

# Philosophical Foundations of Contract Law

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## Does a Promise Transfer a Right?

*David Owens\**

What do you give someone when you make them a promise? One popular answer is that you give them some information, specifically information about how you mean to behave in the future. On this view, the obligation to keep one's promises comes out of the same box as the obligation not to lie, not to mislead, and so forth. This idea lies behind both Hume's conventionalist theory of promise and Scanlon and Thomson's anti-conventionalist expectation theory.

On this informational account of promising there is no suggestion that a promise need transfer anything from the promisor to the promisee. True the promisor *gives* their word and *offers* their assurance, but their word, their assurance are not things which they have prior to their promise and which they lose to the promisee in making their promise. When a promise works as it should, the promisee ends up with the same information as the promisor: they both know what the promisor is going to do. And when the promisee is misled, they end up with something that the promisor never had, namely a false assurance, a mistaken belief, and so forth. In neither case is there any item the promisor relinquishes and the promisee acquires.

Nevertheless, the idea that a promise transfers something from promisor to promisee has informed much theorizing about both contracts and promises. Grotius, Pufendorf, Locke, and Hobbes all affirm that something is transferred or translated by a promise or a contract and the transfer theory is currently experiencing a revival. Several recent critics of the expectation theory of promissory obligation have adopted a right-transfer model and used it to explain the binding force of a promise.<sup>1</sup>

In the first section of this chapter, I'll raise some difficulties for the idea that a promise involves the literal transfer of a right. In the second section I formulate the main idea behind the transfer theory without the metaphor of transfer whilst in the third section I subject the reformulated theory to further criticism. In the final section I sketch my own view, one that rejects both informational theories and the reformulated right-transfer view.<sup>2</sup>

\* Thanks to Chris Essert, Andrew Gold, Peter Graham, Daniel Markovits, Joseph Raz, Gregory Klass, Prince Saprai, Seana Shiffrin, and Robert Stevens for comments.

<sup>1</sup> Right-transfer may also be an element in various "property-transfer" theories of contract. Recent examples include Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2006) and Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009). For skepticism about property-transfer theories of contract, see J.W. HARRIS, PROPERTY AND JUSTICE 19–20 (1996) and STEPHEN A. SMITH, CONTRACT THEORY 97–103 (2004).

<sup>2</sup> Seana Valentine Shiffrin, *Immoral, Conflicting and Redundant Promises*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON 156 n.7 (R. Jay Wallace et al. eds., 2011) and Thomas Pink, *Promising and Obligation*, 23 PHIL. PERSP. 389, 405 (2009) both cite David

## I. Promise and Property

All parties should agree that a successful promise changes the normative situation. After the promise, there is something the promisor is bound to do that they were not previously bound to do. Furthermore, if they break their promise and breach their obligation, they are thereby wronging the promisee. To wrong someone is to do something that tends to render it apt for them to blame you and which puts them in a position to forgive you for what you did, should they so choose.<sup>3</sup> Nothing more should be read into the notion of wronging. In particular, there is no implication that the wronged party (or anyone else) is entitled to vindicate their rights by force or receive any particular remedy.

Does this normative change, this creation of a wronging involve a transfer of some normative item from promisor to promisee? Suppose I promise you that I'll be at the bus stop at noon. And suppose that neither you nor I have any prior obligations with respect to the bus stop. What right, liberty, or power is such that I possess it prior to my promise and you possess it once the promise is made? My promise deprives me of the liberty not to appear at noon since it means I would be wronging you if I failed to show up. But you acquire no liberty in respect of my nonappearance (it was already the case that you wouldn't be wronging anyone if I didn't appear). Furthermore you acquire no claim-right that I not appear. If I show up, I'm not wronging you; on the contrary, I'm fulfilling my obligation. Of course, you do acquire a claim-right that I show up, but this is not a right that I lose in making the promise; if anything it is a right that I exercise in fulfilling it.<sup>4</sup>

In pressing this objection, are we being rather literal minded, treating talk of right-transfer more seriously than was intended? Perhaps all that was meant was this: the right the promisor loses stands in some interesting explanatory relation to the right that the promisee acquires? In Section II, I reinterpret the theory along these lines but we should first ask why the image of a transfer has proved attractive to so many writers.

I'll start with a characterization of the promissory transaction that is, I hope, common ground between myself and the transfer theorist:

*Power Generation:* Before promising I have the power to determine whether or not I would be wronging you by failing to show up, that is I possess the power to promise to appear.<sup>5</sup> This is a *normative power*, that is a power I exercise *by declaration*,

Owens, *A Simple Theory of Promising*, 115 PHIL. REV. 51 (2006) as an instance of the right-transfer theory, a theory Shiffrin endorses and Pink rejects. At one point in the chapter I do employ the transfer metaphor but, as Joseph Raz pointed out to me, the main claims of the chapter do not depend on the metaphor and are better stated without it.

<sup>3</sup> The point of "tends to" in the first clause is to allow for excuses and justifications; the point of talking about forgiveness is to distinguish the wronged party from indignant bystanders. Here I am oversimplifying the connection between wronging and forgiveness; see DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 57–8 (2012).

<sup>4</sup> For related worries about transfer theories of contract see SMITH, *CONTRACT THEORY*, at 101–2 and Gold, *A Property Theory of Contract*, at 50–3.

<sup>5</sup> To be more precise, I have the power to determine whether or not I would be wronging you in a particular way, namely by breaching the promise I am now making. Where I have some prior obligation to do what I am promising to do, things get more complicated.

by communicating the intention of hereby exercising that power. Having successfully promised, I can no longer determine by declaration whether or not I would be wronging you by failing to show up.<sup>6</sup> I can't rescind my promise. Furthermore once I have successfully promised, you *thereby* acquire the power to determine whether or not I would be wronging you by failing to show up, for you have the power to release me from my obligation (or not as the case may be). This again is a power you exercise by declaration, by communicating the intention of hereby exercising that power.<sup>7</sup>

I'll call powers exercised by declaration *normative powers*. According to *Power Generation*, the promisee gains one normative power and does so because the promisor cedes another normative power. I leave it open how similar the power the promisee ends up with is to the power the promisor relinquishes.<sup>8</sup>

*Power Generation* goes beyond the platitude that a binding promise gives the promisee a right to performance. It identifies a normative power relinquished by the promisor and another acquired by the promisee and postulates an explanatory connection between them. Many writers would not accept *Power Generation* since they deny that promising could involve the exercise of normative power.<sup>9</sup> Since these doubts are not shared by advocates of the transfer theory, I shall set them to one side. Instead I'll ask why one might seek to ground *Power-Generation* in the transfer of a normative item from promisor to promisee.

Some see a close parallel between making a promise and giving away something you own.<sup>10</sup> Here is Grotius:

And this is a complete promise, as having the same effect as the alienation of a man's property. For it is either the introduction to the alienating of a thing, or the alienation of some part of our liberty. To the former belong our promises to give, to the latter our promises to do something.<sup>11</sup>

For Grotius, the power of transfer by declaration is involved in the very idea of ownership:

Men who are masters of their own goods have by the law of nature a power of disposing of or transferring all or any part of their effects to other persons; for this is in the very nature of property.<sup>12</sup>

<sup>6</sup> A successful promise is a promise that binds, i.e. a promise not invalidated by deception, duress, nonacceptance, and so forth.

<sup>7</sup> The powers in question are powers to create and rescind particular obligations: the general power to make promises or waive them is not in play.

<sup>8</sup> Pete Graham and Daniel Markovits pointed out one potential difference between these powers: whilst the successful exercise of the power of release does not require the promisor's acceptance, a promise may need to be accepted by the promisee before it binds.

<sup>9</sup> For example T. M. SCANLON, *WHAT WE OWE EACH OTHER* 295–327 (1998). Hume maintains that because promisors do think of themselves as exercising a normative power, the practice of promising rests upon an illusion: DAVID HUME, *A TREATISE ON HUMAN NATURE* 523 (L. A. Selby-Bigge ed., 1978).

<sup>10</sup> The property-transfer analogy informs some contemporary right-transfer theory (e.g., Watson) and is taken literally by property-transfer theorists of contract, e.g., Benson, *A Property Theory of Contract*, and Gold, *A Property Theory of Contract*. The latter have reasons of their own for endorsing the theory (i.e. the need to explain the characteristic remedies for breach of contract).

<sup>11</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 704 (Richard Tuck ed., 2005).

<sup>12</sup> GROTIUS, *THE RIGHTS OF WAR AND PEACE*, at 566.

And by interpreting our rights of self-government as rights of self-ownership, Grotius gives us the power to transfer those rights by declaration:

There is the further fact that ownership of property can be transferred by an act of will which is sufficiently manifest, as we have said above. Why then, since we have equally right over our actions and over our property, may there not be transferred to a person also . . . the right to do something?<sup>13</sup>

When I own my car, I am in possession of a set of claims, liberties, and powers with respect to the car. Among these is the power of sale, namely the power to transfer this set of claims, liberties, and powers *en masse* to another person. Upon the completion of the sale, the buyer acquires the very claims, liberties, and powers that the vendor used to possess. Here the idea of a literal transfer of normative items (perhaps embodied in the physical transfer of a non-normative item, namely the car) gets a firm grip. Grotius suggests that we own ourselves as we own our cars and that our power of promise or contract is the power to transfer some elements of the rights of self-ownership (“some part of our liberty”) to another. For Grotius, our property includes ourselves and our power to promise is one aspect of our power to transfer our property to another.

As we have seen, it is hard to specify the normative item(s) transferred by a promise but even those willing to give Grotius the benefit of the doubt on that point may still balk at the notion that we have property in ourselves, property which can be transferred to another just like our cars and our houses. Isn't it much more obvious that we have the power to promise than that we own ourselves? If so, the power to promise shouldn't be defended against Hume and other skeptics by invoking the idea of self-ownership. In Section II, I'll introduce a contemporary version of the right-transfer theory, one that does not rest on the idea of self-ownership.

## II. Promise and Autonomy

Here is Shiffrin:

*Passage A:* the rights-transfer theory claims that a binding promise effects a transfer from the promisor to the promisee, through the communicated intent to do so, of the promisor's right to decide to act otherwise than how she promised to act . . . The transfer explains why the promisor is bound to perform: he no longer has a (moral) right to decide whether to do otherwise. It further explains why the promisee has the power to waive performance: the moral permission of the promisor to decide to act otherwise now lies in the hands of the promisee and the promisee may exercise this permission. The theory thereby explains the basic structure of the promissory relationship with satisfying simplicity.<sup>14</sup>

<sup>13</sup> Quoted in Pink, *Promising and Obligation*, at 404. Hume would agree that property transfers raise the same issues as promises and they receive a similar treatment at his hands but he denies that we can render promissory obligation any more intelligible simply by portraying it as a species of property transfer. HUME, *A TREATISE ON HUMAN NATURE*, at 477–516.

<sup>14</sup> Shiffrin, *Immoral, Conflicting and Redundant Promises*, at 157. Shiffrin herself would not endorse the theory in precisely this form. See also Seana Shiffrin, *Promising, Intimate Relationships and Conventionalism*, 117 *PHIL. REV.* 481, 517 (2008).

The model of promising described in Passage A has several features worthy of note. Shiffrin begins her story not with a power but with a right, namely (broadly speaking) the promisor's right to decide how they will act. The subject matter of this right is non-normative: for example it is the right to show up or not as you choose. But we are given to understand that the promisor's right to control this aspect of their non-normative situation somehow involves a power over the normative. The promisor can "through the communicated intent to do so" ensure that they are bound to perform, that they no longer possess the right to control that aspect of the non-normative situation implicated in their promise. Furthermore, once the promise is made (a) the promisee will have acquired a power over the normative situation, namely the power to release the promisor from the obligation to perform and (b) their acquisition of this power of release is explained by the fact that the promisee now has the right, previously possessed by the promisor, to control those aspects of the non-normative situation relevant to the fulfillment of the promise.

Passage A raises three questions. First, what exactly is the content of the right transferred from promisor to promisee by the promise? Second, how does the transfer of this right explain the transfer of the associated normative power? Third, why does anyone bother to make such transfers? Why renounce your rights in favor of another?

As to the first, Shiffrin tells us that the promise effects a transfer of "the promisor's right to decide to act otherwise than how she promised to act." As we have seen, the idea that the promisee acquires the promisor's "right to decide to act otherwise than how she promised to act" is hard to elucidate further. I suggest we give up on the attempt to identify some act or acts that the promisor used to have a right to perform (or omit), which right the promisee now possesses. Rather the transfer theorist should seek to defend a conjunctive claim of the following sort:

*Right Base:* First, I no longer have the liberty to not show up at the bus stop because I exercised a power to deprive myself of this liberty by declaration, a power that I have *in virtue of* having that very liberty. Second, you now have the power to determine whether I am obliged to show up and you have that power because I exercised (in your favour) my power to deprive myself of the liberty not to show up.

The second clause here is simply an abbreviation of *Power Generation*: there is no implication that the promisee has this power of release because they now possess some right that the promisor used to have. Our attention should instead focus on the claim implicit in the first clause: *I have the power to ensure by declaration that I would be wronging you by failing to appear in virtue of having the liberty to show up or not show up as I please.* On the transfer theory, a binding promise transfers a right that one possesses prior to the promise. *Right Base* drops the idea of a literal transfer whilst preserving the notion that the power to promise depends on a prior right to fulfill the promise.<sup>15</sup>

<sup>15</sup> Many transfer theorists deem promises to do what one has no right to do invalid because there is no prior right to fulfill the promise for the promise to transfer. For example, see GROTIUS, *THE RIGHTS OF WAR AND PEACE*, at 714. *Right Base* preserves this feature of their theory. For discussion of whether such promises should be deemed invalid, see Shiffrin, *Immoral, Conflicting and Redundant Promises*, at 159–65 and OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, § 48.

Having addressed the first of our questions by dropping the transfer metaphor, an analog of the second question now confronts us. It is unclear why the fact that I have the right to show up or not as I please should give me the power to ensure, just by declaration, that I would be wronging you by not showing up in the future. For example, we can't infer that I have the power to promise you my life from the fact that I am now at liberty to kill myself. There is a gap here that needs to be filled, a gap perhaps concealed by the metaphor of right-transfer. Can the gap be bridged without it?

Shiffrin offers us the following line of thought about consent:

*Passage B:* The idea that an agent can intentionally form an obligation through the exercise and expression of her will alone (and not by first transforming the state of affairs around her) comes part and parcel with any plausible conception of an autonomous agent. When an agent gives consent to another—to a doctor to perform an examination or to a worker to enter the agent's apartment—she transforms, in the way intended, the moral situation between the parties simply through the transmission of her will to do so. Prior to conferring consent, the agent's right to control her body, and her property, forbade touching or entering as forms of assault and trespass. Simply by expressing her will, the consenting agent morally transforms the situation as intended, thereby generating a permission for another.<sup>16</sup>

As “autonomous agents” we start out with a right to exercise control over what happens to our bodies and to our property. This means that others are excluded from our bodies and our property; they cannot enter this protected realm without wronging us. But mere exclusion will not give the autonomous agent all they need:

*Passage C:* 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 could not grant consent to others to exercise these powers in lieu of or alongside herself. . . . 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.<sup>17</sup>

In Shiffrin's eyes the rationale for the rights we have in respect of our “personal space” lies in the importance of control for autonomy, a need that also justifies our being able to modify these rights should we so wish. So the very consideration that explains our enjoyment of these prior rights also explains our posterior ability to vary them.

Having made the case that the rights of autonomous agents involve such a “power of consent,” Shiffrin generalizes to promise. A meaningful human life requires the ability to commit ourselves to others and thereby renounce a part of our liberty in their favor.<sup>18</sup> Thus, our power to make promises is no more mysterious than our ability to

<sup>16</sup> Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 500.

<sup>17</sup> Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 501–2.

<sup>18</sup> For a related line of thought, see Gary Watson, *Promises, Reasons and Normative Powers*, in *REASONS FOR ACTION* 165–6 (David Sobel and Steven Wall eds., 2009).

consent. The gap between right and normative power has apparently been bridged. Furthermore it has been bridged in a way that suggests an answer to our third question also. We can now see why people should wish to make and accept promises, and what interest they have in making use of this procedure.<sup>19</sup>

What of promises to kill yourself, slavery contracts, and the like? Were the right to promise grounded in the fact that we own our lives, our bodies, etc., it would remain unclear why we should lack the power to enslave ourselves. Since Shiffrin instead grounds our natural rights and powers in the value of autonomy, she can respond that the reach of our normative power is restricted by the underlying value. We possess rights and powers because of the significance of our capacity for autonomous agency and slavery contracts etc. are ruled out because they involve a denial of the value of personal autonomy. Even if we have the right to kill ourselves, or work ourselves to death should we so choose, we may lack the power to sell ourselves into slavery.<sup>20</sup>

Before concluding our discussion of the right-transfer theory, we should note that its advocates reject the Humean idea that promissory obligation is conventional, that is the idea that promises bind only in a social context in which people generally treat them as binding.<sup>21</sup> According to both Shiffrin and the Natural Lawyers, we possess a right to control what we do regardless of whether this right is recognized by those around us and we have the power to make binding promises in virtue of having this natural right. Since the power to make promises is implicit in that natural right, our promises bind regardless of whether their binding force is recognized by those around us. In exercising our normative powers we acquire, relinquish, and modify our rights. Linguistic convention may be needed to facilitate the relevant communications but convention is not required to underwrite the normative force of the agreements they enable.

### III. Hume's Point

Let's begin our assessment of Shiffrin's theory with her account of the binding force of a promise and, in particular, with the parallel she draws between promise and consent. Shiffrin claims (a) that consent is a normative power, (b) that our ability to consent can be grounded in our need for autonomy, and (c) that the normative power of promise can also be grounded in our need for autonomy. I suspect that the word "consent" is being used to cover two different phenomena here only one of which, like promise, involves an exercise of normative power. We can't assess Shiffrin's claims

<sup>19</sup> Shiffrin can allow that both the right of autonomy and the consequent power to consent or to promise go well beyond the body. But she will presumably ground both our power to make promises whose fulfillment will involve an exercise of bodily control and our power to consent to manipulations of our body in our natural right to control our own bodies. See Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 501.

<sup>20</sup> GROTIUS, *THE RIGHTS OF WAR AND PEACE*, at 556–8 has a more equivocal attitude to voluntary servitude.

<sup>21</sup> Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 482–5. JOHN LOCKE, *TWO TREATISES ON CIVIL GOVERNMENT* 277 (Peter Laslett ed., 1988), JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 303–4 (1990) and SCANLON, *WHAT WE OWE EACH OTHER*, all reject conventionalism.

about consent, promise, and their connection with autonomy until we have made the relevant distinctions.

Shiffrin tells us that both promise and consent:

alter moral status without a change in circumstances that is independent of the parties' wills. Why then has consent seemed so unexceptional, sufficiently invisible so as to render sensible the idea that promises are unique in this respect? Perhaps it is because this moral power flows so naturally from a plausible understanding of a meaningful right of autonomy.<sup>22</sup>

But what exactly is needed to furnish us with a “meaningful right of autonomy”? We could hardly have such a right unless our choices were normatively significant but *normatively significant choice* need involve no exercise of normative power, no ability to change the normative situation by declaration. The true analog of promise is something much more specific, namely the *power of consent*, a power that, like the power to promise, is exercised by declaration alone and is directed specifically at the normative situation. It is not immediately obvious that any “meaningful right of autonomy” requires such a normative power.

Speaking, in Passage A, of the power of promise, Shiffrin is clear that promising involves the communication of the intention to transfer a right to the promisee and to do so in virtue of this very communication. Thus the analogous normative power of consent must be a device that communicates, say, the intention of hereby making it the case that you are permitted to stick a knife into me and thereby makes it so. Now couldn't an agent change their normative situation, and do so “at will,” without exercising such a power of consent? Shiffrin appears to deny this. In Passage C she implies that without the ability to consent to medical procedures, we'd be left to operate on ourselves. But again this is far from obvious. My having a right that others not invade my body space could consist in the following sort of fact: you would be wronging me by sticking a knife into me unless you do so only when I have chosen this (non-normative) outcome. That way of specifying the right would give me the ability to ensure, and to ensure “at will,” that you can operate on me without wronging me. It would give me a meaningful right of bodily autonomy. Yet it need give me no power of consent.

Passage B states that when promising and consenting, the agent changes the normative situation “simply by expressing her will.” Here Shiffrin intends to distinguish the normative changes effected through promising and consent from those which result when I (perhaps deliberately) alter my rights and obligations by changing the objective circumstances, as when I incur an obligation to remain sober by driving off in my car. But that is not the only distinction that needs to be made here. We must also differentiate (a) the case where someone acquires either a right or an obligation to  $\phi$  because

<sup>22</sup> Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 501; see also 517. Hume was well aware of the parallel between promise and consent. See DAVID HUME, *ENQUIRY CONCERNING THE PRINCIPLE OF MORALS* 208 (Selby-Bigge ed., 1975). Thomson compares consent and promise, with a view to making promising seem unproblematic THOMSON, *THE REALM OF RIGHTS*, at 350–1. See also Herbert Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 184 and Watson, *Promises, Reasons and Normative Powers*, at 165.

I choose that they  $\phi$  from (b) the case where they acquire either a right or an obligation to  $\phi$  because I communicate the intention of hereby making it the case that they acquire such a right or such an obligation.<sup>23</sup>

What is choice? What is involved in “choosing that someone  $\phi$ ”? One instance of choice is where one intends to  $\phi$ , or else intends to bring it about that someone (either oneself or someone else)  $\phi$ s. Here one has made up one’s mind to effect the result once the moment arrives. But I doubt intention is the only normatively significant form of choice. It is often in our interests for what happens to depend on our intentions, perhaps because of our need for autonomy. But we also have an autonomy-interest in whether what happens to us depends on our *judgments* about what ought to happen (or else on our all-things-considered desires). Different forms of choice are normatively significant in different situations and perhaps in different ways. A comprehensive treatment is impossible here.<sup>24</sup> Instead I shall run through a series of examples intended to illustrate the complexity of the phenomena. All these examples have one thing in common: they are cases in which a normatively significant choice is made but no power of consent is exercised.

Let’s start with a choice that may well involve an intention. Michael Thompson gives us the following example:

In a traditional Jewish wedding, the bride is not among the signatories of the *ketubah*, but she is studied for signs of despair or opposition to the advancing proceeding. If they are found, the wedding is off. Though everything depends, in a sense, on the bride’s will, the arrangement seems not to give her a (Mosaic-legal) *potestas* over the groom and her father. Her will does not enter into the matter in the right sort of way, as directed consent.<sup>25</sup>

Here the bride might protest with a view to aborting the wedding by conveying her unhappiness. Under Jewish law her protest is decisive and presumably she is granted this influence (in part) out of respect for her autonomy i.e. to give her some control over whom she lives with. But she is given no power of consent since she can’t call off the wedding simply by communicating the intention to hereby call it off. Of course, Jewish law (as Thompson represents it) does not go far enough: full respect for the bride’s autonomy also requires that she be given direct control over the marriage contract but it is an interesting question why that further power should be needed. Why isn’t the normative significance of her choice enough?

Now let’s consider choice that involves no intention because the subject thinks they can do nothing to bring about the desired result; rather they simply judge that the result ought to be brought about (or else desire that it be brought about all things considered). Suppose I need an operation and judge that this surgeon ought to operate on me were they available, which they are not. I then fall unconscious. The surgeon’s

<sup>23</sup> In the philosophical literature on promising, it is widely accepted that a communication of the intention to  $\phi$  is importantly different from a communication of the intention to hereby undertake an obligation to  $\phi$ . The analogous point is not so well appreciated in the literature on consent.

<sup>24</sup> For a fuller discussion see OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, ch. 7.

<sup>25</sup> MICHAEL THOMPSON, *What is it to Wrong Someone? A Puzzle about Justice*, in *REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ* 351 n. 25 (M. Smith et al. eds., 2004).

knowledge of this judgment of mine might be crucial to whether they are entitled to operate on me should they then become available. But there is no question of my consenting to the operation. Some may suppose that I have “hypothetically” consented in such circumstances but the only basis for thinking that I *would* consent is my actual judgment. Were I to regain consciousness, my consent would now be sought even if my judgment were known and the operation might be permissible only once I had actually given it.

Another kind of normatively significant choice involves no intention because the chooser neither wishes to bring about the desired result themselves nor wishes to communicate the intention to oblige (or permit) anyone else to bring about that result. I am obliged to buy my partner the birthday present they think I ought to buy them and I am supposed to know (or at least to find out) what present that is without the benefit of requests, promises, consents, and so forth. Here my respect for their choice is, in part, an expression of respect for their autonomy—I should not allow my own judgment of what would be best for them to override theirs. And should I need to be *told* what to buy them, that would indicate a lack of interest in and respect for their choices.

Could Shiffrin concede my point? True, some portion of a meaningful right of autonomy could be based on the normative significance of choice alone. Yet, she might urge, the very same need for autonomy gives us good reason to wish to be able to influence people’s rights and obligations through declarations explicitly concerned with the normative situation. Indeed we very often think mere choice is insufficient to authorize an invasion of personal space. A surgeon is expected to get the patient’s consent before operating, not just to divine their intentions.

It is true that we need both ways of influencing our normative situation. This is because (as I shall urge in Section IV) we have both normative and non-normative interests. Furthermore these two modes of influence may pull in different directions, sometimes in a useful fashion. For example, I may invite you to our party whilst making it clear that I don’t intend you to come (you’d have come had my partner invited you but by doing so myself I mean to put you off). And I can communicate that I intend you to be at the party without inviting you myself (I’d prefer that my partner invite you and urge you to ask them). Given this, we should not assume that we can look to the normative significance of choice to ensure the intelligibility of the power of consent (and promise).

Hume for one argued that *nothing* can render such normative powers intelligible. Suppose I have a natural right to control what happens to my body. There must be something about me in virtue of which I have that right. For example, I might possess the right to control my body because it is in my interests to control my body, because my life goes better in various ways if I control my body and worse if I do not. Alternatively I might possess that right because rational agents have a dignity that demands respect and excludes interference with their agency. Let us call the basis for my natural right to control my own body, whatever it may be, the *Foundation*. I lose much or all of this natural right if the Foundation is altered or disappears (perhaps I become magically invulnerable to the actions of others, perhaps I suffer a lobotomy and lose my reason). But if the right is indeed a natural

right, it can't be degraded or lost unless the Foundation is somehow affected. And—here is *Hume's Point*—how could any plausible Foundation be affected simply by the fact that someone (anyone) has spoken with the intention of hereby making it the case that I no longer possess some portion of my right to control my body?<sup>26</sup>

Plausible foundations for the normative significance of choice are close at hand; for instance it is often in one's interests to have whether one goes under the knife or whom one lives with depend on one's intentions or judgments on the matter.<sup>27</sup> But our interest in the potency of these choices grants no authority to the simple communication of an intention to change the normative situation by means of this very communication. For example, if it is in my interests to exercise a given degree of control over what you do to my body, I cannot make it otherwise just by communicating the intention to make it otherwise (and thereby consenting). And this remains the case whatever the shape of our story about the value of control. Suppose the value of control over my body and so forth derives not from some interest of mine but rather from my inherent dignity as a rational agent. Again, I cannot deprive myself of any element of this dignity simply by declaration.<sup>28</sup>

True, consent is frequently an expression of choice. Your consenting to the operation is very often an expression of your intention that the operation should happen. Here your declaration has extrinsic normative significance since it informs us of your choices. Because choice and consent usually go together, it is not hard to see why foundations available to one should be thought to support the other. But, if Hume is right, your communication of an intention to hereby ensure that I can operate without wronging you has, in itself, no normative significance whatsoever. This mumbo-jumbo might have communicated the fact that you'd rather like an operation and *that* fact may well be normatively significant but this is irrelevant. Until we distinguish choice from consent, Hume's Point will escape us.

Hume's Point is, I maintain, a conclusive objection to all those versions of the right-transfer theory so far considered. Advocates of informational theories (from Adam Smith and Richard Price onwards) take Hume's Point and infer that a promise can't be what it seems to be, namely an attempt to change the normative situation by declaration. So what explains the insouciance of contemporary right-transfer theorists in the face of Hume's observation?<sup>29</sup> Shiffrin may be concealing the difficulty from herself by equating consent with normatively significant choice and then modelling promise on consent. In other authors, the idea of self-ownership is playing a role.

In a recent discussion of promising which is in many respects close to Shiffrin's, Watson says that

<sup>26</sup> HUME, *A TREATISE ON HUMAN NATURE*, at 516–25.

<sup>27</sup> The non-normative interests in play here may give choice both an instrumental and an intrinsic importance. See OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 166–8.

<sup>28</sup> In OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 127–9, I formulate Hume's Point as a worry about bare wrongings, i.e., wrongings that involve no action against a human interest. Since the right-transfer theorist may not share the assumption that wrongings involve acting against some human interest, I here formulate the point without it.

<sup>29</sup> "I have never felt the magnetism of the problem nor the attraction of the conventionalist solution, despite their distinguished careers." Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 482. See also THOMSON, *THE REALM OF RIGHTS*, at 303.

Prior to promising, I am free to engage in any number of optional performances. By promising, I transfer my ownership of some alternatives, my entitlement to act within a certain range of options, thereby giving that power to others.<sup>30</sup>

The idea that we “own” our rights to control our performances tends to obscure Hume’s Point because, in Grotius’ words, it is “in the very nature of property” that we are able to transfer or otherwise modify our property rights by declaration. In fact Hume’s Point calls the possibility of property (so understood) into question quite as much as the possibility of promise. Why should I have *both* the right to decide whether or not to drive my car and the power to give that right away by declaration? How does the former right explain the latter power? Indeed how can the latter power be explained at all?

In this section, I’ve made Hume’s Point and offered a diagnosis of the resistance to it but there remains the conviction, which I share, that promise and consent can indeed change the normative situation by declaration and so any argument that makes this seem impossible cannot be sound. One of the main attractions of the right-transfer theory is that it preserves appearances here, offering to make sense of our attempts to exercise normative power. We won’t have laid the right-transfer theory to rest unless we can accommodate Hume’s Point without it.

#### IV. The Authority Interest

A promise grants the promisee a right to performance: the promisor would be wronging the promisee by failing to perform unless the promisee releases the promisor from their promise. Let’s call this right to performance *authority*. A successful promise gives the promisee authority over the promisor. Why should any promisor seek to do so? On the face of it, the promisee is the primary beneficiary of the transaction—they acquire authority from the promisor. And so, it is natural to suppose, the promisee must (at least on occasion) have some interest in acquiring this power, in having authority over the promisor, an interest that the promisor has a secondary interest in satisfying. Call this an *authority interest*. And if authority can be worth something to the promisee, mightn’t that explain the bindingness of the promisor’s promise? We need not suppose that each individual promise is made to serve the promisee’s authority interest, merely that promises serve this interest often enough to explain why promises bind.<sup>31</sup> By postulating an interest in the normative item that the promisee acquires we can identify the source of a promise’s binding force.<sup>32</sup>

Should a theory of the binding force of a promise take this form? Should it appeal to the *value* of a promise, to some *interest* we have in giving and receiving promises?

<sup>30</sup> Watson, *Promises, Reasons and Normative Powers*, at 170. See also Hart, *Are There Any Natural Rights?*, at 323.

<sup>31</sup> I do not say that promises are standardly used to serve the authority interest or even that they are more often used to serve this interest than any other interest. I say only that they are used to serve the authority interest as often as is needed to explain the continued existence of promising. On this point see OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 143–5.

<sup>32</sup> I would argue that the primary normative interest grounding the power of consent is an interest of the consentor. See OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 181–2.

Some might think that we are confusing two different questions: (a) why do people bother to make and accept promises? (b) why does a promise bind once made? People make and accept promises for all sorts of reasons, good and bad but, the objection goes, their reason for making and accepting a particular promise might have little to do with why that promise binds once made.

I agree that the question of why one has a certain right and the question of whether it is in one's interests to have that right are distinct. There may be rights that exist regardless of whether it is ever in the right holder's interests to have them. Suppose, for example, I possess a right to go on living purely because of my dignity as a creature capable of rational decision making. Or suppose I possess this right because I have an interest in remaining alive. Either way, my having this right to life is not grounded in my interest in having that *right*; I have this right to life regardless of whether I benefit from my possession of that right. My right to life is grounded rather in my non-normative interest in remaining alive or else in the inherent value of my remaining alive.<sup>33</sup>

Promissory rights are different. Promissory rights don't exist at all unless someone intentionally brings them into existence by making the relevant declarations. And this will happen only if that person or persons sees some point in bringing them into existence. And this will be so only if they see some value in a binding promise, either for themselves or for someone else. So the right acquired by the promisee can't be a right that exists regardless of whether it matters to anyone that the promisee possesses that right. True specific promises may matter to different people in different ways but on my hypothesis one of these interests, the authority interest, is special: promises would not be made and would not bind when made unless people wanted authority for its own sake. A full defense of this hypothesis can't be attempted here but in the rest of this section I shall highlight some of its more attractive consequences.

On my hypothesis, we can see why it has seemed so natural to model promissory rights on property rights. Even if I own some things as a matter of innate right (e.g., my body) most of my property is not like that. Nobody thinks that I have an innate right to my car, my house, and so forth; rather I own these things because someone gave them to me by gift, sale, bequest, etc.<sup>34</sup> Furthermore such transactions occur because one or both parties have an interest in transferring ownership of the relevant things. In order to explain why I have a right to life, we need not suppose that I have any interest in having a right to life, that it will do me any good to have such a right. But in order to explain how we come to own cars and houses, we *do* need to suppose that people have an interest in ownership of cars and houses, that ownership of these things somehow serves their interests.

What interest does ownership serve? Those who purchase and sell are exercising normative powers, are acting with the intention of changing the normative situation by declaration. When I buy your car, I communicate the intention of hereby acquiring

<sup>33</sup> Non-normative interests are often normatively significant in that they help to determine our rights and obligations but they do not take such normative phenomena as their objects; they are not interests *in* rights and obligations.

<sup>34</sup> There is also ownership by original acquisition etc., but this too (I would argue) involves the exercise of normative power and so presupposes normative interests.

the claims, liberties, and powers associated with ownership of the car and you communicate the intention of hereby granting me those items. This suggests that the interests most directly served by such transactions are normative interests. Of course, we may be interested in the normative situation here only because we are interested in the non-normative situation i.e. in who has physical control over the car. But sometimes those involved in the exchange of physical goods have an interest in ownership that goes beyond any interest they have in making use of the thing owned. For example, the purchaser may be concerned solely with the car's future resale value and thus in having the power to sell it on.

Promissory rights, like property rights, are acquired by declaration. Where a right is acquired by the communication of an intention to acquire it (a) the receiver has some interest in acquiring it and (b) such interests must be capable of explaining their acquisition of that right. The right must be the kind of thing that one can acquire *because* one has an interest in acquiring it. Rights acquirable by declaration are what I'll call *interested* rights, rights that people can possess in virtue of having an interest in possessing them. The interest in play might be a purely instrumental one: I might be interested in your promise simply because it will give me control over what you'll actually do. Yet, on my hypothesis, promises bind because people also have specifically normative interests, interests in being invested with certain rights and powers for their own sake, and they sometimes seek a promise in the service of those interests.<sup>35</sup>

The transfer theorist fell victim to Hume's Point because the natural rights allegedly transferred by a promise (or relinquished by consent) had a foundation that would not allow them to be moved from one person to another simply by declaration. If rights of bodily control etc. are grounded in one's rational personality or in one's (non-normative) interests, it is hard to see how mere declaration could affect the extent of such rights. By contrast, such declarations can intelligibly engage with interested rights, rights whose possession depends on whether it is (or seems to be) good for me to have them. Why shouldn't I be entitled to control whether I have such rights by making declarations directed at those rights, as I am entitled to control various non-normative phenomena that matter to me by making choices directed at those non-normative phenomena? Both entitlements are grounded in my interest in having control over things that matter to me.<sup>36</sup> Once we ground normative power in normative interest, Hume's Point no longer applies.

Can the transfer theorist take advantage of my reply to Hume's Point by invoking an interest in autonomy? Shiffrin tells us that we'd be unable to form "meaningful human relationships" and so forth unless we were able to waive our rights and impose obligations on ourselves by declaration. Though Shiffrin overstates her case here, such normative powers would undeniably give us a useful form of control over our social environment. Mightn't that suffice to make sense of our claim to exercise such control?

<sup>35</sup> To address Hume's Point effectively, we must suppose that our interest in controlling rights and duties is not purely instrumental. See OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 148–9.

<sup>36</sup> There are things (including obligations) that we have no interest in controlling even though they matter to us, e.g., surprise parties and the obligation to hold them. But many things (including obligations) matter to us in such a way as to give us an interest in controlling them.

There is a crucial ambiguity in the idea of an autonomy interest: are we dealing with an interest in normative or in non-normative phenomena? On the one hand, the phrase “interest in autonomy” might refer to an interest in having the kind of physical control over what we do or what happens to us that (e.g.) the rights of bodily integrity are meant to protect. So understood an interest in autonomy is a non-normative interest. And since these rights of bodily integrity are based on the human need to control various non-normative phenomena (e.g., whether a knife goes into my body) they are surely *noninterested* rights, rights we have regardless of whether it does us any good to have them. But to take this line is to expose oneself to Hume’s Point. How can rights so understood be varied merely by declaration? The alternative is to treat our “interest in autonomy” as a normative interest, as an interest in the possession of (and control over) certain rights. So understood the proposal does address Hume’s Point but not in a way that the transfer theorist would find congenial for it also undermines the idea that our power to promise and consent are natural powers, i.e., powers that we have independently of social convention.<sup>37</sup>

Where rights (like promissory rights) are the products of an exercise of normative powers, those rights must be interested rights. Now the idea of an interested right makes sense only if we think of the right in which I have an interest as having some social reality. For it to be in my interests to possess a certain right, possession of that right must (in at least some respect) make my life go better and it can do so only in so far as this right is recognized by the people around me.<sup>38</sup> Interested rights are conventionally recognized rights (and more generally normative interests are interests in conventionally recognized norms). For example, it can’t be in my *interests* that some act be an appropriate object of blame (etc.) unless its being so makes a difference to what actually happens or is likely to happen.<sup>39</sup> True my possession of this right alone hardly ensures that the right will actually be respected: even rights established by convention are frequently violated. Perhaps my possession of the right need make no difference to the probability of its violation. Nevertheless it must at least make a difference to people’s likely reactions to that violation, reactions which cast a pall of disapproval over acts of this sort. Interested rights cannot be items that we

<sup>37</sup> Shiffrin formulates a moderate form of conventionalism according to which, though promises do not bind until they are socially recognized, we all have a pre-conventional obligation to accord them social recognition. She comments: “once conventionalism has transformed itself so completely, it loses moral distinctiveness.” Though I agree that we all have an important pre-conventional interest in the establishment of a social practice of promising, I remain uncertain whether this generates an obligation to establish such a practice. Even if it does, I doubt that this obligation (as opposed to the underlying authority interest) is the source of our promissory obligations. See Shiffrin, *Promising, Intimate Relationships and Conventionalism*, at 521–3 and OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 153.

<sup>38</sup> Nagel maintains that we are all better off simply in virtue of being possessors of “moral” rights and regardless of whether these rights are recognized but he does not explain how the fact that we are wronged by torture and so forth could make our lives go better. He says that the relevant notion of well-being presupposes the possession of moral status but that implies only that nothing counts as better or worse for us unless we have moral status, not that possession of moral status makes things go any better (Thomas Nagel, *Personal Rights and Public Space*, 24 *PHIL. & PUB. AFF.* 83, 92–3 (1995)).

<sup>39</sup> Here we must distinguish what is in my interests (i.e., what is good for me) from what interests me. I may take an interest in things that do not bear upon my interests, e.g., in the fact that I have certain natural or innate rights.

possess regardless of whether anyone ever has or ever will recognize the fact.<sup>40</sup> Hume is quite correct that “a promise would not be intelligible before human conventions had established it.”<sup>41</sup>

I have sketched a theory of promising which vindicates the idea that, in making a promise, we are changing the normative situation by declaration but I have not argued that the normative character of a promise can be explained *only* on the hypothesis that promises are here to serve the promisee’s authority interest in particular.<sup>42</sup> A full discussion is beyond the scope of this chapter but I shall conclude by highlighting one essential feature of the promise that my hypothesis is well placed to explain, namely the fact that the promisee is the only party necessarily wronged by a breach of the promise.

It might be thought that this feature of promising can be explained without invoking any normative interest. Perhaps we need only suppose that the promisee wants control over the non-normative situation and in particular over the behavior of the promisor. For example, the promisee might wish to be able to determine whether the promisor will appear at the bus stop at noon and seeks a promise for that reason. A valid promise gives the promisee’s choice in this matter a certain normative significance: if, at noon, the promisee intends the promisor to appear and the promisor does not appear, the promisor will have violated an obligation and committed a wrong. Furthermore, they will have wronged the promisee in particular. Isn’t this last fact best explained by the nature of the interest that led the promisee to seek the promise, namely the promisee’s need to control the promisor’s behavior “at will”? Things are not so simple.

People often seek promises with a view to giving some third party control over what will happen. For example, I might ask you to promise to mow my mother’s lawn on a certain date. Most such promises are implicitly conditional on the agreement of the purported beneficiary: you are meant to mow my mother’s lawn only if she wishes to have it mowed. So, once you have promised, my mother can determine “at will” whether or not you would be committing a wrong in failing to mow her lawn. Your promise gives her choice in the matter the sort of normative significance that, we were supposing, it is the point of a promise to secure. It gives her “moral control” over your behavior and thereby serves her interest in controlling the non-normative situation. Still it does not ensure that, were you to breach your promise, you would thereby be wronging *her*. The only person necessarily wronged by breach of promise is the person to whom the promise was made, namely myself. My mother may also be wronged but if so that is only in virtue of some further fact (harm, disappointed expectations) beyond the mere breach of promise. Thus, we cannot identify the person wronged by breach of promise as the

<sup>40</sup> OWENS, *SHAPING THE NORMATIVE LANDSCAPE*, at 9–10 and 150–1.

<sup>41</sup> HUME, *A TREATISE ON HUMAN NATURE*, at 516.

<sup>42</sup> For example, someone might endorse the general notion that normative powers are to be grounded in normative interests (plus social convention) whilst arguing that I have misidentified the normative interest or interests at stake. See Raz’s contribution to this volume in which he highlights the promisor’s interest in being able to shape their lives, as well as the promisee’s interest in “normative assurance.” I suspect that what Raz calls “the value of normative assurance” depends on what I call the authority interest. The material that follows may be relevant to this point.

person whose interest in controlling the promisor's behavior "at will" is served by the promise.<sup>43</sup>

One might respond that there is a crucial difference between my mother and me. My mother does not have the power to release you from your promise by declaration; rather she is able to determine by choice whether the conditions of the promise apply and this is so in virtue of the content of the promise. To equate the two is like confusing normatively significant choice with consent. That's all perfectly true but the question remains: Why should this difference matter on the view under consideration, namely that the interest served by promising is an interest in having the right to control what happens "at will"? Both my mother and I are granted *that* right by the promise and so, on this view, both of us should be equally wronged by the breach of it.

All becomes clear once we allow that the promisee might have a specific interest in controlling the *normative* situation by declaration, quite apart from any interest they may have in controlling the non-normative situation. Perhaps my mother too has such a normative interest but a promise made to me does not serve that interest. Like Thompson's Jewish bride, it gives her choice normative significance without granting her any normative power. That difference matters because human beings have what I call authority interests distinct from any interests they might have in exercising control over the non-normative situation. If we suppose that promises are here to serve these authority interests, we can explain (amongst other things) why the promisee is wronged by the breach of promise. Promising exists to serve people's interest in controlling whether they would be wronged by nonperformance, not their interest in controlling whether performance actually occurs.

## Conclusion

It is not hard to see why the transfer theory has proved so attractive over the centuries despite the difficulty we found in identifying the item supposedly transferred by a promise. First, the transfer theory preserves the appearance that those who make and accept promises are changing the normative situation by declaration. Second, the transfer theory seeks to ground this power to change our obligations by declaration in a prior natural right (which many believe we have) to control various aspects of our own lives. In this chapter I have argued that appearances can be preserved here only once the attempt to base our power to promise on such a prior natural right has been abandoned.

Perhaps we do have such a right but, as Hume showed, any attempt to ground the power to promise in natural rights must fail. Expectation theorists respond to this failure by dropping the whole idea of normative power and seeking to rebuild promissory obligation on the quite different foundation of harm avoidance. They affirm that promissory obligation is grounded in our natural right not to be harmed in certain ways whilst denying that it either involves a transfer of this right or originates in an

<sup>43</sup> Hart, *Are There Any Natural Rights?*, at 180–2, discusses such examples to make a related point. For present purposes it does not matter whether my mother will either benefit from performance of the promise or be harmed by nonperformance. All that matters is that the obligation is conditional on her choice.

exercise of normative power. I suggest that we rescue normative power by acknowledging normative interests, by adding to the familiar list of human goods (knowledge, beauty, pleasure, etc.) normative phenomena such as rights and obligations. Our interest in rights and obligations involves an interest in controlling them and that normative control interest is what underwrites our possession of the normative powers of promise and consent.