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Shiffrin, Seana

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IMMORAL, CONFLICTING AND REDUNDANT PROMISES

by

SEANA SHIFFRIN

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7

Immoral, Conflicting, and Redundant Promises

Seana Valentine Shiffrin[1]

THOMAS SCANLON'S CREATIVE and stimulating work on promising figures prominently among the many valuable contributions he has made to recent moral and political philosophy.[2] His work has served as a major source of inspiration for the lively discussion about promising that has flourished over the last two decades.[3] I agree wholeheartedly with Scanlon's nonconventionalism about promising but disagree with him about the content of the moral principles that underlie the promissory commitment. Here, I propose to pursue that disagreement by exploring a variety of neglected cases of promising that highlight some of the differences between expectation-oriented views of promissory commitment like Scanlon's and rights-transfer views like my own.

Scanlon's theory posits that the purpose of promising is to give assurance about the promisor's assertions of future performance. On Scanlon's view, promises give assurance by creating expectations of performance in the promisee through the articulation of the promisor's intention to perform when this intention is transparently articulated for the purpose of assurance; promises are binding because it is wrong intentionally and voluntarily to induce another's expectations that one will act a certain way in order to assure that person but then to disappoint those expectations.[4]

Scanlon's theory has faced criticism on two main fronts. First, some of us doubt that the aim to assure is as ubiquitous and as essential a motive for promising as he posits. For related reasons, we deny that the existence and the binding force of promises hinges primarily upon the expectations of the promisee.[5] Second, some worry that expectation-based views of the moral force of promises confront a circularity—they are unable to explain how the articulation of a promise can, alone, without reliance on a convention, give rise to the sort of legitimate expectations moral agents should then respect.[6]

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The rather different idea that a binding promise involves a transfer of a right from one party to another to decide whether to act in a certain way serves as a nonconventionalist alternative to Scanlon's expectation-based view.[7] A rights-transfer theory does not make assurance or expectations central to the theory of promising, although it acknowledges that the aim to assure is common and important, and further, that morally significant expectations often arise in the promisee because of a promise. One variation of the rights-transfer theory, *the existence view*, holds that it is constitutive of a promise that it involves the valid transfer of a right from the promisor to the promisee. A distinct variation, *the bindingness view*, recognizes some speech acts as creating promises even if they do not involve a valid rights-transfer, but holds that a promise is *binding* only if it is created through a valid rights-transfer. Because of its relative simplicity and its greater plausibility to me, I will focus on the existence view. Others, who believe immoral promises are true promises but without moral force, may find that the bindingness view better fits their intuitions.[8]

On either variation, the salient feature of the promise—the rights transfer—may occur independently of whether the relevant promissory utterance persuades or should reasonably persuade the promisee of future performance. Hence, rights-transfer views avoid the difficulty that expectation-based (and reliance-based) views face in explaining why the promisee was justified in developing the expectation that the promisor would act as she said she would. Indeed, rights-transfer views have the strength that they can explain how a promise provides justification or warrant for a promisee's developing an expectation of performance.

Further, it seems as though many promises that do not generate expectations of performance may nevertheless be binding—as with promises to repay a creditor who believes the promisor will renege.[9] The rights-transfer theory can explain, without circularity, why a promisor must perform without appealing to the wrong of disappointing expectations or of squandering others' investments: it is because she has transferred her right to decide to act otherwise to someone else and so has no moral right to make a fresh choice at the present.

The rights-transfer theory, however, faces some difficulties of its own that arise when one considers the rather neglected examples of immoral and conflicting promises, and, in particular, the virtually orphaned but fascinating case of redundant promises. I plan here to identify and explain the problems these cases pose, to flesh out a version of the rights-transfer theory in more detail, and to investigate what resources the theory has to address these problems. These resources come into sharper focus, I submit, when the formulation of the rights-transfer theory is further refined. Rather than conceiving of the right that is transferred in a broad way (as the right to *decide to act* otherwise), I will argue it is appropriate and illuminating to begin by conceiving of the relevant right as the right, between the promisor and the promisee, to be the one to decide whether to act, how to act, and on what grounds. As I will clarify, a promise may, in different circumstances and on different occasions, involve a more precise commitment to transfer a right to decide whether to act for a particular sort of reason. The cases I will discuss will help motivate why these refinements are necessary and significant.

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In addition to attempting to flesh out the rights-transfer theory and to take it through some paces, I aim to make two other contributions: First, I hope to stimulate interest in these under-discussed categories of promising for their own sake. However, although they are fascinating cases, I hasten to acknowledge that they may be difficult cases that even plausible theories cannot dispatch with ease. Second, my effort to untangle the puzzle of redundant promises suggests a different, but potentially important, notion of partiality than usually occupies the spotlight in discussions of interpersonal relations and of promising, in particular. Whether this notion figures in the correct account of redundant promises or not, it is an aspect of partiality that deserves greater attention.

1. INTRODUCTION TO THE PROBLEMS

Although I will refine the formulation as the essay proceeds, the gist of the rights-transfer theory may first be grasped by putting it in its simplest, broad form. Put broadly, the rights-transfer theory claims that a binding promise effects a transfer from the promisor to the promisee, through the communicated intent to do so, of the promisor's right to decide to act otherwise than how she promised to act. On the version of the theory I will explore, *the existence view*, promises themselves are constituted and made binding by these transfers. The transfer explains why the promisor is bound to perform: he no longer has a (moral) right to decide whether to do otherwise. It further explains why the promisee has the power to waive performance: the moral permission of the promisor to decide to act otherwise now lies in the hands of the promisee and the promisee may exercise this permission. The theory thereby explains the basic structure of the promissory relationship with satisfying simplicity.

But this theory might be thought to be embarrassed by the three following sorts of cases: immoral promises, conflicting promises, and redundant promises. The theory seems to presuppose that the promisor had a right to perform or not to perform the promised action. So, first, how can it make sense of promises between criminal conspirators to perform criminal actions? How can it be that Mary the bank-robber can promise Joe, her conspirator, to neutralize the bank guard if Mary has no moral power to manhandle or murder the bank guard in the first place? Is Mary's communication not a promise at all?

Second, what about cases in which the activity promised is morally innocuous but one already has a duty not to perform it for some more contingent reason? If Alice promises to meet Bob for lunch and then subsequently promises to meet Carly for lunch at the same time, how can the rights-theory make sense of her second promise? It might be thought that Alice no longer has the right to decide whether or not to meet Bob for lunch; she is committed. So what right could she transfer to Carly?[10] Is this like or unlike the criminal case?

Finally, how does the rights-transfer theory account for redundant promises, that is, promises to perform an act that the promisor is already obliged, and knows he is

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already obliged, to perform for other reasons?[11] Suppose Karen knows that Roger—her dashing bounder of a friend—occasionally steals money from her purse when she leaves the room. She reminds him that this is outrageous behavior and asks him to promise not to do it again. Roger's promise not to do so seems to make perfect sense even though he lacks any right to do otherwise.

How can the rights-transfer theory of promises make sense of what seems like a perfectly intuitive judgment that standard promises are involved in each of these three cases—those of immoral promises, conflicting promises, and redundant promises? Further, how can it do so while also vindicating what seem (to me) to be the appropriate judgments about bindingness: the immoral "promise" is not binding, but the conflicting and redundant promises do exert moral force?

Notice that an assurance theory handles these cases fairly easily, at least on the surface.[12] Through their promises, the criminal gives assurance to the conspirator, the friend to her lunch dates, the petty thief to his acquaintance. The recipients now expect performance, in part, on the basis of these assurances. There are costs, however, to such smooth sailing. The assurance theorist then has to relinquish the idea that promises are pro tanto binding if he wishes to avoid the unpleasant consequence that the conspirator has an obligation or greater reason to perform an immoral action because one has promised to do it. This relinquishment may be thought, by some, to represent a strength and, by others, a weakness. And, having relinquished this idea, the assurance theorist must explain why some of these problem promises have moral force (e.g., the conflicting promises) while others do not.

With respect to redundant promises, some may be inclined to think this assurance is not worth much. If one doubts the (known) duty will be performed in the first place, why should one place one's trust in the assurance provided by a promise?[13] Such skepticism is the point of impeaching witnesses by revealing their prior crimes.[14] Jurors are supposed to think that because a person committed a theft and thereby showed a willingness to violate a known duty, their oath to give truthful testimony is unreliable. On the other hand, if one thought that there were different sorts of moral transgressions as well as different causes and related character traits giving rise to transgressions, the fact a person has acted badly in one respect (or is prone to do so) might not necessarily support an inference that she is entirely unreliable in other respects.[15] Hence, the assurance provided by the promise might nonetheless be meaningful and assuring.

In any case, regarding immoral, conflicting, and redundant promises as true promises seems quite intuitive. In particular, it seems intuitive that each conflicting promise is binding and that a wrong is done to either one of the parties who is stood up. Further (though it is a harder case), it seems as though the redundant promises exert some moral force. The assurance theory seems rather handily to accommodate this assessment and to make sense of why such promises might be made. Although I do not plan to vindicate each of these intuitive assessments, my task is to sketch a rights-transfer account of these cases that either fits the phenomenology of our judgments about them or, in the case of immoral promises, gives a convincing account of how the phenomenology might reasonably mislead.

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2. IMMORAL PROMISES

I will begin with promises to engage in immoral conduct. I have in mind, as will be evident, conduct that is *intrinsically* immoral *and* that one has no autonomy right to perform, for example, theft, assault, murder, or fraud. To distinguish: some conduct may be all-things-considered immoral in a particular situation but not *intrinsically* immoral, for example, refusing to swim in one's clothes may be generally permissible but immoral when a young child's life is at stake. Other conduct may be intrinsically immoral yet fall within the scope of what one has an autonomy right to do, for example, failing to apologize when one should or acting stingily with one's needy friend. Although such conduct is wrong, it is important to the meaning or significance of the performance of the corresponding moral conduct that there is an autonomy right to forbear.

The sorts of promises I have in mind when I write of "immoral promises" are like those of a criminal, for instance, who promises a conspirator to rob a bank or to drive the getaway car. These may appear to be bona fide promises. We would not be surprised if her conspirator were angry if she failed to perform them. This phenomenon does not submit to a straightforward explanation on the rights account. The criminal has no relevant moral right to rob the bank or drive the getaway car, or to decide whether or not to do so; ipso facto, she has no relevant right to transfer to her conspirator through a promise.

Indeed, I think the rights-transfer account should say that the criminal has not *truly and successfully* made a promise. Although she has presented something that wears the shell of a valid promise's form, it lacks its substance. Although we often speak of promises between conspirators, perhaps it is not an overly counterintuitive form of revisionism to suggest that this is shorthand for something else. Suppose the criminal offers what appears to be a promise to rob the bank. Does she have any more reason to rob the bank than she did before she attempted to promise to do so? No. Her declaring that she has promised to rob the bank does not alter her moral status with respect to robbing the bank at all. It is not merely that she has some reason to rob it in virtue of the promise, but still a greater reason not to. Her utterance does not create any valid justificatory reason whatsoever, not even a pro tanto one, to rob the bank.[16]

The contrary view—that a true promise has been generated, providing the promisor with *some* reason to rob the bank, but one outweighed by the evil of robbing the bank—encounters the difficulty that, with respect to more minor evils than robbery, the evil of the promised act may not in fact outweigh the importance of fidelity. This view may thus have to acknowledge moral obligations to pilfer petty cash just because one promised to do so. This seems to me absurd.[17] (Or are we really to say that the importance of property always outweighs the importance of fidelity?) One cannot, by declaration, bootstrap oneself into a moral *obligation* to perform an *intrinsically immoral* activity.[18]

I concede that it can be linguistically appropriate and convenient to say that the conspirators *promised* one another to rob the bank or to retaliate against a snitch. Indeed, in this essay, I make use of this convenience. This use does not strike me as

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dispositive evidence of whether they have made what I call "true," "valid," or "bona fide" promises. In other contexts, we assign the noun associated with successes to invalid attempts, sort of like an honorific concession prize. For instance, statutes that are invalidated as unconstitutional are still called "statutes," and sometimes are referred to as "law," even when they retain none of the legal force of valid statutes and are treated as void ab initio.[19] The same holds true of contracts whose formation defects (including having immoral or illegal acts as their subject) render them void. Courts will treat them as invalid attempts at contracts and as though they were never made. Still, courts will refer to these invalid agreements as void *contracts*, although they have *none* of the force or standing of a true, valid contract.[20] I regard immoral promises analogously. We may use the noun "promise" linguistically to acknowledge that a certain sort of attempt was made, one that fails because of its substantive content and thereby does not have the characteristic moral and practical significance of a true promise.

Although I deny that immoral "promises" are true promises and that they give rise to reasons to perform the "promised" activity, I recognize that the attempted promise may well alter the moral relationship between the attempted promisor and promisee. A satisfactory theory of immoral promises should accommodate and explain this fact. For instance, even though the promisor does not have reason, by virtue of her promissory language, to perform the immoral act that, ex hypothesi, she has no moral power to perform, her conspirator may be angry if she does not perform. How can we make sense of this anger and the real feelings of betrayal occasioned by breaches of this sort?

In many cases, both parties incorrectly believe that a binding promise has formed. Sometimes, this is because they do not recognize that the object of the attempted promise is immoral.[21] In many cases, though, conspirators are not self-deceived about the moral status of their plans. They may, however, believe that even binding immoral promises can be formed.[22] Perhaps our language of promising strongly encourages this idea because we lack a clear term for an attempted promise that is not formed or is not binding because of its immoral character. In such cases of false moral belief, the party's failure to perform involves many of the same character flaws and morally defective motives as those implicated by intentional omissions where the failure to perform *itself* would be immoral. This may go a long way toward explaining why these failures to perform evoke resentment and anger, although the omission to perform, considered by itself, is not immoral.

I am also tempted to analyze these promises as forms of misrepresentation. In saying "I promise to rob the bank," Mary misrepresents what rights she has and that she may legitimately transfer. The wrong done to the recipient lies not in the failure to perform, but in the initial misrepresentation of what she was empowered to commit to.

This assessment of the wrong is, I believe, entirely consistent with the conspirator's knowledge that Mary lacks the moral power to act in these ways. By analogy, a lie is still a lie and it still morally offends even when the recipient is aware that it is a lie and even when the speaker knows the recipient knows it is a lie.[23] Think about some of the transparent excuses students give for absences or late papers. Even if your students believe that given the complexity of modern families you might entertain the possibility that they have four grandmothers, they do not really think you will believe that

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all four of them died in the same term, each on the eve of an essay deadline. Or, consider the transgression committed by an obvious perjurer on the stand who knows his testimony will be roundly contradicted.[24] Lies may be told without the intent to even attempt to persuade: Sometimes the lie is offered because one must say something and one wishes to avoid revealing or acknowledging the truth even if the fact of one's evasion is transparent.[25]

My suggestion in the case of the attempted immoral promise is that the recipient is wronged by the pseudo-promisor's fraudulent misrepresentation that the action is in that person's moral power to perform, but not by the failure to perform as such. Had the action been performed, such anger might still have been appropriate had the promisee privately changed her mind about the desirability of performance. One can imagine a reformed criminal exclaiming to her conspirator "What were you thinking when you promised me to kill the bank guard?? Were we both out of our minds?" Such outbursts are unlikely, of course, but then again some lies are desired by their recipients. In some circumstances, the desirability and the transparency of the lie may partly mitigate the wrong of the lie, but they do not entirely eradicate it. The bare misrepresentation may suffice to make it a wrong.[26] Further, the misrepresentation may encourage the recipient to engage in wrongful conspiratorial behavior by supporting tendencies to rationalize the permissibility of such behavior or to downplay its wrongfulness. In addition, in this way and others, third parties may be put at greater risk in virtue of the misrepresentation.

My analysis thus provides an error theory of the phenomenological sense that attempted immoral promises are true promises. It provides an alternative explanation of how their breach can generate anger and other reactive attitudes. As I will now argue, it can also answer the other main argument given for the position that these are in fact promises. Altham and Anscombe argue that conspirators' immoral promises must be true promises or else one could not make sense of the following case: Leonard pays Jack money in exchange for Jack's undertaking to kill Harry. If Jack reneges, Leonard may demand the return of his money. But as Altham argues, "If there was not really a promise, [Leonard] would have nothing to invoke in demanding his money back."[27]

The existence of a bona fide promise, however, is not necessary to explain the basis for Leonard's demand. Although Leonard has no right to demand performance or compensation for the failure to perform, Leonard may demand restitution on two grounds that do not presuppose the validity of Jack's attempted promise: First, most simply, Leonard may demand restitution on the grounds that he has given money to Jack and received nothing valuable (or negotiated for) in return although it was obvious that Leonard had no intention of making a gift. Second, in those cases in which Leonard operates in moral ignorance of the wrongness of what was "promised," Leonard may demand restitution on the grounds that he gave Jack money on the basis of Jack's misrepresentation that Jack had the (moral) power to render a desired service in return.[28] Neither explanation invokes the idea that Jack actually promised. Further, neither explanation treats Jack's duty to return the money as resting on Leonard's disappointed expectation that Jack would perform. This latter feature represents an

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advantage over an account that appeals to a breach of promise or a failure to make good on an assurance given by Jack.[29]

What about more complex, *nested* cases such as the following?[30] Aida and Bert form a conspiracy to rob a bank. They consider whether to do it Tuesday or Wednesday. They decide on Wednesday. Aida, in a burst of insecurity, asks Bert to promise that he will rob the bank on Wednesday with her, rather than on Tuesday on his own, thereby leaving Aida out of the deal. Bert promises not to jump the gun. We might be inclined to say that if Bert sees the light and decides against robbing the bank entirely then Bert has not wronged Aida at all. What should we think instead if Bert decides he stands to reap higher rewards by cutting Aida out of the arrangement and robbing the bank on Tuesday? Doesn't Aida have a complaint based on the promise that Bert made about Wednesday in particular (and not just a complaint that Bert and Aida mutually misrepresented to each other whether they had powers to rob banks at all)?

Or take a more quotidian case involving the same characters: Aida, who turns out to be Bert's domestic partner, calls Bert and asks him to get $20 on the way home. Bert replies that he won't be able to both get to ATM and go to the gym as he'd planned, and that his interests in exercise are as or more important than Aida's need for the cash. Aida urges Bert to take the money from the office's petty cash drawer and to replace it tomorrow. I assume for the purposes of the example that this is wrong to do but that Bert promises to do so. Bert then shows up at home empty-handed simply because he was forgetful and not because he morally reconsidered. Does Aida really have no complaint at all? How should the rights-transfer theorist account for what seem like reasonable complaints the putative promisees would have in these cases?

I am of two minds about these cases. On the one hand, those who receive (and especially those who elicit) immoral promises really have no reasonable stake in their fulfillment at all, whatever the reason for the failure to perform. On the other hand, it seems that Bert has, in some sense, mistreated Aida and that Aida has some complaint. I do not, however, think that complaint arises from any duty created by the attempted promise. This may be partly brought out by the fact that the complaint may seem to disappear if Bert's failure to perform was motivated by reconsideration of the morality of the activity rather than by greed or negligence. Whatever complaint she has, then, must in some sense be rooted in Bert's reason for not performing.

My suggestion is this: Bert's agreement to rob the bank on Wednesday rather than Tuesday or to steal the petty cash is not a binding promise because it either directly or indirectly presupposes a right to do what Bert could have no right to do, whatever his reason. But, Bert's agreement may have generated some duty of consideration toward Aida even if it did not transfer an entitlement to her to demand performance. Suppose Aida made clear her ultimate purposes: she wanted the money in the first case to pay her rent and in the second case to buy cookies from the next door neighbor's child. One might think that in making the agreement and deliberately attempting to cultivate expectations in Aida that her legitimate interests would be promoted, Bert took on some responsibility for attending to the legitimate interests behind Aida's request.[31] In making the agreement, Bert committed to performing some action to further Aida's interests and to not allowing certain sorts of considerations

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(e.g., personal inconvenience or greed) to be grounds for ignoring them. When Bert treats Aida's expectations negligently or recklessly, he has violated that duty of consideration, although Bert would not violate it if he omitted to steal because he was motivated by the wrongness of the action; that reason need not represent any failure of care or concern for Aida's interests but would represent the proper accounting for them relative to the action they together contemplated. Aida and Bert together share responsibility for contemplating and agreeing to use an immoral action to further Aida's interests; when either reconsiders on moral grounds, neither does wrong. But when Bert fails for reasons orthogonal to the appropriate valuation of Aida's interests in the circumstances, for example, for greed or through negligence, Bert may have violated a duty of consideration engendered by the agreement. This is not to say—in any sense whatsoever—that Bert ought to have waited until Wednesday or taken the petty cash. It is a duty that perhaps could only be satisfied, compatibly with his other duties, through moral reconsideration.

But, the judgment that failure to perform for poor reasons may violate a duty of consideration may explain a sense that there may be some residual duties of remedy that apply here. Bert may owe Aida an apology in cases where he failed from negligence or greed. To remedy the omissions for those reasons, perhaps Bert should offer Aida some legitimate funds to help with Aida's rent or, if Bert realizes his negligence on the way to the gym, perhaps Bert should stop at the ATM and skip his workout. These remedial actions are not owed in virtue of any expectations Aida had to the money, for those expectations were intimately connected to and infected by the use of illegitimate means. Rather, in making the agreement or in representing himself as transferring a right, Bert implicitly assumed some relational duties not to show disregard for Aida's interests in certain ways or for certain reasons; it is therefore appropriate, as a remedy for that disregard, to demonstrate a more active form of consideration for those interests (even though the remedy, as with many remedies, may involve doing more than Bert initially would have had to do had he complied with his duties in the first place).

3. CONFLICTING PROMISES

I have been contending that what appear to be promises to engage in inherently immoral behavior are better understood as misleading statements that take the form of promises but, in fact, are not true promises. A similar analysis seems more difficult to sustain in the case of conflicting promises. I have in mind overlapping promises to lunch. Although it may be wrong for Alice to make a lunch promise to Carly given her prior promise to Bob, unlike the recipient of an immoral promise, Carly does have a right to demand performance. She is reasonably disappointed, morally, by Alice's failure to perform as such, even once she learns of the earlier promise to Bob. This makes it harder to sustain any suggestion that Alice's promise to Carly is not a true promise. But if the second promise, to Carly, is a true promise, how can the rights-transfer theorist make sense of this because one might think Alice's promise to Bob has already transferred her right to decide with whom to have lunch? The difficulty is not unique

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to the case of conflicting promises: it arises in many cases of promises to engage in behavior that is not intrinsically immoral, but that conflicts with other all-things-considered duties established by the context, such as a promise to lend you money that all things considered I should give to Oxfam or a promise to support your proposal at a meeting, although really it is not the right one for our department and conflicts with my fiduciary obligations.

These all seem as though they are true promises, although of course they may not be all-things-considered binding (because of the conflict, among other things). Explaining how they could be true promises under the rubric of the rights-transfer theory requires greater precision than I have so far offered about what right it is exactly that has been transferred from Alice to Bob when Alice promises Bob to meet him for lunch. My suggestion, which I will continue to refine once I turn to redundant promises, is that these promises do not involve the simple transfer of the right to decide to be in one place or another or to do some act or another. If the rights transfer were that sweeping, then the second lunch promise would resemble the attempted immoral promise just discussed.

Instead, I suggest these promises involve the transfer of a more limited right than the broad right to decide whether to perform an activity or not. What is transferred is the specific right to be the one, *between* the two parties, to decide the matter. This understanding dovetails with what I have elsewhere argued is a crucial function of the power to promise—to provide a mechanism within a relationship by which autonomous parties may share and transfer their discretionary powers.[32] Normally, between A and B, A has the moral authority to decide whether to follow through on A's intention to lunch with B. When A promises to have lunch with B, A transfers that decision-making authority—between them—as to who may decide whether that intention will be implemented, while setting a default that it will and that they will lunch together. A's promise to B does not, however, alter the balance of power between A and C. Between A and C, A remains the one with the moral authority to decide whether to follow through on her intentions.

Hence, it is possible for A to transfer the decision-making authority between A and B to B and also to transfer the decision-making authority between A and C to C. So even if A has promised B to meet B for lunch, A may still make a valid promise to C to meet C for lunch. And, in a sense, both promises could be honored if either C or B "waives" the promise and allows A to make other plans. Of course, if the lunch dates are at the same time and both B and C elect for A to show up, then, necessarily, A will act in one case without right because A will act against a decision of a person who has rightful authority about the matter. But understanding the right that has transferred in this way has the advantage that it does not make the second promise a sham. It also explains why if B were to cancel, then A is bound to respect C's authority and therefore, to show up and meet C. This result is harder to explain on the theory that the second promise is empty or a sham.[33]

Finally, this account helps to explain why, generally, a promise is not simply transferable. Suppose A promises to meet B for lunch at P1, T1. Typically, B may not transfer that promise to D, making A obliged to meet D. This is because, typically, all A transfers

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to B is something specific about the relation between A and B, not a general power to make decisions on A's behalf about A's presence at a time.[34]

This way of understanding the structure of the content of the promise gibes with the prior analysis of immoral promises. Absent a promise, between A and B, A has the right to decide whether to meet B for lunch and so can transfer that right through a promise. A may act wrongly by making a similar, conflicting promise to C but that does not render the promise to C an immoral one per se because the content of what is promised does not involve intrinsically immoral activity. Hence, the conflicting promises are possible.

Contrast the case of immoral promises. Between A and B, A does not have the moral right to decide whether to rob a bank or "take care" of the guard. Neither of them have any such decision-making power. Hence, neither may transfer rights over that decision to the other and so neither can promise the other to engage in that activity. Although for A to be responsible for robbing the bank, she must be an autonomous agent who is responsible for her decisions, she has no moral discretion about what decision to make. That is not true with respect to the subject matter of the promises that may conflict with other promises or with other duties. Despite A's promise to B, prior to any promise made to C, A still retains the decision-making power between herself and C about where A should lunch. Given her promise to B, A would be wrong to decide other than to lunch with B, but absent a promise to C, it would be inappropriate for C to *tell* (versus advise) A where to lunch; between A and C, that decision still lies within the sphere of A's discretionary powers. Likewise, although there may be a right answer about how much I should give Oxfam, it is within my discretion and power to try to identify that amount and arrange my affairs to so donate; ditto with the exercise of my judgment power with respect to departmental affairs.

4. REDUNDANT PROMISES

Redundant promises offer perhaps the most challenging case for the rights-transfer theory. Although they have not received much philosophical attention, they are not all that atypical.[35] Debtors issue fresh promises to repay debts that are still outstanding;[36] wrongdoers promise never to commit the wrong again; the known grifter or criminal promises not to prey upon a friend.

In my view, redundant promises cannot be analyzed in the same way as immoral promises, mostly because the analysis falls so flat phenomenologically. For, suppose one hazarded the hypothesis that these promises involve misrepresentation. The bounder who promises not to steal from your purse might be thought essentially to do nothing. He represents himself as having a right to decide whether to steal or not, a right he then transfers to you. The wrong would be in the making or purported making of the promise because it misrepresents what his degrees of freedom are.

This hypothesis does not seem plausible, though. If the bounder nevertheless rifles through your purse after making the promise, it seems as though you have a distinct reason to feel betrayed by the theft, one that sits atop the background reason that your

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purse should not be subject to trespass. The misrepresentation theory does not do much to accommodate this sense that the promise itself makes a difference. Nor will the analysis just offered in the case of the conflicting promises, as it stands, help. In the example at hand, it really is already in the promisee's decisional power whether or not the acquaintance takes money from her purse. So it cannot be that the thief transfers *that* decisional power to the promisee.

The appropriate analysis of redundant promises seems multi-fold, differing according to content and context. Communications that present themselves as redundant promises may be divided into at least three categories: faux promises, promises regarding imperfect duties, and promises regarding perfect duties (the most difficult category).

a. Faux Promises

In some cases, the redundant promise is not in fact a true promise but is not a failed attempt or a misrepresentation either. In these cases, the language of promise is used to signal that the speaker acknowledges explicitly that the behavior in question is a true wrong. Sometimes, when a prior wrongdoer promises never to engage in that action again, what may be transpiring is less a promise than the issuance of an explicit recognition that the behavior is morally inapt and perhaps a complementary statement by the speaker that although she at one time was unwilling or unable to conform her conduct to ethical standards, she now recognizes those standards and plans to adhere to them.

In other related cases, some utterances taking the form of redundant promises may be elicited or provided to show that the speaker understands how a general moral rule applies in this specific case.[37] Imagine the following exchange: I am visiting another university and overhear a teaching assistant say that she is teaching in the common room at 1. Half an hour later, I see a graduate student entering the common room at 12:50 with his lunch bag in hand. Meaning to be helpful, I say "In case you don't know, I heard that the common room is being used at 1 P.M. for an undergraduate section." He says, in reply, "Don't worry. I promise to finish my lunch by then." One way to read this colloquy is that the graduate student does not so much promise as he confirms to me that he realizes that he has a duty to vacate the common room when it is reserved for another purpose and that he recognizes that duty applies to this situation. It is not clear that much more than that is happening. The promissory language is just used to signal his understanding of the moral situation. It may also communicate the intention to comply with the relevant duty. But one piece of evidence that it is not also a real promise is the reaction I might plausibly have were the common room not vacated by 1 P.M. If the section were not mine and the common room was not my special responsibility, it would be peculiar for me to regard him as having committed a transgression against me were he to linger nonetheless. Yet promises generally ground a specific personal complaint by promisees when breached.[38] If it were my business, so to speak, we might then have a case of a redundant promise with respect to a perfect duty—the truly hard case—to which I shall turn in a moment after discussing the second category, that of redundant promises with respect to imperfect duties.

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b. Imperfect Duties

Although some statements that take the form of redundant promises may not be promises at all, others seem to do more than just announce facts about the speaker's moral awareness and good will. In many cases, the statement seems to empower its recipient with a new and special complaint if the speaker later acts in ways inconsistent with the statement's contents. In some cases, what I suggest is going on is that an imperfect duty has been made more precise. I may have an imperfect duty to help my friends financially if they are in need, but on any particular occasion it may be permissible to decline a request. If, however, I promise, then although I am doing what I have a duty to do in some sense, in another, I am making the commitment much more precise and determinate. Before, my friend could complain if I never helped her; now she may complain if I fail on this occasion.

c. Perfect Duties

The most interesting cases are those in which one promises to do that which one already has a perfect duty to do, as in our signal case of the thief promising not to steal from an acquaintance's purse. Here, the background duty is perfectly determinate and in need of no further precisification. What right is it that the thief transfers?

We might say the thief transfers the right to decide otherwise in the counterfactual case in which the perfect duty no longer obtains, for example, on those occasions on which taking without permission becomes permissible. In this particular case, this may be a difficult counterfactual to get one's mind around. In other cases of perfect duties, the circumstances that give rise to the perfect duty may alter in more familiar ways. For instance, I assume that in two-parent families that the parents together have a perfect duty to pick up their young children from school (or to make a satisfactory arrangement), and that each parent has a perfect duty to do so if the other is unavailable. Suppose B is unavailable. Then A, the other parent, has a perfect duty to pick up the children. A also specifically promises her child that she'll pick the child up. If B suddenly becomes available, A could fulfill her perfect parental duty by having B agree to do it but A's promise could not be discharged in the same way. Her promise obligates her to pick the child up despite the fact that B is now available.

But there are cases in which the discharge conditions of the perfect duty and the discharge conditions of a promise may be the same, in which case the counterfactual oomph of the redundant promise would be ethereal. In the case of the promise not to pilfer, the perfect duty not to take money from another's purse might be overcome. If there were a medical emergency, for instance, and an urgent need for funds for a quick-acting medicine, that circumstance might represent the limiting condition on the perfect duty; but so too it probably represents the limiting condition on the thief's promise. So is the redundant promise here superfluous? I do not think so.

Consider the content of the reaction to breach. Suppose no exigent circumstances obtain but our thief steals from the purse anyway, despite the promise. The victim's reaction is likely and appropriately to be more personal in nature than it would be

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absent the promise: Some particular betrayal has occurred that goes beyond the betrayal of the theft alone, had the promise not been made. Or, suppose the thief forbore and is asked by a fellow pick-pocket why the thief didn't relieve the easy mark of her money. The thief sincerely replies, "Well, to be honest, the only reason was that I wasn't sure I could pull it off without being detected." If the promisee overheard this exchange, I can imagine her being reasonably, albeit uncomfortably, peeved not just because the thief's report betrays the attitude that theft is permissible, but because it more specifically betrays an indifference to the particular wrong of stealing from *her*, given the promise. I can imagine her thinking that the thief should have abstained also and largely because he promised to do so. The promisee may reasonably feel put out that the thief treated her impersonally—as just any old possible victim—rather than specially, in a more personal way. Where the utterance taking the form of a redundant promise is not merely a disguised acknowledgment of a standing moral duty, it seems to alter the reason why a particular action is or is not to be performed.

Prior to the promise, the purse is to be left alone for the same reasons, basically, that every purse is to be left alone: there is an impersonal duty not to interfere with others' legitimate personal property. After the promise, the purse is to be left alone for a more personal, promisee-oriented reason. Through his promise, he alienates his prerogative to treat the purse-owner impersonally regarding this matter, as the thief would otherwise treat anyone else.[39]

Put in this way, the idea should be somewhat familiar. This is in part what we do when we befriend a person. We relinquish our power to treat the person as we would treat anyone else and we generate claims in them to expect that we will treat them as not just one among many but as having agent-specific reasons to expect certain behavior from us. Some of the behavior that is to be expected is unique: we will give greater weight to their needs and interests and we will perform certain actions we otherwise would not because they are our friends. This aspect of friendship and personal relationships, along with some of the common emotions associated with relationships, is often emphasized in the literature.[40] But, the move from the impartial to the partial stance with respect to what actions to perform or what weight to give various reasons is not the only important shift of deliberative perspective involved in special relationships. Often the behavior called for by the relationship is not different than the behavior we owe to others. I am obliged to refrain from gratuitous slapping of strangers, friends, and annoying acquaintances alike. What is different with a friend is what reason I have to perform or refrain: my reason with respect to a friend should be my care or concern for that individual or perhaps the fact that we have a friendly relationship. What is different with the thief is that he agreed to take something about her perspective about the matter as authoritative and to abstain, in some sense, *for her sake.*

This shift is not captured by a standard version of the distinction between impartiality and partiality. In some circumstances, I may have reason to give my friend's interests greater weight than a stranger's when they conflict, but that sort of reason does not do any work to explain the difference between the nature of the quotidian duty not to assault the friend and the quotidian duty not to assault the stranger. Both duties are agent-relative in the sense that is often meant—namely, I cannot assault

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the friend or the stranger in order to prevent more assaults by others (or myself). Both duties are owed to the specific person and are not fungible. But, with respect to the friend, there is a deliberative difference: In some sense or another, my reason should refer to something quite specific about that person or our relation (without in any way suggesting that contrary behavior would be licensed with respect to other people). I think of this as the move from the impersonal to the personal.[41] With respect to the stranger, I owe that particular person—as I owe everyone else, each as an individual—the sort of respect that obliges me to refrain from assault, etc.; with respect to the friend, I owe that person a certain sort of consideration and care that propels such restraint, a sort that I do not owe to all others each as individuals.[42]

Not all redundant promises initiate this movement from the impersonal to the personal. Some redundant promises may overlap with duties that already take a personal form. Suppose the single parent has a specific, personal, perfect duty to pick up her child after school. So a promise she makes on top of that to pick her child up cannot be analyzed in terms of a maneuver that substitutes a personal reason for an impersonal one. This is not the only such example—lawyers may promise clients to exert their best efforts or to honor their clients' rights to decide whether to settle or not. These are already duties owed to specific individuals with whom a personal relationship has already been forged.

Of course, the force of the promise may be just the counterfactual force mentioned before, but I suspect that something else, deliberative in nature, is going on at least in some cases. The idea that the promise involves a commitment to a deliberative stance is not in itself so unusual. Other familiar promises take a deliberative form, explicitly manifesting concern for the reasons on which a promisor will act. A promisee who is altruistic, or perhaps does not wish to owe a debt of gratitude, may ask her friend to promise that he will not perform some action, for example, see a particular movie, *for her sake* but rather, only to do so if it interests him.[43] With respect to redundant promises, I suggest that what is being promised, implicitly, is to take on in one's deliberation a greater proportion of the promisee's perspective on the significance of the duty, how it is to be discharged, what sort of effort to exert to fulfill it, and how to assess whether exonerating circumstances hold.

What do I have in mind? Take the standing duty to pick up your child from school. It is important to be timely. This means, often, interrupting desired tasks and even leaving earlier than will typically be necessary. But, nonetheless, one acts serviceably well with respect to this duty if one tries hard in light of known, likely hazards even if one does not do all that one can. If the school is ten minutes away in light traffic and traffic is light at the relevant time, one may have to leave twenty minutes in advance to protect against unexpected delay but one surely does not have to leave—every day—an hour and a half in advance although that would ensure being timely. You need not do all that you can to contain all possible risks from maturing. Now suppose you typically take one route and make it on time reliably. But your anxious child strongly prefers that you take the other route because it's more direct and contends that that's the proper way to be on time. Her reasons are fine ones but so are yours: Although your route is longer, there's often less traffic, it is prettier and you have

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become expert at gaming the traffic lights. It is reasonable for you to choose your route but still, there is a greater (albeit small) risk of being late with your route if the timing is inexact on a heavily trafficked day; perhaps there is a lesser risk on other sorts of days. If this mild conflict has been aired and is thereby in the background when you promise to be on time, I think that there is greater moral pressure for you to take the route your child prefers; she will have some real complaint if you are late because you took your own route (even if the choice absent the promise is a perfectly reasonable one and even if the delay really is not your fault). To return to the rights framework, with this sort of redundant promise, I suspect that—often at least—you transfer the right to deploy your exclusive judgment about how to fulfill one's duty, which means to use, what risks of failure may permissibly be run, etc. You agree, in part, to take on some of the promisee's perspective and judgment about how to approach the preexisting duty.

I am tentative about this suggestion.[44] In part, it is because it does not seem as though the promisee has a complaint if you do show up on time and used your own route (though I am honestly unsure about this). Perhaps she does have a complaint but it is one that it is petty to voice in the circumstances; maybe all she is entitled to is raised eyebrows followed by a concessive smile. If she has a right to complain, this suggests that the right transferred would be the right to use one's exclusive judgment about how to comply with the duty, but if she has no right to complain, perhaps all that is transferred is the right to enjoy impunity if one breaches while using one's own judgment, even without objective fault. I do not have much in the way of argument that this is exactly what happens and I do not think our intuitions or reactions are all that sharp in this domain. Nonetheless, I am attracted to a view with this structure because it seems as though something goes on even in these redundant promises, and that the relevant complaints the promisees could make have to do with the promisors not sharing power in the appropriate way in light of the promise. Because the relevant issue could not concern what action is performed, it will have to concern how or for what reason the action is performed.

Although I find the degree of tentativeness in our understanding of redundant promises frustrating, in another way it is entirely apt. Accounts that revolve around assurance and the development or strengthening of expectations too handily address redundant promises (as well as immoral and conflicting ones), treating them as just other cases in which new expectations are generated or greater levels of confidence in existing expectations are warranted. These are difficult cases. Yet the assurance view does not recognize the redundant promise as an especially hard case (except in those cases in which the promisee already has a complete and full expectation that the promisor will perform on the basis of the preexisting duty). This oversimplifies what seems to be indubitably rugged terrain.

The preliminary lessons I would draw from considering the surprisingly rich subject of redundant promises are that although they do submit to fruitful analysis within the rights-transfer framework, their structure is not always transparent. Sometimes, they only appear to be promises but are instead forms of assertion: for example, testimony acknowledging one's primary duty. In other cases, they seem to have true promissory

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power: rendering imperfect duties determinate. In yet further cases of promises to perform already perfect duties, they may commit the promisee to performance even if the limiting conditions of the primary, preexisting duty are met. But there are cases in which the limiting conditions of the preexisting duty and the limiting conditions of the overlapping promise are similar if not identical. In such cases, I suggest that the redundant promise still has moral force—what it involves is a commitment to deliberate in a certain way or to act as though one has deliberated in a certain way. One replaces the default method of deliberation (the impersonal perspective or one's own perspective) with a method that gives greater prominence to the deliberative perspective of the specific promisee. This amounts to a distinctive form of partiality.

Those are the main points about redundant promises that I have been trying on. Three larger themes emerge from them. The first is that the content of promises varies in ways rarely remarked upon. It is commonplace that different promises have different actions as their objects. But the subject of redundant promises highlights that the content of a promise may also vary on other dimensions, including with respect to one's deliberative stance. Further, the promise's content may vary depending upon not merely the words used, but also what other things are present and fixed in the moral environment.

Second, some of these variations are quite subtle and inexplicit. The moral features of promises are, like many other moral actions, superficially familiar and usually partly accessible on the surface. Yet, many of their characteristics and nuances are not at our fingertips. This, I concede, is a controversial view that will flummox some and irritate or alienate others.

Third, these suggestions about one's deliberative stance—here, with respect to redundant promises and, earlier, in the discussion of nested immoral promises—reveal a larger schism between rights-transfer theorists about promises and some contemporary ethicists. If this analysis of redundant promises is correct and the right that is transferred involves the reasons one should or can act upon, then the dispute may implicate the issues of whether one's motives may be relevant to the sort of action one performs, its permissibility and its moral nature. Some resistance to such views has been prominent in Scanlon's most recent work.[45]

For a variety of reasons, I embrace a broader view of the relevance of motives to the nature of moral action. But, I will not here embark on a defense of the broad relevance of motives to the moral classification of actions. Rather, I will end by observing that the interweaving of these issues further underscores the philosophical richness of the topic of promising.

NOTES

1. I am grateful to Scott Altman, Jorah Dannenberg, Scott Dewey, David Goldman, Mark Greenberg, Jeffrey Helmreich, Barbara Herman, Pamela Hieronymi, A.J. Julius, Gregory Keating, Niko Kolodny, Gabriel Rabin, William Rubenstein, Tim Scanlon, Vicki Steiner, Terry Stedman, Judith Jarvis Thomson, Gary Watson, Stephen White, members of a course at University of California–Los Angeles on Truthtelling and Promising, and audiences at Harvard University, Princeton University, the University of North Carolina, and the University of Southern California Gould School of Law, for help and constructive trouble.

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2. I will focus here on (and cite) Scanlon's theory as presented in "Promises," ch. 7 in *What We Owe to Each Other* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999). An earlier version of that article appeared as "Promises and Practices," *Philosophy & Public Affairs* 19(3) (Summer 1990): 199–226. Another important article on the subject, "Promises and Contracts," may be found in *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003).

3. Scanlon's article came out the same year as Judith Jarvis Thomson's important and influential work on the subject. Together, these two works reinvigorated the subject. Judith Jarvis Thomson, "Giving One's Word," ch. 12 in *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990).

4. Scanlon, *What We Owe*, 304. I will focus here on the view articulated in Scanlon's first book, although I believe his position has evolved in two ways, both relating to the mental states of the promisor and promisee. The published view stresses the significance of the actual expectation of the promisee and the actual intention of the promisor to induce that expectation.

I believe now that Scanlon endorses a more "objective" version of the position along the following, rough lines: a promise is a speech-act that gives warrant to the promisee to form an expectation of performance on the part of the promisor; it is wrong to provide such warrant insincerely (i.e., without the intention of performance) and it is wrong to provide such warrant and then act in a way that would disappoint the expectation that the promisee had reason to develop (assuming the promisee does not reject the promise). Whether or not it is one's intention to give that warrant, if one acts in ways reasonably understood to give that warrant (e.g., by saying "I promise" in a nonjoking fashion), one is bound to respect the expectations one has given the recipient a warrant to form; likewise, what matters is not whether the expectation is formed by the promisee, but whether its formation would be reasonable.

This more objective formulation still leaves open whether we should say that it would be *reasonable* for the promisee to form an expectation of performance in controversial cases such as the Profligate Pal in which the promisee has every reason to predict the promisor will not in fact perform. See Scanlon, *What We Owe*, 312–14, and my discussion in Seana Valentine Shiffrin, "Promising, Intimate Relationships, and Conventionalism," *Philosophical Review* 117(4) (October, 2008): 486–92. If the reasonability of the expectation turns upon the objective likelihood of performance, then Scanlon's theory still (implausibly in my view) entails the Profligate Pal is not obliged to perform. If the reasonability of the expectation does not turn on what it is reasonable to anticipate, then it seems less clear what work the appeal to expectations does in the theory. In any case, with respect to the issues discussed in this essay, I do not think much turns upon whether the promisor intends to assure or whether, through means other than a rights-transfer, the promisor acts in a way that may reasonably be taken to provide assurance.

5. See, e.g., Shiffrin, "Promising, Intimate Relationships, and Conventionalism," 486–93; Stephen Darwall, "Contractualism, Root and Branch: A Review Essay," *Philosophy & Public Affairs* 34(2) (March 2006): 211–14; Michael Pratt, "Scanlon on Promising," *Canadian Journal of Law and Jurisprudence* 14(1) (January 2001): 146–49.

6. See, e.g., Niko Kolodny and R. Jay Wallace, "Promises and Practices Revisited," *Philosophy & Public Affairs* 31(2) (April 2003): 119–54; John Deigh, "Promises under Fire," *Ethics* 112(3) (April 2002): 483–506.

7. See, e.g., Shiffrin, "Promising, Intimate Relationships, and Conventionalism,"; David Owens, "A Simple Theory of Promising," *Philosophical Review* 115(1) (January 2006): 51–77; Joseph Raz, "Voluntary Obligations and Normative Powers II," *Proceedings of the Aristotelian Society* 46 (suppl.)(1972): 100–101; Gary Watson, "Promises, Reasons and Normative Action,"

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in *Reasons for Action*, ed. D. Sobel and S. Wall (Cambridge: Cambridge University Press, forthcoming).

Judith Jarvis Thomson's view, that a promise involves giving a claim to, or creating a claim for (rather than *transferring* a *right to*), the promisee is closely related. I do not think she would describe herself as a rights-transfer theorist. Instead, she believes that promises, like other sorts of word-givings, give the recipient *a claim*—in this case a claim that one must do what one said one would do. (See Thomson, "Giving One's Word," 305.) I am more attracted to the characterization of promises as transferring rights rather than creating claims in the promisee that the content of what one has said is true and that it may be relied upon. The former more clearly accounts for the fact that when one promises, one must *perform*, whereas a mere claim that one do what one has given one's word to do might be discharged by warning that one has changed one's mind and will not perform after all or by compensating for any monetary losses associated with nonperformance. The idea of giving a claim does not seem, as obviously, to explain the default and distinctive requirement of performance in the case of promises. I discuss the significance of the obligation to *perform as such* at greater length in Seana Valentine Shiffrin, "Could Breach of Contract Be Immoral?" *Michigan Law Review* 107(8) (June 2009): 1551–68.

8. The problems I will discuss arise in one guise or another for both variants. The main difference between them is that the existence view holds that immoral promises are not true promises at all, whereas the bindingness view holds they are true promises, but without binding force. With respect to conflicting and redundant promises, both views hold that the relevant promises are valid and must grapple with the same issues about whether they exert moral force and why. *Mutatis mutandis*, both versions of the theory must resolve issues about what sorts of rights are transferred in order to grapple with the problem cases I identify.

9. See Scanlon's discussion of this case and his denial that a binding promise forms in *What We Owe*, 321. I criticize Scanlon's analysis of this case in Shiffrin, "Promising, Intimate Relationships, and Conventionalism," 487–93.

10. An articulation of the problem appears in Thomas Pink, "Promising and Obligation," *Philosophical Perspectives* 23(1) (December 2009): 405–406.

11. I focus on the case in which the promisor *knows* he has a preexisting duty. That case presents both the issue of what work the redundant promise could do and whether the redundant promise as such could make sense to the promisor and the promisee. Where the promisor does not believe he is under a preexisting duty, it is clearer what phenomenological and motivational work the promise would do for the promisor and therefore clearer what value the promise would have for the promisee. See Joseph P. DeMarco and Richard M. Fox, "Putting Pressure on Promises," *Southern Journal of Philosophy* 30(2) (Summer 1992): 57; Pink, "Promising and Obligation," 414.

12. For that matter, so may conventionalist accounts of promising. Conventionalist accounts, e.g., may interpret the convention of promising as recognizing immoral promises as true promises, but ones that do not create an obligation. See J. E. J. Altham, "Wicked Promises," in *Exercises in Analysis*, ed. Ian Hacking (Cambridge: Cambridge University Press: 1985): 7, 13. Or they may claim that the convention does not recognize promissory language purporting to commit to immoral activity as promises at all.

13. Bernard Williams, *Truth and Truthfulness* (Princeton, N.J.: Princeton University Press, 2004), 89. Of course, the promise may seem more meaningful when the promisor does not realize she has a preexisting duty.

14. Jurisdictions differ about what sorts of crimes are admissible for purposes of impeachment. To impeach, some states *only* admit evidence of crimes involving dishonesty, such as

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perjury or fraud. Other states, and the Federal Rules of Evidence, allow the admission of evidence of some other felony convictions (if more probative than prejudicial) on the grounds that they support an inference of poor character and, therefore, untrustworthiness. See Federal Rules of Evidence, R. 609(a)(1). The rationale is that the commission of a felony, whether involving dishonesty or not, shows a willingness to place one's own interests over others and over the importance of respecting social norms; one might, therefore, do the same as a witness. See, e.g., Richard Green, "Evidence," *Southern Illinois University Law Journal* 13(3) (Spring 1989): 649; David Sonenshein, "Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases under the Federal Rules of Evidence," *George Washington Law Review* 57(2) (December 1988): 281. Nonetheless, even the Federal Rules of Evidence privilege evidence of crimes of dishonesty over evidence of other crimes. Federal Rules of Evidence, R. 609(a)(2). Even when evidence of nonfraudulent felonies is admissible to cast doubt upon the veracity of testimony, character evidence is disallowed for the purpose of establishing any greater likelihood that the defendant is guilty of the crime with which he or she is charged. See generally Kenneth J. Melilli, "The Character Evidence Rule Revisited," *Brigham Young University Law Review* 4 (1998): 1579.

15. This sort of distinction (between different moral transgressions and different character flaws giving rise to them) explains why impeachment evidence of felonies that do not involve dishonesty is sometimes excluded (even under the Federal Rules of Evidence). Hawaii, in developing its rule for witness impeachment, relied explicitly on this reasoning in *Asato* v. *Furtado*, 474 P.2d 288, 294–96 (Haw., 1970) (witness's conviction for heedless and careless driving inadmissible for impeachment because it "bears no rational relation to a witness's credibility"). The Supreme Court of Hawaii explained:

> We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness's propensity for lying or truth-telling, and that such convictions ought not to be admitted for purposes of impeachment. This is true not only of minor offenses . . . but also of some major offenses like murder or assault and battery. It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will tell the truth. Id., 294–95.

See also Hawaii Rules of Evidence, R. 609 (a) (2006). Although the Federal Rules of Evidence permit evidence of prior crimes other than those of dishonesty, the admission of such evidence is not automatic as it is with crimes of dishonesty; instead, its probative value must outweigh its prejudicial value. Often, that burden is unmet. See, e.g., *United States* v. *Begay*, 144 F.3d 1336, 1338 (10th Cir., 1998) (witness's prior drug conviction improper for cross-examination because insufficiently probative of dishonesty); *Eng.* v. *Scully*, 146 F.R.D. 74, 78 (S.D.N.Y., 1993) (prior felony conviction of murder not admissible for witness impeachment because character flaw indicated by murder not sufficiently probative of dishonesty. "Murder is not necessarily indicative of truthfulness, and the probative value of a murder conviction is substantially outweighed by the danger of unfair prejudice."); *United States v. Rosa*, 891 F.2d 1063, 1069 (3rd Cir., 1989) (evidence of past fraud admissible but evidence of bribery inadmissible because bribery is "not the kind of conduct which bears on truthfulness or untruthfulness.").

16. I acknowledge, however, that some people's intuitions and considered philosophical positions differ. Altham takes the view that immoral promises must be promises and uses the example to cast doubt on efforts, such as John Searle's, to derive "ought" from "is." See Altham, "Wicked Promises," 1–21; see also Margaret P. Gilbert, "Three Dogmas about Promising," in *Promises and Agreements*, ed. Hanoch Scheinman (Oxford: Oxford University Press, forthcoming). Ironically, Searle does regard the immoral promise as a true promise, albeit one

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whose reason-giving force is outweighed by the "evil nature of the promised act." See John Searle, *Rationality in Action* (Princeton, N.J.: Princeton University Press, 2001), 194–95.

Although I doubt immoral promises are true promises, my aim is not to vindicate or undermine Searle's is/ought derivation. As I discuss in note 8, the bindingness version of the rights-transfer theory does recognize these as promises, albeit ones that are not binding because they do not actually transfer a right (and not because the moral force of the promise is outweighed by the significance of the immorality of the act).

17. Gary Watson develops a like-minded criticism in his "Promises, Reasons, and Normative Powers," 20–28. But see Gilbert, "Three Dogmas About Promising," who argues that immoral promises create obligations but contends that they are the sort of "obligations" that do not provide their possessor with a moral reason to perform. This position allows Gilbert to accommodate the linguistic familiarity of calling immoral promises true promises. The bindingness version of the rights-transfer view also has this feature. In both cases, though, divorcing obligations and promises generally from a necessary connection to moral reasons to perform seems too high a price to pay for this accommodation.

18. I have attempted to dislodge the general purported mystery about how promises could generate moral reasons just by declaration in "Promising, Intimate Relationships, and Conventionalism" with respect to typical promises to perform actions that are, ex ante, morally discretionary. I agree, however, that it would be beyond puzzling if by declaration we could create moral reasons to do things that, *ex ante*, are morally impermissible and lie outside our sphere of autonomy.

19. See, e.g., *United States* v. *Stevens*, 130 S.Ct. 1577, 1591 (2010) (refusing to uphold an "unconstitutional statute" on the basis of the government's intention to implement it with discretion); *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 130 S.Ct. 2971, 3017 (2010) (reaffirming that "[a] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose"); *Lemon* v. *Kurtzman*, 411 U.S. 192, 198 (1973) (referring to "unlawful statutes").

20. See, e.g., *United States* v. *Mardirosian*, 602 F.3d 1, 7 (2010) (reiterating that "contracts for illegal purposes are void as a matter of public policy"); *Massachusetts Mun. Wholesale Elec. Co.* v. *Town of Danvers*, 411 Mass. 39, 54–55, 577 N.E.2d 283 (1991) ("When adjudicating rights between parties to a contract that is void ab initio, courts treat the contract as if it had never been made.").

21. See, e.g., Thomas Firestone, "Mafia Memoirs: What They Tell Us About Organized Crime," *Journal of Contemporary Criminal Justice* 9(3) (August 1993): 201–204 (quoting, among others, Sammy "the Bull" Gravano's testimony in which he explains that the Mafia lifestyle "didn't seem wrong" and reporting that many Italian-American mobsters "were raised in communities in which becoming a gangster was seen as a legitimate and even desirable career path.").

22. Organized crime groups standardly inculcate strong senses of loyalty and "honor" among members as well as a *sense* of duty to carry out the groups' directives. See, e.g., Letizia Paoli, *Mafia Brotherhoods* (Oxford: Oxford University Press, 2003), 67–87; Francis A. J. Ianni, "The Mafia and the Web of Kinship," *Public Interest* 22 (Winter 1971): 80–98; David E. Kaplan and Alec Dubro, *Yakuza: Japan's Criminal Underworld* (Berkeley and Los Angeles: University of California Press, 2003), 8–17; Martin Booth, *The Dragon Syndicates: The Global Phenomenon of the Triads* (London: Doubleday, 1999), 158–61.

23. Jokes differ from transparent lies because the joke (as well as the intentional piece of fiction or other sort of entertainment) is transparently proffered as such. The lie is a representation the speaker does not believe but offers to the recipient as a representation to be treated as true; this is compatible with it being evident that the speaker does not believe its content.

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Jokes and fictional material are not offered to be taken as true but rather are offered for another purpose. One reason why some jokes are morally questionable, or even cruel, is that the timing of the speech and the timing of the revelation of the purpose of the speech are far from coincident.

24. See Thomas L. Carson, "The Definition of Lying," *Nous* 40(2) (June 2006): 289–90. Strangely, Carson's example unnecessarily specifies that the perjurer believes she will not be convicted for perjury to underscore the perjurer is not intending to deceive.

25. There is more to say about why transparent lies are wrong. Part of the explanation lies, I think, in the fact that they generate epistemic burdens for the recipient in light of our standing dispositions to believe what interlocutors say and particularly to regard the testimony of friends and acquaintances in a charitable light and to treat their assertions with politeness and respect. Confronting transparent lies may generate forms of cognitive dissonance, forcing recipients to enact barriers against the operation of these dispositions or tempting listeners into wishful thinking and other sometimes dangerous forms of conflict and truth avoidance. Dealing with transparent lies also burdens the listener ethically: she must either behave inauthentically and act as though nothing has happened, or confront the liar and spark a confrontation.

26. I argue that moral misrepresentations, et alia, may be wrong independent of their consequences on particular occasions in "Lies and the Murderer Next Door," unpublished ms.

27. Altham, "Wicked Promises," 9; Elizabeth Anscombe, "On Promising and Its Justice, and Whether It Need be Respected *In Foro Interno*," in *Ethics, Religion, and Politics: Collected Philosophical Papers of G.E.M. Anscombe* (Minneapolis: University of Minnesota Press, 1981), 16.

28. The principle of "unjust enrichment," provides that a person who receives a benefit besides a gift from another party owes restitution thereto "if the circumstances of its retention are such that, as between the two persons, it is unjust for him to retain it"; see *Restatement of the Law of Restitution* (St. Paul, Minn.: American Law Institute, 1937), § 1 comment C. Such circumstances include cases where one party pays another in exchange for services or goods never received; see, e.g., *Landeis* v. *Nelson*, 808 P.2d 216, 219 (Wyo., 1991) (finding it unjust for franchisor to retain money paid by franchisee in exchange for franchise when the franchisee "received nothing in return"). This principle may apply even to payments for services or transfers that, like the case of an immoral promisor, the recipient has no legal duty or right to render. "A person who transfers something to another believing that the other thereby comes under a duty to perform the terms of a contract or becomes subject to other duties, is ordinarily entitled to restitution . . . if the obligation intended does not arise and if the other does not perform . . . ," *Restatement of the Law of Restitution* § 47 at comment b. See also id. § 52.

29. Suppose Jack performs. On the restitutionary theories I have articulated, it would seem that Leonard could claim restitution anyway: for we cannot say, in a sober moral voice, that Leonard received true value for his money when Jack killed Harry (even though Leonard got what he wanted). Further, whether or not Jack performs, Jack misrepresented what rights he had to convey. I do not regard this as an embarrassment (although it is no priority of mine that Leonard be made whole). Jack had no business accepting money in exchange for his "promise" and it is not disturbing if the money he accepted is not rightfully his to keep. Such reasoning is not unheard of in criminal cases involving money paid for illegal enterprises, where the payor has been found entitled to full restitution for the amount spent, regardless of what she received in return; see, e.g., *Watts* v. *Malatesta*, 186 N.E. 210 (N.Y., 1933) (casual horse gambler entitled by statute to restitution for full amounts waged to unlawful bookmaker regardless of

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amount won or lost). Even a gambler who knowingly transfers money to a professional bookmaker for the purpose of betting has been found to have "never parted with the title to his money"; *People* v. *Stedeker*, 67 N.E. 132, 133 (N.Y., 1903). One justification for such rulings is that where the money was paid for unlawful purposes, the recipient has no rights to it, for "from such activities there could arise no rights at all"; see *Hofferman v. Simmons*, 49 N.E.2d 523, 526 (N.Y., 1943) (professional gamblers not entitled to proceeds seized by police).

30. Both cases are versions of examples suggested by Jorah Dannenberg.

31. Although I do not believe Scanlon's expectation account provides the correct account of what promises are or why they bind, I do agree with the insight that the deliberate cultivation of others' expectations may have serious moral consequences, although they may not consist of obligations to *perform* what is expected.

32. Shiffrin, "Promising, Conventionalism, and Intimate Relationships."

33. If the promise to C were a sham, the obligation to meet C would grow only from a concern for C's interests, as described in the prior section, but C would not have the right to demand performance as such. C would only have a claim that her underlying interests are responded to, which may or may not require performance as such.

34. Contract law is, however, permissive of some sorts of assignments of rights to third parties, but the ability of a promisee to assign contractual rights to another without the promisor's consent is quite limited in personal-service contracts and other circumstances in which the identity of the party to whom performance is owed might reasonably matter to the promisor. See *Restatement (Second) of Contracts* (St. Paul, Minn.: The Institute, 1981) §§ 317, 318; E. Allan Farnsworth, *Farnsworth on Contracts* (New York: Aspen Law & Business, 1990), § 11.10 (1990).

35. The issues they raise may also arise with respect to other moral phenomena. For instance, an apology, in some respect or another, seems to involve some commitment not to engage in the same wrong again. Because one's original behavior was a wrong, one is already bound, by the underlying principle making it a wrong, not to engage in that activity. But, recommission of the wrong seems all the more galling after an apology has been made. This essentially raises the same issues as redundant promises do, although an apology is not, on its face, a promise. Jeff Helmreich explores these issues with respect to apologies in "More Than Words," unpublished ms.

36. See, e.g., *Restatement (Second) of Contracts*, §§ 82, 86; *Farnsworth on Contracts*, § 2.8.

37. Compare the legal presumption *against* injunctions that are worded so as to instruct the defendant to obey the law in fairly general terms or in the actual terms of the relevant statute or legal provision. See Federal Rules of Civil Procedure, R. 65(d) (requiring an injunction to be specific in its terms); *Burton* v. *City of Belle Glade*, 178 F. 3d 1175, 1201 (11th Cir., 1999) (invalidating an order "not to discriminate in future annexation decisions"). The legal presumption does not seem to be based on the idea that an injunction to obey the law generally would inaccurately presuppose or suggest that, without it, agents were not so bound. Rather, it seems to rest on the idea that such injunctions do not supply much guidance and specificity to those who have already demonstrated their failure to respond appropriately to the law as it is already worded.

38. Promises seem to presuppose that the promisee has an interest (or might reasonably be thought to have an interest) in what is promised or, at least, in having the power to decide whether what is promised is performed.

39. Scanlon might say the promise alters the meaning of the action not to be performed; see T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, Mass.: Belknap

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Press of Harvard University Press, 2008), 52–56. I disagree with him about this way of putting it but that disagreement should be pursued elsewhere.

40. See, e.g., Niko Kolodny, "Love as Valuing a Relationship," *Philosophical Review* 112(2) (April 2003): 154, 160–61; Samuel Scheffler, "Relationships and Responsibilities," *Philosophy & Public Affairs* 26(3) (July 1997): 189–209; Bernard Williams, "Persons, Character and Morality," in *Moral Luck* (Cambridge: Cambridge University Press, 1981), 17–18.

41. Related ideas are developed in J. David Velleman, "Love as a Moral Emotion," *Ethics* 109(2) (January 1999): 355–60, 366–72, and Daniel Markovits "Promise as an Arm's Length Relation," in *Promises and Agreements*, ed. Hanoch Scheinman (Oxford: Oxford University Press, forthcoming). Markovits suggests that the move from the impersonal to the personal, essential to love, is antithetical to promising. See Markovits at 8–13. I aim to show that promising, in some cases, involves this very move; if plausible, this compatibility dissipates one of Markovits' arguments about the tension between promises and intimacy.

42. The move from the impersonal to the personal stance is not always appropriate in intimate relationships. For instance, if one's child or friend is enrolled in one's course, the reason one has to give her the grade she earns or to call on her when she raises her hand is exactly the same reason as to call on any other student. To inject the personal here at all is entirely inappropriate.

43. I am grateful to Terry Stedman for helpful discussion on this point.

44. For an even stronger emphasis on the promisee's perspective, see Jorah Dannenberg, "Promising as Valuing," ch. 4, in *Promising as Paradigm* (Ph.D. diss., University of California–Los Angeles, 2010).

45. See Scanlon, *Moral Dimensions*. Some of his prior work on promising did not reflect this view, as he acknowledges, id., 37–39. His original principle against manipulation condemns actions as impermissible manipulation if through the action, the actor intentionally leads a party to believe an exchange will be made when the eliciting agent has no intention of fulfilling his end of the bargain (*What We Owe*, 298). In later work, he says that if the action would lead the other party to suffer a serious loss, due to detrimental reliance, it would still be impermissible whether or not the eliciting agent's intention is to cause this loss or to allow this loss to occur (*Moral Dimensions*, 39).

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