Contracts and promises are widely regarded as cognate ideas. Indeed legal orthodoxy has it that contractual liability is promissory. A distinction needs to be drawn between two senses in which this might be true. It may be true in a justificatory sense if contractual obligations are justified by reasons that are the same as or analogous to those that justify the moral obligations of promises. Or it may be true in a formal sense, if contracts are constituted by promises or exchanges of promises.

These two senses are logically independent of each other. It can be a perfectly coherent position to adopt that contracts are formed by promises, despite that contractual obligations bear no justificatory likeness to the moral obligations of promises. Such is the position, for example, of those who subscribe to both the (Millian) thesis that state-sanctioned interference with liberty is legitimate only insofar as it is aimed at protecting against harm, and to the thesis that the moral obligation of a promise is not reducible to a duty to avoid doing harm.\(^1\) On this view, contractual obligations are

triggered by promises in their capacity as reliance-inducing instruments of potential harm, but they are not promissory, since they are justified by (harm-based) reasons that bear no resemblance to those that support the moral obligation of promises.

Likewise, it can be coherent to argue that contractual obligations are promissory in a justificatory but not a formal sense. The claim that contractual obligations are justified by the same kind of reasons that support promissory obligations does not, in other words, entail the claim that making a contract involves making a promise. For it may be that the act involved in making a contract, while not identical to that involved in making a promise, shares in common with promising some feature in virtue of which both contracts and promises generate their respective obligations. It may be, in other words, that contractual and promissory obligations are justified by the occurrence of a particular kind of act or event, of which contracting and promising are different instances. Thus one might argue that contracts are formed by agreements and that agreements, while distinct from promises (and promise-exchanges), share in common with promises the feature that they involve a manifestation by the parties of an intention to bind themselves – a feature on the basis of which both contractual and promissory obligations are justified.2

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