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Pratt, M. (2014). Disclaimers of contractual liability and voluntary obligations. *Osgoode Hall Law Journal*, 51(3), forthcoming.

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Abstract:

Contractual obligations are traditionally regarded as voluntary. A voluntary obligation is one that can be acquired only if one intends to acquire it. This traditional understanding finds doctrinal expression in the requirement that contracting parties intend to create legal relations. It has, however, been doubted that the Anglo-Canadian law of contract insists on this requirement. Skeptics argue that cases ostensibly decided on the basis of such a requirement are better explained otherwise. In this paper I invoke the legal force of contractual disclaimers to show that contractual obligations are indeed voluntary. When parties to an agreement purport to exclude it from the reach of the law by expressly disavowing an intention to bind themselves legally, they have issued a disclaimer. An unambiguous disclaimer will preclude an agreement from being enforced as a contract. Contractual obligations are thus “disclaimer-sensitive”. I argue that this striking feature of contractual obligations can be plausibly explained only if contractual obligations are voluntary.

Keywords:

Contract theory, voluntary obligation, intention, disclaimer

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Disclaimers of Contractual Liability and Voluntary Obligations

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**[Forthcoming, *Osgoode Hall Law Journal* (2014) 51(3)
a special issue in tribute to Professor John McCamus]**

I was once a first-year student at Osgoode Hall Law School. That was a long time ago, but it often occurs to me that a significant part of my life now, all these years later, is a product of a single, arbitrary decision by an administrator at Osgoode to place me in the contract law course taught by Professor McCamus.

I could not have known it at the time, but having been in this business for a while now it is all too clear to me just how rare is the quality of instruction Professor McCamus provided to his first-year charges in that course on contracts. Several aspects of the course remain prominent for me. Professor McCamus took us seriously as thoughtful future participants in the business of making the law. He engaged with us, pressing us to articulate principles from the cases and to say whether we thought the courts were getting things right or wrong. We knew we were part of something more than a merely academic pursuit; that our thoughts on the often arcane doctrines we were learning could come to really matter in the world. But I was most struck by what Professor McCamus revealed to us about the other side of this coin: about what it is to engage in a serious academic study of the law. I knew there were folks called “law professors” who apparently understood a lot about the law. But I did not imagine that the law could be subjected to the same sort of careful, exacting, critical scrutiny that professors in disciplines like philosophy and the sciences bring to bear on their subjects. And yet that is exactly what Professor McCamus was doing, and encouraging us to do, in that first-year classroom.

Here was a brilliant teacher inviting us to see cases as arguments for propositions, to formulate the bases for those arguments, and to evaluate them. Nor did he confine himself within the bounds of the subject that he was assigned to teach. He would routinely venture across the contract boundary into tort, restitution, property, equity, and everything in-between (the remarkable depth and breadth of his knowledge was apparent even to a first-year student) to draw contrasts and

¹ I am grateful to participants in the 2014 International Conference on Contracts in Miami for comments on an earlier draft, to Jamie Cameron for pressing me to clarify certain points in the paper, and to Warren Whiteknight for his research assistance.

trace principles to their roots. It was exhilarating. No single course I have ever taken inspired me more toward a career thinking and writing about the law than that one. And it is no coincidence that contract law is the field in which I do most of my research and teaching. I came away from Professor McCamus's course with a sense that the law of contract is venerable, fundamental, challenging, and that it might even be beautiful if one could see the whole of it clearly enough. I left no other course in law school feeling even remotely the same way (as much as I enjoyed many of them). Perhaps no other law school subject *could* leave such an impression on a student. I will leave that idea alone. But even if contract law is a jewel in the common law, rare is the teacher who sees it for what it is, and rarer still is the teacher who inspires his students to see it that way. I am very grateful to have been taught by one of those teachers.

In this paper I pay tribute to the teacher who taught me the basic principles of contract law by drawing on those principles to establish certain fundamental features of contractual liability. Professor McCamus conveyed to his students his deep respect for the authority of case law, and for legal history (drawing often on his rich understanding of the history of the common law), but he also taught us that part of what it is to respect the common law is to call on it to justify itself, and to scrutinize the answers it gives in an uncompromising way. I hope that some of the same sense of respect through rigorous scrutiny is reflected in what follows.

1. Introduction

Legal orthodoxy has it that contractual obligations are voluntary. It is this that marks contract off from tort on the map of civil obligations. Whereas tortious duties arise by operation of law, liability in contract is traditionally understood to be voluntarily created by the parties themselves.²

What is it that distinguishes an obligation as voluntary? In an attenuated sense every obligation that is knowingly acquired by an agent who could have avoided it is a "voluntary" obligation. But this conception of voluntary obligations does not capture the distinctive and robust sense in which the obligations of contracts are typically understood to be voluntary. Most legal obligations can be acquired knowingly or intentionally, after all, including those of the tortious or criminal variety. The drifter who commits an offence on a bitter winter's night with the aim of becoming bound to spend time detained in a warm cell has acquired that

² "Broadly-speaking, the law of contract is that part of the law which deals with obligations which are self-imposed." P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed., (Clarendon, Oxford, 2000) at p.1. "The traditional and still orthodox view of the nature of contractual obligations is that they are self-imposed promissory obligations." S. Smith, *Contract Theory* (Clarendon, 2004), p. 56. (Emphasis omitted.)

obligation voluntarily, but the obligation is not properly described as a “voluntary” one.³

The voluntariness of an obligation is a property not of the mental state of the agent who acquires it but of the conditions under which the obligation obtains (its triggering conditions).⁴ The reason the drifter’s duty to submit to incarceration is not voluntary is that his intention to acquire it played no role in his having acquired it. What distinguishes an obligation as voluntary is that it obtains only if the obligor intends to acquire it. A voluntary obligation is one that depends on the intention of the obligor to take it on. Contractual obligations are voluntary in this robust sense, then, if and only if the law requires that an agreement is enforceable as a contract only if the parties intended to create legal obligations when they made it.⁵

Is such a requirement part of Canadian law? One need not look far to find judicial assertions of such a requirement. Indeed, statements to the effect that a contract is formed only if the parties intend to create legal obligations (or “legal relations”) are scattered throughout the law reports.⁶ Nevertheless, scholars often doubt that such a requirement is in fact part of the common law of contract, in Canada or elsewhere.⁷ These skeptics point out that the law is more about what

³ N. MacCormick, “Voluntary Obligations”, in MacCormick, N., *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*, (Clarendon, 1982), p. 190.

⁴ Joseph Raz makes this point in his “Voluntary Obligations and Normative Powers” *Proceedings of the Aristotelian Society*, 46 (supp.) (1972), p.79; see also J. Raz “Promises in Morality and Law” (1982) 95 *Harvard LR* 916.

⁵ As I use the term in this paper, “agreement” is to be construed liberally as embracing all arrangements that evince the kind of consensus necessary to attract the law of contract. I am concerned in this paper only with the extent to which an intention to create legal relations must be part of this consensus.

⁶ The classic statement is that of Atkin LJ in *Balfour v Balfour* [1919] 2 KB 571 who wrote of most domestic agreements that “[t]hey are not contracts ... because the parties did not intend that they should be attended by legal consequences” (at 627). In *Carman Construction Ltd v CPR* [1982] S.C.J. No. 49 the Supreme Court of Canada held that a statement made during a tendering process was not enforceable as a collateral contract because such contracts “must be established, as in the case of any other contract, by proof of an intention to contract”. In *Matchim v BGI Atlantic Inc.* 2010 NLCA 9 the Newfoundland & Labrador Court of Appeal held that “intention to create legal relations ... must be present to constitute an enforceable contract”. In *Girouard v Druet* 2012 NBCA 40, involving an agreement of purchase and sale made by an exchange of e-mails, the court approached the question of enforceability by asking “fundamental question: Was there an intention to create legal relations?”

⁷ Numerous authors have doubted that there is a genuine requirement of an intention to create legal relations in contract law, independent of the doctrines of offer, acceptance

judges do than about what they say, and in most contracts cases judges do not even address the question whether the parties intended their agreement to be legally binding. Genuine factual inquiries into the issue are quite unusual.⁸

Of course courts occasionally do purport to refuse to enforce agreements on the basis that the parties did not intend to be legally bound. *Balfour v Balfour*⁹, the most celebrated example of such a case, has Canadian progeny.¹⁰ But the *Balfour* line of cases does not silence the skeptics. Certainly it is true that where friends, intimates, or parties otherwise not at arm's length make agreements the courts often refuse to enforce them, ostensibly on the basis that the parties did not intend their agreement to have legal consequences. But cases like *Balfour* provide only ambiguous evidence of the reality of a contractual requirement of an intention to be legally bound. There are reasons for thinking that the law of contract ought not to concern itself with strictly domestic and social agreements that are unrelated to the intentions of the parties.¹¹ So when courts refuse to enforce such agreements by invoking facts about intentions that they seldom even investigate in relation to other kinds of agreements, the skeptic responds, plausibly, that these cases actually have little to do with the intentions of the

and consideration. See, e.g., *Williston on Contracts* (4th ed, 1990) §3.5; P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed., (Clarendon: Oxford, 2000), pp. 153ff; A. Swan, *Canadian Contract Law*, 2nd ed., (LexisNexis: Toronto, 2009) pp.129ff; B.A. Hepple, "The Intention to Create Legal Relations" (1970) 28 *Cambridge LJ* 122; A. Robertson, "The Limits of Voluntariness in Contract" (2005) 29 *Melbourne U LR* 179. Section 21 of the U.S. *Restatement (Second) of Contract Law* provides that no intention to create legal relations is required to form a contract.

⁸ The orthodox explanation for this is that since the law presumes that parties who were at arm's length when they negotiated their bargain had the requisite legal intention, triers of fact are rarely called upon to investigate whether the parties actually had such an intention. But this orthodox answer will not satisfy the skeptic who doubts that it is a genuine requirement of a contract that the parties intend to create legal relations. From the skeptic's point of view it is more likely that courts rarely assess whether the parties to an agreement intended to be legally bound because the question is of no legal relevance, than that it is of fundamental legal importance but there is seldom any doubt about the matter.

⁹ *Balfour v. Balfour* [1919] 2 K.B. 571 (C.A.). See also the judgment of Danckwerts and Fenton Atkinson LJJ in *Jones v Padavatton* [1969] 2 ALL ER 616.

¹⁰ See, e.g., *Stenberg v. Steinberg* (1963), 45 D.L.R. (2d) 162 (Sask. Q.B.); *Buchmaier v. Buchmaier* [1971] B.C.J. No 596 (B.C.C.A.); *Rogalsky Estate v Rogalsky* [1984] M.J. No. 515; *Decorby v. Decorby Estate* (1989), 57 Man R. (2d) 241 (Man. C.A.).

¹¹ See, e.g., J. Poole, *Textbook on Contract Law*, 11th ed., (OUP, 2012) section 5.2; M. Chen-Wishart, "Consideration and Serious Intention", [2009] *Singapore J. Legal Studies* 434 at 452-53; E. McKendrick, *Contract Law: Text, Cases and Materials*, (OUP, 2003) at 297-98.

parties. The “intention to create legal relations” requirement invoked in the *Balfour* line of cases is, the skeptics insist, merely a fiction used by judges to limit the extent to which the law enforces non-arm’s length agreements or agreements that are outside of the market. It is a tool for “keeping contract in its place”.¹²

In this paper I invoke a different line of cases against the skeptics and in support of thesis that parties to a contract must intend to be legally obligated by their agreement. The cases I invoke are those in which the parties have expressed that they do not intend their agreement to be legally binding. When parties purport to remove their agreement from the ambit of the law in this way I will say that they have issued a “disclaimer”. If a disclaimer clearly expresses the intentions of both parties it will virtually always be effective in precluding either party from enforcing the agreement as a contract. Contractual obligations are, in other words, “disclaimer-sensitive”: they do not obtain if the parties have included a disclaimer in their agreement. The decision in *Rose & Frank Co v JR Crompton & Bros Ltd*, in which the House of Lords refused to enforce an agreement that included an unambiguous “honour” clause, is the best-known authority for this proposition.¹³

Disclaimer-sensitivity is a striking feature of contractual obligations that stands in need of explanation. Why should parties who make a bargain while disavowing an intention to acquire a legal obligation not acquire one, if making a bargain otherwise attracts such an obligation? What accounts for the normative difference that disclaimers make? I argue in what follows that the most plausible explanation is that contractual obligations are voluntary. I argue, in other words, that if contractual obligations are disclaimer-sensitive then they must also be voluntary.

2. Voluntariness and the “Objective” Approach to Intentions

Before examining the relationship between disclaimer-sensitivity and voluntariness I address a preliminary matter. Assume for the moment that there is a genuine contractual requirement that the parties must intend to create legal obligations. The “intentions” with which such a requirement is concerned will not always be those that the parties actually possessed. Here, as elsewhere in contract law, one

¹² S. Hedley, “Keeping Contract in its Place—*Balfour v Balfour* and the Enforcement of Informal Agreements” (1985) 5 OJLS 391.

¹³ *Rose & Frank Co v JR Crompton & Bros Ltd*. [1924] UKHL 2. See also *Ferrera v Littlewoods Pools* [1998] EWCA Civ 618; *Halloway v Cuozzo* (1999) EWCA Civ 746. Disclaimers are often incorporated into so-called “comfort letters”. When they are clear and unambiguous they render these letters unenforceable: see *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1999), 45 O.R. (3d) 417 (Ont. C.A.).

will sometimes be deemed to have intended what others reasonably inferred from one's words and deeds that one intended. The law will substitute a person's "objective" intentions for his actual intentions where this is required to ensure that contracts fulfill their function of permitting parties to order their affairs in reliance on them.

Despite some dramatic remarks by some judges and scholars to the contrary,¹⁴ I suspect that this substitution does not seriously undermine the thesis that contractual obligations are voluntary. In the first place, bargaining parties are generally adept at interpreting each other's intentions. "Objective" intent is usually excellent evidence of actual intent, and the substitution by a court of "objective" intention for a divergent actual intention is therefore rare.

More fundamentally, the rule that an "objective" intention to be legally bound will suffice to generate contractual liability, far from being a repudiation of the idea that contractual obligations are voluntary, is in fact evidence that the law takes this idea seriously. The rule protects promisees by permitting them to rely on their own reasonable assessment of whether they have a contract with the promisor – that is, *of whether the requirements of contract formation have been satisfied*. The reason that a contract may be created by a party who displays an "objective" intention to be legally obligated is precisely that contracts can be formed only by parties who *subjectively* intend to be legally obligated. The law construes a merely apparent intention as genuine intention just insofar as that is necessary to protect a promisee in his reasonable inference that the promisor had the requisite genuine intention. The rule that an "objective" intention to be legally obligated is sufficient is therefore not a fundamental rule of contract formation. Rather, it is a rule about how the basic requirement of *actual* legal intention can be satisfied in certain exceptional cases.

I do not pretend to have reconciled objectivity and voluntariness with this brief argument; the problem of subjectivity and objectivity in contract formation is a vexed one that is beyond my scope here.¹⁵ It is enough for my purposes to show

¹⁴ "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." *Hotchkiss v. Nat'l City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911). "Every law student is taught from his earliest days that contractual intent is not really what it seems. Actual subjective intent is normally irrelevant. It is the appearance, the manifestation of intent that matters." P. Atiyah, *Essays on Contract* (1986) at 21. See also A Robertson, "The Limits of Voluntariness in Contract", *supra*. note 6 at 187ff.

¹⁵ For a sampling of the scholarly debate, see J. Spencer, "Signature, Consent, and the Rule in *L'Estrange v Graucob*" [1973] CLJ 104; W. Howarth, "The Meaning of Objectivity in Contract" (1987) 103 LQR 274; D. Goddard, "The Myth of Subjectivity" (1987) Current Legal

that objectivity is not the obvious and conclusive answer to voluntariness that it is often taken to be. In what follows I use the word “intention” in an undifferentiated way to refer to whichever kind of intention, actual or “objective,” the law is concerned with under the circumstances. An obligation can thus be “voluntary” in the robust sense I have defined even though it can obtain in the absence of an actual intention to acquire it. For the reasons I have outlined, I think the nexus between “objective” and actual intention in the law of contract is such as to justify using the term “voluntary” to refer to contractual obligations if they depend on either phenomenon. But nothing in my paper turns on the use of this term, and if the reader prefers, he or she may substitute “‘voluntary’” (with scare quotes) for “voluntary” in what follows.

3. Explaining Disclaimer-Sensitivity

Rose & Frank and cases like it establish that parties who qualify their agreements with a disclaimer thereby avoid contractual liability. In other words, contractual obligations are disclaimer-sensitive. I will argue that this feature of contractual obligations can be explained in a plausible way only if contractual obligations are voluntary. I argue, in other words, that if contractual obligations are disclaimer-sensitive then they must also be voluntary.

The truth of this claim is not obvious, but it is sometimes assumed that it is. Courts and commentators often invoke cases like *Rose & Frank* in support of the view that there is a requirement of legal intention in contract formation, i.e., that contractual obligations are voluntary.¹⁶ Some of these authors seem to assume that voluntariness can be inferred from disclaimer-sensitivity in the following simple way. A disclaimer is evidence that the parties had no intention to generate legal obligations when making their agreement. A disclaimer prevents an agreement from generating a contractual obligation. Therefore agreements generate

Problems 263; D. McLauchlan, “Objectivity in Contract” (2005) 24 U. Queensland Law Rev. 479; B. Coote, “Reflections on Intention in the Law of Contract” (2006) NZ Law Review 183.

¹⁶ Many of those text-writers from Commonwealth jurisdictions who take the view that contracts require an intention to create legal relations discuss *Rose & Frank* in connection with that requirement, and Professor McCamus is no exception: see J. McCamus, *The Law of Contracts*, 2nd ed., (Irwin Law: Toronto, 2012) chapter 4. See also E. Peel, *Treitel’s The Law of Contract*, 12th ed., (Sweet & Maxwell: London, 2007) at 177; B. MacDougall, *Introduction to Contracts* (LexisNexis: Toronto, 2007) at 48; J. Beatson, *Anson’s Law of Contract*, 28th ed., (Oup, 2002) at 71; M. Chen-Wishart, *Contract Law*, (OUP, 2005) at 114.

contractual obligations only if they are made with an intention to create legal obligations.¹⁷

This simple inference from disclaimer-sensitivity to voluntariness is too quick. It presupposes that disclaimers preclude contractual obligations in virtue of their being evidence that the parties did not intend to create legal obligations. If disclaimers were evidence of this fact and of no other fact, then an inference from disclaimer-sensitivity to voluntariness would go through. But disclaimers reveal not only that the parties intend to create a legal obligation – they also reveal that the parties *intended not to create a legal obligation*. These two facts are not the same. That the parties to an agreement intend not to create legal obligations entails that they do not intend to create legal obligations, but the entailment does not go in the other direction. Imagine two parties making an agreement who are unaware that there is any law relating to the making and keeping of agreements. Corbin wrote of an agreement to trade a horse for a cow by “two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement”.¹⁸ These farmers have no intention to create legal obligations, but they do not intend their agreement not to create such obligations.

In light of this we can see why voluntariness cannot be inferred from disclaimer-sensitivity in a straightforward way. Disclaimers reveal two distinct facts about the intentions of the parties, and it is not obvious which of them the law responds to when it refuses to enforce disclaimer-qualified agreements. Are such agreements unenforceable because of the intention (to be legally bound) that disclaimers reveal to be *absent*, or because of the intention (not to be legally bound) that they reveal to be *present*?

I will argue that the latter answer is not plausible. If I am right about this then it must follow that it is the absence of an intention to be legally bound to which the law responds when it refuses to enforce an agreement that is qualified by a disclaimer – that is, contractual obligations must be voluntary. In other words, if I am right then it follows from the disclaimer-sensitivity of contractual obligations that they are voluntary.

The skeptic will agree with me that a simple inference from disclaimer-sensitivity to voluntariness is impermissible, but he will resist my claim that disclaimer-sensitivity can be plausibly explained only if contractual liability is voluntary. At

¹⁷ This inference is rarely made explicit but it is the most plausible way to make sense of those who invoke *Rose & Frank* as authority for (or even as pertaining to) the voluntariness of contractual obligations.

¹⁸ A Corbin, *Corbin on Contracts* (1st ed, 1950) § 34, at 135.

least one skeptic has advanced an argument along these lines. In a well-known paper Stephen Hedley argued that there is no “necessary connection” between disclaimer cases like *Rose & Frank* and a requirement that contracting parties intend to create legal obligations.¹⁹ While these cases “mesh perfectly” with such a requirement, they do not provide any independent evidence of such a requirement since “the fact that a rule of law may be excluded by the intentions of the parties does not show that the rule itself is based on those intentions”.²⁰ Hedley's point appears to be that these cases also mesh perfectly with a rule permitting parties to intentionally exclude contractual liability by means of a disclaimer. On this view, *Rose & Frank* and its ilk are cases about the legal efficacy of disclaimers and *not* about the intention to create legal obligations.

Hedley does not develop his objection any further than this, apparently regarding it as more or less obvious. In what follows I argue that it is mistaken. There is no plausible way to justify cases like *Rose & Frank*, which establish that contractual obligations are disclaimer-sensitive, unless such obligations are also voluntary.

4. Voluntariness or Avoidability?

Let *C* be the set of necessary and sufficient conditions ($c_1, c_2, c_3 \dots c_n$) under which the parties to an agreement acquire an enforceable contractual obligation (*O*) to adhere to the agreement. *C* includes, for example, conditions requiring that the parties provide consideration, that the agreement be sufficiently complete and certain, etc. Now imagine two parties *A* and *B* who negotiate an agreement with each other in two possible worlds. In the first world, W_1 , all of the conditions in *C* are satisfied and the parties acquire *O*. The second world, W_2 , is the nearest possible world to W_1 in which the parties qualify their agreement by a disclaimer. Since *O* is disclaimer-sensitive the parties acquire *O* in W_1 but not in W_2 . One or more of the antecedents of *O* ($c_1, c_2, c_3, \dots c_n$) is not satisfied in W_2 . What is it about *O* that explains why our parties acquire it in the first world but not in the second? By virtue of what feature of contractual obligations is this difference to be explained?

From our earlier discussion of what disclaimers reveal about party intentions, two possible explanations present themselves. The first is that contractual obligations are voluntary. On this view *C* includes a voluntariness condition, c_v , by virtue of which *O* obtains only if the parties intended to create legal obligations when they made their agreement. I will refer to this view as the “Voluntariness” thesis:

¹⁹ S. Hedley, “Keeping Contract in its Place—*Balfour v Balfour* and the Enforcement of Informal Agreements” (1985) 5 OJLS 391 at 399.

²⁰ *Ibid.*

Voluntariness Thesis: The law enforces an agreement as a contract only if the parties intended their agreement to create legal obligations.

The second possible explanation for disclaimer-sensitivity is that contractual obligations do not depend on an intention to create legal obligations but that such obligations are precluded if the parties intend that their agreement is *not* to create legal obligations. On this view c_v is not included in C , but C includes an “avoidability” condition, c_a , by virtue of which O is not acquired if the parties intend to avoid becoming legally obligated by their agreement. I call this the “Avoidability” thesis:

Avoidability Thesis: The fact that the parties to an agreement did not intend to become legally obligated by their agreement is irrelevant to whether it ought to be enforced, but the fact that they intended to *avoid* becoming legally obligated by it is a sufficient reason not to enforce it.

This thesis is presupposed by section 21 of the *American Restatement 2nd of Contracts*, which provides that “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”

Contractual obligations are disclaimer-sensitive. It follows from this that either the Voluntariness Thesis is true or the Avoidability Thesis is true. (They cannot both be true.) I proceed now to argue that the Avoidability Thesis is false.

5. A Reductio of the Avoidability Thesis

According to the Avoidability Thesis contractual obligations are avoidable but not voluntary. I want to argue that this thesis is not plausible. My argument takes the form of a *reductio*. The Avoidability Thesis implies, first, that A and B acquire O in W_1 even if they did not intend to acquire it, and, second, that the fact that A and B intended to avoid acquiring O in W_2 is a sufficient reason for not imposing O on them in W_2 . The Avoidability Thesis therefore implies that the following proposition (P) is true:

P : The fact that A and B intended to avoid acquiring O when making their agreement in W_2 is a sufficient reason to preclude them from acquiring O despite that their having made the same agreement with no such intention in W_1 was sufficient to justify imposing O on them.

I claim that this proposition is implausible. The fact that A and B intended to avoid acquiring O when making their agreement in W_2 cannot be a sufficient reason to preclude them from acquiring O, if their having made the same agreement was a sufficient reason for imposing O on them in W_1 .

Unless an obligation is voluntary then the fact that an agent intends to avoid acquiring it when he behaves in a certain manner is irrelevant to whether he will acquire that obligation when he behaves in that manner. The agent's intention to avoid acquiring the obligation is normatively inert, in the sense specified by the following principle:

Inertness Principle: My plea that in doing some act β (e.g., making an agreement with you) I intended to avoid acquiring an obligation to you to do ϕ (e.g., to fulfill the terms of the agreement) cannot excuse my not doing ϕ if my doing β with no such intention is sufficient to obligate me to you to do ϕ .

I take the truth of this principle to be more or less obvious. If I do β with no intention of acquiring (or avoiding) an obligation to you to ϕ , and I thereby acquire an obligation to you to ϕ , then that obligation is presumably grounded in some interest you have in my doing ϕ after having done β . And the normative force of this interest cannot be reduced by my intention or desire that it be reduced. If by taking another's property one becomes obligated to return it, then if I take your bicycle I thereby acquire an obligation to return it even if I intended to avoid such an obligation when I took it.

If the Inertness Principle is true then proposition P must be false, and since P is entailed by the Avoidability Thesis, the latter thesis is also false. Since the Avoidability Thesis is false, moreover, the must be true.

6. The Internalization Strategy

One way to defend the Avoidability Thesis against my *reductio* is to argue that when the law gives effect to a disclaimer it is simply giving effect to the parties' agreement. On this view the law enforces agreements as contracts even if the parties do not intend to be legally bound by them, and disclaimers are terms in agreements, enforced like any other term. In other words, disclaimers are internal to agreements and disclaimer-sensitivity follows from the law's respect for agreements.²¹ This view finds its most authoritative expression in the comments to

²¹ I argued that the Avoidability Principle entails proposition P, which falls foul of the Inertness Principle. The internalization strategy avoids this *reductio* by denying that the Avoidability Principle entails proposition P. According to that proposition, A and B did the

section 21 of the *Restatement*, which explain that “[p]arties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected... such a term is respected by the law like any other term.”²²

The first difficulty with the internalization strategy is that it seems to be incoherent. It holds that the law gives effect to disclaimers because they are terms in agreements, and agreements are enforceable. But to give effect to a disclaimer is to render unenforceable the agreement of which it is a part. The internalization strategy therefore implies, incoherently, that an agreement with a disclaimer in it is unenforceable only to the extent that it is enforceable.²³

Even if this logical problem can be remedied, the internalization strategy seems to beg the question that it seeks to answer, namely, why the law gives effect to disclaimers. The strategy purports to explain the legal force of disclaimers by internalizing them to agreements and invoking the enforceability of agreements as an explanation. On this view agreements are enforced, and disclaimers have legal effect because they are terms in agreements. This suggests a picture of an agreement as a kind of enforcing container that confers legal effect on any terms that are poured into it. But this is not quite right. The law does not enforce terms (merely) because they are contained within agreements; it enforces terms because they *comprise* agreements. An agreement consists in its terms, and the law enforces agreements just insofar as it enforces the terms that comprise them. The internalization strategy is plausible, therefore, only if disclaimers are terms of a kind that the law enforces. But disclaimers seem very different from the kinds of terms that render agreements enforceable.

same thing (β) in W_1 and W_2 – they made the *same agreement* – albeit with different intentions. According to the internalization strategy, however, A and B did *not* do the same thing in W_1 and W_2 , for if disclaimers form part of the agreements that they qualify, then A and B did not make the same agreement in W_2 that they made in W_1 . In W_2 the parties made their agreement with the mutual intention that it not be legally binding, and that mutual intention became *part of their agreement* in W_2 .

²² See also S. Smith, *Contract Theory*, (OUP, 204) at 212-13; M. Furmston, *Cheshire, Fifoot, and Furmston's Law of Contract*, 14th ed., (Butterworths: London, 2001) at 127; P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed., (OUP, 2000) at 153.

²³ It may be urged that this charge of incoherence is mistaken because a disclaimer does not render unenforceable the entire agreement of which it is a part. Rather, it renders unenforceable all the terms in the agreement other than the disclaimer itself. But this move will not work. The internalization strategy insists that a disclaimer is to be treated like any other term in an enforceable agreement. But if a disclaimer is treated as enforceable only to the extent that the other terms are enforceable, then the internalization strategy implies, absurdly, that a disclaimer renders all the other terms unenforceable just to the extent that all those terms are enforceable.

Agreements that are enforceable as contracts consist of terms that supply the agreements with content by specifying the states of affairs that fulfill or violate them. These terms are of three kinds. The first are performance-terms that stipulate what the agreement requires of the parties by way of performance. The second are warranty-terms that provide that if certain facts not related to the actions of the parties do not obtain then the agreement is violated (e.g., a term warranting the provenance of the goods sold). Conditions are a third kind of term. A condition specifies the circumstances under which other terms become or cease to be part of the agreement.

Disclaimers are unlike any of these three kinds of ordinary terms. Disclaimers express the parties' intentions with respect to the legal force of their agreement. They do not supply the agreement with content by specifying the circumstances under which it is violated. Rather, disclaimers purport to deprive the agreement of its status as a contract; they aim to determine its status in law rather than its scope as an agreement. "This is a (morally) binding agreement," declares a disclaimer, "but it is not a contract".

This difference between ordinary terms and disclaimers is a problem for the internalization strategy. An agreement comprising ordinary terms is enforceable, and therefore agreements are enforceable in virtue of their having contents that define the circumstances under which they are violated. The contractual status of an agreement is, in other words, a function of its being an agreement capable of being fulfilled or violated as an agreement. Since disclaimers do not define the contents of an agreement in this way, their status as terms in an agreement cannot explain their legal force because they are not the kind of terms that make agreements enforceable. By the internalization strategy's own lights the law respects agreements not as juristic acts or intentional exercises of legal power but as pre-legal arrangements by which the parties mutually commit themselves to ensuring that certain states of affairs obtain. There is no reason to think that *because* it lends its force to such arrangements *therefore* the law also gives effect to declarations in such arrangements that they are not to have contractual status.

To summarize, the claim that disclaimers are "respected by the law just like any other term" is either mistaken or question-begging. If the claim is that disclaimers *are* just like any other term, it is mistaken. Conceived as terms, disclaimers are status-determining rather than content-providing. If the claim is rather that the law *treats* disclaimers just like any other term by affording them the same legal effect, then it generates the very question that it purports to answer, namely, *why* does the law give effect to disclaimers?

7. Conclusion

Rose & Frank and its progeny establish that contractual obligations are disclaimer-sensitive. This striking feature of contractual obligations is often discussed by text writers and judges in connection with a requirement that contracting parties must intend to create legal obligations. The precise nature of the relationship between this requirement and disclaimer-sensitivity is, however, rarely examined or made explicit. If the requirement of legal intention were manifestly part of the law of contract – if it were axiomatic that contractual obligations are voluntary – then disclaimer-sensitivity could be explained as a corollary of that feature. But voluntariness is a disputed characteristic of contractual obligations. Skeptics of the Voluntariness Thesis abound. Few, however, are those who would deny that contractual obligations are disclaimer-sensitive. It would be fruitful, therefore, to be able to derive the disputed requirement that contracting parties must intend to create legal obligations from the settled premise that contractual obligations are disclaimer-sensitive. That is what I have attempted to do here.

It is sometimes assumed that the voluntariness of contractual obligations follows straightforwardly from the fact that they are disclaimer-sensitive. I have argued that no such straightforward inference is possible. The relationship between these two features is more complex than previous writers appear to have appreciated. I have argued that if contractual obligations are disclaimer-sensitive then either the Voluntariness Thesis is true or the Avoidability Thesis is true; that the Avoidability Thesis cannot be sustained; and that therefore the Voluntariness Thesis is true.

I first encountered the idea of disclaimer-sensitivity – the notion that contractual obligations can be avoided by disavowing an intention to create them – as a first-year student in Professor McCamus's classroom. I like to think that my old teacher will find my arguments in this paper persuasive. But more than that, I hope that he will take some pride in having helped to inspire in one of his students a passion for the law of contract sufficient to cause him still to be writing and thinking about its foundations all these years later.