

SYMPOSIUM: *PROMISES, COMMITMENTS, AND THE
FOUNDATIONS OF CONTRACT LAW*

INTRODUCTION

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Most of the essays gathered in this Symposium were submitted to the *Special Workshop on Economics, Ethics, and Law* at the 22nd IVR World Congress in Granada, Spain.¹ The papers selected address promises and commitments, their rational or moral grounding, and their relationship to various kinds of contracts and agreements.

While the duty to fulfill promises is uncontroversial, the nature of promises has given rise to two conflicting views, respectively associated with Thomas Hobbes and David Hume. Thus, Hobbes's third "law of nature" says, "That men performe their Covenants made: without which, Covenants are in vain, and but Empty words"² Though Hobbes did not treat natural laws as moral laws, but rather as "dictates of reason," he nonetheless assumed that the capacity to make a commitment has a natural, non-conventional foundation. David Hume rejected the proposition that keeping promises is a natural virtue. For Hume promises are conventional, and the obligation to keep them is an artificial virtue, originated from self-interest. It is worth quoting one of his statements: "But as there is naturally no inclination to observe promises, distinct from a sense of their obligation; it follows, that fidelity is no natural virtue, and that promises have no force, antecedent to human conventions."³

How does Hume explain the fact that the obligation to keep promises is usually regarded as a moral obligation, not just a conventional one? Hume resorts to his well-known view that "[m]ankind is an inventive species."⁴ Man invents conventions and artificial virtues, and while promising is among the former, the virtue of keeping promises is among the latter.

1. The Congress took place on May 24–29, 2005; my own essay was written for a presentation at the Université de Montreal. I would like to thank the late Aleksander Peczenik for his encouragement in the organization of the Granada workshop. Let this symposium be a tribute to his memory.

2. THOMAS HOBBS, *LEVIATHAN* 110 (Oxford Univ. Press 1965) (1651).

3. DAVID HUME, *A TREATISE OF HUMAN NATURE* 519 (L.A. Shelby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1888). This passage is found at Book III, Section V.

4. *Id.* at 484 (Book III, Section I).

Thus, as long as the convention of promises is established from self-interest,

. . . a sentiment of morals concurs with interest, and becomes a new obligation upon mankind. This sentiment of morality, in the performance of promises, arises from the same principles as that in the abstinence from the property of others. *Public interest, education, and the artifices of politicians*, have the same effect in both cases.⁵

When Hume mentions the artifices of politicians, he echoes a classic philosophical view according to which religion and morality are the inventions of politicians. To give a prominent example of this view we can quote Bernard Mandeville when he says, “. . . [I]t is evident, that the first Rudiments of Morality, broach'd by skilful Politicians, to render Men useful to each other as well as tractable, were chiefly contrived that the Ambitious might reap the more Benefit from, and govern vast Numbers of them with the greater Ease and Security.”⁶ Mandeville's influence on Hume in this point seems hardly deniable.

Contemporary moral philosophers divide their sympathies between the moral and the conventional approaches. Thus, Eric Mack and Thomas Scanlon maintain that promissory obligations derive from moral principles related to the wrong of frustrating intentionally created expectations. While Mack grounds the duty not to frustrate expectancies on the moral right against being coerced—expectation frustration being one form of coercing someone into doing something⁷—Scanlon believes that there is a fundamental principle of fidelity that obliges promisors and other expectation-creators to do as they have assured their recipients that they would do.⁸ Non-conventional accounts of promissory obligations must face the “circularity objection,” clearly formulated by H. A. Prichard.⁹ Suppose I promise X that I will purchase tickets for the opera. My obligation to keep this promise cannot rest non-circularly on my creating an expectation in X that I will buy the tickets if such expectation is based on my belief that I have an obligation to keep this promise. Scanlon tries to elude this objection by claiming that X's expectation—which grounds my obligation to keep the promise—hinges on my moral obligation not to make a lying or false promise.¹⁰ However, this elusive maneuver is quite controversial.¹¹

5. *Id.* at 523 (italics in original) (Book III, Section V).

6. Bernard Mandeville, *An Enquiry into the Origin of Moral Virtue*, in *THE FABLE OF THE BEES, OR PRIVATE VICES, PUBLIC BENEFITS* 46–47 (1988).

7. Eric Mack, *Natural and Contractual Rights*, 87 *ETHICS* 153, 154 (1977).

8. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 304 (1998).

9. H.A. Prichard, *The Obligation to Keep a Promise*, in *MORAL OBLIGATION* 169, 171–72 (1949).

10. SCANLON, *supra* note 8, at 308.

John Rawls is the main contemporary representative of the Humean account. Rawls resorts to Hart's principle of fairness to account for the morality of a promise.¹² This principle holds that "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."¹³ According to Rawls, on the assumption that promising is a mutually advantageous social practice, the principle of fairness generates the moral obligation to keep promises. Though this account is not open to the circularity objection, it locates the wrongness of promise breaking at too general a level. On this view, the duty to fulfill promises loses its fiduciary character to become a special case of the general obligation to avoid free-riding in commonly advantageous social practices.

This symposium contains three contributions on the nature of promissory and contractual obligations by Peter Vallentyne, Eduardo Rivera-López, and B. Sharon Byrd and Joachim Hruschka. These contributions explore moral accounts that part company with Mack's and Scanlon's positions. Vallentyne distinguishes *normativized* and *non-normativized* conceptions of promises. (Among the former he also differentiates between *moralized* and *legal* versions, according to whether the obligation concerned is moral or legal, but he declares to be only interested in the moralized versions.) According to the moralized conceptions, promises entail an obligation to keep them. So one might morally disagree about whether there are promises, but, once this is accepted, the conclusion that promising generates a duty to the promisee follows straightforwardly. Vallentyne believes that there is a natural right to full self-ownership that includes the moral liberties and the moral powers that moralized promising requires. Therefore, he claims that moralized promising is a reality. However, he also explores non-moralized accounts, according to which promising does not have a conceptual connection to the moral obligation to keep promises. Elaborating on Mack's view, Vallentyne suggests a moral principle that assimilates "word-induced ignorance" to coercion. This principle, he argues, can ground the moral duty to keep promises. Is Vallentyne's non-moralized view not affected by the circularity objection? The answer to this question is not clear to me. In effect, it seems that the word-giver can in-

11. See generally Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119 (2003).

12. JOHN RAWLS, A THEORY OF JUSTICE 348 (1971).

13. H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77, 84 (Jeremy Waldron ed., 1984).

duce a false belief or expectation in the promisee only if his duty to respect his pledged word is assumed from the start.

Rivera-López develops a rights-based approach to promises. This is a species of the moralized conceptions Vallentyne refers to. Rivera-López credits his approach with meeting the objections raised against the conventional approach. Thus, he claims that the rights-based approach “explains promise-breaking as a personal wrong done to the promisee” and “allows us to conceive the wrong of promise-breaking outside of social conventions.” Like other moralized accounts, the rights-based approach is free from the circularity objection. Rivera-López analyzes “A promises to B to do X” as “A surrenders his right not to do X *in favor of* B.” Now the right not to do X is either a claim-right or a liberty-right. If it is a claim-right, as Rivera-López says, A’s surrendering merely creates in B a liberty to force A to do X. Therefore, Rivera-López favors the latter alternative. He says that the right is a liberty-right. It is important to note that Rivera-López’s conception of rights surrendering is different from rights transference. Typically, if A transfers a right to B, B obtains the same right. Thus, if A’s liberty-right not to do X is transferred to B, then B obtains a liberty-right not to do X. But according to Rivera-López, when A surrenders his liberty-right not to do X in favor of B, B gets a claim-right to A’s doing X. Therefore, the rights-based approach might be challenged, for all its plausibility, by arguing that “surrendering a right in favor of someone” comes too close to promising to have independent explanatory power.

Byrd and Hruschka concern themselves with Kant’s account of the duty to keep one’s promises. They distinguish between the ethical duty not to make false promises, which Kant discusses in the *Groundwork*, from the legal obligation to fulfill a contractual promise, which is based on the promisee’s right to his assets or possessions. According to Byrd and Hruschka, Kant associates a contractual claim to the intelligible possession of another’s choice. The “permissive law of practical reason” says persons are permitted to acquire others’ choices. Because contracts are formed through the parties’ self-legislating wills, one party can acquire intelligible ownership over the other party’s choice without violating the latter’s freedom of choice. So for Kant, “not fulfilling a contractual claim, or interfering with someone else’s fulfilling a contractual claim, is a violation of the promisee’s possessions or assets, more similar to theft than to moral failure to do as one promised to do.”

Bruce Chapman challenges traditional game theoretical explanations of strategic interactions by suggesting a public or objective understanding of reasonable interactions. Chapman takes his cue from the law: “[U]nder

law, two parties who are acting together will have the separate individual actions that make up their cooperative activity linked conceptually under some objective or public understanding.” In particular, it is the Kantian conception of contracts, as exposed by Byrd and Hruschka, that provides Chapman’s model of public understanding of bilateral interactions. Unlike the strategic rational agents portrayed by the theory of rational choice, Chapman’s reasonable agents interact in a shared conceptual space. On this “holistic” conception of collective action, the reasonable choice must be reached from a practical reflection conducted from the “we-perspective,” rather than from the “I-perspectives” of each actor. For Chapman, the “we-perspective” arises when one adds the dimension of “shared categories of thought” to the two traditional game theoretic variables of preference and information. Thus, collective rationality reconciles itself with individual rationality through a shared system of concepts and categories. Chapman’s suggestion nonetheless raises a puzzle. If reasonableness relies on a conceptual system, the emergence of this system and of language generally cannot then be modeled in terms of reasonable interactions among language users. Yet economists usually think about the creation of language as an equilibrium point in a coordination game.¹⁴ This tendency can be traced back actually to Hume, who, after analogizing the establishment of property to two persons’ rowing in a boat, goes on to say, “In like manner are languages gradually establish’d by human conventions without any promise.”¹⁵

My own paper tackles a more specific issue in the philosophy of contract law. I discuss Seana Shiffrin’s theory about the moral foundations of the doctrine of unconscionability, which revolves around government’s duty not to get involved in morally objectionable actions. I argue that this theory is restricted in scope and wanting in its power to explain why free and voluntary contracts can nonetheless be unfair. Instead of Shiffrin’s account, I submit a contractarian argument that tries to ground a narrow conception of the unconscionability doctrine.

Closing the symposium, Gopal Sreenivasan addresses an interesting topic in the philosophy of international law: How can international agreements be binding for future generations? Just as bills of rights create legislative disabilities in respect to future legislation, international agreements can disable future legislatures from establishing alternative educational or health care regimes. Sreenivasan concerns himself with international trade

14. See, e.g., GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE COLLECTED WORKS OF JAMES M. BUCHANAN, THE REASON OF RULES* 12 (Liberty Fund, Inc. 2000) (1985).

15. HUME, *supra* note 3, at 490 (Book III, Section II).

agreements. He claims that, whereas constitutional rights and liberties are in the common interests of the population, particular policies entrenched in free trade agreements are not necessary conditions of an “acceptable system of government.” However, in downplaying the importance of free trade for a liberal constitutional polity, Sreenivasan runs afoul of a vigorous tradition in liberal thought that associates trade with the maintenance of a peaceful and prosperous free state. For instance, David Hume, whom I must quote once again, says that foreign commerce augments “the power of the state, as well as the riches and happiness of the subject.”¹⁶ Even more to the point, Benjamin Constant argues that there is a fundamental connection between commerce and individual liberty; for instance, he says, “Athens . . . was of all the Greek republics the most closely engaged in trade: thus it allowed to its citizens an infinitely greater individual liberty than Sparta or Rome.”¹⁷ For Constant, in modern societies commerce emancipates the individual by reducing his subjection to arbitrary power.¹⁸ It remains to be discussed whether a state that annuls certain commercial freedoms, either by removing them from a bill of rights or by denouncing an international treaty that protects them, does not thereby enhance its citizens’ subjection to arbitrary powers, as Constant and other classical liberals were only too eager to emphasize.

As usual, this symposium does not close any of the topics discussed. On the contrary, as I tried to show, the papers pose new questions and puzzles that only further inquiry will be able to clarify. But I hope the reader will agree that contributors have taken great pains to make some steps forward, and in this its value may possibly lie.

16. David Hume, *Of Commerce*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 253, 263 (Eugene F. Miller ed., 1987) (1777).

17. Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns*, in *POLITICAL WRITINGS* 308, 315 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1820).

18. *Id.* at 324–25.