

Conventions and Moral Requirements

We can all agree that we should keep our promises. But why? Some theorists believe that it is wrong to break a promise because doing so is a form of free-riding; the promisor takes advantage of a useful social convention only to fail to do his part in maintaining it.¹ Recently such accounts have come under persuasive attack² by those who claim that the wrong of breaking a promise has nothing essentially to do with any social convention at all. That is to say, the existence of a social convention of promising is not necessary to explain the wrong of breaking a promise. I agree that a social convention is not necessary to explain the wrong of breaking a promise, but I will argue that it can be sufficient.

To say that the existence of the social convention of promising can be sufficient, but not necessary, to explain the wrong in breaking a promise means that the fact that promising is a social convention can have an effect on our deliberations in light of a given promise. I aim in this paper to give an account of this fact, and also to explain what this fact reveals about the structure of a moral theory. In other words, I should like to give an account of some of the structural features that a moral theory will have that takes seriously the moral reason-giving force of social conventions. The analysis I will give is largely irenic. That is, I aim to show how conventionalist accounts and anti-conventionalist accounts of promising can happily sit alongside one another in a unified theory, preserving what is most compelling about each. The way that I will propose to

¹ See John Rawls (1971) pp. 344-350, and David Hume (1978) pp. 516-525.

² See, for example, Judith Jarvis Thomson (1990) chap. 12; Thomas Scanlon (1999), chap. 7; Seana Shiffrin, (2008).

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affect this unification will reveal structural differences between types of moral requirements that a moral theory generates, based on the roles that these different types of requirements play in the course of our moral deliberation.

Let me begin by summarizing what I take to be the most compelling features of conventionalist and anti-conventionalist accounts. I will then show how these two kinds of accounts can be reconciled without compromising what has made them each so attractive and enduring. I will argue that while a social convention may play an essential role in the generation of a genuine moral requirement, the existence of this social convention will not in most cases properly play a principal or even salient role in a person's moral deliberation about what to do in light of it. The analysis I give here, while aimed at the debate between conventionalists and anti-conventionalist accounts of promising, will nevertheless have a much wider application; it will show how social conventions can do essential moral work while at the same time allowing that this moral work may not provide the principal explanation for why non-conformance is wrong in any given case, *ceteris paribus*.

Section 1: Conventions and Conventionalism

Conventionalist accounts of promising, like those of Rawls and, more recently, Kolodny and Wallace,³ appeal to the fact that promising is a social convention. Since this social convention is at the very least useful (if not indispensable), then we should keep

³ Nico Kolodny and R. Jay Wallace (2003).

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our promises in order to avoid exploiting a social practice from which we individually are sure to benefit. This kind of account is attractive, not only because it is difficult to dispute that promising is a useful social convention (not even anti-conventionalists dispute it), but because its invitation to echo the familiar Kantian refrain “what if everyone did that?” seems appropriate. When we consider the situation from the point of view of a person who has benefited from the ability to make promises (or from others’ kept promises) but who would rather not keep a promise he has made, this refrain indeed seems most apt to capture the salient moral hazard.

Nonetheless, much of the current literature on promising eschews conventionalism about promising. Anti-conventionalist accounts focus on discovering the correct moral principle(s) that explain why it is wrong to break a promise, but they do so without recognizing that a social convention does any *essential* moral work in that explanation. While the moral principles adduced in anti-conventionalist accounts may differ, they will all have in common their ability to explain why it is wrong to break a promise without appeal to the fact that promising is a social convention or that a promise-breaker takes advantage of others in a way that presupposes their participation in a mutually-beneficial cooperative endeavor. For example, since it would be wrong to frustrate people’s expectations, or undermine their autonomy, or sabotage their access to reliable information, etc., then this explains why promise-making is a legitimate source of genuine moral requirements.⁴ Under this explanation, promising is only one among many

⁴ Scanlon (1999) adduces what he calls “Principle F” as follows: “If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A’s not doing so); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he

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ways that people can lead others to form expectations, offer assurance, or get others to rely on them. But it is the forming of expectations, reliance, or the value of assurance on the part of the promisee, rather than the fact that promising is a useful social convention, that does the moral work. When I promise you to do the washing up after you cook, for example, I lead you to form expectations, or give you assurance, or invite you to rely on me, which (pick one) would be wrong for me to frustrate absent some special reason, and the wrong of frustrating this particular expectation, assurance, or reliance, forms the content of the moral requirement to do what I promised. Thus, Scanlon summarizes his anti-conventionalist approach this way:

I do not doubt that there is such a thing as a social practice of promising, which consists in the fact that people accept certain norms, which they generally follow and expect others to follow. The question is what role this practice plays in generating obligations to keep one's promises. According to the standard institutional analyses, these obligations arise from a general duty to comply with just and useful social practices. I will argue, however, that the wrong in breaking a promise and the wrong of making a lying promise are instances of a more general family of moral wrongs which are concerned not with social practices but rather with what we owe to other people when we have led them to form expectations about our future conduct. Social practices of agreement-making, when they exist, may provide the means for

or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X not being done." Pg. 304.

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creating such expectations, and hence for committing such wrongs. But I will argue that these practices play no essential role in explaining why these actions are wrongs.⁵

Scanlon then explains what he means with the aid of several influential scenarios, some of which involve making a “promise” extra-conventionally.⁶ These serve to show (correctly, in my view) that in those cases the social practice of promising does not do any essential moral work in explaining why it is that one should honor their promise, or why not honoring their promise is wrong. What Scanlon’s particular account shares with most other anti-conventionalists⁷ is the central claim that there are extra-conventional ways to instantiate the very same moral hazard that is instantiated by the making of a promise. It is the instantiation of this moral hazard, whether or not by means of a promise, to which the applicable moral principle applies. That same moral principle then explains why it is wrong to break a promise, *ceteris paribus*, and therefore why promises are binding.

While the conventionalists and anti-conventionalists are deeply divided over the explanation of why promises are morally binding and why breaking promises are wrong, *ceteris paribus*, they are nevertheless united by two key assumptions. I will rely only on this widespread agreement in my own account. First, both camps agree that promises are capable of generating moral requirements, *ceteris paribus*. That is, promising is in fact a legitimate source of genuine moral requirements. Second, whether or not the social

⁵ Thomas Scanlon (1999) pg. 296.

⁶ Thomas Scanlon (1999) pg. 297-316.

⁷ I make an exception on this point for Shiffrin (2008), who gives a transcendental explanation of promising.

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practice of promising does any essential moral work in the explanation of why it is wrong to break a promise, both camps agree that a convention (in this case the convention of promising) is at the very least often *instrumental* in instantiating the circumstances of a particular kind of moral hazard (note Scanlon's assertion above). That is, the convention of promising is normally part of the means by which we become morally bound to do what we promise to do.

The explanation I will give for the reconciliation of conventionalist and anti-conventionalist accounts of promising is a transcendental one. I will argue that there are certain structural features that conventionally-generated moral requirements must have in order for conventions to be instrumental in instantiating the circumstances of a moral hazard. In the case of promising, the moral requirement to keep a promise has certain structural features, in virtue of the fact that promising is a social convention, that make it different than other types of non conventionally-generated moral requirements, such as the requirements that moral principles generate. These structural features of conventionally-generated moral requirements make it possible to reconcile conventionalism to anti-conventionalism, while keeping what is compelling about each. I will begin by outlining what these structural features are, and why they are necessary if conventions are capable of providing the means by which we come to be morally bound, as anti-conventionalists agree they are. This will be the case even if, as Scanlon and others rightly point out, the existence of a social convention often does no essential moral work in explaining why non-compliance with such requirements is wrong in a given case.

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First, if social conventions are, as Scanlon says, social practices characterized by participants' acceptance of certain norms which they generally follow and expect others to follow, then they must conform to the following key constraint: the norms which they specify must not depend on features of a situation which are not mutually accessible to representative parties to the requirement. (The representative parties to the requirement are in this case the promisor and promisee.) That is, conventional norms cannot generate requirements that depend either in their content or in their success conditions on features of a situation that not all parties to the norm could know. The actual motives, intentions, and other internal mental states of the parties to a conventionally generated requirement are normally inaccessible in just this way. Therefore, conventions cannot generate requirements that depend either on participants actually having certain mental states or on participants knowing the actual mental states of others. Before I argue for this claim, let us first see why most plausible anti-conventionalist accounts violate this constraint.

On most contemporary anti-conventionalist accounts of promising, the moral principles adduced to explain the wrong of breaking a promise will normally refer to some features which are inaccessible to some of the representative parties to the requirement. Without referring to these features, they could not give a plausible account of the wrong of breaking a promise. This is because we normally think that, quite apart from specific anti-conventionalist explanations of why we should keep our promises, moral wrongs must at the very least be intentional. (We normally do not condemn as morally wrong the things that people do unintentionally.) Thus, most anti-conventionalist accounts that adduce general moral principles to explain the wrong of breaking a promise

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will normally include an intentionality requirement, at the very least. Scanlon's principle, for example, applies only to situations in which a person "voluntarily and intentionally leads" another to form certain expectations.⁸

The reason that the legitimacy of conventionally-generated moral requirements cannot depend on features that are not mutually accessible to representative parties to the requirements is that this constraint is a precondition for a convention's ability to structure the expectations of the participants in the convention. In order for a convention to get going at all, it must provide a means for people to recognize the conditions under which they are subject to the norms that the convention specifies. This is not a specific point about promising, or even about conventions that generate specifically moral requirements. Consider a well-known example: after a dropped telephone call, the person who originally placed the call is conventionally expected to re-establish the connection. This is a useful convention; both parties normally want to re-establish the call, but if both call back at the same time the line will be engaged and the call will not be re-established. Since the call can only be re-established if only one person calls back, it makes most sense for the person who initiated the call to do so, since the original caller is sure to have the number of the other party.

But notice what happens when we change the specifications of the call-back convention. Imagine a putative convention that says the person who is most loved by God should re-establish the call. Quite apart from whether this could be a norm at all, it is clear that it cannot be a conventionally-generated norm. A convention cannot even be

⁸ Thomas Scanlon (1999), pg. 304. See also Judith Thomson (1990) pp. 297-298.

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merely instrumental in generating this norm. The reason it cannot be a conventionally-generated norm is that representative participants cannot recognize the conditions under which the norm applies to them. That is, they cannot recognize who between them is most loved by God. If they cannot both recognize this, then a convention – a social practice consisting minimally of norms that people generally follow and expect others to follow – cannot get started. This is because when the conditions under which norms apply to people are sufficiently opaque, the norms will not generally be followed. But the morally-neutral, positive fact that a norm is generally followed is a necessary feature of a social convention. This will be true of social conventions whether or not they are instrumental in generating specifically moral requirements, like promises.

Here, if a convention is to be instrumental in generating a requirement, it must not refer to features of the situation which are too opaque. In the case of promising, the details of the promisee's actual expectations are inaccessible in the relevant sense to the promisor. Likewise, the promisor's actual intentions in making the promise are inaccessible to the promisee. Therefore, these features cannot be relevant to the determination of a conventionally generated requirement. So why do many anti-conventionalists assume that the expectations generated on the part of the promisee play a necessary role in generating a moral requirement to keep one's promises?

Although the actual expectations and intentions of the parties are opaque, there is a related feature that is suitably accessible to both: the entitlement that the convention gives them to make an inference about the expectations and intentions of the parties. This entitlement has two important features. First, entitlements of this kind are a necessary

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condition for the existence of the convention. Second, the entitlement to make an inference about inaccessible features of a situation for the purposes of the convention is part of the norm generated by this particular convention. The entitlement to make inferences about the mental states of the parties to the promise should not therefore be confused with their actual internal mental states, such as what the promisee actually expects the promisor to do or the motivations the promisor actually has in making a promise.

Indeed, the entitlement to make an inference about a given fact for the narrow purposes of a convention does not depend on whether or not that inference is *ever* actually correct or even whether it ever *could* be correct. Therefore, it does not depend on whether the inference is correct in any specific case. In order to show that the entitlement to make an inference about features of a situation for the purposes of the convention need never be correct, let's consider one of Evans-Pritchard's examples of the convention of witchcraft detection.⁹

According to Evans-Pritchard, the Azande in North Africa believe in the dual causation of misfortune. That is, they believe that while misfortunes such as illness and death have natural causes, occult forces explain why such misfortunes befall specific persons at specific times. So, for example, although a hunter's death may be caused by the weight of the elephant that tramples him, witchcraft will explain why this particular elephant trampled this particular hunter at this particular time. The occult cause of the misfortune is the activity of an inherited substance which resides in the gut of a witch,

⁹ Max Gluckman (1972), pp. 2-29.

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who may not know he harbors such a substance. When this substance is enflamed by the envious or malevolent emotions of the bearer, it leaves the witch's gut and causes particular misfortunes to occur to whoever is the object of the malevolent emotions. In order to put an end to these misfortunes, the kin of the victim consult an oracle to determine who the witch is. The victim's kin submit to the oracle the names of those who they suspect might be the culprits. These will be people who have evidenced the malevolent feelings necessary to activate the occult substance. The oracle then performs a divination procedure. He administers a toxic substance to an animal after asking about one of the suspects whether or not he is the witch. If the animal dies, the answer is "yes." If the animal recovers, the answer is "no," and the oracle will continue the process until he exhausts the list of suspects.

I adduce this example as a convention that has the narrow purpose of determining who in the community is a witch so that the culprit may be punished or rehabilitated. I trust that my audience will believe as I do that the divination process never correctly identifies witches. This is not merely because the divination procedure is unreliable, but because there are no witches to identify. I also trust that my audience will be skeptical that such practices are morally justified. Nevertheless, the convention generates an entitlement to infer the existence of witches, according to this narrow purpose of the convention. More specifically, it generates an entitlement to infer from the death of a poisoned animal that the particular suspect named is a witch. This inference is only "valid" within the specific confines of the convention. Without an oracle acting in accordance with a highly regulated social practice, no such entitlement is generated. The

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poisoning death of an animal does not in itself, outside the confines of this practice, license such an inference for the Azande. What is salient about this example is that what licenses the inference for the purpose of the convention is an accessible feature of the situation, namely the death of an animal in the course of the divination procedure. This must be the case, since the convention would collapse if it depended on the actual existence of witches.

What the above discussion shows is that, if a convention of promising is capable of playing even an instrumental role in generating a moral requirement to keep one's promises, then this convention will have the following features. First, the requirements it generates will not depend on features that are not publicly accessible to representative parties to the promise. This is what it takes for the convention to get going at all. So, even assuming that there is a fact of the matter which party to a dropped call is best loved by God, no convention could generate a requirement on that basis. Similarly, even if we assumed that there was a fact of the matter as to what the parties to a promise actually intended and expected in light of the promise, the legitimacy of the conventionally-generated requirement to keep one's promise cannot depend on those features of a situation.

Secondly, one of the necessary features of a convention is its ability to coordinate participants behaviors by structuring a social practice according to norms that people generally follow and expect others to follow. Therefore it must be capable of both structuring participants' expectations about what others will do and give them guidance about what course of action to take in particular situations. It must, therefore, generate

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entitlements – for the narrow purpose of this guidance – to make inferences about features of a situation that are inaccessible. So, even assuming that there are no witches, the Azande conventions of witch-detection will generate entitlements that there are such entities, for the narrow purpose of determining who deserves punishment or rehabilitation. Similarly, while the legitimacy of a promise cannot depend on the actual intentions of the promisor or actual expectations of the promisee, the convention of promising must be capable of generating an entitlement (for the narrow purposes of the convention) to make inferences about such features.

Section II: Reconciling Conventionalism and Anti-conventionalism about Promising

At this point, it is important to point out that the above discussion does not show that anti-conventionalist principles are misguided or ought to be revised. I do not believe they are or should be. More specifically, nothing that I said above suggests that any of the plausible anti-conventionalist moral principles adduced to explain what is wrong with breaking a promise are even partly incorrect. It seems to me that these principles correctly point out the reasons that certain kinds of actions are wrong, and correctly identify the features of the actions that make them wrong. What the above discussion shows is only that, to the extent that we agree that promising is a convention that is instrumental in generating moral requirements, this fact cannot be explained by these anti-conventionalist principles alone. That is, these principles cannot explain how the

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convention of promising can generate moral requirements – requirements that play a proper role in our moral deliberations about what to do in light of them. Consider Scanlon’s own case of the Profligate Pal. In this example, a deadbeat friend borrows money and promises to repay it. The promisee does not actually expect him to repay the loan. Scanlon concludes that the promise does not thereby create a moral requirement. I assume that Scanlon is mistaken about this. What Scanlon’s anti-conventionalist principles explain is why a particular kind of action is wrong – an action that has many of the same features of a characteristic promise-breaking. But if a moral theory’s resources were limited to these moral principles, we would not be able to affirm what clearly seems true in the Profligate Pal example, namely that the fact that the pal made a promise to repay a loan exerts at least some moral pressure on him to repay, and properly figures into his moral deliberation about what to do. This limited moral theory would not be able to explain in a satisfactory way why his repayment of the loan had any moral explanation related to his promise to do so. But surely we think that the fact that he promised is not irrelevant.

What the anti-conventionalists’ accounts lack is not to be found in the particular formulations of their various anti-conventionalist proposals. Revising the principles to cover more cases would not help. What the anti-conventionalists lack is the part of the fuller theory of promising that explains how requirements – like promises – that are conventionally generated can properly figure into a person’s moral deliberation. In other words, the anti-conventionalist accounts cannot explain why the act of making a promise will occasion the kind of moral hazard to which anti-conventionalist moral principles

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alert us. This is consistent with anti-conventionalist principles being accurate insofar as they correctly determine both the morally correct response to this hazard and the reasons which make that response correct in most particular cases.

The fact that moral principles cannot do all of the moral work that conventions do will be a necessary consequence of a convention's ability to structure the expectations (and accordingly the behavior) of the participants to the convention. Recall that conventions must refer only to features of a situation that are mutually accessible to the parties to the convention. This constraint is necessary to get a convention going and to keep it going. Apart from internal mental states being opaque, the convention of promising introduces another special kind of opacity. Promising, unlike some other conventions, characteristically binds a person's future actions. That is, promises characteristically generate a requirement to perform some act at a future time. The parties to the promise cannot know at the time a promise is generated whether or not keeping the promise will be morally permissible, all things considered, or morally required, all-things-considered. Therefore, promises cannot be genuine requirements only on the condition that keeping them will turn out to be permissible or required. This is because, as we saw, the participants in the convention need to know when a requirement is generated. Promising cannot therefore typically generate a present requirement in virtue of a future fact, unless the representative participants have detailed access to that future fact (which in this case they do not have). So in order for promising to be able to generate genuine moral requirements, these requirements must exist independently of an all-things-considered moral judgment about whether or not to perform them. If I make a

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promise, I must be under a moral requirement to keep it from the time I make it. But this hardly seems controversial.

The conventionally-generated requirement to keep a promise will therefore do moral work that no moral principles can do. The role of moral principles is to help us deliberate.¹⁰ Taking (one of) Scanlon's anti-conventionalist principles as an example, the principle tells us that thwarting the expectations we have intentionally created in others is impermissible, *ceteris paribus*. Obviously, whether or not it is impermissible to break a particular promise on a particular occasion will depend on all morally relevant features of the situation. That is the purpose of the "ceteris paribus" clause. The role of conventionally-generated moral requirements will be to provide one among many of the morally relevant considerations that determine what we all-things-considered ought to do. The fact that I made a promise is one among many morally relevant features of a situation to which moral principles are applicable. This is just to say that the fact that I have made a promise will properly have moral reason-giving force in the course of my moral deliberations about what to do, given that the convention of promising is instrumental in generating moral requirements.

For this reason, we cannot see the existence of a requirement to keep a promise as flowing from the wrongness of breaking the promise, as Scanlon says. We may grant that it is wrong to frustrate people's legitimate expectations, and cite that as a reason why we ought not all things considered break a particular promise. But we may not from this

¹⁰ [citation suppressed for blind review]. See also Barbara Herman (1993), chapters 4, 7, 8.

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alone determine when a moral requirement has been created (in this case, the requirement to keep a promise). Whether or not is wrong to break a particular promise can only be settled by applying applicable moral principles when the time comes for the promisor to keep it. But a moral requirement to keep a promise must exist prior to that time. This is the moral requirement generated by the convention, given that the convention is capable of generating moral requirements.

The identification of a moral requirement with what an agent ought to do all-things considered has caused an unnecessary rift between conventionalism and anti-conventionalism. But in actuality, the two positions are complementary once we reject the supposition that the explanation of my moral requirement to keep a promise must be the same as the explanation for why I ought to keep a promise once I have made one. In other words, we should reject the idea that what a person ought to do in light of a promise precisely tracks the presence of a moral requirement to keep a promise. Conversely, we should reject the supposition that my conventionally-generated moral requirements correctly track what I ought to do. Once a convention generates a requirement, an individual's deliberation about what to do naturally focuses on the most salient moral features of the situation. This most salient feature in the case of promising is normally the regard one has for the other party to the promise. For it is the potential harm done to *them* (rather than the potential damage done to a useful institution) that exerts the most moral force on us to keep our word. It is their expectations, imbued with all the richness of their individual circumstances, which stand to be thwarted. The requirements generated by conventions will be abstracted from particular circumstances, but the relations between

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persons under these requirements are concrete and specific. It is no wonder that, for one particular person relating to another, the moral force of the convention properly recedes far into the background in the course of our deliberations.

Conclusion

I've argued for the reconciliation of conventionalist and anti-conventionalist theories of promising by showing how both types of theories contain an important kernel of truth. Conventionalist theories recognize the essential role that conventions play in generating requirements like the requirements to keep one's promises. Anti-conventionalist theories recognize that what is wrong with breaking a promise in a given situation may be independent of any convention. In so far as the convention of promising generates moral requirements at all, which even anti-conventionalists admit it does, then it must be capable of generating a moral requirement independently of both the actual internal mental states of the promisee or whether keeping the promise is what the promisor ought to do all things considered. Conventions that are capable of generating moral requirements at all do so by generating requirements that are capable of providing legitimate moral reasons, reasons which properly figure into an individual's deliberation about what to do, all things considered. Sometimes – though not always – these reasons are sufficient to explain what a person ought to do, all things considered. That is, the fact that a person made a promise may provide a sufficient reason to keep it in certain circumstances, like those described by Scanlon's Profligate Pal example. Normally,

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though, this will not be the case. Normally, the salient and decisive moral reason to keep a promise will be determined by general moral principles that apply to the specific moral hazard typically occasioned by the making of a promise.

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