

## Promises, Agreements, and the Structure of Contract Law Doctrine

J E Penner\*

This paper is both a development of the views I first expressed some fifteen years<sup>1</sup> ago on the nature of promises, agreements, and the law of contract (hereafter 'VO'), and a response to the recent work of Shiffrin on the same subject.<sup>2</sup> There are a number of points I intend to discuss, so I hope the reader will forgive something of a preliminary outline by way of introduction.

I shall begin by giving reasons for taking agreements, rather than promises, as the kind of voluntary obligations which help us make sense of both the voluntary undertakings between those whom Shiffrin calls 'intimates' as well as those in contracts between strangers. I will briefly reprise the reasons I gave for this preference in VO, but here I will give a couple more reasons which have been prompted by Shiffrin's work. The general argument will be that our collective practical reason is typically organised around agreements, not promises, and so understanding agreements is essential if we want to understand the normative relations between intimates as well as contracts between strangers, for both of these are kinds of agreements, not promises. I take this not to be a matter of semantics, but one of substance. But I shall build upon both Raz's and Shiffrin's work here to try to establish the truth of this 'agreement' thesis.

I then turn to some criticisms of Shiffrin's work. If Shiffrin errs in treating agreements as promises, as I believe she does, this has consequences for the truth of her theory. The principle reason for that judgment can be stated as follows: promises are voluntary obligations that principally address what might be regarded as pathological failure properly to respond to reasons, as in the case of akrasia. By situating her analysis of intimate voluntary obligations in the province of promises, Shiffrin explains the normative function of voluntary joint action as essentially the prevention

---

\* Professor of Law, UCL Faculty of Laws. Thanks to George Letsas, Prince Saprai...

<sup>1</sup> J E Penner, 'Voluntary Obligations and the Scope of the Law of Contract' (1996) 2(4) *Legal Theory* 325-57

<sup>2</sup> In particular Seana Valentine Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117 *Philosophical Review* 481, (hereafter 'PIRC'), but see also Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2006-07) 120 *Harvard L*

of the negative, as the prevention of exploitations of vulnerability. Focussing on this negative aspect, she fails to grasp the positive, facilitating aspects of agreements. As she realises,<sup>3</sup> this prioritisation of the negative over the positive distinguishes her account of promising from her account of consent (with which I am entirely in agreement), but, at least on the assumption that her account of promising would also colour her account of agreements between intimates, I think her reason for this prioritisation is inadequate. I shall argue that agreements are typically facilitative, not preventative, whereas, as I have said, promises are typically preventative, dealing with 'pathological' personality aspects which interfere with a person's doing what they realise they should do. I think this error facilitates another, which is Schifffrin's 'property fetishistic' conception of a promise as a transfer of a right to another, who receives the right to control the behaviour of the promisor.

Finally, I shall turn to the question whether contracts, agreements between strangers, are dependent upon a convention. I shall argue that the strongest argument that they are derives from Kant's attitude to rights in the state of nature, and his conventionalist explanation about the transition to a civil condition. I shall argue that this conventionalist explanation is wanting, largely for the sorts of reasons that Gardner gives: roughly, as (normal) human beings are responsive to reasons, something like a duty of humanity operates even in a state of nature. If this is right, then voluntarily undertaken obligations of co-operation between strangers (as in Scanlon's example of the spear- and boomerang-throwers) can genuinely arise in the absence of conventions. After all, there is *some* truth in the treacly sentiment, as I understand Will Rogers put it, 'a stranger is just a friend I haven't met.'

### ***The priority of agreements over promises***

In VO I argued that contracts are agreements, not promises, and I gave two distinct reasons for that. The first was conceptual, the second technical. The conceptual argument was that, unlike contracts, promises serve as an 'executory' form of gift. When I promise to do something for you, then, just as in the case of a gift, this is conceptually a unilateral action on my part. Whilst one does have a right to refuse a

---

Rev 708 and Seana Shifffrin, 'Could Breach of Contract Be Immoral?' (2009) 107 *Michigan L Rev* 1551.

<sup>3</sup> PIRC 504 n39

gift or a promise, this does not turn gifts or promises into joint agreements or contracts. If I may unhumly quote from VO:<sup>4</sup>

Although a *refusal* is recognised as legitimate *response* to a gift or promise, that does not mean *acceptance* is to be construed as a necessary *complement* of the promisor's or the donor's act...

and:<sup>5</sup>

To hold otherwise is essentially to deny the *conceptual possibility* of unilateral acts or unilateral undertakings of obligations that are intended to benefit someone else. There is, as far as I know, no reason for thinking such a view even plausible.

This, I think, explains what I mean by a promise, as opposed to an agreement. Under both a promise and an agreement one can individuate a promisor's and a party's<sup>6</sup> personal obligations. My claim is that there is a substantive difference between unilaterally undertaken obligations, such as promises, vows, or oaths, and bi- or multi-laterally undertaken obligations, where for the obligation to come into existence two or more parties must agree to their respective undertakings. And my claim is that contracts are of the latter sort.

The second argument I made was technical. Everyone knows that under a contract the obligations of the parties are linked in substantial ways. Whilst I have an obligation under a contract from the outset of its formation, it is defeasible. The most important cases of this are when I am entitled to terminate the contract for breach, or when I am relieved of performance by the contract's being frustrated by some event. Under the promissory theory of contract, however, these sorts of doctrines make no sense, because under that theory parties to an agreement are treated as promisors and promisees, and nothing in your behaviour, such as your breach of your promise to me relieves me of my liability to perform my promise. This is made clear by pursuing the model of contractual promises as conditional promises. Let me modify a passage from VO as follows:<sup>7</sup>

Take the case of an executory contract of sale in which A wants to buy B's book. Framed in terms of a promissory characterisation of offer and acceptance, contract formation is initiated by a conditional promise, say by A: 'if you promise to transfer the

---

<sup>4</sup> VO 328-9.

<sup>5</sup> VO 329

<sup>6</sup> For the sake of clarity I will call the individuals involved in a contract the 'promisor' and 'promisee', and those who agreeing forms an agreement as 'parties'.

<sup>7</sup> VO 333-34

book to me, then I promise to pay you £10.' When B promises to transfer the book, he undertakes the obligation to transfer it, and the condition on A's promise is met, so he now has the obligation to pay £10. But the obligations are not linked any more than that. A and B now merely have separate unilateral obligations. It is no answer to B's claim for £10 from A that B has not transferred the book, for the promise to pay £10 is now absolute. The condition for the coming into being was not that B transfer the book, but that he promise to do so, and that B has done. This result of the promissory analysis cannot be avoided or patched up by incorporating conditions which last for the life of the contract, for that renders all contractual obligations merely conditional, and they are not. Try it out: What would constitute the offer? A's first stab might be something like, 'I promise to create a conditional promise to transfer £10 to you conditional on your transferring the book to me if you promise to transfer the book to me.' But B would not accept this offer, for it would leave him under an unconditional obligation to transfer the book, but A only under a conditional obligation, an obligation which only comes into existence when an event occurs, ie to make payment only once the book is transferred, so if, prior to the time of B's performance, A was unable to pay, say because of his insolvency, or unwilling to pay, as when A repudiates,<sup>8</sup> B would still be obliged to transfer the book. B wants to be in a position to say that A has an obligation to pay B *when* B performs, not *if* B performs, and this rendering of A's offer as a conditional promise fails to provide that for B.<sup>9</sup> The problem is obvious: promises are unilateral obligations. As such, they are conceptually unlinked to the obligations of other persons, and conditions do not frame that linkage. The bilateral character of agreements comprises more than the coincidental or bi-conditional creation of otherwise independent obligations. An agreement comprises a future state of affairs both parties to which are bound to bring into existence, though their actions in doing so are differently defined and set out.

Whilst I stand by these arguments, they make a negative, rather than a positive case for the agreement analysis of contracts. That positive case, as I shall now set out, is, in essence, that agreements are conceptually prior to promises in an important sense. In order to show this I shall draw upon both Raz's and Shiffrin's work. Let's start with Raz.

The Razian perspective (which I take to be a development of Hart's) is well-known so I can be brief. This is the idea that voluntarily undertaken obligations are a type of exclusionary reasons, which facilitate the co-ordination of behaviour, and as such are an aspect of what I like to call 'collective' or 'communal' or 'social' practical reason. A simple example might be the unanimous agreement within a family to go to Edinburgh on holiday. Once the agreement is formed, each member of the family will have various positive and negative obligations which, if fulfilled, will make the holiday a success. Such an agreement allows co-operation, typically by permitting a

---

<sup>8</sup> If B accepts A's repudiation, then A is no longer bound to perform (neither is B of course), but A is still liable for damages for breach of contract.

<sup>9</sup> Contract lawyers distinguish between an obligation to perform and the *time* of performance. under the contract.

sensible 'division of labour', without which the individuals could simply not act together (act *in agreement* or *in concert*) to achieve their goal. By entering into the agreement, each member of the family binds themselves to perform whatever tasks fall to them, as well as (usually implicitly) undertaking not to act in a way which undermines the enterprise, but though these obligations can be specified as the individual obligations of each particular person, they are not promises in the sense of a unilaterally undertaken obligation. What I want to emphasise about this way of conceiving agreements is that it is both *positive*, or *facilitative*, and completely *natural*.

As to its facilitative aspect, I take it this is really blindingly obvious. The benefits of social co-operation are all around us for everyone to see. Very little in the way of complex enterprises could get off the ground if individuals could not act in concert with others. And the fact is that in many cases, one hopes in most cases, the tasks one is under an obligation to perform as part of a joint enterprise are not onerous. I am obliged to do all the things that go with my contract of service at my university, and whilst some are irksome, their totality is not. We can quibble about whether the modern world demands us to be busier than we should be (I think it does), but humans mostly like doing valuable things, and just because achieving those things may involve acting in concert with, and therefore under an obligation to, others, does not transform the required performances into drudgery. If we agree to go to dinner together, my interest and pleasure in doing so is not diminished in the least because attending is a subject of agreement with attendant obligations. Indeed, because I trust you to come to dinner, I have the added pleasure of anticipation, which gets me through the long afternoon hours writing a paper on the philosophy of agreements. This is why when I apologise for not being able to comply with my obligation to come to dinner I normally not only express regret for your inconvenience, but also *my own disappointment*.

As to agreements of this kind being *natural*, we can draw upon Shiffrin, who explains the plausibility of humans having the power to consent in this way:<sup>10</sup>

One could imagine a conception of autonomy without consent in which an agent exercised complete sovereignty over her body and other personal spaces, such as the home, but had no ability to share or transfer these powers to others. That is, the agent

---

<sup>10</sup> PIRC 501-02

could not grant consent to others to exercise these powers in lieu of or alongside herself. Such a structure is imaginable but so impoverished as to be utterly implausible. As Joseph Raz has argued, the development and realization of our central autonomous capacities requires a diverse and rich set of meaningful options. Rights of autonomous control that were inalienable to this degree would render (morally) impossible real forms of meaningful human relationships and the full definition and recognition of the self (not to mention making medical and dental care cumbersome, dangerous, and awfully painful). To forge meaningful relationships, embodied human beings must have the ability to interact within the same physical space, to share the use of property, and to touch one another. They must therefore be able to empower particular people. A plausible account of autonomy would have to reject the isolation the constricted model of self-sovereignty would enforce as inconsistent with affording opportunities to lead a decent life and realize one's central capacities. It would have to include the power of consent to share at least some of the powers associated with self-sovereignty.

This is one of the best statements of the 'social thesis' I have ever encountered. The 'social thesis' is the thesis that the 'default' characterisation of human existence for the purposes of exploring interpersonal (including political) morality is not that of a hermit in some state of nature who shares no interests with others, but one in which interpersonal relations of real significance are native or natural to human existence. As such, those normative means, like the power to consent or to make agreements, are not some cultural achievement which we could plausibly be without, but are part and parcel of our natural endowments, in the same way as our basic responsiveness to reasons<sup>11</sup> makes us (in part) the kind of creatures that we are. Indeed, as I shall argue below in the last section on bargain agreements, the power to enter into agreements *just is* an aspect of our basic responsiveness to reasons.

In VO, I, like Shiffrin, examined voluntary obligations taking first the case of 'intimates', not strangers, though I took agreements, not promises, to be fundamental. The analysis went something like this. I divided voluntary obligations between intimates into two kinds. One, which I called 'mutual obligatory agreements', are those agreements that parties are obliged to come to, not in the sense that any one particular agreement is necessarily obligatory, but obligatory in the sense that some agreement as to how they will co-ordinate their behaviour is necessary. The most obvious examples are agreements between parents and other care-givers to co-ordinate their behaviour so as to provide care to those needing it. There may be any number of ways of dividing up the various tasks that need doing, but in order that the tasks get done there must be a co-ordination of behaviour. Notice that the good

---

<sup>11</sup> John Gardner, 'Nearly Natural Law', (2007) 52 *American Journal of Jurisprudence* 1

achieved by the co-ordinated actions agreed upon here is a good for all concerned, including those obliged to come to agreement. I take it that a parent has an interest in the welfare of his or her child (who is, of course, also interested in its own welfare), and that interest is one which both parents share.

The second sort of agreement I called 'mutual agreements', and these differed from those just set out in not being the result of an obligation to come to an agreement (or are at least not dominated by an independent obligation to agree on a course of action). The example of the family holiday to Edinburgh above is, I think, an example, though if you think that parents and children have an obligation to go on holiday together, it is easy to come up with your own. These agreements attend to joint projects in which the interest in the project is one which all parties value (not always necessarily to the same extent), and which deepen, redefine, or express the relationship between the parties. Whilst I have taken the family context as the obvious one, relations of friendship also display agreements of the two kinds. Friends have an obligation to see each other when they can, and this will involve co-operation, but friends also deepen or express their relationship by undertaking joint activities which they agree to, but not which they must.

If this is right, then the idea of 'offer and acceptance' as the way in which we conceive the formation of agreements has to be explained in a different way than the stating of conditions upon which one will be bound. On the view of agreements as being matters of bilateral or multilateral practical reason, an offer is a statement of the terms of engagement proposed by one party, i.e. proposed as terms of engagement he is willing to agree to, and acceptance is the acceptance of this proposal, meaning the acceptor agrees that this will be the basis upon which they proceed. The mutuality of this notion of agreement formation is seen in the handshake, which joint act is seen as the sign that the parties are bound.

Understood in this way, it seems to me that the bilaterality or multilaterality of agreements shows them in one sense to be conceptually prior to promises, or unilateral voluntary undertakings, at least in the context of intimates. Whilst agreements are just as voluntaristic as promises in the sense that they equally are acts of the individual will of the parties, they express, or are explained by, the social thesis in a much more straightforward way. Let me explain.

To understand the typical voluntarily undertaken obligation as the being party to an agreement treats the sociability of humans, their shared fate and their shared interests, which typifies the condition of intimates, as being a core feature of their existence as humans. (The situation is, after all, that if you had no intimates, you would not survive childhood.) An adult who is responsive to the reason that is the interest of a dependent child will regard themselves as being obliged in some sense to respond to that interest. And more than one person, one assumes, is around, and thus all those around, having that same responsiveness to reasons, will have the same obligation because they will share the same interest in the child's interest. Now, the natural way in which these adults will respond to their situation is not that each one will *promise* to do whatever respecting that child's interest requires them to do (whatever that might be), nor to unilaterally promise to look after the child on every second Tuesday on the assumption that, on their own, each individual has a power to determine without consulting any others what 'share' of the workload he or she will bear, but to come to an agreement with others to co-ordinate their behaviour to achieve the shared end of advancing the child's welfare. Promises, as well as oaths and vows, seem a singularly odd way of aiming to meet one's obligations or advance one's relationships with intimates if the reality of the social thesis is appreciated. Indeed, as I shall now go on to show, independently of the claim I have just made about the way in which agreements are more naturally and plausibly taken to be the sorts of voluntarily undertaken obligations which would typify those of intimates, promises are largely untypical between intimates, and essentially deal with human frailties and pathologies which would otherwise work to undermine agreements.

I am going to begin with my own case, as it is most familiar to me, but not for that reason atypical. Now it seems to me that I rarely make promises. I enter into agreements with people all the time, to go for coffee, to go for dinner, to throw the frisbee around, to go on holiday, to plan a party, to do things at work such as teach this course rather than that, become chairman of the undergraduate exam board rather than vice-dean for teaching, and on and on. Now of course when I enter into these agreements I am undertaking personal obligations, most of which I do not regard as onerous (indeed, typically the opposite), and some of which may be more or less trivial. The point about these undertakings, however, is that they are overwhelmingly



agreements, not promises; they are inherently particular agreements dependent upon a sharing of purposes, interests, and goals, and an underlying network of agreements which form the context or backdrop to all of these particular agreements. Even when I voluntarily undertake to do something 'on my own' as it were, this is typically the specification of an obligation that I have under a pre-existing agreement. It would seem to me to be silly to say that when I meet my teaching obligations, in so far as I have free choice in the matter, by saying that I will teach first year property, I am in any genuine way making a promise. What I am doing is exercising a power as to the way in which I fulfil my obligations under the agreement that makes me a law teacher at UCL. There might be all sorts of good reasons that *I* have this power which I can in one sense exercise unilaterally, but it is not a power to promise, but a power to specify the way in which I fulfil my pre-existing obligation, and my exercise of that power must, to be reasonable, be responsive to the rationality of the underlying agreement which co-ordinates my activity with others. In that sense, there is nothing *unilateral* at all about my exercise of the power.

The relatively rare occasions when I do promise are when I want to assure people that I am responsive to those sorts of underlying reasons. Guess when I am most likely to make a promise. Well, if you are at all like me you will guess that it is when I have, and am about to miss, a deadline, or have just missed one. Even if there is nothing in the world that I would rather do than meet a deadline I have agreed to but am about to miss, I have failed in my obligation, and it is natural to assure the publisher or whomever that this *is* something I take seriously, and I may promise to get the piece to him or her by the end of the week. By making this promise I 'gild the lily', undertaking to do what I already value and desire, and which I already understand myself to be obliged to do. It assures my promisee that I do respond properly to the reasons that apply to me, expresses my disappointment in my failure, and commits me to attend as assiduously as I can, 're-double my efforts', to complete.

As I read her, following her analysis of consent, Shiffrin begins her explication of promising by citing the facilitative, positive possibilities that the power to promise (though I should say the power to agree) opens up for the co-ordination of behaviour.<sup>12</sup> But then she takes us to her examples, and here she emphasises the way

---

<sup>12</sup> PIRC 502-04

in which promises are preventative of the negative consequences of power imbalances between intimates. I want to take some time on these examples, for here I think it is clearest that she characterises promises correctly, but without I think meaning to do so, shows them at the same time to be incapable of performing the role of the typical voluntary obligation that is found amongst intimates, which is the agreement.

*Shiffrin on the functions of promises*

Her first example is that of Bernard and Amy. Bernard wants Amy to listen to an album that Bernard admires but which Amy expects not to enjoy. Nevertheless, Amy promises to do so to avoid a tedious discussion about the merits of the artist, whilst Bernard is happy to have the promise, not because he wants to avoid such a discussion – there is nothing he'd like better – but because he is hopeful that Amy will find the album enjoyable and then come to change her mind about the artist. This example sets up Shiffrin's discussion of promises between intimates, and of this example she says:<sup>13</sup>

While they don't share an end because of or through the promise, the promise allows Amy to commit to pursue an end that is not actually held or valued by her. This is an important feature of the power to promise. To be able to commit to a course of action, without valuing it as the promisee does, can facilitate healthy dynamics within relationships...

This passage reveals what will be an important difference between Shiffrin and me in our analysis of voluntary obligations in the context of intimate relationships. I agree with the function of the promise in this example. But I want to argue that this sort of circumstance, whilst typical of the use of promises, is atypical of the sorts of voluntary obligations which intimates undertake, because they are paradigmatically ones in which interests are shared. The Bernard and Amy example shows how promises may be engaged to negotiate what would otherwise be a stumbling block in their relationship, viz their very different tastes in music. Now, spouses, brothers and sisters, and very good friends can have very different tastes in music without that being such a stumbling block, but it is in this case because Bernard wishes so much that Amy and he shared interests in music. By promising Bernard that she will listen to the album, she assures him that his interest in her interest in music is something she takes seriously, seriously enough to listen to the album, though not seriously enough to persist in a conversation about the artist's merits. So the promise has an 'assurance'

function here, but does so in response to a pathology in their relationship. The example as written seems to indicate that Amy is not similarly concerned that they share the same interests in music. If this is right, the promise is merely a stopgap. (If there is only one artist about which they disagree, but share their musical tastes more generally, then a stopgap when that artist's music comes up may be all that is required.) If this issue continues to recur, then it will undermine their relationship. Whilst promises like Amy's may work as temporary stopgaps, they cannot forestall the inevitable. If there is a genuine absence of sharing of significant interests, or worse, an actual and significant antipathy of interests between them, the exercise of the power to promise in the way that Amy does might actually be regarded as itself pathological, in that it perpetuates a dysfunctional relationship which should really be brought to a dignified end.

Shiffrin's next example is a case of A and B (whom I shall call 'Anna' and 'Ben') who are in a conflict about whether they should move to another city in some months' time.<sup>14</sup> Anna's interest in moving with Ben to the new city is much greater than Ben's interest in moving with Anna to the new city because Ben has other attractive options which Anna does not. Therefore, in terms of determining how to act prior to the move, Anna is more vulnerable than Ben. If Ben cannot commit to making the move because there is no facility to promise, but is only able to state a present intention to move, which he can revise later, then any prior investment in making the move with Ben that Anna makes is liable to be wasted, and the danger is real, since Ben has less interest in the move. As a result, Anna may under-invest in making the move, or sweeten the pot by doing other things to entice Ben not to change his mind, transforming Anna's vulnerability into a real loss. Furthermore, Anna may become frustrated and feel powerless and resentful, so that the relationship sours. All because Ben cannot make a promise to Anna and thereby undertake a binding obligation to Anna to go to the new city, not just announce his present intentions. Shiffrin concludes from this analysis<sup>15</sup> that:<sup>16</sup>

---

<sup>13</sup> PIRC 496.

<sup>14</sup> PIRC 504-09

<sup>15</sup> The analysis, running to 6 pages, is obviously more nuanced than I can do justice to here, but I do not think I misrepresent this as her main conclusion as to the function of promises from the example.

<sup>16</sup> PIRC 508

[F]or moral agents acting in moral character, promises provide a unique and indispensable tool to manage and assuage vulnerabilities.

I would put this another way, following on from my discussion of Amy and Bernard: for moral agents acting in moral character, promises provide a questionable tool which can at times be used to manage and assuage the pathologies of relationships, but there are typically better ways forward. The reasons for this substantial revision is that I think there is a lot going on in the example of Anna's and Ben's move to a new city, and I am not very hopeful about Anna's and Ben's prospects, whether or not Ben is able to and does promise Anna to go with her to the new city. What Anna and Ben need to do is to agree, not promise each other, to move to the new city (or not to do so), and this must express a joint commitment based upon the interests that they share. Relationships do come to turning points, in which life throws an opportunity, perhaps, sometimes a challenge, to one member of the relationship which changes its dynamic. But the way to deal with such turning points, however heart-wrenching it may be, is to express where one thinks one's interests lie honestly to the other member(s) of the relationship. This, by the way, will not be simply a report of preferences. People who are interested in each other are entitled, and indeed to some extent have an obligation, to help shape that other's appreciation of his or her own interests, drawing upon their own experiences, but often more crucially, their intimate understanding of what that other is really like, what he or she really values, what he or she really is capable of, in short, what really makes that other prosper or founder. It seems to me that this is the sort of chat that Anna and Ben need to have. If after that chat a way forward is found, they can agree how to proceed. If not, then their relationship may necessarily have to become less consequential for them, as they move apart to pursue a range of interests less involving of the other. Again, this is not to deny the particular bond of a love relationship, in which the interest is most tangibly, if I can put it that way, an interest *in* the interest of the other, in the sense that one's own interest in flourishing is one of flourishing with that other, and whose own flourishing depends on that other's flourishing. But if that is the situation with Anna and Ben, then they should be able to work out whether the move to the new city is one which is good or bad for them (accepting that there are always uncertainties and disagreements that arise as a consequence).

This is why I think Ben's use of a promise in this case is questionable, if not actually problematic. If what Ben really wants to express is that he intends to go with Anna to the new city because he agrees with her that it is the best option available *to them*, despite the fact that, considering his self-interests, narrowly conceived, staying put would be roughly as good, or even a little better, then he should say so upon which they could *agree* to move to the new city. But by making a promise in this way, it appears that Ben is expressing much the opposite, something like, 'I promise to go though I don't see the advantage in doing so. I am doing it for your sake, not mine.' If I were Anna, I should think myself a fool to be happy with this sort of promise. Rather than assuaging a vulnerability or an inequality, it positively expresses it. By accepting the promise, Anna is in the unhappy position of one who can only maintain a relationship by extracting promises, promises that *ex hypothesi* are grudgingly given (otherwise there would be an agreement between them), and what a relationship *that* is going to be.

The last example Shiffrin gives is that of young children extracting promises from their parents.<sup>17</sup> Shiffrin again:

Their need for promises arises independently of the quality of parenting and is directed at even the most loving, nurturing, devoted parents. It is implausible to attribute children's strong desire for promises predominantly to parental failures to attend to their needs or even to their insecurity about whether they are loved and important. The parent-child relationship, though, does carry an important, emotionally charged, power imbalance. What happens to children is largely determined by their parents; children have little official power. In seeking promises, they seek some measure of acknowledged control over their experience. To promise a child is, in a limited domain, to share power with him or her.

I don't actually recall my children regularly getting me to make promises to them when they were little, but I do recall that their promising behaviour struck me as along the same lines as adults. One of the functions of promises is to make a person who has *already* agreed to do something, but is weak-willed or is in some other way in danger of not acting on his intentions, to reassure the other. Shiffrin gives just the right sort of example:

[Y]ou and I plan to review the department's job applications tomorrow. We concur that we should get an early start and that 9 a.m. would be a civilized, sensible time to begin. In a conversation confirming our plan, you say "I'll see you at 9 a.m.," and I reply "Yes . . . Do you *promise* to be on time?" You respond, "Yes, I'll be on time." We have not created or generated any new shared end through this exchange, at least not in any interesting way; our ends remain the same. By asking for the promise, I communicate

---

<sup>17</sup> PIRC at 497, 509-10

perhaps a concern about your past tardiness and a desire for you to acknowledge the special significance of resisting your tendency to interpret starting times in a loose way. You undertake a special obligation to be on time and therefore to pay close attention to the temptations and habits that have previously led you astray. The promise alters our moral situation, but does not add a new end. We already had the end of meeting for a shared purpose at a specific, agreeable time. Further, I may regard it as regrettable, rather than valuable, that a promise need be sought or relied upon.

I agree here with the essentials of Shiffrin's analysis. This promise is regrettable, because we normally expect people to be motivated by the agreements they make. But experience tells us that sometimes they do not. So we seek a super-strong, added obligation to pile on top of the one they already have. Promises can provide this. But it is not clear to me that insisting to X that one will comply with the obligations one already has to X could be other than dealing with a parasitic or pathological case. If it were a normal case, surely this would lead to a regress. Thus, if having an obligation to do *y* did not sufficiently motivate me in the general case, so that in order truly to motivate myself I needed to come under an obligation to comply with my obligation to *y*, then why should this second order obligation motivate me any more? Let's suppose that in this example that even having given the promise one's colleague shows up late after all? What does one ask for next time? 'Now, I don't want you just to promise me, but promise me that you'll keep your promise.' And so it would go, I suspect.

I think the case with children is basically similar. I agree with Shiffrin that the promising behaviour of children does not correlate with an absence of care or affection. And I think Shiffrin's analysis is along the right lines, but just needs a bit of tweaking. The powerlessness children often feel is that they are unable to predict and anticipate the frequent changes of plans that occur almost every day in adult life for one reason or other. Just like adults this gives rise to disappointment, but in view of their relative powerlessness, it is easy to re-configure this justified disappointment into resentment, and a desire to have (more of) a say in the change of plans in future. And to be fair, every parent has to let his or children know, perhaps indirectly, on numerous occasions that the child's own priorities, its sense of its own interests, must give way to its parents'. That, no doubt, is one of the frustrating aspects of childhood, and a natural response is to extract a promise from a parent when the possibility of some upcoming event or activity that is important to the child is at issue. By the way, the promising behaviour in families tends to undergo a reversal as children age. When

children become teenagers, their parents start extracting promises from them for much the same reasons. Teenagers let their parents know directly and indirectly in countless ways whose priorities they truly regard as the more important.

I have been explaining why, in my view, promises are typically parasitic on prior agreements and are 'pathological' in the sense that they are typically only sought or given when a person already obliged is, for one reason or another, less than optimally likely to fulfil their obligations. In this sense, I think promises are a bit like oaths.

Consider the oath given by witnesses in court. Everyone has an obligation to tell the truth in circumstances in which honesty can reasonably be expected; that is true of a court of law where people's lives and fortunes are at stake. I have no obligation as a witness to tell the truth in a kangaroo court or show trial, of course, but let us assume that we are not dealing with that sort of court. Why the oath? Why aren't witnesses motivated by the obligation of truthfulness that they already have? The reason is obvious; this is a classic case in which an individual witness's loyalties, and perhaps obligations, may conflict. By requiring the oath, we insist that the witness swear that he will comply with his obligation of truthfulness, in preference to his other loyalties, obligations, or all-things-considered judgments. The oath is probably pointless in the case of a neutral witness with a good reputation to protect, but we swear everybody out a concern for equal treatment or just *ex abundante cautela*.<sup>18</sup>

The last thing I want to touch on is the unilateral nature of promises and gifts, and the relation between them. Let me say at once that I think gifts are not pathological at all. Gifts are not one half of some *sotto voce* or 'implicit' bargain, whatever the more psychopathic sort of economist might tell you, but are perfectly normal expressions of the fact that people share interests, can be interested in the welfare of others.<sup>19</sup> Promises, that is, *unilateral* undertakings of obligations to be bound, on the other hand, are odd sorts of creatures. It is difficult for me to think of circumstances where these arise in a healthy relationship. Take the case of a promise to make a gift. Who would seek or desire such a promise? I am speaking of a genuine gift here, not a

---

<sup>18</sup> In some cases oaths are formal declarations of role and allegiance, which we do not really think 'up the ante' when someone takes them. I think this is true of the US president's oath of office. No one would elect a president who was prone to subverting the US Constitution in the belief that swearing the oath would turn him or her around.

gratuitous transfer I might be obliged to make, say a transfer of money to my child for a school book. When I make a gift to you, part of the meaning of that act is that I am under no obligation to do so. Otherwise it wouldn't express the fact I am interested in your welfare as an aspect of my welfare, of my flourishing, not because I am bound by obligations to you.<sup>20</sup> So any gift that I make *because* I promised to make you a gift fails to do what a gift ought to do. Think about it, when an 'obligatory' arrives, it doesn't feel much like a gift, does it? The only non-pathological cases of 'promising' in respect of gifts are really cases of agreeing, to my mind. I might get in touch with you about a gift I intend to make to ensure that it can be delivered when it is convenient for you, or in the case of one's children, if the gift is of a substantial sum of money I will get them to confirm their bank details, tell them when I can move the money to them, and so on. I think this comes out in the sense we have that there is something odd about regarding as legitimate an expectation interest in gratuitous promises. If someone is unable to make the gift they intended and said they would, because, perhaps, of changed circumstances, then to the extent the intended recipient *reasonably* relied to their detriment, then the intending donor might have something to answer for. But if there was no reliance, and yet the intended recipient feels wronged, rather than just disappointed, then to my mind there is something wrong with the sensibility of that intended recipient.

Now I must justify my earlier claim that Shiffrin's explanation of promising leads her to treat promises, perhaps even agreements, in 'property fetishistic' way, conceiving of a promise as a transfer of a right to another, who receives the right to control the behaviour of the promisor. The issue is a complicated one, but I shall try to give a brief sense of the issue. Now the idea that the undertaking of a voluntary obligation is best explained as a 'transfer' of some kind has a long history, going back at least as far as Kant,<sup>21</sup> but I think it is wrong-headed. When I voluntarily undertake an obligation to you in a non-pathological context, such as when we agree to meet for dinner, there is no noumenal or abstract piece of me which I notionally hand over. In this case what I do is not mysterious in that way. My undertaking is to treat our shared

---

<sup>19</sup> For discussion see J E Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997), 88-90.

<sup>20</sup> Intimates, friends and family members, do of course owe each other obligations, but I am concerned with generous acts between them which are not matters of obligation.



interest as an exclusionary *reason*; thus my obligation depends on *my* continuing responsiveness to reason and *my* will. An undertaking of this kind is about what I have, not what you do. What I call the property fetish is the recurrent trope in moral and political philosophy to estrange people by regarding their relations one to another as akin to barter or sales, transactions of property transfer, property which they will then go on to use as exclusively theirs, rather than as exercises of their social practical reason to co-ordinate their behaviour to achieve shared ends. All I want to point out here is that if Shiffrin takes voluntarily undertaken obligations as primarily preventative of exploitation, as means to control negatives, then she is in danger of estranging the very intimates upon whom she wishes to model the central case of those obligations, by casting them as 'normative hermits', as individuals who may be in the position to exploit each other, but have no genuine shared interests.

***The nature of bargains and the conventionality (or not) of contract***

In VO<sup>22</sup> I described bargain agreements as agreements between strangers, which I explained to be cases where the parties did not share interests in each other's welfare or in some shared joint project (though I did question, given that there are all sorts of contracts where this is not the case, such as contracts of employment, long-term supply contracts, relational contracts of various kinds, whether the bargain between strangers should be the paradigm it seems to be in contract law theory).<sup>23</sup> Nor in the case of bargains are parties usually in a position to help shape or reveal the interests of the other (the pattern of certain sales people notwithstanding). Nevertheless, it would be a mistake to characterise bargains purely in terms of self-interest, narrowly conceived.<sup>24</sup>

It is often assumed that in a true bargain, one is supposed to disregard the interests of the other party, paying attention only to one's own. As a practical matter, in the limiting case of some simple transaction, such as the purchase of an umbrella, the interests of the other party hardly rise to consciousness; one simply goes through with the transaction. But generally, not only is this a poor bargaining strategy, it involves a misconception of the relationship bargainers have to each other's interests. In a bargain, parties do serve the interests of another, by acting in accordance with the normative character of the transaction (e.g. selling only what one has title or power to sell) or by performing executory undertakings. Each party therefore must 'take on board' the

---

<sup>21</sup> I. Kant, *The Metaphysics of Morals* (M. Gregor trans.) (Cambridge: Cambridge University Press, 1996) (hereafter MM), 57-61 [6:271-6:277]

<sup>22</sup> VO 337-39

<sup>23</sup> VO 341-43

<sup>24</sup> VO 338.

interests of the other – as defined by the agreement – by treating the agreement as an exclusionary reason guiding his or her behaviour. The value of bargains, indeed their nobility, is that this relationship of obligation and trust permits strangers voluntarily to treat the interests of each other as reasons guiding their behaviour.

I now want to deal with a sort of Kantian challenge to the plausibility of this picture. As is well known, Kant has an extremely austere notion of what rights individuals, that is, strangers, have in a state of nature. In that section of the *Metaphysics of Morals* called 'The Doctrine of Right', Kant describes the innate right a person holds in the state of nature as essentially the right not to be shoved off or out of the space one currently occupies.<sup>25</sup> No one has any property rights, and of promises Kant has this to say:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. – This principle of innate freedom already involves the following authorisations... his being authorised to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere, for it is entirely up to them whether they want to believe him or not.

Thus, prior to entry into a civil condition there just is no facility for promising or agreeing, since *ex hypothesi* the declarations of one's intentions cannot be assured to be binding; since the other party is always free to disregard one's commitments, *ex post facto* one can never be bound by one's communications; one can *always* say, 'you did not have to take what I said seriously'.

Kant, however, does allow individuals to escape the state of nature, and enter into what he calls a 'civil' or 'rightful condition', one in which, roughly, people live under a rule of law. But our interest here is that although Kant claims that individuals who cannot avoid interacting with each other have a duty to enter into a rightful condition, the rightful condition itself seems strongly conventional, that is, entered into to generate a practice for the advantage of each, for under the rightful condition property rights, which are only 'provisional' in the state of nature, become fully recognised and enforced.

---

<sup>25</sup> MM, 30-31; 44-46; See also Ripstein, *Arthur Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009), --

The conventionality of the transition to the civil condition is brought out in Kant's famous 'assurance' argument.<sup>26</sup>

When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations. I am therefore not under obligation to leave external objects belonging to others untouched unless everyone provides me with assurance that he will behave in accordance with the same principle with regard to what is mine.

I have discussed the merits of this argument at some length elsewhere,<sup>27</sup> but what I want to point out here is that, whether or not interacting individuals have an obligation to enter into a civil condition, their doing so is nonetheless 'voluntaristic' in the sense that it seems everyone's willingness to play the game, everyone's assurance to each other that he will play by the rules, is what secures the state in which right and duty genuinely exist, and that is, at base, what a conventional explanation of right and duty does. The question which I want to close with is whether Kant's characterisation of those in a state of nature, whom I shall treat as the equivalent of strangers, ie not intimates, for my purposes, is plausible. I realise that I am treating Kant's persons in state of nature as equivalent to what I call 'strangers' and that this is definitely not what Kant had in mind. But the issue is whether, given the existence of interactions between strangers, we are in some sense *required* to treat them like people coming into interaction in a state of nature, that is, in the absence of any conventions of agreement or rights enforcement and so on, and then conclude, as Kant seems to do, that in the absence of those conventions such strangers could not enter into agreements, for they could not give commitments.

It seems to me that that Kantian rationale for a conventional account of promising can be undermined, and I want to do so by drawing once again on an aspect of human nature Gardner emphasises, our responsiveness to reasons. Consider again Scanlon's example<sup>28</sup> of two hunters in a state of nature. They are on opposite river banks, and

<sup>26</sup> MM, 44–45/6: 255–6: 256, my italics.

<sup>27</sup> James Penner, 'The State Duty to Support the Poor in Kant's *Doctrine of Right*' (2010) 12 *British Journal of Politics and International Relations* 88, 94–96

<sup>28</sup> T M Scanlon, *What We Owe to Each Other* (Cambridge, Mass: Belknap Press, 1998), 296–97.

one has thrown his spear to the opposite bank, the other his boomerang. Can they co-operate, promise each other, agree, so that they return their weapons to each other? I want first to say that I am a little surprised by the set-up to the story. Why not start (surely more plausibly) with the case where one hunter, standing on his side of the river with his spear, see the other chap's boomerang sail over the river and land on his side. Now the boomerang hunter appears, seeking his boomerang. It seems obvious to me that what the other hunter should do is just toss it back to him. Humans are responsive to reasons, and this includes the interests which others have.<sup>29</sup> Whilst on occasions one might have reasons for not doing this (the other hunter is a warrior intent on harming one, one simply hasn't the time, etc), it is implausible that the other hunter would, as a constitutive matter of his strangerhood, be unable to *appreciate* the interest of the boomerang hunter, and thus not be able take it on board as a reason for his action. Similarly, he would be able to realise his mistake if, after throwing it over to the chap who appeared on the other side, a third hunter turned up beside him and jumped up and down, mimicking that he had thrown it, and thus that is was his (and now the other hunter shamefully recalls that boomerangs tend to return in an arc). None of this requires any convention.

Now, the further question is whether this appreciation of the interests of others, which I take to be necessary for the formation of agreements, is sufficient in the absence of conventions for individuals to be able to enter binding agreements. I think it is. Consider another state of nature case. Child minder Andrew is walking along the river past Brenda, a stranger, when Andrew's child falls into the water. If hunters can appreciate the interests of stranger hunters in their weapons, then I take it as given that Brenda, another human, can recognise stranger Andrew's interest in retrieving the child. Now let us assume that the only way in which Andrew will retrieve the child is with the co-operation of Brenda; say Andrew needs Brenda to hold onto a branch at the side of the river and hold her hand out to Andrew so Andrew can reach the child. I don't see how we could doubt the possibility of this co-operation taking place. It seems like the most natural thing in the world, this co-operation forced by circumstances. Assuming that it is not perverse for Brenda to consider the interests of the child and Andrew as sufficiently motivating for her to act the way she does, what

---

<sup>29</sup> I am assuming there is no obvious hostile intent in this situation; but Scanlon assumes this

motivation is there for denying Brenda the facility of assuring Andrew that he can trust her? If there is such a facility we can easily account for the intuition that Brenda would do wrong if, just when Andrew was about to reach the child, Brenda wrested her hand from Andrew's grasp, sending Andrew into the river himself.

Thus, in the same way that Shiffrin argues that, given the value we place on autonomy an inability to consent is just implausible, I should argue that given the human capacity to respond to reasons, an inability to agree with others so that we could respond to reasons in a co-ordinated fashion, *in concert* as it were, is equally so.