

NATURAL RIGHTS AND TWO CONCEPTIONS OF PROMISING

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INTRODUCTION

Does promising to perform some act generate a moral duty to the promisee to perform the promised act? One possibility is that the moral force of promising is limited to what is morally *desirable* (as opposed to required). Prior to the promise, there was, we may suppose, nothing morally problematic about my failing to meet you at the theater. Once I promise to meet you there, however, I would not be acting virtuously if I were not to do so. While this is surely correct, it also seems grossly inadequate as an account of the moral force of promising. Breaking a promise, most of us think, is typically wrong and not merely non-virtuous.

Another possibility is that promising generates an *impersonal* duty on the part of the promisor to keep her promise. The duty is impersonal in the sense that it is owed to no one. It is wrong to break a promise, but no one has a right to have another keep her promise. This comes much closer to capturing the common sense moral force of promises, but it still seems inadequate. When, under normal circumstances, I fail to show up at the theater after promising you to do so, I wrong you. It is not—or at least not merely—an impersonal wrong. I owe you an apology and compensation.

In what follows, I shall examine the question of whether promising generates a duty to the promisee to perform the promised act. Throughout, I shall understand permissibility, obligation, duties, rights, etc., in their *pro tanto* (all else being equal) sense. I shall thus be concerned with the question of whether there is at least a *pro tanto* duty owed to the promisee to keep promises. More specifically, I shall focus on the question of whether there is a (*pro tanto*) *natural moral right* to have promises made to one kept. I shall thus not be concerned with social practice (institutional) accounts of the obligation to keep promises (according to which there is such an obligation when one participates in the right way in certain social prac-

tices),¹ nor with instrumental accounts (e.g., rule contractarian² or rule consequentialist accounts³).

I shall distinguish two broad conceptions of promising—normativized and non-normativized—and explore their very different implications concerning the status of the requirement to keep one's promises.

I. THE NORMATIVIZED CONCEPTION OF PROMISING

On the *non-normativized conception*, which I will explore more fully in the next section, the nature of promising does not conceptually entail any connection with the obligation to keep promises. A promise might be understood, for example, as an assertion that one will do something, along with a special assurance that one will do so, and an invitation to rely on that assurance. It may, as a matter of fact, be wrong to break promises so understood, but such wrongness is not built into the concept of promising on this conception. Promising on this view is like killing, which is also a non-normativized concept. Even if one believes that killing is always wrong, this is not part of the concept of killing.

On the *normativized conception* of promising, on the other hand, the wrongness of breaking a promise is part of the concept of promising in roughly the same way that the wrongness of murder is part of the concept of murder understood as wrongful intentional killing. More specifically, a promise is made, on the normativized conception, when an agent validly offers to undertake an obligation to the promisee to perform some act (i.e., give up a liberty-right in relation to her) and the promisee validly accepts the offer. The following are sample statements of normativized conceptions:

I take it that promising is, by definition, an act of placing oneself under an obligation.⁴

According to the second [the obligation conception of a promise], promises are expressions of intentions to undertake obligations. . . . To prom-

1. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 342–50 (1971); John R. Searle, *How to Derive "Ought" from "Is,"* 73 PHIL. REV. 43 (1964).

2. See, e.g., RAWLS, *supra* note 1 at 27–33; Searle, *supra* note 1; DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

3. See, e.g., BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY 122–23, 131–32 (2000).

4. Searle, *supra* note 1, at 45.

ise is, on this conception, to communicate an intention to undertake by the very act of communication an obligation to perform a certain action.⁵

Normative-Power View: Promising is the exercise of the power to effect a normative requirement that one carry out a course of conduct by communicating one's intention to undertake, by that very act of communication, an obligation so to act.⁶

The Word-Giving Thesis: If Y gives X his or her word that a certain proposition is true [e.g., promises that she will do something], then X thereby acquires a claim against Y to its being true. . . . The Assertion Thesis: Y gives X his or her word that a proposition is true if and only if Y asserts the proposition to X, and (i) in so doing, Y is inviting X to rely on its truth, and (ii) X receives and accepts the invitation (there is uptake). . . . There is nothing deeper that either needs to be or can be said about how word-givings generally and promisings in particular generate claims. Their moral force lies in their generating claims; and the fact that they do generate claims is explained by the fact that issuing an invitation is offering to bind oneself, so that when the invitation is accepted, the offer is accepted, and one therefore *is* bound.⁷

The normativized conception of promising is a family of views. One dimension of variation concerns the normative perspective from which the obligation applies. The two main possibilities of interest here are morality and the law. The *moralized* version holds that promising is validly offering to undertake a moral obligation to the promisee to perform some act, which the promisee validly accepts. The *legalized* version holds that promising is validly offering to undertake a legal obligation, which is validly accepted

5. J. Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 211, 218 (P.M.S. Hacker & J. Raz eds., 1977). The distinction between normativized and non-normativized conceptions of promising is a generalization of the distinction made by Raz between the obligation conception and the intention conception thereof. Moreover, the normativized conception corresponds, at least roughly, to what Pratt calls "the volitional account," and has very close affinities with Owens's authority interest account of promising (as opposed to the information interest account). See Michael Gordon Pratt, *Promising and Promissory Obligation* 81–116 (June 2004) (unpublished Ph.D. dissertation, University of Sydney) (on file with Chicago-Kent Law Review); David Owens, *A Simple Theory of Promising*, 115 *PHIL. REV.* (forthcoming Jan. 2006). For other generally insightful discussions of promising, see Randy E. Barnett, *Rights and Remedies in a Consent Theory of Contract*, in *LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS* 135 (R.G. Frey & Christopher W. Morris eds., 1991); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Eric Mack, *Natural and Contractual Rights*, 87 *ETHICS* 153 (1977); and T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 295–327 (1998).

6. Gary Watson, *Promising, Assurance, and Expectation* 15 (April 2004) (unpublished manuscript, on file with Chicago-Kent Law Review), <http://www.law.berkeley.edu/centers/kadish/gala/Promising,%20%20assurance%20and%20expectation.pdf>.

7. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 302–03 (1990). It should be noted that Thomson here uses the notion of an invitation to rely in a normativized sense of offering to impose an obligation.

by the promisee. The legalized version is of interest if the purpose is to give an account of legally binding contracts (understood as exchanges of promises). Here, however, I am concerned with the moral obligation to keep promises, and hence I shall focus on the moralized version.⁸

On the moralized conception, there is no mystery about how promising generates a moral obligation to the promisee. It is simply part of the meaning of “promising” so understood that it generates such an obligation. It is, however, an open question whether anyone has ever made a promise! The answer depends on whether anyone ever placed herself under an obligation in the specified manner. Promising, on this conception, requires that a valid offer be made, and this requires that (1) one is at moral liberty with respect to the promisee to perform the promised act; (2) one has the moral power—by giving valid consent—to relinquish that liberty and give another a claim-right against one that one perform that act; (3) one gives consent; and (4) the conditions under which the consent is given (e.g., freely and informedly) make the consent valid.

Moreover, promising requires that the offer be validly accepted, and this requires that (5) one has the moral power to acquire a claim-right against the promisor that she perform that act by giving valid consent to a valid offer; (6) one gives consent; and (7) the conditions under which the consent is given (e.g., freely and informedly) were valid.

If any of these conditions fail, then a moralized promise has not been made, and no obligation has been generated. If individuals do not have the right kinds of rights (the liberties and powers above) or do not exercise them under the right conditions, then there are no promises; there are only purported promises.⁹

The moralized conception of promising is very different from the common sense notion. Still, it is a legitimate notion, and it is perfectly acceptable to ask whether promising so understood generates an obligation to the promisee. The answer, we have seen, is that by definition it does.

8. Note that promissory obligations can be acquired unintentionally (as well as intentionally) on the normativized view. Suppose, for example, that Harris falsely believes that Jones is dead. Harris says to Smith, “I promise to go to the theater if Jones asks me,” and Smith accepts the offer. If Jones shows up and asks Harris to go, then Harris has an obligation to go. (On the non-normativized view, promissory obligations are typically undertaken unintentionally, but they can be undertaken intentionally, as when I promise you I will stop smoking with the intention of acquiring an obligation to you so as to provide additional motivation for stopping.)

9. There is a broader normativized conception than the one I have defined here. It holds that a promise is made when an offer (whether or not valid) is made to undertake an obligation and is accepted (whether or not validly) by the promisee. It thus allows that at least sometimes promises do not generate obligations (e.g., when the promisor does not have the relevant authority to undertake the obligation). I am indebted to Les Green for identifying this version of the normativized conception. I focus on the narrow version for simplicity.

I believe that individuals have certain natural rights, and that these include the rights of *full self-ownership* and the *powers* to acquire rights over others by consensual transfer. If this is so, then there often are moralized promissings, and these generate obligations to the promisee. Full self-ownership is simply a special case of full private ownership. Full private ownership of an object consists roughly of a full set of the following ownership rights: (1) *control rights* over the use of the object—both the *liberty-right* to use and the *security-right* against others using without one's permission; (2) *rights to compensation* if someone uses the object without one's permission; (3) *enforcement rights* (to prevent the violation of these rights or to extract compensation owed for past violation); (4) *rights to transfer* these rights to others (by sale, rental, gift, or loan); and (5) *immunity to the non-consensual loss* of any of the rights of ownership.¹⁰ For the present purposes, the (control) security-rights, the rights to compensation, and the enforcement rights can be ignored. What matters for the promising issue is that an agent have (1) the (control) liberty-right to perform the promised action; (2) the right (power) to transfer that right to someone else (thereby losing the liberty-right not to perform it and giving the other person a claim-right to its performance); and (3) a reasonably robust immunity to the non-consensual loss of these rights (so that agents typically have the previous two rights if they have not consensually transferred them away).

Obviously, even this weak form of self-ownership would be controversial if it was advocated as an all-things-considered view (which I would advocate). Here, however, I am only concerned with *pro tanto* moral obligations, and hence we only need these self-ownership rights to be *pro tanto* rights. Of course, some might object to them even in the *pro tanto* form, but most, I think, would accept them in this form. In any case, I shall not attempt here to defend the view. The important point is that if full self-ownership and the power to acquire rights by transfers are granted, and one assumes (as seems plausible) that the rights of transfer are often exercised under valid conditions (e.g., freely and informedly), it follows that moralized promises are often made. From that, it follows immediately that individuals often acquire moral obligations to perform their promised acts.

10. For further discussion of full ownership in general and of full self-ownership in particular, see Peter Vallentyne, *Self-Ownership*, in *ENCYCLOPEDIA OF ETHICS* 1561 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001); Peter Vallentyne, *Libertarianism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, (Edward N. Zalta ed., 2002), <http://plato.stanford.edu/archives/fall2002/entries/libertarianism/>; Peter Vallentyne et al., *Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried*, 33 *PHIL. & PUB. AFF.* 201 (2005).

In short, if full self-ownership is granted, then it is clear that individuals typically owe an obligation to their promisees to keep their moralized promises. Next, I will consider the non-normativized conception of promising, which is, I believe, much closer to the common sense view.

II. THE NON-NORMATIVIZED CONCEPTION OF PROMISING

On the non-normativized conception of promising, the fact that a promise was made does not conceptually entail anything about obligations of any sort, and nothing about moral obligations in particular. There may be a valid moral principle that entails that promisors sometimes, or even always, have a moral obligation to keep their promises, but any such obligation does not follow from the mere fact that a promise was made. Such an obligation would require that some related moral principle about promising be true.

There are many versions of the non-normativized conception, but a strong version—one that is especially likely to generate an obligation—might hold that A promises B that she will perform some future action if and only if (1) A asserts that she will do so; (2) she thereby expresses a firm intention to do so; (3) she assures B that she will do so; (4) she invites B to rely on this assurance; (5) B accepts this invitation; and (6) the above is common knowledge between the two parties. Perhaps not all of these elements are essential, and perhaps there are some additional necessary conditions, but the general idea should be clear. Promising in this sense leaves open as a conceptual matter whether the promisor has an obligation (of any sort) to the promisee to do as promised.

The following are two examples of non-normativized conceptions:

According to the first [intention conception of promises], promises are expressions of firm intentions to act.¹¹

[P]romising as a speech act will here be explained as an utterance of the speaker's about his own future conduct which is essentially characterized by the speaker's intending his addressee to take it as being intended to induce the addressee to rely upon the speaker's taking the action in question.¹²

11. Raz, *supra* note 5, at 211. Raz rejects this conception.

12. Neil MacCormick, *Voluntary Obligations and Normative Powers: Part I*, 46 ARISTOTELIAN SOC'Y, SUPP. VOL. 59, 62 (1972).

On the non-normativized conception, then, the fact that an action breaks a promise may provide a moral reason not to perform that action, but it is not part of the concept of promising that there is some moral reason to keep the promise. On the moralized conception, on the other hand, to say that an action breaks a promise is simply to assert that there is a moral reason owed to the promisee not to perform that promise-breaking action.

On any reasonable non-normativized conception of promising, promising often takes place. All that is necessary is (roughly) that the appropriate assertion, assurance, and invitation be made and that the invitation to rely upon the assurance be taken up. The question then arises as to whether there is a (*pro tanto*) moral obligation to the promisee to perform the promised action. That is, do individuals have a (*pro tanto*) moral right against promisors to have non-normativized promises made to them kept? Different moral theories give different answers. Act utilitarianism, for example, denies that there are rights at all and thus holds that there is no such right (although this theory will, of course, be indirectly sensitive to the importance of keeping promises).¹³ Social practice views can hold that one has a right to have promises kept if one participates in the right kind of way in the right kind of social practice of promising.¹⁴ Instrumental rule-based theories of morality, such as rule consequentialism¹⁵ and rule contractualism,¹⁶ can, and probably do, recognize a right to have promises kept. Our focus, however, is on natural rights. Is there a natural right to have non-normativized promises made to one kept?

One possibility is that the natural rights of self-ownership somehow include the right to have non-normativized promises made to one kept. Self-ownership includes security-rights that make it impermissible for others to *physically use* one's person (touching, striking, etc.) without one's permission. Perhaps these security-rights also make it impermissible for others to *mentally use* one's person in certain ways without one's permission. After all, the person that one owns (oneself) is not merely a physical thing. It is also a mental thing. Ownership of a physically embodied mental thing arguably gives one some rights over it that one would not have if the thing were merely a physical thing. Perhaps there are certain ways of "messing with a person's mind" that are incompatible with her security ownership rights over her mind. Perhaps subliminal hypnosis, certain kinds of deception, certain kinds of emotional harms, and threats to wrongfully

13. See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR & AGAINST* (1973).

14. See, e.g., RAWLS, *supra* note 1 at 342–50; Searle, *supra* note 1.

15. See, e.g., HOOKER, *supra* note 3 at 122–23, 131–32.

16. See, e.g., RAWLS, *supra* note 1 at 27–33; Searle, *supra* note 1; GAUTHIER, *supra* note 2.

harm are such ways of messing with a person's mind. If so, then perhaps breaking a non-normativized promise is also incompatible with a person's security ownership rights.

In the abstract, I find this possibility plausible. I have, however, been unable to come up with a general account of "mental use" (or "messing with a person's mind") that would plausibly be precluded by ownership rights over a mental being. It cannot simply involve having one's mind altered; almost everything others do does that. When you walk by me in a public park, your action typically alters my beliefs about the world. Any mental use that self-ownership precludes must be restricted to actions that alter one's mental state in ways that undermine or bypass one's mental capacities, or something like that. It is not clear, however, what a general account of mental use would look like.

Even if self-ownership does not entail a right to have non-normativized promises kept, there may still be a natural right to have them kept. Agents have more rights than just self-ownership rights (e.g., rights to acquire property rights in other things). It may be that agents have certain *communication* rights against other communicators simply by virtue of their both being communicators. In what follows, I shall briefly explore this possibility, leaving open whether this follows from full self-ownership or not.

As indicated above, merely having one's beliefs altered by another (as when you walk past me) does not violate one's self-ownership or any other natural right that one has. Nor does having one's beliefs *damaged* (i.e., altered in an undesirable way). You violate no right of mine when you walk past me wearing a tuxedo and I form the false belief that you are going to a wedding. Nor, I think, are any rights violated when one's beliefs are damaged by the *assertions* of others. You violate no right of mine when you falsely assert to me that Smith is going to a wedding and I believe you. Asserting would be far too risky if there were such a right. Things may, however, be different, if we limit our attention to those assertions that are accompanied by a special guarantee—*giving one's word*. If the assertor explicitly says, "You have my word," "I warrant it to be true," or "I swear that it is true," then it is not so clearly unreasonable to hold her accountable for the truth of her assertion when someone takes her at her word (i.e., treats the special guarantee as having the right kind of significance). Such accountability imposes no unreasonable liability on assertors because they need not give their word and because effective communication would seem to require that those who give their word be accountable for the truth of their assertions.

There is, of course, the important question of what it is to give one's word. Just as there is a distinction between normativized and non-normativized promising, there is a distinction between normativized and non-normativized word-giving. To give one's word in the moralized (normativized) sense is something like a word-giver's valid acceptance of a valid offer to undertake certain obligations to the word-receiver should a specified proposition be false. Here, however, I am concerned with the non-moralized sense.

What is it to give one's word in a non-moralized sense? Obviously, there are many different accounts. The crucial feature, however, is that some kind of special assurance is given for the truth of the assertion. It is something like assertion under heightened standards for assertion. The word-giver is expressing her confidence in the truth of the proposition, not merely for everyday contexts of assertion, but also for contexts in which the truth of the proposition is especially important. Moreover, she is not merely expressing her heightened confidence; she is also in some sense inviting the other to rely upon it. Much more needs to be said on this topic, but I shall not explore this further here.

It seems plausible that agents have certain communication rights against those who give them their word. (Indeed, something like this may follow from a proper understanding of the mental aspects of full self-ownership.) One can give one's word for any proposition (e.g., that it rained in Hong Kong yesterday). Promising, on a particularly important non-normativized conception, is simply the act of giving one's word that one will perform some future action.¹⁷ Rights against promisors, on this conception, are simply special cases of rights against word-givers.

Much more careful discussion is needed of whether individuals really do have rights against word-givers. Here, I simply assume that this is so and explore the content of such rights. Suppose that I give you my word that my car is in my garage. What rights do you have against me? It seems plausible that you have a right that, if the asserted proposition is false: (1) I alert you as soon as I discover the word-given proposition is not true; (2) I apologize to you for my mistake; and (3) I compensate you for relevant damages.¹⁸ The important point is that, in general, word-receivers do not seem to have a right against word-givers that, if possible, they make the word-given proposition true. You do not, it seems, have a right against me

17. For more on promising as a special case of word-giving, see THOMSON, *supra* note 7, at 294–321. It should be noted, however, that Thomson probably invokes word-giving in the moralized sense.

18. I leave open whether the relevant damages are limited to reliance damages (i.e., losses from choices made that relied on the truth of the word-given proposition) or whether there may also be some kind of “emotional damages” for the discomfort of having one's mind messed with.

that I place my car in my garage merely because I gave my word that it was there, even though you may well have the above three rights. If, as I am supposing, promises are simply special cases of word-giving, then it would also seem that promisees do not generate rights against promisors that they perform the promised actions. Promisees may well have (1) a right to be alerted, if the promisor realizes that he will not perform the promised action; (2) a right to an apology; and (3) a right to compensation; but, on this (non-normativized) conception of promising, promisees arguably do not have a right to have the promised action performed.

Obviously, the issue is complex and requires much more discussion. The above account is meant to be merely suggestive of what a plausible non-normativized account of promising might look like. The speculation is that there is no natural right to have non-normativized promises kept, if promising is simply a special case of word-giving. Clearly, there are other possible non-normativized accounts, and I have not ruled out the possibility that there is a natural right to have promises kept on some such account.

CONCLUSION

Because I believe that agents have (1) the requisite liberty-rights of action and power-rights to renounce such liberty-rights and give someone else a claim-right against that action, and (2) the requisite powers to acquire claim-rights over others by consensual transfer, I believe that agents can and do make moralized promises. Keeping such promises is morally obligatory by definition. Most of what people want to accomplish from promising can be accomplished by moralized promising.

Still, it is an interesting question as to whether individuals also have the right to have non-normativized promises kept, even when they do not correspond to any normativized promise. The idea that agents have certain rights against those who give them their word that certain propositions are true seems quite plausible (and may well follow from full self-ownership¹⁹). A particularly attractive and relevant non-normativized account of promising takes promising simply to be giving one's word con-

19. The following is an imperfect analogy that may be suggestive of how self-ownership might generate rights against word-givers: If you are permitted, but not obligated, to improve the stairs in my house (improve my beliefs), and you come in and damage my stairs (give your word to a false belief), then I have a right against you that you alert me, apologize to me, and compensate me, or perhaps restore the stairs to their original condition. I do not have a right that you improve the stairs. Similarly, if you come in and begin the work of improving the stairs (give me your word that you will do something), and then fail to complete the project (fail to keep your word), and this damages the stairs, then, once again, I have the above rights against you, but not the right that you improve the stairs (do as promised).

cerning one's future conduct. In general, giving one's word to a proposition does not, it seems, give the word-receiver a right that, if possible, the word-giver make the proposition true. Promising as a special case of word-giving thus seems to generate certain rights, but not the right to have the promised action performed. If this is right (and greater analysis is needed), then this is an important difference between moralized promising and this particularly attractive non-normative conception of promising.²⁰

20. For helpful comments, I thank Larry Alexander, Trent Dougherty, Heidi Hurd, Eduardo Rivera-López, Eric Mack, Mike Otsuka, David Owens, Erik Roark, Seana Shiffrin, Michael Pratt, Hillel Steiner, and Catherine Valcke. I have also benefited from discussion with the participants at the Roundtable on The Moral Bindingness of Promises, Program in Law and Philosophy, University of Illinois at Urbana/Champaign (2005) and the participants at the Workshop on Economic, Ethics, and the Law (Commitment and Contract), XXII World Congress of Philosophy of Law and Social Philosophy, Granada, Spain (2005).