

Immoral Promises

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1. Introduction

The proposition that “promises ought to be kept” (Habib, 2014) is one of the most important normative ideas or value judgements in daily life. (Cf. Midgley, 1974, p. 235: “promising is everywhere a kingpin of human culture.”) Following Charles Fried (1981), we shall refer to this ethical ideal as “the promise principle.” Indeed, the promise principle is also relevant to politics and business transactions. (Cf. Macaulay, 1963 p. 58: “Businessmen often prefer to rely on ‘a man’s word’ in a brief letter, a handshake, or ‘common honesty and decency’--even when the transaction involves exposure to serious risks.”)

But what about “immoral promises”? That is to say, what about promises that are legally or morally speaking *malum in se* or inherently wrongful, like bribes, blackmail, and murder for hire, etc.? In short, what moral obligations, if any, do immoral promises impose? Although many of the greatest thinkers in Western civilization have offered a wide variety of theories to explain the source of promissory obligations (see generally Habib, 2014), it turns out there is an enormous blind spot in this centuries-old conversation, for few theorists have given the problem of immoral promises any sustained thought. (Even legal scholars have fallen into this trap. Charles Fried (1981) and Seana Shiffrin (2012), for example, make no mention of illegal agreements in their work.)

Nevertheless, immoral or illegal promises should be of theoretical interest to philosophers and legal theorists because such promises may help us delimit the outer boundaries of promissory obligations. Moreover, immoral promises may also exemplify the complex and uncertain relation between ethics and law. Many legal theorists, for example, recognize that contract law, in the words of Professor Shiffrin (2012, p. 249), “has not ... fully internalized the significance of contracts being promises.” A fitting but oft overlooked illustration of this disconnect is the problem of illegal or immoral promises. Although courts will not enforce illegal promises (see, e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982)), there are many significant exceptions to this rule. (See generally Chunlin, 2015).

This paper is organized in five parts. Following this introduction (sec. 1), we present a paradigm example of an immoral promise (sec. 2). Later, we examine several existing theories of promissory obligations in light of the problem of immoral promises (sec. 3). Next, we examine what effect, if any, threats and deception may have on immoral promises (sec. 4). We then conclude (sec. 5).

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2. Paradigm case: the breaking bad problem

Some legal theorists worry that the legal motives for keeping one's promises might "crowd out" or displace moral motives. (See Shiffrin, 2012, pp. 252-254. Cf. Murphy, 2006 p. 11: Prof. Shiffrin invites us to consider "what effect contract law might have on our ethical lives as promising creatures.") But what about illegal or immoral promises? Since such promises are generally not legally enforceable, should we worry that the legal or policy reasons for breaking an illegal promise will "crowd out" the moral ones?

To illustrate the problem of illegal/immoral promises, let's consider the memorable partnership depicted in the pilot episode of the critically-acclaimed TV series *Breaking Bad*. In brief, Walter White and Jesse Pinkman form an ill-fated and illegal partnership in episode 1, season 1 of the series ("Pilot"). As part of their informal agreement, Walt promises to use his meager savings to purchase an RV and convert it into a meth lab, while Jesse promises to teach Walt how to "cook" and to establish a distribution network. Walt and Jesse further agree to split the profits from their illicit venture 50/50.

Let's now call a "time out" and hit the pause button on the DVR. Do Walt and Jesse have a moral obligation to keep their promises? Although Walter White's initial motives for entering into this illegal agreement are arguably "good" in a moral sense (he has been diagnosed with a terminal form of lung cancer and just wants to provide a nest egg for his family before he dies), most courts would most likely refuse to enforce such an illegal agreement under the non-enforcement doctrine of contract law. (See, e.g., *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396 (1889). See generally Williston, 2009, p. 695.)

But putting aside the illegality of their partnership, do Walt and Jesse have a moral obligation to keep their promises to each other? Generally speaking, **what moral obligations, if any, do immoral or *malum in se* promises impose?** Is a promise morally binding irrespective of the content or substance of the promise? (For convenience, we shall refer to this moral dilemma as the "breaking bad problem" in the remainder of this paper.)

3. Theoretical discussion

The breaking bad problem poses a difficult moral dilemma because there are two competing moral principles in direct conflict with each other whenever someone makes an illegal or immoral promise: (1) the general obligation to keep one's promises, and (2) the general moral obligation to avoid harming third parties.

How are we supposed to reconcile these competing moral claims? According to one theorist (Peetz, 1977, p. 580), "the obligation to keep a promise may, of course, be over-ruled by some stronger obligation." But this statement begs the question of what makes an obligation stronger or weaker. (Cf. Clark, 1972-1973, p. 58, who refers vaguely to "countervailing considerations." As an aside, I have explored the potential incommensurability problem involving such "countervailing considerations" in other contexts. See, e.g., Guerra-Pujol, 2014.)

Worse yet, existing theories of promissory obligations--including such major theories as consequentialism, autonomy (the will theory), and expectations theory--are generally unhelpful because such theories fail to distinguish between 'good' promises and 'bad' ones. In sum, none of these theories provide an adequate solution to the breaking bad problem.

3a. Consequences

Consequentialist or pragmatic theories of morality generally take a forward-looking or probabilistic view towards promises: when deciding whether to keep or break a promise, what matters are the probable *consequences* of one's promise-keeping or promise-breaking behavior. (Cf. Blackburn, 2005, pp. 74-75.) In other words, the goodness or badness of a given promise (e.g. a promise to do *X*) depends entirely on the consequences resulting from keeping or breaking the promise to do *X*.

But how does one figure out or guess what these probable promissory consequences will be? (See end note #3a.) At the "micro" level or in the aggregate? (For reference, the "micro" approach is usually referred to as act utilitarianism (cf. Blackburn, 2005, p. 6), while the aggregate or "macro" approach is generally referred to as rule utilitarianism or indirect utilitarianism. Ibid., p. 183.) Let's start with the micro-consequentialist approach. The micro approach focuses on the probable consequences of an individual act, such as the act of keeping or breaking a particular promise in a specific situation. (Cf. Waller, 2012, pp. 127-128.) Under this approach, one may break a promise if breaking it will produce better consequences than keeping it.

But what about the breaking bad problem? For example, one might promise to manufacture an illegal substance like crystal meth. The fact that such a promise is *malum in se* or an illegal promise is not, standing alone, morally salient to a micro-consequentialist. Instead, what matters are the consequences of breaking or keeping such an illegal promise. Returning to our Breaking Bad example from the pilot episode of the TV series, a micro-consequentialist could easily argue that Walt and Jesse have a moral obligation to keep their illegal promises to each other. After all, Walt will be able to provide for his family with the proceeds of his ill-gotten gains (see, e.g., Brace & Arp, 2012, p. 141), Jesse will be gainfully employed, and meth addicts will be able to purchase a pure product. (See also Stephenson, 2012, p. 205.)

In the alternative, one could take a "macro" or aggregate approach to illegal or wrongful promises. That is, instead of focusing on individual acts or specific promises, one could take a step back in order to evaluate general rules or practices, such as "always keep your promises." Under the macro approach, the best rule or practice is the one that produces the best consequences overall. A macro-consequentialist could thus solve the breaking bad problem at this more general level: even if an illegal promise might produce good consequences in isolation, a general rule that illegal promises are not morally or legally binding might produce better consequences overall.

Nevertheless, notice that under either version of consequentialism (Micro or Macro), whether a given promisor makes a 'bad' promise (i.e. an immoral or illegal one) does not automatically nullify the promisor's supposed moral obligation to keep his word. Instead, what matters are the

individual or overall consequences of keeping or breaking one's promises, irrespective of the content of those promises. So, if we could empirically prove that making and keeping illegal or immoral promises produces better consequences at the micro or macro level, then in principle it should not matter to a consequentialist what the content of the promise is.

3b. Autonomy

Will theories of promises are premised on the idea that promises are *self-imposed* obligations. (See, e.g., Barnett, 2014, p. 44; Fried, 1981, p. 2; Clark, 1972-1973, p. 61.) This "normative power" view of promises thus focuses on a promisor's intentions when he make a promise. Although no one is required to make a promise, once you do, you are under a self-imposed obligation to keep your word. (Cf. Habib, 2014, sec. 5.1.)

The will theory or normative power view, however, is not only self-refuting (after all, if you can "will" a promise into existence at time t , then presumably you can also "unwill" that very same promise at any subsequent time; see end note #3b) and incomplete (what about conditional promises?); it is also self-defeating. Why? Because the efficacy of a promise under the will theory does not depend on the internal content of the promise itself. Instead, its efficacy depends only on the promisor's intent at the time when he made the promise. In other words, like the consequentialist theories discussed above, the will theory fails to distinguish between 'good' promises and 'bad' ones.

Consider the breaking bad problem. Recall that Walter White and Jesse Pinkman make mutual promises to each other when they establish their illicit business venture in the pilot episode of *Breaking Bad*. Now, let's consider this clandestine and criminal partnership from Jesse Pinkman's point of view. Walter is willing to trust his life savings to his former student in order to purchase a used Winnebago under Jesse's name to use as a mobile meth lab. Does Jesse have a moral obligation to use Walt's savings to purchase the RV?

In fact, at first Jesse is very skeptical of Walt's indecent proposal. He does not trust his putative partner, and he literally questions Walt's reasons for wanting to "break bad." But under the will theory of promising, once Jesse agrees to become Walt's partner in crime, he is supposedly under a moral obligation to keep his promises to Walt (e.g. use Walt's savings to purchase the Winnebago and teach him how to "cook" meth).

Thus, will theories not only fail to solve the breaking bad problem; they ignore the problem altogether, since what matters is the sincerity of one's intentions when one is making a promise, not the content of the promise itself. Is there any way out of this conundrum? What if we were to focus on the expectations of the promisee instead of focusing on the intentions of the promisor? This theoretical possibility leads us to another major view of promissory obligations and, as we shall soon see, to another dead end: the expectations theory.

3c. Expectations

Since the will theory is self-refuting (see Note #3b), many theorists have embraced an alternative "expectations" theory of promissory obligations. (See generally Habib, 2014, sec. 5.5.) In brief,

this theory views the making of promises as an “expectation-producing mechanism.” (Ibid., sec. 5.7.) That is, when a person (the promisor) makes a promise, he is making a promise to another person (the promisee), and by making a promise, the promisor is creating an expectation in the promisee that he (the promisor) will not later break his promise. To break a promise, then, is to deceive the promisee. (See, e.g., Ardal, 1968, p. 234; but see end note #3c.)

The expectations view, however, has the same blind spot as the will theory and consequentialist theories discussed above: it does not distinguish between ‘good’ promises and ‘bad’ ones. What matters for the expectations account of promising is not the content of the promise but rather the state of mind of the promisee. Although an illegal promise may no doubt generate a general expectation that such a promise is legally unenforceable, this outcome need not be the case. In principle, an illegal or immoral promise can create a valid promissory obligation so long as the promisee has the requisite expectation that the promisor will keep his word.

Consider again the breaking bad problem--i.e. our paradigm case of an illegal agreement--but now let’s look at this example from Walter White’s point of view. If Walt expects Jesse to keep his word (i.e. to use Walt’s savings to buy the Winnebago and to teach Walt how to cook meth), then perversely under the expectations view of promises, Jesse has a solemn moral obligation to honor the promises he has made to Walt!

In short, the expectations view of promises does not solve the breaking bad problem. It ignores it altogether. (Even Scanlon’s “Principle of Fidelity” suffers from this blind spot. See Scanlon, 1998, p. 304.) Although the expectations approach takes into account not only the conduct of the promisor (the person making a promise) but also the resulting expectations of the promisee (the recipient of the promise), it has nothing to say about the content of the promise itself. [See also end note #3c for additional criticisms of the expectations theory.]

Summing up our theoretical discussion thus far, whether you are a consequentialist or whether you buy into the will theory or the expectations theory of promissory obligations, these moral theories are either incorrect or incomplete to the extent they do not solve or at least address the problem of immoral promises. After all, few would claim that a promise or pledge, however solemn, is still morally binding if the purpose of the promise is to perform some inherently evil or immoral act.

4. Threats and lies

Let us assume for the sake of argument that promises in the abstract generate promissory obligations. Our thesis is that, even if this were the case, even if promises were somehow morally binding, we must still draw a distinction between moral promises and immoral or *malum in se* promises. As an aside, we are not arguing that drawing this distinction will be an easy task. We are simply arguing that this distinction is unavoidable. In short, what matters is the content or the purpose of the promise. An inherently immoral promise does not and cannot impose a promissory obligation.

To see this, let’s consider the problem of threats and the use of deception. What happens when a promisor uses threats to coerce a return promise from a promisee or when the promisor uses

deception to trick the promisee into making a return promise? We would argue that if the promise to be made under these conditions is itself immoral, then nothing at all.

The pilot episode of *Breaking Bad* (our paradigm case) provides a perfect illustration of our argument. It turns out that the partnership between Walt and Jesse is founded on threats and deception. Walt not only withholds crucial information from Jesse; he uses a threat to coerce Jesse into becoming his partner. Specifically, Walt initially conceals from Jesse his real reason for wanting to manufacture meth (i.e. to provide for his family), and he also threatens to report Jesse's whereabouts to the police in order to induce Jesse into teaching him the meth trade. Given these facts (illegality, plus deception, plus threats), is Jesse still under a moral obligation to keep his promises to Walt? Of course not. That the promisee acted under duress or that the promisee was lied to does not add anything to our analysis of promissory obligations in cases involving immoral promises.

4a. Deception

From a legal perspective, acts of deception do not always override the promise principle. In fact, common law fraud is very hard to prove. At a minimum, in order to undo an otherwise binding contract, the alleged act of deception or misstatement must be "material," and moreover the promisee must also prove "justified reliance" and damages. (See generally Restatement (Second) of Torts, sec. 162. Cf. Restatement (Second) of Contracts, sec. 161.) In other words, even if the promise in question is not an immoral or illegal one, not all forms of deception are legally salient.

For his part, Charles Fried discusses the problem of deception and the scope of the legal duty to disclose at length in his classic work *Contract as Promise*. (Fried, 1981, pp. 77-85.) Although he condemns promises secured through outright fraud: "Honesty assures, first, that one will not mislead another as to the facts in order to profit by the other's misinformed decision" (ibid., p. 78), he also concedes (p. 79) that "the concept of fraud is unstable" and that "as a general matter the general prohibition on lying can hardly entail a general duty to remove all instances of ignorance and error that might swim within your reach."

In other words, what if instead of lying or making an affirmative misstatement, the promisor simply withholds information from the promisee? When is merely withholding information the same as lying? When does a promisor have a duty to disclose private information to the promisee? Consider again the breaking bad problem. Walt does not disclose to Jesse his medical diagnosis. Is this omission relevant to the ultimate question of whether their mutual promises are morally or legally binding? We would argue that if the underlying promise itself is an immoral one, then this omission does not matter.

4b. Threats

Threats do, however, matter, since promises made under duress are not legally enforceable or morally binding. But why not?

Unfortunately, the existing philosophical literature on threats is, for the most part, woefully inadequate and highly unsatisfactory. Indeed, the most common philosophical solution to the problem of threats borders on sophistry: philosophers tend to redefine promises in such a way as to exclude threats (see, e.g., Peetz, 1977, p. 581; Searle, 1971, p. 48; Ardal, 1968, p. 231). Michael Clark (1972-1973, p. 57), for example, states that “clearly a threat is not a promise,” while Vera Peetz (1977, p. 581) writes, “The most important difference, perhaps, between threats and promises is that, whereas promises involve some obligations, threats do not involve any obligation at all.” Statements like these, however, are not only conclusory; they beg the ultimate question under consideration: why aren’t threats just a special case of promises? (In the case of Peetz (ibid.) she begs not one but two questions: why do promises involve obligations and why don’t threats?) Moreover, this proposed philosophical solution will not do since all promises implicitly involve threats. (See generally Schelling, 1980, ch. 2; see also Guerra-Pujol & Martinez-Garcia, 2014, pp. 1303-1304.)

Some theorists have attempted to distinguish promises and threats by equating promises with the conferral of benefits and threats with the imposition of harms. Fried (1981, p. 97), for example, poses the following rhetorical question, “Might we not say, then, that it is coercive to elicit a promise by threatening *harm*?” Or in the words of the philosopher of language John Searle (1971, p. 48), “One crucial distinction between promises on the one hand and threats on the other is that a promise is a pledge to do something for you, not to you, but a threat is pledge to do something to you, not for you.” Yet, even Searle concedes that both threats and promises involve pledges. (Ibid. Furthermore, as Fried (1981, p. 97) himself recognizes, “equating coercion with a proposal to do harm (as opposed to refusing a benefit) runs into analogous difficulties.” Why? Because it is fiendishly difficult to draw a principled line between actively doing harm and passively refusing a benefit.)

For his part, Charles Fried offers an extended discussion of threats in his classic work *Contract as Promise*. (See Fried, 1981, pp. 95-99.) According to Fried (p. 95), “A threat worsens the recipient’s situation; he would rather not have received it.” (Cf. Ardal, 1968, p. 231: “a threat is distinguished from a promise in that a threat is unwelcome to the threatened person (promisee) ...”) But at the same time, Fried concedes whether a threat worsens the recipient’s situation depends on the legal rights of the parties, i.e. on the legal status quo. In particular, Fried notes that “[a] proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses.” (Ibid., p. 97.)

But as Fried (pp. 96-97) himself points out, it is not always obvious what the legal status quo of the parties is. Consider for the last time the breaking bad problem. Recall that Walt coerces Jesse into becoming his partner in the pilot episode of *Breaking Bad* by threatening to turn him over to the police. Is Jesse morally obligated to keep his illegal promises to Walt? Given the illegal or immoral nature of these mutual promises, is the fact that Jesse’s return promises were made under duress morally relevant? Does the answer to these questions, in turn, depend on the relevant status quo for Jesse Pinkman? After all, Jesse is suspected by the police of engaging in illegal activities, so doesn’t Walt have a legal right (or even a legal duty) to inform on Jesse?

To sum up, whether one makes a promise or a threat, in either case the promisor wants the promisee to change his behavior in some way, i.e. to do something or to refrain from doing

something. (Cf. Atiyah, 1981, pp. 143-146.) What should matter, then, is the *content* of the promise or threat being made and the reason for making the promise/threat. (Cf. Midgley, 1974, p. 236: “Until we understand the reasons for playing [games], I do not think we understand the bindingness of the rules.”) Our focus on promissory content and promissory reasons, in turn, raise a new and much deeper philosophical question: how should we distinguish between ‘good’ and ‘bad’ promises or between ‘good’ and ‘bad’ threats? Absent a universal moral code, the answer to this question appears to be beyond reach. (Suffice it to say that we shall leave this deeper question to others.)

5. Tentative conclusions

There is probably no morally-satisfying solution to the breaking bad problem because of the incommensurability between (1) the obligation to keep one’s promises and (2) the obligation to avoid harm. (Cf. Barnett, 2014, p. 50: even the general principle of consent “does not not immediately explain the limitations on its application; for example, in cases involving promises to perform illegal acts or consent to servitude.”) But in the process of exploring the breaking bad problem, we can say that illegal/immoral promises (including threats) are of theoretical interest because such promises and threats not only delimit the outer limits of promissory obligations; such ‘bads’ also suggest that the promise principle might be of secondary importance to the harm principle.

End notes

#3a

Aside from the problem of illegal or immoral promises, consequentialist theories (both micro and macro) are problematic since they do not provide any definition of “utility” or offer any guidance on how to measure such “utility.” For an additional criticism of consequentialist theories, see Nozick, 1974, p. 41 (the problem of utility monsters).

#3b

Aside from the problem of illegal/immoral promises, the main problem with the will theory is that it is self-refuting! If the source of a promissory obligation is the promisor’s sincere intention or will to make a binding promise on himself, then the promisor’s subsequent intention to break his promise should have the effect of producing a self-release from his original promissory obligation. That is, if one can will into existence a binding promise on oneself, then one should be able to undo a promise via one’s will as well. Cf. Hume, 2000, p. 332, n.77. (For additional criticisms of the will theory, see Atiyah, 1981, pp. 17-22.)

#3c

Even aside from the problem of ‘bad’ promises, proponents of this theory are also unable to explain the ultimate source of a promisee’s expectation. (See generally Habib, 2014, sec. 5.7.) Instead, they tend to assume out of thin air that a promise by itself will generate an expectation in the promisee that the promise will be kept. But as Jake tells Lady Brett at the end of *The Sun Also Rises*, “Wouldn’t it be pretty to think so?” In other words, why is it justified for the promisee to have such an expectation in the first place? On the contrary, one could argue that a non-naive promisee, if anything, should generally have the opposite expectation, especially in the case of a bare promise. That is, without an additional guarantee or some other form of credible commitment, the promisee should expect the possibility that the promisor will change his mind and will break his promise if it is in the promisor’s self-interest to do so. (Also, this critique of the expectations theory provides a plausible reply to the “death-bed hypothetical” in the philosophical literature. (See, e.g., Ardal, 1968, p. 236.) A promises B to attend B’s funeral when B dies, but there are no witnesses in the room when A makes this solemn promise. Shouldn’t B know or expect that A’s death-bed promise is just cheap talk?)

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