PROMISES, MORALS, AND LAW

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Preface

This is not the work on Modern Contract Theory which I foreshadowed in *The Rise and Fall of Freedom of Contract*. But it is a by-product of my continuing work on the theory of contractual and promissory obligation.

The present book is addressed to philosophers, and especially to moral and linguistic philosophers interested in the topic of promising, on the one hand, and to lawyers with a taste for theory, on the other. This explains why the work contains a number of elementary explanations of some basic legal and philosophical issues. I hope that readers of both disciplines will nevertheless find sufficient to interest them in this attempt to bring legal and moral theory into one intellectual discussion.

I am deeply indebted to a number of colleagues and friends for reading the first draft of the book and offering me much valuable criticism; in particular I am glad to express my thanks to John Dwyer, Joseph Raz, Gordon Baker, Robert Summers, Colin Grant, Neil MacCormick, and Richard Bronaugh.

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CONTENTS

Chapter 1

Promising in Law and Morals

Promissory and contractual obligations raise many issues of common interest to philosophers and lawyers. For lawyers, it goes without saying that the nature and extent of contractual liabilities are matters of enduring professional concern. But because the nature of their discipline makes them more immediately interested in practical questions, lawyers tend to adopt theories of liability without testing them too rigorously for consistency with positive law. And for many years now English lawyers, including even academic lawyers, have shown little interest in the underlying rationale of the law of contract. They generally take it to be axiomatic that this branch of the law is founded upon the prima-facie enforceability of promises, subject only to compliance with some simple legal rules. There has been virtually no disposition to inquire into the nature of promises, or to probe into the reasons for their legal enforceability. It is almost always taken for granted by lawyers that prima facie promises are morally binding and that this is at least one, if not itself a sufficient, ground of legal liability.

For their part, philosophers have found the nature of promissory obligation of absorbing interest. For many years, the morally binding nature of a promise has been thought one of the strongest refutations of utilitarianism, on the ground that breach of a promise would not normally be condoned even though it seemed likely to produce more happiness (or more good) than keeping it. On the other hand, if utilitarianism is rejected, the moral obligation to keep a promise has seemed to some philosophers to be puzzling in the extreme. How, it is asked, can a person create an obligation by the mere process of wishing to have one, or perhaps, declaring that he has one? To some, ethical theory has centred on the concept of duty, irrespective of consequences, and the nature of these duties is a matter for internal reflection or intuition. The obligation to keep a promise has been treated by some writers as a paradigm example of a duty which is readily recognized by this intuitive process. More recently, promising has figured prominently in the work of linguistic philosphers.

Promising has been treated as an obvious illustration of a performative, a verb with the aid of which one can not merely say that one promises but actually *do* it. Yet another group of writers has used the rule that promises should be kept as a prime illustration of a constitutive rule; the 'practice of promising', it is said, is logically impossible without prior recognition of rules constituting the practice, and enabling obligations to be created by the mere act of promising. And there has, too, been controversy about whether it is possible to bridge the logical gap between 'is' and 'ought' by pointing to the binding nature of a promise.

With isolated and minor exceptions, most of this literature has, in recent years, proceeded in total disregard of the law. Just as the lawyer tends to think of the philosopher as an airy theorist having little contact with reality, so the philosopher tends to see the law as technical and abstruse, having little contact with morality. It was not always thus. Until Bentham and Austin wrought their work in setting apart legal and moral obligations, discussions of the nature and limits of promissory liability treated the two as though they were inextricably interwoven. In the works of the seventeenth-century Natural Lawyers, for example, positive law, natural law, and the moral law are all treated together in such a way as to suggest that it would be impossible to understand at least the latter two in isolation from each other. And even in the writings of moralists and philosophers in the British tradition, such as Hume and Paley, there is a much greater awareness of, and reference to, the law as itself of profound relevance to the moral issues involved in the subject of promises. With the common lawyers, too, particularly in the early formative period of the development of modern contract law, there are signs that lawyers tended to fashion the law of contracts broadly in accord with what they took to be moral principles. They tended to create the law in the image of morality as they understood it. No doubt, as the Natural Lawyers made explicit, positive law did sometimes diverge from morality. But in its central doctrines and ideas, law and morality were largely congruent.

Now the importance of this lies in the fact that the English common law has never treated the mere fact that a promise has been made as even prima facie a sufficient condition for the creation of a legal obligation. Even in the latter half of the sixteenth century, when common lawyers began to build the modern

law of contract on new foundations, it is quite plain that they rejected the notion that prima facie a promise created a legal obligation. To them, it was of vital importance to ask *why* a promise had been given. A promise made for a good reason—a good 'consideration' as it came to be said—was prima facie enforceable; a promise made without reason—or consideration—was prima facie not enforceable.

Very roughly, it could be said that a promise was only legally actionable if the promise was to do something which the promiser ought to have done anyway.[1] As a matter of positive law, the doctrine of consideration crystallized in the reign of Elizabeth I into a number of rules which are still clearly recognizable by the modern common lawyer. First, if a person received a benefit at the hands of the promisee for which he promised to pay, the benefit was a sufficient consideration: in effect, the promise here was bought and paid for. Second, if the promisee acted to his detriment in reliance on the promise, so that the non-fulfilment of the promise would cause him actual pecuniary loss, the detriment was a sufficient consideration. And thirdly, if two parties exchanged mutual promises, each promise was a sufficient consideration for the other promise: here, as in the first case, an exchange of benefit was contemplated, though one party might be able to sue the other (for example where the latter's performance was due first) even though he had not himself yet performed, or even though the anticipated benefit turned out to be harmful rather than beneficial. Much has been written by modern lawyers and legal historians about this doctrine of consideration, but most of this literature has tended to take for granted the perspective of the modern lawyer who accepts the prima-facie binding nature of a simple promise. The doctrine of consideration has, therefore, often seemed in need of explanation; the assumption has nearly always been that the doctrine is somehow odd and perhaps unjust in rejecting the simple notion that prima facie a promise is binding. But in recent times it has been suggested that this is to read history through modern spectacles. The doctrine of consideration, it is now urged,[2] was a profoundly moral doctrine, reflecting the belief of the early common lawyers, not merely that a promise *per se* should not be legally enforceable, but also that a promise *per se* was not necessarily

[1] A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford, 1975), p. 457.
[2] Ibid., p. 488.

morally binding. More acceptably to modern eyes, the doctrine of consideration itself showed what circumstances *were* conceived to render a promise morally binding, and hence legally deserving of protection. What has not so far been seriously canvassed is the possibility that the ideas underlying the doctrine of consideration are relevant also to the nature of a promise itself, the question whether a promise creates an obligation, the weight of that obligation, and, indeed, to the question whether a promise has ever been made at all.

I myself have written at length elsewhere[3] suggesting that the common lawyers' approach to these questions underwent a complete metamorphosis between about 1600 and 1800. By the latter date, the common lawyers had largely come round to the modern viewpoint, that promises *per se* are morally binding, and that insofar as the doctrine of consideration fails to give effect to this moral ideal, it is an anomaly, a technicality, a curiosity of legal history. During the greater part of the nineteenth century, I have argued, the result of this change in attitude reflected itself in a large number of ways in the development of the law. Although the doctrine of consideration could not be overthrown—it was too firmly embedded in the law for that—it could be downgraded into a subordinate role. Lawyers came to place an increasing emphasis on the notion that the law of contract was designed to give full effect to the intention of the parties: the distinction between liability on a bare promise (or an exchange of bare promises) on the one hand, and liability on paid-for, or relied-upon promises, on the other hand, became much less important. Lawyers tended increasingly to ignore the reasons for which promises were given, and to assume that promises were always made with a view to creating a binding future commitment.

During this period, it may be said that the morality underlying the law of contract fell largely into line with the writings of utilitarians and other moralists. From Paley at one end of the period[4] to Sidgwick[5] at the other, moral discussion about the nature and extent of promissory liability was closely in accord with the moral ideals prevailing in the Courts. There remained, of

[3] *The Rise and Fall of Freedom of Contract* (Oxford, 1979) (hereafter referred to as *Freedom of Contract*).

[4] Paley, indeed, was cited to the Courts on a number of occasions, and his views on the effect of ambiguous promises were largely adopted in *Smith* v. *Hughes* (1871) LR 6 QB 597.

[5] *Methods of Ethics* (London, 1907).

course, the problem of the gratuitous unilateral promise, binding in morals, no doubt, but still not legally enforceable. But cases of this nature only rarely came before the Courts, and when they did, it was not difficult for judges to find some implied counter-promise, or some act of detrimental reliance, or some element of benefit to the promisor, and thus uphold the binding nature of the promise. For example, in the well-known case of *Shadwell* v. *Shadwell*[6] an uncle promised his nephew (who was a barrister) £150 a year on hearing of the nephew's intended marriage. The Court decided that, on his marriage, the nephew acted to his detriment in the sense that he took upon himself the obligation of maintaining a wife, and that this rendered the promise legally enforceable.[7]

There were, of course, other legal rules (such as the requirement that certain legal contracts should be evidenced in writing) which sometimes compelled Courts to refuse legal validity to promises which would generally have been regarded as morally binding. Thus under the Statute of Frauds of 1677 (an Act which may well have been influenced by the then prevailing morality) various types of contract could not be enforced unless they had been partly performed, or were evidenced by some signed note or memorandum. In the mid-nineteenth century, judges made no secret of their dislike for this Statute, and to plead the Statute as a defence came to be thought a dishonourable and shabby thing to do.[8]

Since the end of the last century, and, more particularly, in the past twenty or thirty years, there have been (I have argued[9]) growing signs of a legal reversion to the moral ideals which were more in evidence before the nineteenth century. On the one hand, there are signs of an increasing reluctance to impose liability in wholly executory contracts, that is, on promises which have neither been paid for, nor relied upon. And on the other hand, there are many signs of an increasing tendency to regard the rendering of benefits and acts of justifiable reliance as more

[6] (1860) 9 CB (NS) 159.

[7] Many modern lawyers consider the decision was wrong, precisely because there appears to have been no 'real' detriment or benefit, and the Court was thus enforcing a bare gratuitous promise. Interestingly, Byles J., who dissented, is known to have been out of sympathy with the prevailing adherence to freedom of contract ideology, see my *Freedom of Contract*, pp. 380-3.

[8] See, e.g., Isaacs J. in *Charlick* v. *Foley Bros. Ltd.* (1916) 21 CLR 249. In 1885 Sir James Fitzjames Stephen argued for repeal of the Act in the first number of the *Law Quarterly Review*.

[9] *Freedom of Contract*, Part III.

important grounds for the imposition of legal liability than bare mutual promises.

A good example of the former tendency can be found in the increasing stress on the legal doctrine of 'mitigation of damages', whereby the innocent party to a breach of contract cannot recover damages for a loss which he has, or even could have, avoided by taking reasonable steps following the breach. In *Lazenby Garages* v. *Wright,*[10] for instance, the defendant contracted to buy a second-hand car from the plaintiffs, who were car dealers. Before the car was delivered or the price paid, the defendant refused to go through with the transaction, and the dealers resold the car to another customer at the same price. The Court held that the dealers could not claim damages as they had suffered no 'loss'. It will be seen that a decision of this kind, although it does not in terms deny the 'binding' nature of the contract, or of the defendant's promise, does in effect remove one of the chief legal consequences of holding a contract to be binding, viz. that it is enforceable by an award of damages. It is, therefore, possible that decisions of this character indicate increasing doubts about the desirability of holding such contracts to be binding, while they remain wholly unperformed and unrelied upon; and this in turn may suggest increasing doubts about whether such contracts (or promises) are even morally binding.

Even where contracts are created as a result of a clear agreement, a clear exchange of promises, there is a trend towards treating the consensual aspects of the arrangements as of less importance when once performance has begun, benefits have been rendered to one side, or acts of justifiable and detrimental reliance have begun on the other. To take one simple example, the 'small print', which is so commonly seen in written consumer transactions, is nowadays usually regarded as something which must give way before the consumer's actual expectations which are nearly always in contradiction to the small print.[11] Yet the consumer will, by his signature on the document, have indicated that he assents to the terms contained in it (the document often says this, even though it may well not be read), so that, in one sense at least, the consumer's expectations are allowed to over-

[10] [1976] 1 WLR 459.

[11] Judges formerly resorted to a number of technical devices to arrive at this result, but the process will be much simpler since the enactment of the Unfair Contract Terms Act 1977.

ride the terms to which he has given at least a nominal agreement, or even a nominal promise.[12]

These are no doubt controversial suggestions. Not all lawyers would agree that (even in the limited ways I have argued) judges no longer believe in the sanctity of contract, or in upholding the morally binding nature of promises. Certainly it is true that judges do not say these things very loudly, if at all. It is only through their actual decisions and sometimes in their *obiter dicta,* that one can (as I have attempted to do) draw conclusions about the changing values which influence them. I have argued elsewhere that one of the reasons for this divergence between the theory and the practice of the law is to be found in the history of the subject. Modern contract theory is still largely based on the 'classical contract model', a model which was developed between 1770 and 1870, by which time the ideal of freedom of contract had reached its highest point in the Courts, though it was perhaps already in decline elsewhere. The classical model of contract grew up under the shadow of a number of intellectual movements which stressed the importance of free choice and consent as the origin of legal and moral obligation alike. It is unnecessary here to do more than point to the obvious sources of the legal ideal of freedom of contract—the classical economists, the Benthamite utilitiarians, the radical politicians calling for democracy, and, perhaps more generally, liberalism and all that it stood for.

It is, therefore, a matter of no surprise to find that much contemporary philosophical writing concerning promises appears to be closely related to the classical model of contract theory. In both, one finds the same stress on free choice; in both one finds the promise or contract regarded as the paradigm way of creating obligations merely by declaring one's intention to be bound; in both one finds the same disregard for the distinction between paid-for or relied-upon promises or contracts, on the one hand, and wholly executory promises and contracts, on the other hand; in both one finds the same widespread use of the notion of 'implied' or 'tacit' promises and contracts to explain results otherwise difficult to reconcile with the theory; and in both one finds (I will argue) an apparent or overt belief in the sanctity of promises and contracts which is no longer to be found in the value systems of modern England, at least.

[12] And it is only now that judges would agree that such promises or agreements are only 'nominal'. Nineteenth-century judges generally found them real enough.

In this book I propose, therefore, to re-examine the nature and extent of promissory and contractual liability. This re-examination is conducted from the standpoint of a modern contracts lawyer who rejects the classical model of contract as not reflecting contemporary law or legal values. My primary objectives are twofold. First, to see what light is thrown on the moral foundations of the law by examination of the principal philosophical theories concerning promises; and secondly, to see how well these theories themselves stand up to examination in the light both of the law itself and of the empirical data thrown up by any study of the law.

PRELIMINARY NOTE ON TERMINOLOGY

It is well to make clear two points at the outset, as they affect the terminology used throughout this book. The first is that I do not believe that all promises are morally binding; accordingly, I use the term 'promise' without prejudging the question whether the promise creates an obligation. The second is that, where a promise does create an obligation, the reason for that may depend upon whether the promise was explicit or implied. There is thus, in my view, a fundamental distinction between explicit and implied promises, and when I use the word 'promise' without qualification, I normally mean an explicit promise.

Chapter 2

Promising and Natural Law

The notion that a bare promise is, prima facie at least, a binding moral commitment, irrespective of the reason for which it is given, was known to the later Roman lawyers. In modern times it can be traced back at least to the Natural Lawyers of the sixteenth and seventeenth centuries. In the works of Grotius and Pufendorf, for example, one can see legal theory struggling to free itself from the view which survived in the English common law, that promises are only binding if made for some good reason, or consideration. Similar notions had, it seems, been advanced by the French jurist François de Connan (1508-51) who had argued that a promise, by itself, created no 'natural' obligation unless it was relied upon, and so would cause loss if broken, or unless some exchange of considerations, or of promises, was undertaken. These views are remarkably close to those of the English common lawyers, and they seem to have stemmed from the idea that a bare unilateral promise which has not yet been relied upon cannot cause any loss to the promisee. If it is not performed, the promisee is no worse off than he was before; he may have suffered (as we would say) a disappointment of expectation, but nothing else.

In saying that these views were close to those of the early common lawyers, I have not overlooked that, in a formal sense, two distinct questions were being addressed. To the Natural Lawyers,[1] the question was when was a promise morally binding; to the common lawyers, the question was when was a promise legally binding. Since nobody would argue that the answers to these two questions should always be the same, it might be urged that they are quite unrelated questions. But it is precisely the fact that the Natural Lawyers, and the early common lawyers, do seem to have been discussing the same issues which is so interesting. For it is these same questions—the binding legal nature of unrelied-upon promises or contracts—which are being

[1] Natural Law has, of course, a long and complex history. My references to 'Natural Law' and 'the Natural Lawyers' in this Chapter should be understood as references to the rational school represented by Grotius and Pufendorf.

re-opened, or at least re-examined, by common lawyers in modern times; and it is this re-examination which suggests that the time may be ripe for a similar re-examination of the moral issues.

The argument advanced by Connan (which leaves out of account the possiblity that the promise has been paid for by some benefit) appears to treat the obligation to keep a promise as derived from the duty not to cause harm or injury, a derivation also to be found in the very early history of the modern English law of contract. But this approach found no favour with Grotius.[2] Grotius had two principal concerns which greatly coloured his whole approach to the source of promissory obligation. The first was that, in common with other social contractarians, he wished to identify the source of positive law in some kind of agreement by which the people surrendered their individual freedom from restriction in return for a like surrender by others. To Grotius such a surrender could only be based on an agreement, but the problem was to see how such an agreement could be valid. The agreement represented, no doubt, the will of those who made it, or must be taken to have made it, but why was their exercise of will binding on them? Anticipating many later philosophical arguments, Grotius raises the question of how an agreement can be binding unless there has been, or is, some prior rule in existence whereby a person is bound to keep his promises or agreements. The answer to his difficulties he found in Natural Law. There must be a rule of Natural Law that promises and agreements are binding obligations, so that from this rule can be derived the validity of the social contract, which creates the State and makes positive law possible.[3]

Grotius' second main concern was, of course, the implications of any theory of promises and agreements for treaties and contracts made between rulers. Since one of Grotius' main aims was to establish that there was a body of law governing the relationships between rulers, and since the role of treaties was necessarily a large one in this body of law, it was obviously necessary to find some source for the binding obligations created by treaties. This too he found in Natural Law. But further, Connan's views would have led to the conclusion that treaties were not

[2] *De Jure Belli ac Pacis*, Book II, Chap. XI.

[3] See generally K. Olivecrona, *Law as Fact*, 2nd edn. (London, 1971), Chap. 1, and 31 *Current Legal Problems* 227 (1978).

binding so long as they had not been partly carried out, a conclusion which Grotius obviously found unacceptable.

The subject received somewhat fuller treatment at the hands of Grotius' successor, Samuel Pufendorf. He too cites, only to refute the views of Connan. Most writers, asserts Pufendorf, agree that promises are 'naturally' binding, and this is true even if they are without 'cause' or consideration. To deny validity to gratuitous promises destroys all possibility of kindness and liberality, he argues.[4] This, of course, is quite fallacious. To deny the binding nature of gratuitous promises does nothing to prevent actual acts of kindness and liberality, nor even to prevent the making and performance of promises of future acts of kindness and liberality. Pufendorf goes on to argue that although the probable reliance of a promisee is one of the grounds for regarding promises as binding, it is 'dangerous' to conclude that the promise is not binding unless and until it is relied upon. Unfortunately, he is not very explicit as to why he thinks this argument dangerous. True it is, he concedes, that if there is no reliance the promisee will not have been made worse off by the promise; but the promisor's duty is not limited by his duty not to injure or harm. He also has a general 'duty of humanity', he must strive always to further the interests of his fellow men. It seems thus that it is not possible to derive the duty to keep a promise solely from the duty not to injure, although on Pufendorf's reasoning it is still a derivative duty rather than an ultimate one.

Much of this reasoning is, of course, extremely flabby by the standards of modern philosophy,[5] and it would hardly be worth serious consideration if it was not for the immense influence which the Natural Lawyers had, both with lawyers and philosophers; there is, too, a remarkable similarity between their whole approach, and that of many modern philosophers, notably, but not exclusively, intuitionists like Sir David Ross. The Natural Lawyers assumed that one could, by internal reflection, and the use of reason, deduce from the most meagre premisses about man's 'nature', both that promises were morally binding, and in addition a great many detailed rules about the precise extent of this principle. For example, problems about the effect of impossibility, mistake, fraud, and coercion were thought to be

[4] *De Jure Naturae et Gentium*, Book III, Chap. V, 11.

[5] The recent book by John Finnis (*Natural Law and Natural Rights*, Oxford, 1980) offers a modern version of Natural Law which, on the subject of promises, has very little in common with the theories of Grotius or Pufendorf, see id., pp. 298-308.

deducible by pure reasoning from the principles of Natural Law. The fact that some of these cases (such as that of coercion) raised acute differences of opinion does not seem to have shaken their faith in the procedures which they followed.

Among English writers, the nearest in spirit to Grotius and Pufendorf was perhaps Locke; but on the particular subject or promises it was Hobbes who resembled them more, at least in methodology. There is, however, good ground for thinking that Hobbes was in effect maintaining the views rejected by the Natural Lawyers. In the key passage in *The Leviathan* Hobbes distinguishes between contract, covenant, and promise.[6] Contract, he says, involves a mutual transferring of right; or, as we might say, it involves an exchange of benefit for benefit, so long as it is understood that the mere transfer of a right amounts to a benefit. He proceeds then to deal with the case in which one party to a contract has performed his side, leaving the other to perform in the future. The contract on the part of the latter is called a pact or covenant. Although Hobbes is not fully consistent in his use of these terms, it is surely not without significance that in the one place where he actually attempts to define the term covenant, he clearly limits it to the case of a promise for which the promisor has already received value. There seems no foundation for the general belief that Hobbes's third Law of Nature, *That men perform their Covenants made,* is the equivalent of a general moral obligation to perform all promises. Indeed, after he has dealt with pacts or covenants, Hobbes goes on to the case of the plain promise. A bare promise is to be distinguished from a present act of will, he asserts; for a promise to give something in the future cannot be a present act of will. But, he adds, if there are any other signs of the will to transfer a right besides words, then even a promise to make a bare gift may be binding. He then gives the example of a man who promises a prize to the winner of a race, though at this point Hobbes's reasons become somewhat lame. The promise is binding in this case, he asserts, because if the promisor 'would not have his words so be understood, he should not have let them runne'. The explanation will not do, of course, because it would cover all promises which are clear in their terms, even though Hobbes has just told us that bare gift-promises are not binding. A better explanation, and one which seems to be more consistent with Hobbes's over-all

[6] Part I, Chap. 14.