchinson & Sons, 1975); "Reasons for Action, Decisions and Norms" Mind 84: 481-499 (1975). For a discussion of both positions see Yovel, *supra* note 34.

[40] *ibid.*

[41] This is what separates the genuinely performative paradigm from semantico-referential interpretations of Wittgenstein's "use" theory. Ludwig Wittgenstein, *Philosophical Investigations.*

[42] Aharon Barak questions this qualification in the following sense: all action is subject to either a legal proposition which applies to it or to a proposition asserting that no such legal proposition does; for action not to be constrained by legal norms means that the law "applies" to it in that it does not constrain it. (A "gray zone" of indeterminacy does not oppose, but rather builds on this claim.)

[43] Law's role as a nonexclusive relevant normative system applicable to transactional relationships is a tenet of the relational approach to contracts since the publication of Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study", 28 *Am. Soc. Rev.* 55 (1963); see also Macaulay, "Elegant Models, Empirical Pictures, and

aside, such an approach renders traditional social contract narratives such as Hobbes' incoherent, whatever their use in structures of political legitimization may be: consider the transition from the natural condition to the political one -- promises without a normative framework? Rights without a normative language? The language of normative culture is available, but without a normative world -- a context from which importation works -- normative speech acts cannot materialize, grammar notwithstanding).

However, social action appears in diverse normative contexts. Within a certain community or industry (e.g. traders in raw and cut diamonds), it may be that certain communicative acts (e.g. handshakes in certain circumstances, but not in others) constitute promises in that community's terms – in its Wittgensteinian language-game, framed by the rules of its own practice. We recall Habermas' important insight, that social practices are "pre-interpreted" matter for the social scientist -- they are interpreted by the practitioners who take part in them.[44] With acceptable hermeneutical constraints, an "internal" point of view is thus available or at least translatable for the courts. The realist (namely, Llewellynian) position is that the courts' function is to internalize, at least tentatively, a community's communicative practice, that is to inspect it from an internal point of view. The question of how to deal with practices from the external point of view is, as Searle would correctly stress, a matter of policy or of a theory of justice. The point is that while courts are typically conceived as having a mandate to dictate and even impose justice, they do not, typically, have an equal mandate to impose original ways of understanding and interpreting the world (the argument here is restricted to civil,

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the Complexities of Contract", 11 *Law & Society Rev.* (1977), 507-28.

[44] Habermas, *Supra* note 8. Dworkin tacitly relies on this insight in his treatment of constructive and evaluative interpretation in chapter 1 of Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). Dworkin's main point there is that the relevant practitioners may ere in interpreting the real social function of their practices. This may seem obvious to Marxists thinkers who will emphasis the social and economic significance of such failure to interpret rituals and practices in their power contexts. Anthropological studies reveal a richer, more complex picture in which true and ritualized interpretations serve various social functions, e.g. in transactional analyses of seemingly gift-based economies. Pierre Bourdieu, *An Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977); *Ce que parler veut dire; L'economie des 'changes linguistiques* (Paris: Fayard, 1982).

and primarily contractual matters).[45] In terms of legitimacy, the "normal theory of legitimacy" employed by courts entails that when courts insist on imposing or privileging some language-games over others, such as in the context of contract formation, the typical justification is from justice rather than from epistemology (this does not mean that courts do not impose epistemologies, only that this is not part of their paradigmatic function, in particular within any society with epistemological diversity). In an important sense that is the significance of the so-called "objective doctrine" of contract formation that places the risk and the responsibility for successful communicative interactions on a speech-act's utterer. The objective doctrine is not a theory of language, not a theory of how language and communication work in the intersubjective world -- rather, it is a system for the allocation of risks, responding to a theory of justice.[46]

However, in court-oriented terms, Atiyah's intuition seems to turn on the right note: an interaction is said to amount to a promise in any meaningful sense if it is, in normative terms, enforceable[47] -- that is what promises are about, what distinguishes them from other illocutionary acts.[48] This does not mean that promises are constructs that necessarily inhabit only legal discourse, nor that there are no promises in non-legal senses, because the process of importation -- already at the linguistic level, recall -- may

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[45] Although to a degree the former requires the latter. Justice employs its own presuppositions, at times its own epistemology; it asks questions for different reasons and in the service of other interests than scientific disciplines, thus unsurprisingly yields different answers. Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1983). In civil matters it is not clear that courts have a mandate to uncritically privilege one way of understanding and interpreting the world over another, because such questions are typically at the heart of the dispute. For empirical work suggesting links between epistemology, social power and courtroom dynamics see Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990); Mindy Lazarus-Black (ed.), *Contested States...*

[46] A more complete argument is included in Jonathan Yovel, "Where Do Promises Occur? An Outline for a Language-Paradigm Critique of the External-Internal Model of Contract Formation".

[47] Enforceability is of course a disposition, subject, in according to various doctrines of remedies, to such factors as equitable defenses.

[48] Or at least from those Austin and Searle referred to as "commissives", a category that includes orders as well as promises. John Searle, "A Taxonomy of Speech Acts" in

have occurred in a non-legal domain (e.g., one based on standards of practice). Atiyah's argument should not be carried to far. It does not deny the social, psychological, and other normative, non-legal aspects of promises. It only questions in what sense "promises" may be understood as contracts, or as the basis thereof.[49] In mediating between social action and legal discourse it is the courts' typical role to translate pre-legal normative constructs such as promises to the language of legal enforceability. Those constructs, however, are not "skeletal" or purely linguistic or norm-free as SAT claims.

For the relationalist the emphasis in this context is that the translation -- which involves the faculty of judgment (e.g. whether and how to attribute to a "promise of practice" legal significance) -- indeed examines the true nature of the interaction and not look for artificial semiotic factors that can be readily translated into the legal language of "offer", "acceptance" and the like. When assuming obligations the true communicative nature of an interaction is what matters, not adherence to a presupposed narrative or model, as both SAT and much of standard contract doctrine require. Over the relational movement's camp a banner flies, reading "beware of the semiotic trap". Indeed, in reconstructing contract formation, courts struggle with formal and narrative constraints habitually. The neoclassical theory's scenario of formation, insisting on distinct formative moments of "offer" and "acceptance" (or, in Hugh Collins' terms, a "moment of responsibility"),[50] fails to capture the complexity of many real-life interactions, such as complex commercial transactions.[51] Through language it imposes a rigid scheme of action that courts are coaxed into applying as an interpretative framework: which speech

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Searle, *Expressions and Meaning* (Cambridge: Cambridge University Press, 1979).

[49] Contra Fried, *supra* note 1, Atiyah flatly denies that promising may count as sufficient condition for contractual privileging (i.e. when no reliance or consideration is involved). That is a different claim than the stronger one -- that Atiyah does not make -- that the concept of promise is itself incoherent unless entailing *legal* enforceability.

[50] Hugh Collins, *The Law of Contract* (London: Weidenfeld and Nicolson, 1986).

[51] Victor P. Goldberg, "Price Adjustments in Long-Term Contracts" *Wis. L. Rev.* 1985 527-43; Speidel, Richard, "Court-Imposed Price Adjustments in Long-Term Agreements", *76 Nw. U. L. Rev.* 369 (1981). For contract to provide the measure of security expected from an instrument of "private insurence", as Friedman puts it, distinctions between formation and adjustment must nevertheless be maintained. Wolfgang Friedman, *Law in a Changing Society* (London: Penguin 1961).

acts could, or did, count as "offers"? Which as "acceptance"?[52] What if none do? As Collins argues,

> Courts frequently have to cut their way through a tangled web of negotiation in order to determine the moment of contractual responsibility. Often the results appear arbitrary, for the court gives no reason for choosing one standard form over another, or for concluding that one series of negotiations reached fruition while the other did not. Although the courts often present the results as the inevitable conclusion of the application of the rules of offer and acceptance to the facts, the appearance of arbitrariness suggests that in reality the courts follow criteria other than the classical rules.[53]

If this claim be substantiated the indication it makes may well be that "promises" are interpreted by courts on a richer, more relational-inclined basis than SAT and standard neoclassical doctrine insist on.[54]

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[52] Comparative work on letters of intent yeilds obvious examples. Consider the following example, noted by UNCITRAL's Working Group on International Contracts: a government agency informs a construction company that it has been awarded a contract in public tender, wherof the terms are as stipulated in the invitation of tender and the company's offer. The notice ends with a request that a "signed and dated receipt" of the order be sent by the company "in acceptance". Fontaine (who headed the Working Group) notes that the agency -- ineffectively, he argues -- attempts to "transform into an offer what is already an acceptance." Marcel Fontaine, "tude du Groupe de travail Contrats Internationaux: Les lettres d'intention" (1977) 3 *Droit et Pratique do commerce international* 73.

[53] *Supra* note 50, 75.

[54] Gordon takes the argument a step further, claiming that courts mask, via rhetorical manipulations of language, both relational inclinations and the theories of justice they employ:

> Every time mainstream contracts courts or commentators approach a full recognition of relationalist insights... they will find some device to keep the implications of relationalism from threatening their liberal individualist core premises. They will saturate the reasons for the result in the peculiar facts of the case at hand... They will rhetorically celebrate the core values of freedom of contract in dicta while doing freehand equitable redistribution in the case before them.

Robert W.Gordon, "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law", 1985 *Wis. L. Rev.* 565, 576.

Conclusion

Is contract law primarily a framework of translation for privileging (according to theories of justice or moral maxims or economic rationale or other standards) "skeletal promises" that are linguistic acts wholly conceivable in non-legal language proposes? If so, are they conceivable in non-normative language?

The critical discussion of both standard speech act theory (represented here by Searle) and Atiyah's somewhat Holmsian brand of legal realism, suggests that, to different degrees, affirmative answers either questions is incompatible both with legal practices and with the conception of courts as authoritative dispensers of justice but not -- or at least not to the same extent -- of ways of understanding the world. Furthermore, the skeletal claim rests upon a misconceived theory of language, one that does not recognize -- as the Habermasian approach does -- the essential intersubjective nature of language and its intimate, formative relation with the normative world into which it is launched. Thus the answer to the first question is skeptical in relation to any form of the skeletal, "aboutness" claim, and the answer to the second, which implies a world of pure reference on which performance "rides" is a straightforward negative. Except for the purposes of academic abstraction there is no such thing as a "skeletal promise" as SAT claims, and understanding the communicative performance of assuming obligations is better understood in the flexible terms of a history of practice than an analytic linguistic framework, whose main function is, in essence, ritualistic.[55] In histories of practice -- e.g. in the context of contract formation -- each communicative act launched by any player

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[55] Such linguistic rituals -- e.g., the insistence on iterating the formula "I promise" may indeed serve communicative functions. In such cases it is the practice, the communicative context, that calls for them. Thus SAT becomes, essentially, an ethnography of discourse, not a theory about universal "skeletal" units as Searle claims (Searle's claim is most fully expressed in John Searle, in "Response to Jürgen Habermas", in E. Lepore, R. Van Gulick (eds.) *John Searle and His Critics*, 89-96 (Oxford: Blackwell, 1991). For SAT as ethnography see Michelle Z. Rosaldo "The Things we do with words: Ilongot Speech Acts and Speech Act Theory in Philosophy", *Language in Society* 11: 203-237 (1982); Richard Bauman and Charles L. Briggs, "Poetics and Performance as Critical Perspectives on Language and Social Life", 19 *Annual Review of Anthropology* 59-88 (1990); Richard Bauman and Joel Sherzer (eds.) *Explorations in the Ethnography of Speaking* (Cambridge: Cambridge University Press, 1974).

becomes a possible contender for legitimacy, for being counted *as* the relevant communicative act (e.g., an acceptance), as implying a claim for possible alternatives to other, perhaps more canonical patterns.[56] If the rigidity of SAT be dropped, non-standard communicative acts will be seen as presenting possible alternatives and amendments to standard language-games, rather than automatically risking meaninglessness in relation to a presupposed language-game; thus an immediate political dimension of social power is always at work in such cases. This does not mean that language and promising are not rule-governed practices; it does mean that acting within a rule-governed practice does not entail nor grant all rules the constitutive status of presuppositions.

Promises *are* normative constructs: that is their proper classification, even *as* speech acts. Other things being equal, to promise is to assume an obligation, which occurs always in a normatively-saturated medium (this does not entail, of course, an exclusive way of assuming obligations).[57] As Collins claims, It is a phenomenology of promising and assuming obligations that courts deal with and translate, not a rigid adherence to formal and narrative patterns.[58]

Two further points: A Kelsenian (and Kantian) understanding of normativity is even more removed from SAT: that approach regards normativity as a *category*, a logical primitive analyzable only as such, a "lens" through which phenomena is cogitated, irreducible to linguistic units or mental states and nonexhausted by phenomenological explanations.[59] This is not the approach adopted in this study; however, even according to the phenomenological approach invoked here there are no "skeletal promises" in any non-normative, "purely linguistic" sense because in the intersubjective world language necessarily imports normative content from the normatively-saturated social medium in which it occurs (in the form of a speech act). Understanding and mastering importation

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[56] Thus every non-standard contractual offer implies a claim for its own legitimacy. Such structures have been thoroughly analyzed as implications of relevance, which is a kind of legitimacy. Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Cambridge, MA: Harvard University Press, 1986).

[57] See Fried, *supra* note 1.

[58] *Supra* note 50.

[59] Hans Kelsen, *General Theory of Norms* (Oxford: Oxford University Press, 1979).

and thus correctly manipulating speech acts within social mediums is a primary social-linguistic skill, one that involves more complex modes of appropriation than acquiring grammar, and one that perhaps challenges the Chomskian notions of linguistic competence.[60]

How about Atiyah's misgivings, then? Are there in any meaningful sense "unenforceable promises" or is that, like "skeletal promises", an oxymoron?[61] Is contract law never "about" promises because no promise exists unless it is made so by contract law? Is there never a true process of translation because, in a somewhat Holmsian turn, what is a promise is what the court, for whatever reason, grants the commissive status? This extreme position, too, seems untenable. It implies that courts do not translate, but play hermetic language-games that do not interact with other social language games. On the other hand, if the thesis is that a realization that any speech act amounts to a promise according to any normative, non-legal language-game (practice, morality, psychology, etc.) is a reason, perhaps even a condition for translation into a legal obligation, then Atiyah's argument indeed lends a hand to relationalism. It is a realization that translation is constitutive and not transparent, and that law's language nevertheless interacts with

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[60] In performative terms, linguistic competence ceases to be regarded merely as a mastery of grammar and vocabulary and becomes the ability to navigate and manipulate communication in social mediums. The latter calls for a more complex, heterogeneous theory of language acquisition, possibly reviving the discredited notion of learning. If linguistic competence *is* the social competence of negotiating social reality there is little reason to believe that all social agents master it to the same degree. That language is about power becomes an inherent matter of complex (rather than basic) social skills; the egalitarian world of Chomskian language-acquisition then depicts an abstract, grammatical life form of pure reference that is then "put to use" in performative, rhetorical and representational modes. Silverstein's critique, *supra* note 34, thus runs deeper than a critique of speech act theory to the very understanding of the relation between some "linguistic norms" (i.e., grammar) and "extra-linguistic" norms (e.g., social norms of assuming obligations). If importation is a correct theory of social language than this distinction must be rethought. This challenge owes much to the work of Lev Vygotsky in developmental psychology; see Jerome Bruner, "Vygotsky: A Historical and Conceptual Perspective" in James Wertsch (ed.) *Culture, Communication, and Cognition: Vygotskian Perspectives* (Cambridge: Cambridge University Press, 1985), 21-34; Rommetveit, Rangar, "Language Acquisition as Increasing Linguistic Structuring of Experience and Symbolic Behavior Control", *ibid.* 183-204.

other normative mediums and social relations.[62] Promises are not "skeletal" and legal language is not merely "about" them, as the hypothesis discussed at the beginning of this paper proposed, because it shapes and transforms them. Nevertheless, promises exist in the non-legal, unenforceable normative world already at the speech act level.[63] What may count as a promise is yet a different matter.

In a widely-quoted study, Stewart Macaulay presents complex modes of commercial relations as involving, strategically, both legal and non-legal discourse in relating to agreement and promise.[64] Perhaps, in a purely rational-choice--based culture, practical agents will relate only to enforceable promises as promises at all; the extreme interpretation of Atiyah's position may prove wholly vindicated there. Otherwise, cultural norms make the issue more complex, less organized. For sure, practical agents are (arguably, to different degrees) influenced by the legal narrative – by the possibility that their as-yet non-legal dispute may be translated into one and end up in a court of law.[65] According to Macaulay, this position is strategically and tactically applied in commercial interactions.[66] Promises would not be promises as commercial agents understand and

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[61] *Supra* note 5.

[62] A well-known problem is that of commercial letters of intent that deny their own legal effect. The common use of such documents in business may indicate that business people ascribe to them a commissive effect even is lawyers, under regular circumstances, would not. Michael Furmston, Takao Norisada, Jill Poole, *Contract Formation and Letters of Intent* (Chichester: John Wiley & Sons, 1998).

[63] This interpretation of Atiyah's argument emphasizes the role of promises instead of undermining it, although rejecting the concept of skeletal promises. What may get somewhat undermined is the status of default rules and other rational-choice--based devices; see Jay M. Feinman, "Relational Contract and Default Rules", 3 *S. Cal. Interdisc. L. J.* 43 (1993).

[64] Stuart Macauly, "Non-contractual Relations in Business: A Preliminary Study" *supra* note 43; also John P. Esser, "Institutionalizing Industry: The Changing Forms of Contract", 21 *Law and Social Inquiry* 3, 593 (1996).

[65] Beale and Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" *British Journal of Law and Society* 2: 45 (1975).

[66] Macaulay, *supra* note 43. Esser's study indicates that this is more the case than when Macaulay's original study was carried out; a certain "legalization" of commercial

manipulate them without the potential availability of legal intervention (and thus of translation) – thus much Atiyah is surely correct – but neither, Macaulay shows, are promises constituted *solely* on the power of the availability of legal recourse. Promises are understood to inhabit social spheres of which law is an important inhabitant, not landlord. Practical agents treat promises as normatively distinctive on various levels: moral, psychological, pragmatic. Doctrine's constitutive relation to enforceable promises should not be taken too strictly: like in language, courts may -- and do -- consider alternative basis for granting remedies.[67] More importantly, realizing that according to language-games practiced by the relevant practitioners, some non-doctrinal communicative acts amount to promise may be – perhaps should be – a reason for courts to examine different language-games than their standard ones.[68]

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discourse, as it were; *supra* note 28. Large variations in attitudes occur cross-culturaly with some understanding contracts mainly as framework of cooperation, rather that a strict distribution of risks and obligations; see Takeo Sawaki, "Japanese Attitudes Towards Contracts" (1978), quoted in Furmston et al., *supra* note 62, 145-6. Furmston et al. Nevertheless argue that the main divergence is between the attitudes of businesspeople and lawyers, crossing national and other cultural boundaries; *ibid*. While lawyers focus on future disputes businesspersons use contracts as "primarily a facilitative device within an economic cycle"; Tillotson, *Contract Law in Perspective* (1995) 13.

[67] So much as to undermine much of the significance of promise itself, as Atiyah has shown; Patrick S. Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford: Oxford University Press, 1979); also Grant Gilmore, *The Death of Contract* (New Haven: Yale University Press, 1972).

[68] However, It is important to emphasize that such empirical "opening up" of the process of translation is different from -- and does not necessarily imply -- that the courts yield to alternative or competing conceptions of justice. It is an established function of courts to impose conceptions of justice. It is not, however, an established function of courts to impose modes of reading and understanding the world. The court may be interested in the ways in which some practitioners understands obligatory relations to be assumed, even if it rejects any conception of justice those practitioners follow.