By Convention Alone: Assignable Rights, Dischargeable Debts, and the Distinctiveness of the Commercial Sphere*

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This article argues that the dominant "nonconventionalist" theories of promising cannot account for the moral impact of two basic commercial practices: the transfer of contractual rights and the discharge of contractual debt in bankruptcy. In particular, nonconventionalism's insensitivity to certain features of social context precludes it from registering the moral significance of these social phenomena. As prelude, I demonstrate that Seana Shiffrin's influential position concerning the divergence between promise and contract commits her to impugning these features of the modern economy. Finally, I examine the importance of promising for friendship and why we resist the commodification of promissory rights in this domain.

I. INTRODUCTION

It is commonly observed that the norms of the marketplace diverge noticeably from those governing the rest of ordinary life. For example, it is ingrained that we ought not to view the occasion to help a friend, neighbor, classmate, or fellow congregant as an opportunity to extract a service

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from them; indeed, it would often be galling to respond to a favor request from a friend with a quid pro quo counteroffer even when it would be acceptable to refuse the request outright. And yet holding out for a better deal, on the hunch that one can extract even more for one's service, is an acknowledged prerogative of the commercial actor. Despite such divergences, it is also widely recognized that the line between the commercial and noncommercial is a porous one. For one thing, it is not always clear whether a given context of interaction is commercial. Often enough, relationships that begin as purely commercial become, through repeat interactions, sites of mutual affection, shared confidences, and expectations of loyalty. Furthermore, many of the characteristic differences between commercial and noncommercial domains are mere empirical generalizations admitting of exception. For example, whether or not it is a sign of a degraded or deteriorating relationship, bargaining between intimates is hardly a rare occurrence. There is, however, one commercial practice that is at once fundamental to the working of the modern economy and altogether nonexistent in other contexts: the transfer of rights resulting from promises or agreements.

Suppose that one person promises another to pay a sum of money (or to deliver goods or services), and the recipient of the promise proceeds to transfer that right to T, a third party. If the transfer is effective, the promisor now owes it to T, and to T alone, to pay her the money (or to deliver to her the goods or services). This might raise eyebrows insofar as the identity of the person to whom one is obligated usually figures essentially in the account of why one owes what one does as a result of a promise. It is because I promised *you* to pay *you* that I incurred an obligation to do so, and it is not immediately obvious how such explanations could extend to an obligation to pay a transferee to whom I promised nothing. Nevertheless, this practice of transfer (otherwise known as assignment) is central to modern credit-based economies. Assignment allows contractual rights to serve as currency substitutes, enabling us to pay off our creditors with debts that are due to us from others. It is not only the newfangled creatures of high finance (e.g., "repos" and mortgage-backed securities) that depend on the transferability of debt; the willingness of a seller to enter into the most mundane forms of credit transactions—for example, accepting a payment plan for the purchase of an

Harvard Law School's Law & Philosophy Colloquium (2015), USC's Private Law Theory Colloquium (2021), and the Legal Studies & Business Ethics seminar series at the Wharton School of the University of Pennsylvania (2022). A final prefatory remark: this article remained in a drawer for many years chiefly owing to methodological misgivings concerning the role moral "intuitions" should play in arguments for certain philosophical conclusions. For those with similar leanings, I alert the reader to n. 31, which recites the considerations that allowed me to overcome these concerns.

automobile—often depends on the readiness of some third party to purchase, or lend against, the seller's accounts.[1]

It is safe to say that nobody thinks that a moral right generated by a promise is transferable in the absence of a practice or convention that recognizes such a power. Absent a collective decision to treat promissory entitlements as tradable commodities, the recipient of a promise cannot bind its maker to a third party, in the manner of a transfer, without the

1. The sense in which assignment allows contractual rights to assume some of the functions of money in an economy is a difficult topic that is perhaps best illustrated by a parable, which also sheds light (however dim) on the even more difficult topic concerning the relations between the notions of *money*, *payment*, *exchange*, and *debt*: In 1935 "Ludwik Landau [a distinguished Polish economist and statistician, as well as a member of the Polish resistance movement in World War II and victim of the Holocaust] explained at length [to the Polish colonel with responsibility for economic development in Poland's military junta] the principles of effective demand and credit cycles underlying levels of output and employment at any one time. The colonel had evident difficulty in grasping this. In a final effort to break through the colonel's incomprehension, Landau told the following story: 'In an impoverished Jewish shtetl in Eastern Poland, whose residents were mired in debt and living on credit, a wealthy and pious Jew arrived one day and checked into the local inn, taking care to pay his hotel bill in advance. On Friday, to avoid breaking the Sabbath injunction against carrying money, he handed over to the inn-keeper for safe-keeping a $100 note. Early on Sunday, the wealthy and pious Jew left the inn before the inn-keeper had had a chance to return the banknote. After a few days, the inn-keeper decided that the wealthy Jew was not going to return. So he took the $100 note and used it to clear his debt with the local butcher. The butcher was delighted and gave the note for safe-keeping to his wife. She used it to clear her debts with a local seamstress who made up dresses for her. The seamstress was delighted, and took the money to repay her rent arrears with her landlord. The landlord was pleased to get his rent at last and gave the money to pay his mistress, who had been giving him her favours without any return for far too long. The mistress was pleased because she could now use the note to clear off her debt at the local inn where she occasionally rented rooms. So it was that the bank-note finally returned to the inn-keeper. Although no new trade or production had occurred, nor any income been created, the debts in the shtetl had been cleared, and everyone looked forward to the future with renewed optimism. A couple of weeks later, the wealthy and pious Jew returned to the inn, and the inn-keeper was able to return to him his $100 note. To his amazement and dismay, the wealthy Jew took the note, set fire to it at the paraffin lamp that was on the table, and used it to light his cigarette. On seeing the inn-keeper's dismay the wealthy Jew laughed and told him that the banknote was forged anyway.' Landau finished his story and waited for understanding to seize the colonel. Beads of sweat appeared on the colonel's forehead, from the intellectual effort at comprehension. Finally, when he thought he had stumbled on the explanation, the colonel exclaimed: 'Ah, I knew from the very beginning that there was something wrong with that Jew. Of course, the money was forged!'" Jan Toporowoski, "A Kalecki Fable on Debt and the Monetary Transmission Mechanism," *Review of Keynesian Economics* 4 (2): 224–28 (quoted in https://www.crisesnotes.com/payment-systems-monetary-policy-101/). For recent treatments of money that should be of interest to analytic philosophers (though they are hardly the last, or only, words on the subject), see Simon Gleeson, *The Legal Concept of Money* (Oxford: Oxford University Press, 2018); Joseph H. Sommer, "Where Is a Bank Account?," *Maryland Law Review* 57 (1998): 1. I have myself begun grappling with the notions of debt and payment in Jed Lewinsohn, "Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration," *Yale Law Journal* 129 (2020): 715–39, pt. 2.

promisor's consent. And yet, against the backdrop of an appropriate transfer practice, it becomes difficult to deny that a promisor who voluntarily confers a transferable claim assumes the risk of becoming morally bound to a third party in place of the promisee. The practice of assignment thus brings into sharp focus not only the sensitivity of prevailing conventional norms to social context but also the sensitivity of moral obligations to conventional norms.

It also sheds light on one of the perennial questions in moral and political philosophy: whether the moral principles governing promising are themselves conventional—that is, whether they are creatures of custom or law. If there are principles governing this domain that are prior to convention—that is, principles that are authoritative whether or not they are accepted or enacted by human communities—then they may serve as a basis to criticize not just individual action but also convention itself.[2] While the debate concerning the conventional status of promising has raged in recent decades, its stakes have not been adequately perceived. In particular, the relation between the conventional status of promising, on the one hand, and the sensitivity of promissory obligations to social context, on the other hand, has been utterly obscured. Socially significant distinctions outstrip those that are recognized by the principles of nonconventional morality, where, to borrow a phrase, "there is neither Jew nor Greek" nor sundry other socially constructed categories of immense practical significance. Accordingly, there are certain distinctions within any branch of morality, including the morality of promising, that can only be recognized by a theory that assigns to conventional norms (whether social or legal) a partly constitutive role in the determination of what is morally right and wrong. In particular, it is doubtful that a nonconventional moral principle governing promises would assign different normative consequences to promises depending only on whether they were made in commercial or noncommercial contexts.[3] Likewise, the lines marking important subdivisions within the category of broadly commercial commitments—for example, lines separating agreements between consumer and seller, employer and employee, or landlord and tenant—dissolve in the neutralizing acid of a nonconventional theory of promising. While social context might play a nontrivial role for the

2. A more detailed characterization of conventionalism about promising will be provided in Sec. III.

3. The doubt would be confirmed if, for example, the commercial domain cannot be picked out solely by reference to self-regarding motives or any other indicia available to a nonconventional morality. None of the arguments that follow depend on this assumption; however, it bears noting that the common law has long had difficulty cordoning off the commercial domain, as when it struggled to demarcate the boundary between the law of bills and the general law of obligations. See James Stevens Rogers, *Early History of the Law of Bills and Notes* (Cambridge: Cambridge University Press, 2009), 177–86.

nonconventionalist, in determining whether some behavior qualifies as a commitment with some particular content, it plays no direct role in the allocation of rights and responsibilities once it is determined that some such promise has been made. According to this monolithic view of promising, a promise to Φ issues in the same rights and obligations, whether it is made to one's lover or to the roofer.[4] Conventionalist writers appear to have largely acquiesced in this assumption regarding the invariance of the principles of promising across social contexts. However, as soon as the assumption is exposed, we are in a position to appreciate that one of the more attractive features of conventionalism is its capacity to explain why the binding rules of promising are sensitive to social and institutional context in ways that cannot be readily accommodated by nonconventional principles.[5] A primary aim of this article is to offer a novel argument in defense of conventionalism, by identifying an implausible commitment of nonconventionalist positions, which has been obscured by a failure of moral and political philosophers to pay sufficient attention to the norms of commercial life.

Among the battery of arguments put forward by Hume against natural rights theories of promising and property is one based on the premise that the moral obligations associated with promising and property "are changeable by human laws," a fact that cannot be accommodated by nonconventional theories.[6] Cast in such general terms, the argument has little force, as any proponent of natural rights would simply deny the premise. Indeed, natural rights theorists of property and promising have often criticized innovations in the law governing property and contract precisely for running roughshod over the supposed contours of putative natural rights—a mode of criticism that presupposes that nonconventional principles of morality do not yield in the face of opposing custom or positive law. However, Hume's remark is better construed as a generalization of our moral judgments regarding specific cases. That is, the claim is that a survey of our concrete moral judgments concerning property and promising reveals them to be sensitive to the customs and laws that prevail in the situations under evaluation; vary the customs and laws in relevant respects, and our moral evaluations may shift as well. Although Hume does not provide examples, I believe that a convention's rule concerning the transferability of promissory rights is a case in point:

4. Of course, a nonconventionalist can allow that it sometimes matters indirectly whether a promisee is a friend. For example, if breaching would set back the interests of a (relying) promisee, or reduce the overall level of trust between the parties, then the fact that the promisee is a friend might provide additional reason not to breach.

5. P. F. Strawson also views such sensitivity to social context as a "merit" of a conventionalist outlook. P. F. Strawson, "Social Morality and Individual Ideal," *Philosophy* 36 (1961): 1–17, 6–7.

6. David Hume, *A Treatise of Human Nature*, ed. David Fate Norton and Mary J. Norton (Oxford: Clarendon, 2007), 339.

our judgments concerning what is owed to transferees are profoundly sensitive to the background conventions against which a promise is made. And assignment is hardly the only example of an impingement of a promising practice on our promissory obligations; indeed, the commercial realm is rife with examples, and, in addition to assignment, I will also consider the bearing of the institution of bankruptcy on our commercial obligations. In each case, as I will argue in Section III, the moral impact of the practices cannot be accommodated by nonconventional principles—not by suitably enriching the content of the relevant promises, grafting conventional norms onto nonconventional principles, or denying that the agreements forged in these commercial contexts are genuine promises.[7]

7. The targets of my criticism (in Sec. III) are the leading nonconventional theories of promising that have dominated the philosophical scene for the past half century—theories that cast themselves in opposition to the conventionalist (practice-based) theories of Rawls or Searle, both of whom prominently analogized promising to a rule-defined move in a game like baseball. (This includes the "invitation-to-rely" theories of J. J. Thomson and Neil MacCormick, the "assurance" theory of T. M. Scanlon, and the "normative power" theory of Joseph Raz.) However, my criticism is not intended to target the different class of theories associated with the natural law tradition of Grotius and Pufendorf, culminating in the writings of Kant and Hegel on contract. The juridical "rights-transfer" conception of contract at the core of the latter tradition has recently been developed and elaborated with skill and sensitivity (by way of a detailed examination of the common law of contract) by Peter Benson in *Justice in Transactions* (Cambridge: Belknap, 2019). Unlike the modern-day nonconventionalists, who view promises made in ordinary social and domestic contexts as paradigms of promissory acts generating performance rights, "the great natural law writers . . . categorically distinguished between promises [such as most informal social and domestic promises] that are fully binding morally but that do not vest in the promisee a . . . right to performance and those that can be viewed as intrinsically intended to confer such a right and do so. The first kind of promise, which these writers called 'imperfect,' gives rise to a noncoercible duty to perform. . . . The second kind, called a 'perfect' promise, transfers to the promisee a right to performance, analogously, they said, to the alienation of property or services. According to these writers, it is only this second kind of promise that can ground contractual obligation and that, by the law of nature, is enforceable as a matter of justice between the parties" (ibid., 10–11; citations omitted). Whether the juridical conception, as developed by Kant and others, should be classified as a nonconventionalist theory is a vexed question. On the one hand, like other "acquired rights," contractual rights are, for Kant, merely "provisional" in the state of nature, requiring institutionalization to be rendered "conclusive." See generally Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard University Press, 2009), chaps. 3 and 5. On the other hand, according to this view, "the institutional establishment of the juridical conception as a system of principles, standards, and rules does not change the basic content of the juridical conception: it merely actualizes this conception and all that it comprises such that it can be known and used by any and every transactor" (Benson, *Justice in Transactions*, 440). Even if the institutions are obligated to "actualize" a certain set of rules, however, the question naturally arises as to what happens when they fail to do so. Let us consider the example closest to home—namely, the rule that contractual rights according to the juridical conception are, subject to qualifications, properly assignable. (Benson's argument in support of this rule goes like this: since, on the juridical conception the promisee acquires a "second-order title in" her right to performance that "figures as an asset of crystallized value . . . that she owns," it follows that

In recent decades, as nonconventionalism about promising has risen to dominance, several legal theorists and philosophers, most prominently Seana Shiffrin, have argued that since contracts typically involve genuine promises, the law of contracts is normatively constrained with respect to the goals it may otherwise pursue. In a famous article, Shiffrin appeals to a "divergence" between contract law and promissory morality to critique several prominent features of the common law of contract.[8] Very roughly, Shiffrin lines up several doctrines of contract law; places them alongside our informal, noncommercial promissory norms; and criticizes the doctrines if they require more or less from the parties than what is required by the familiar norms.

Here, too, the assumption concerning the monolithic character of the morality of promising silently exerts a distorting influence. As discussed in Section II, Shiffrin's argument is far more powerful than she acknowledges: in particular, the susceptibilities of contractual rights to assignment and to impairment in bankruptcy constitute marked departures from our informal promissory norms, practices which are no less vulnerable to challenge on divergence grounds than are the general common law doctrines that are the explicit targets of Shiffrin's critique. Such extreme implications of Shiffrin's position will strike many as a reductio of her position. Be that as it may, it would be rash to pin the blame on a salutary call to take promissory morality seriously. Rather, the problem can be traced to Shiffrin's implicit reliance on a monolithic conception of promissory morality—one that is all but entailed by the nonconventionalism that she elsewhere defends.[9] By appealing to our intuitions

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"there can be nothing in its being such an asset that *per se* precludes the promisee from treating it as having value vis-à-vis others as well"; ibid., 83–100, 360.) Be that as it may, we can readily contemplate institutions and communities that do not recognize the power to alienate contractual rights—thereby, according to Benson, "arbitrarily limit[ing] the . . . represented value and benefit [of the promise]" (ibid., 87)—and ask whether contractual rights conferred in such transactional contexts are nevertheless assignable as a matter of right (subject to Benson's qualifications) according to the juridical conception. If the answer to this question is no, then the view may indeed qualify as "thoroughgoing conventionalist" (in the terminology introduced in n. 29), notwithstanding the great differences between it and the (equally thoroughgoing) conventionalism associated with Hume. I will not further consider the important juridical conception and do not purport to subject it to criticism.

8. Seana Shiffrin, "The Divergence of Contract and Promise," *Harvard Law Review* 120 (2007): 708–53.

9. Seana Shiffrin, "Promising, Intimate Relationships, and Conventionalism," *Philosophical Review* 117 (2008): 481–524. I have already observed that contemporary conventionalist writers (with the notable exception of P. F. Strawson) appear to have acquiesced in the assumption that a single promising convention prevails throughout a given society. One may surmise that it is perhaps for this reason that Shiffrin claims, erroneously, that "most of this Article's points [concerning the divergence of contract and promise, as well as its significance] . . . do not depend on [her] rejection of conventionalism." Shiffrin, "Divergence of Contract and Promise," 720 n. 18.

concerning noncommercial cases in an effort to discern the contents of a promissory morality that applies to all situations, Shiffrin relies on the assumption that certain widely accepted norms governing noncommercial promises apply to all promises, irrespective of social context. Given this assumption, substantial differences between contract law and those familiar noncommercial norms amount to a potentially problematic conflict between law and morality. By contrast, if the morally authoritative norms are sensitive to social context—as a conventionalist can and should maintain—then we cannot infer a problematic clash between the law and the morality of promising by noting differences between the rules of contract law and some set of widely accepted informal norms.

Shorn of a one-size-fits-all conception of promising, a conventionalist can turn to the substantive values associated with different social contexts to evaluate our promising practices in different domains. In Section IV, I begin to consider the reasons that lead commercial promissory norms to diverge so considerably from noncommercial ones. I focus on the case of assignment and explore whether a promising practice should resist recognizing a power to assign with respect to commitments made in the context of friendship.

II. RADICAL DIVERGENCE: ASSIGNMENT AND BANKRUPTCY

The moral critique of contract law on the basis of divergence begins from the assumption that, in general, the agreements that give rise to contractual obligations also constitute promises. If contractual breach systematically involves promissory breach, contract law must take note of the moral rights and obligations in its midst and must take care not to undermine their significance, lest it run afoul of the requirement that "the content and normative justifications of a legal practice . . . should be capable of being known and accepted by a self-consciously moral agent."[10] According to Shiffrin, the law violates this requirement whenever it demands less from the promisor, or more from the promisee, than what morality requires of them, provided that the most natural explanation of the law's deviation is either that the law does not take morality's higher standard to impose serious demands on people or that the law embodies a false view of what morality requires.[11] On this basis, Shiffrin criticizes the

10. Shiffrin, "Divergence of Contract and Promise," 712.

11. Shiffrin emphasizes that such an attitude on the part of the law would be unfortunate in part because of the possibility that "the law plays. . . a leadership role in shaping social practice [of promising]" (ibid., 741). In taking this position, Shiffrin echoes Karl Llewellyn, another distinguished critic of divergence: "And my guess is . . . that the real major effect of [contract] law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as

law's preference for expectation damages over specific performance—that is, the policy whereby "the financial value of the performance is demanded from the [breaching] promisor, but actual performance is not required (even when it is possible)"—if its actual or apparent purpose is to encourage individuals to redirect goods or services that have already been promised to one individual (for an agreed-upon price) to somebody else who is willing to pay more for them.[12] Additionally, Shiffrin criticizes the law's mitigation doctrine—that is, the law's unwillingness "to supply relief for those damages [the promisee] could have avoided through self-help, including seeking another buyer or seller, advertising for a substitute, or finding a replacement"—on the grounds that "it is [often] morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor's own wrongdoing."[13] Finally, Shiffrin objects to the so-called "*Hadley* rule" that limits contractual liability to the losses that the breaching promisor could reasonably have foreseen at the time of the contract's formation (as opposed to at the time of breach), a holding that Shiffrin takes to be at odds with the norms of promissory morality.[14]

I will grant for the sake of argument Shiffrin's claims concerning the content of promissory morality as manifested in our informal, noncommercial practices. My aim in this section, beyond introducing the two practices that will figure in the argument against nonconventionalism in Section III, is to show that contract law, broadly construed, deviates from informal, noncommercial promissory morality far more radically than Shiffrin acknowledges. My strategy, in other words, is to broaden our focus beyond Shiffrin's classic "1L" contract doctrines to include highly significant doctrines, pertaining to contractual rights, usually covered elsewhere in the law school curriculum—only then will the full implications of Shiffrin's position come into view.

a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what 'is done.' . . . This work of the law-machine at the margin, in helping keep the level of social practice and expectation up to where it is, as against slow canker, is probably the most vital single aspect of contract law." Karl Llewellyn, "What Price Contract? An Essay in Perspective," *Yale Law Journal* 40 (1931): 704–51, 725.

12. Shiffrin, "Divergence of Contract and Promise," 723, 731–33. For an insightful, state-of-the-art discussion of Shiffrin's target (the theory of efficient breach), see Gregory Klass, "Efficient Breach," in *Philosophical Foundations of Contract Law*, ed. Gregory Klass, George Letsas, and Prince Saprai (Oxford: Oxford University Press 2014), 362–87.

13. Shiffrin, "Divergence of Contract and Promise," 725.

14. Ibid., 724. Additionally, Shiffrin criticizes the law's reluctance to apply punitive damages in the event of contractual breach on the grounds that such doctrines manifest an attitude that promises (in salient contrast with conduct singled out by criminal and tort law) do not give rise to serious moral requirements. Ibid., 726.

A. Bankruptcy

An individual is insolvent when their total liabilities exceed the value of their assets.[15] In such a condition of insolvency, one lacks the present means to pay off one's debts, even if there is no particular debt that one cannot satisfy. When such an individual, or one of their creditors, files a petition in a bankruptcy court, a process may be initiated whereby the debtor's (nonexempted) assets are distributed to the debtor's creditors in accordance with the distributive principles of bankruptcy law. At the end of such a bankruptcy proceeding, many of the individual's remaining debts may (depending on the type of bankruptcy invoked and other technical matters) be discharged, and the debtor thereby absolved of all further liability with respect to those debts. The discharge is a permanent order, backed by the threat of judicial sanction, barring the debtor's creditors from any form of collection activity with respect to the remaining balance of the discharged debts, including legal action and extending to informal collection efforts via telephone, letters, or personal contacts. In providing for a discharge, bankruptcy law purports to "give to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[16]

Contract law's choice of expectation damages as standard remedy, even if selected to incentivize "efficient" breach, is mild fare compared to the interference imposed by bankruptcy's discharge. Beyond merely rendering unenforceable the debts that have been discharged in bankruptcy, the law takes various affirmative measures to help the debtor achieve a "fresh start" unhampered by his old obligations. For example, in addition to barring even informal collection efforts, US law requires that no employer may discriminate against a current or prospective employee either on account of a failure to pay off a debt that was discharged in a bankruptcy proceeding or on account of the filing itself.[17]

15. There are various measures of insolvency, including "cash-flow" insolvency and "balance sheet" insolvency, and there is also a "means test" that considers the debtor's income. See, e.g., Elizabeth Warren et al., *The Law of Debtors and Creditors: Text, Cases, and Problems*, 7th ed. (Alphen aan den Rijn: Wolters Kluwer, 2014).

16. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Of course, the debtor's credit rating may be affected by the bankruptcy, and so their financing opportunities may in fact be considerably curtailed.

17. 11 U.S. Code § 525 (b) provides that "No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title [i.e., the US Bankruptcy Code], or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt . . . (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or (3) has not paid a debt that is dischargeable in a case under this title."

Notably, bankruptcy's permanent modification of the debtor's prior unfulfilled obligations has no analogue in prevailing noncommercial promissory practices. If your friend or relative does not have the means to repay an interest-free loan, it may be inappropriate to harass them, but nobody thinks that the debt simply vanishes merely because of the debtor's present inability to pay. Bankruptcy's discharge therefore runs afoul of Shiffrin's strictures regarding acceptable divergences between contract law and promissory norms.[18] Indeed, the very idea that bankruptcy's discharge offers a fresh start to the debtor is not compatible with the view that the old obligations survive bankruptcy and are to be taken seriously.

B. Assignment

By exercising an assignment power, a promisee gives their promissory entitlement to a transferee, who acquires not only the claim-right but also the power to transfer that right to another. The transformation that a claim undergoes in the course of transfer is more complex, and more thoroughgoing, than may initially appear. The act of transferring a promissory right operates on two distinct levels, modifying not only the identity of the right-holder but also, in the typical case, the content of the right. In my terminology, the right-holder is the party to whom the promisor owes the obligation—the party with privileged standing to waive the obligation in advance of performance and to complain (and demand compensation) after breach—while the content of a right is a description of a course of conduct that must be satisfied in order to fulfill the corresponding obligation.[19] Whereas prior to the transfer the promisor owed it to the promisee to pay her a sum of money, after the transfer he owes it to the transferee to pay him the same sum.[20]

18. It is worth noting that, given her own critical aims, Shiffrin is unable to consistently avail herself of any of the anticonventionalist strategies for accommodating bankruptcy's operations that will be considered (and rejected) in the next section. And the same goes for the generalization of her critique to the case of contractual assignment, to be discussed next.

19. The modification at the level of content is characteristic, but not essential, since a required performance can have no recipient (as when I promise to jump in the lake). *Moreover, in claiming that the content of the obligation typically changes as a result of the transfer, I am here assuming that the initial recipient of the performance was not picked out by a description (e.g., "the holder of this chit") that is consecutively satisfied by promisee and transferee.* This assumption will be relaxed in the next section.

20. This is the dominant conceptualization of the mechanism of assignment in the common law world today and informs many standard textbook treatments. See, e.g., Greg Tolhurst, *The Assignment of Contractual Rights*, 2nd ed. (London: Hart, 2018). It also reflects the views of commercial actors (who generally conceive of assignment as the purchase of claims). However, it should be noted that, given the traditional ban on assignment in English law, creative efforts have sometimes been made to reconceptualize the mechanics of assignment. Grant Gilmore recounts the potted history of the law's development: "The

In the commercial sphere, it is not only rights to the payment of money that are transferable. Under US law, rights to the delivery of goods are also assignable, and although traditionally rights to "personal services" are not freely assignable, this exception has eroded as the service industry has grown and as services have become increasingly commodified.[21] And while the power to assign is the product of a default rule that can be overridden by a nonassignment clause, insisting on such a provision is sometimes costly or impractical. Moreover, due to US law's questionable policy of favoring free assignment, such provisions are construed narrowly by courts, and, absent express intent to the contrary, nonassignment clauses do not succeed in stripping right-holders of the power to assign, merely imposing on them a duty not to exercise that power.[22]

To be sure, even in the commercial realm, there are widely recognized limitations on the promisee's power to assign. One such limitation is that assignment must not make performance materially more burdensome.[23] This material burden condition would be violated, for example, if somebody tried to transfer their right to a delivery from a nearby store to somebody living on the other side of town. However, the promisee's power to transfer is no mere corollary of a more general power to insist on any sort of performance so long as it is no more costly than what the promisor originally signed up for. The power to assign, limited by a material burden condition, in no way implies that a promisor is, or ought to be, at the mercy of a promisee's selection from an array of all possible performances no less burdensome than what the promisor originally agreed to perform. Furthermore, it is notable that the material burden condition takes into account the burdens of performance but not the

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treatises and judicial opinions of the first half of the nineteenth century leave no doubt about the pattern into which the sense of history had transmuted the past. It was believed that the English courts had at one time refused to give effect to assignments of claims; that courts of equity had rejected the legal rule and recognized assignments; that courts of law, bowing to the . . . powers of equity, had in turn recognized the rights of assignees to sue on assigned claims, but only in the name of the assignor and on the theory that the assignment constituted an irrevocable power of attorney." Grant Gilmore, *Security Interests in Personal Property* (Boston: Little, Brown, 1965), 202–3. The agency ("power of attorney") characterization is especially strained, since the assignee does not have the fiduciary duties that would ordinarily follow from general principles of agency.

21. That is, courts now deem fewer services to be personal, though the exception still has considerable significance in the context of employment contracts, which are usually nonassignable. See E. Allen Farnsworth, *Farnsworth on Contracts*, 3rd ed. (New York: Aspen, 2004), 692–93. (Query: where a service provider cannot lawfully discriminate among potential customers, can they nonetheless claim that the service is personal?)

22. Ibid., 695; *Restatement (Second) of Contracts*, sec. 322(2). The policy has recently been described and criticized by Paul MacMahon, "Contract Law's Transferability Bias," *Indiana Law Journal* 95 (2020): 485–531. MacMahon's criticisms are compatible with all of the claims of this article.

23. Farnsworth, *Farnsworth on Contracts*, sec. 11.4.

burdens associated with the relation of obligation itself. In particular, the fact that a right is transferred to a less accommodating or forgiving creditor is of no significance as far as the material burden condition is concerned.[24]

Outside of the law, by ordinary lights, the entitlements generated by noncommercial commitments are not freely assignable. If I had previously agreed to help a friend carry a recently acquired piano into his home, a third party (my friend's neighbor, say) cannot demand that I deliver the piano to her home instead on the ground that in the interim she had been "assigned" the entitlement that had been generated by my commitment. To be sure, depending on the circumstances, I may be unreasonable if I were to refuse a request to depart from the original plan and deliver the instrument to the neighbor's house instead of my friend's. Nevertheless, however we characterize such unreasonableness—whether it is the unreasonableness of standing on one's rights, of failing to engage with a friend in a cooperative spirit, or of failing to recognize that the obligation one incurs by making a promise to a friend itself has a kind of slack that is sensitive to the friend's changing situation—it is not the unreasonableness of violating the neighbor's right.

Recall Shiffrin's objection to contract doctrines that diverge from familiar noncommercial promissory morality. Whatever one makes of Shiffrin's argument, the present point is just that it has at least as much force in the case of assignment, where the divergence is starker. When a contractual right is assigned, the promisor not only may fall under an obligation to perform a different act than what was originally required but also becomes accountable to a different party, to whom she made no promise. And if Shiffrin is right that a promisor cannot justify substituting the market value of the promised performance for the performance itself by reasoning that the payment would leave the promisee no worse off than if performance had been rendered, then the same must be true of contractual assignment and the determination that performance redirected to a third party would leave the promisor no worse off than performance directed to the promisee.[25]

Of course, the observation that the case against various common law doctrines extends to the practices of assignment and bankruptcy leaves proponents of the divergence criticism the option of embracing a more radical critique. But one need not choose between rejecting these practices and adopting a blasé attitude toward interpersonal commitments. As soon as one adopts a conventionalist stance regarding promissory norms, one loses reason to think that there is a single set of moral

24. Ibid., 692.

25. On the former point, see Seana Shiffrin, "Could Breach of Contract Be Immoral?," *Michigan Law Review* 107 (2009): 1551–68.

norms governing promising, valid across all social contexts. In particular, conventionalists should not assume that the norms governing our noncommercial commitments either do or should govern our commercial ones.[26] Of course, given that the extralegal norms of commercial practice can come apart from the law governing commercial contracts, the possibility of problematic divergence persists.[27] However, while this is possible, it is not established merely by pointing to differences between certain features of contract law and the more familiar norms of everyday life governing noncommercial spaces.[28]

III. THE MORAL IMPACT OF BANKRUPTCY AND ASSIGNMENT

The argument of the preceding section did not assume that either assignment or bankruptcy modifies the moral obligations incurred on

26. I do not mean to suggest that the application of contract law is restricted to commercial transactions (even broadly construed), though this is certainly its central sphere of operation. Indeed, I am open to the possibility that Shiffrin's criticism of contract law has bite with respect to the (narrow and controversial) class of enforceable social and domestic agreements.

27. For fascinating discussion (and brilliant writing) on this point, see Llewellyn, "What Price Contract?," 722–24 n. 45.

28. In generous personal correspondence, Shiffrin has encouraged a reply in print to the proposal that bankruptcy's discharge falls within the scope of the exception that she draws in her article for features of contract law that, while diverging from the norms of promissory morality, can be justified by "distinctively legal normative arguments," that is, by "a moral argument whose range is specifically tailored to the special, normatively salient properties of law and its appropriate content and shape" (Shiffrin, "Divergence of Contract and Promise," 733). Although I find it difficult to engage with Shiffrin's proposal in light of the highly general characterization of the exceptional category (a difficulty unalleviated by Shiffrin's own examples, which only serve to cast doubt that she will be able to answer the challenge I shall raise), I will canvas several explanatory burdens that Shiffrin must meet, should she wish to pursue the proposal in earnest. First, since Shiffrin evidently does not believe that the pursuit of a flourishing economy qualifies as "a distinctively legal normative argument" in favor of a contract doctrine, she must take care to supply a principle that would underwrite the distinctions that she wishes to draw. Second, since Shiffrin presumably would not wish to say that an otherwise problematic divergence falls within the scope of her exception whenever a contract doctrine is serving an egalitarian goal, she must explain precisely which features of the discharge are relevant. And in so doing, Shiffrin must take into account the following important fact: while nobody with access to the novels of Charles Dickens can seriously deny that the predicament of debtors in a social and legal order can amount to an injustice, it hardly follows (given that debt relief can assume so many forms) that there is a strict requirement of justice to provide for a permanent discharge in bankruptcy. Perhaps Shiffrin can meet these burdens; until that time, it is incumbent on us not to flinch in our assessment of her position. It is a significant fact that the best way of pursuing a wide range of desirable progressive goals might involve developments to the law of contracts that diverge sharply from deeply ingrained norms governing spaces such as the playground or even the faculty lounge. Accordingly, it is fair to say and important to recognize that, whatever her intentions, Shiffrin is a lawyer-philosopher who might be fruitfully retained by anyone yearning for a renewal of Lochner-era jurisprudence.

account of a promise. However, we may now turn to considering such moral impact, as well as its significance for long-standing debates about the conventional status of the norms governing promising. Before doing so, let us distinguish between two versions of conventionalism about promising. On the weaker version (*count-as conventionalism*), while prevailing promising conventions determine whether one has made a promise to Φ, the normative effects of one's promise are entirely determined by nonconventional principles governing promising. In particular, the fact that the social rule recognizes certain defeaters, excusing conditions, or deontic operations (and this might include forms of debtor relief, as well as provisions related to the assignment of rights and delegation of duties) will only affect the obligations indirectly, insofar as they affect the proper characterization of the promised performance. By contrast, *thoroughgoing conventionalism*, which will be the version defended in this section, points to the prevailing social rule of promising not only to determine the content of one's undertaking but also to determine, subject to moral constraints, the scope of one's promissory obligations. Specifically, the *thoroughgoing conventionalist* identifies the making of a promise with the triggering of a social rule of promising, a social rule that partially determines—subject to moral constraints—the scope of one's promissory obligations.[29]

To reiterate, the anticonventionalist about promising does recognize a significant role for social context in the determination that some

29. We may further characterize (what I have dubbed) thoroughgoing conventionalism by building on the pithy summary of Neil MacCormick, a well-known opponent of the view: "Promising, it is said [by Rawls], can be analyzed as a speech act in an intelligible way only if it is observed that particular promissory utterances essentially 'count as' promises only because they are . . . recognized as instances of a social 'practice', or 'institution'. The act presupposes the practice; the practice is rule-defined in that widely recognized social rules exist under which if any person S says to another A 'I promise that I shall Φ' it becomes obligatory upon S to Φ, unless he can point to some . . . excusing circumstance which either exceptionally negates the existence of the promise or excuses him from his obligation under it. *The conditions of . . . excuse are themselves defined by existing social rules*, which are no doubt constantly evolving and being further refined and developed by the usages of persons in society. . . . What has to be morally justified is the . . . practice, not the judgment that performance of this or that promise is prima facie obligatory." Neil MacCormick, "Voluntary Obligations and Normative Powers I," *Supplement to the Proceedings of The Aristotelian Society* 46 (1972): 59–78, 60–61 (emphasis added). Two caveats are in order: first, if MacCormick intended to single out a particular promissory formula ("'I promise . . .'"), then the definition is obviously too narrow. A thoroughgoing conventionalist should more clearly identify the act of promising with the triggering of a social rule of promising and then provide an account of that class of social rules that does not appeal to the notion of promising. (I provide such a characterization of social rules of promising in Jed Lewinsohn, "The 'Natural Unintelligibility' of Normative Powers" [unpublished manuscript].) Second, as noted above, "excusing conditions" are hardly the only operations on rights or duties that may figure in social rules of promising.

behavior constitutes a commitment to perform some act. In light of a rich history of interaction, an exchange of meaningful gestures between intimates might communicate a complex commitment—for example, that after this drink we will leave the party and head home. Similarly, more broadly shared social expectations can obviously help determine the content of a promise, as when my promise to pick up someone's children from a music recital implies a commitment to drop them off at their home and not at the military recruitment center. This sort of context-sensitivity is common ground between anticonventionalists and conventionalists.[30] My main goal in this section is to show that the context-sensitivity of promissory morality extends beyond this and that only thoroughgoing conventionalists have the resources to accommodate its full extent. In particular, I will show that anticonventionalists about promising lack the resources to account for two basic judgments about the effects of assignment and discharge on (morally binding) claim-rights arising from promises in commercial contexts: first, that we are not, in general, obligated to satisfy the unpaid balance of such claims once they have been discharged in bankruptcy; second, that the transfer of such a claim can be morally binding in that it can endow the transferee with a morally binding claim-right against the promisor.[31]

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Let us continue to assume, with Shiffrin, that the law of contracts imbues some subset of interpersonal commitments (promises, in a broad sense of the term) with legal significance. In light of this relation between contract and promise, one may wonder about the effect of discharge on

30. Thomson, e.g., emphasizes that her anticonventionalist view "is compatible with saying that social understandings do figure in what goes on in and around a promise. . . . It may be unclear from a promisor's words exactly what is promised, and here an appeal to social understandings may be made in order to settle the matter." Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 304. Similarly, Shiffrin writes that "nonconventionalists agree that many features of promising have conventional components that are not intrinsically morally significant—including which words, gestures, or conditions of silence create commitments" (Shiffrin, "Promising, Intimate Relationships, and Conventionalism," 484).

31. Although I have little doubt that most readers will come to share these "intuitions" in due course, it is perhaps worth flagging that the value of the analysis in this section does not depend on them. For if a nonconventionalist disputes these intuitions—that is, if they hold that the practices of contractual assignment and bankruptcy do not (and cannot) have the moral impact that I claim—they can then appeal to my analysis to defend their intuitions. In other words, notwithstanding the dialectical framing of this article, conventionalists and nonconventionalists alike share the common interest in determining how moral principles related to promissory commitments between two parties interact with practices such as contractual assignment and bankruptcy. More generally, the question of how far the notion of "privity" can be stretched in an economy of indirect and long-distance contacts is of great practical and theoretical significance quite apart from debates about conventionalism.

the corresponding moral obligations. In considering the question, we must look past ancillary considerations, such as a particular creditor's financial hardship, or some (benighted) ideal of self-sufficiency that is at odds with tendering anything less than "full payment" for services received. The question is whether the creditor has a legitimate grievance on account of the unpaid portion of the discharged debt. If the bankruptcy process works as designed, and a debtor gets back on his feet sometime later, is he obligated to use newly disposable income to pay the unpaid balance of the discharged debts? It is my own sense (subject to provisos registered below) that the debtor's purely commercial obligations—whether owed to his lawyer, hair salon, hospital, or general contractor—do not continue to bind in morality, whereas discharged debts that originated in the context of family or other significant personal relationships, or some other noncommercial transaction with gift components, still impose genuine obligations.[32]

The conventionalist can explain this judgment by appealing to a multiplicity of promissory norms governing different domains of social interaction. It is the action of the bankruptcy court, and the significance accorded to it by prevailing commercial practice, that explains the extinguishment of one's extralegal obligations as a result of bankruptcy's discharge, and not the condition of insolvency in conjunction with a nonconventional principle of promising.[33] Of course, to deny that the operations of a bankruptcy court reflect a natural morality of promising is not to say that the values that animate it are creations of a particular legal institution. Bankruptcy's discharge, in particular, arguably gives expression

32. It is not uncommon for "social and domestic agreements" to technically satisfy the conditions for contractual liability. (In the United States, there is no "legal-intent" requirement, and an interest-free loan satisfies the consideration requirement.) Accordingly, a debtor undergoing a bankruptcy proceeding, which involves the liquidation of her assets, may opt to include in the process friends and family to whom she owes money, even if the parties would not have otherwise contemplated litigation.

33. Of course, it is a contingent matter whether the prevailing social norms of any transactional context are sensitive to the discharge of a bankruptcy court, and some variation across industries should be expected. For an example of an industry-wide opt-out (from US bankruptcy law), see Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," *Journal of Legal Studies* 21 (1992): 115–57, 128. (It may be noted in passing that, given this element of contingency, even if my project were an interpretive one [it is not], the "moral consideration" doctrine, as applied to discharged debts, would cause no serious difficulty, especially in relation to certain periods and places.) Finally, it would be a mistake to assume that bankruptcy laws are always incorporated (when they are) by a blanket provision that conditions performance on legal enforceability. Reference to the law is often more fine-grained than this, incorporating certain features of the law while neglecting others. See, e.g., Stewart Macaulay, "Noncontractual Relations in Business: A Preliminary Study," *American Sociological Review* 28 (1963): 55–67.

to the ideal that debtors ought not be bound to their creditors, without any mode of relief, in perpetuity.[34] This ideal has certainly found expression in a wide range of times and places and has been the animating force behind institutions as varied as the biblical Sabbatical and medieval English debtor sanctuaries. Still, it hardly follows from the attractiveness of the ideal that bankruptcy's discharge simply mirrors a nonconventional moral principle, according to which a debtor's commercial debts are automatically extinguished upon the debtor's insolvency and liquidation of assets. Just as there might be good reasons to create the limited liability company and a tax system with a certain structure, so too there may be good reasons to institute bankruptcy's discharge. However, these are reasons for the creation of a legal institution, and not reasons that apply to commercial debtors and creditors merely in virtue of insolvency and the liquidation of assets.[35]

As with bankruptcy, the practice of assignment can impact the moral rights and obligations generated by promises. Just as a bankruptcy discharge can absolve a debtor of a moral obligation, so too a promisor can become morally bound to a transferee to whom she promised nothing. In saying this, I do not mean to make any claims about what is currently owed to any existing financial institution that may have snapped up your mortgage on a secondary market. Consider, instead, what is

34. This is hardly the only possibility. For a rich historical account, see John C. McCoid II, "Discharge: The Most Important Development in Bankruptcy History," *American Bankruptcy Law Journal* 70 (1996): 163–94.

35. In a valuable recent discussion, Liam Murphy claims that there is an "important difference between bankruptcy, on the one hand, and contract and property on the other. For there is not only no moral order of bankruptcy, there is no [nonlegal] conventional morality or *any kind of non-legal social practice of bankruptcy either.* Bankruptcy is a legal order and only a legal order." Liam Murphy, "The Artificial Morality of Private Law: The Persistence of an Illusion," *University of Toronto Law Journal* 70 (2020): 453–88, 479 (emphasis added). Three remarks about this claim are in order. First, Murphy's claim about bankruptcy is at odds with Lisa Bernstein's aforementioned study of the "club" of NYC diamond dealers, where she observes that their "bankruptcy rules and procedures do not supplant civil bankruptcy law; *they provide instead a parallel set of* [nonlegal] *rules that are mandatory for club members*," and which she refers to as "private bankruptcy rules" that diverge sharply in content from US bankruptcy law (e.g., in not providing for a discharge). Bernstein, "Opting Out of the Legal System," 128 (emphasis added). Second, regardless of whether there are extralegal bankruptcy practices, we shall see shortly that contractual assignment has, historically, fallen on the "contract and property" side of Murphy's divide and in fact has its origins outside of the law. Finally, it is important not to confuse Murphy's distinction with the equally significant distinction concerning whether or not the law of a given domain of social interaction invokes a nonlegal rule-governed practice covering the very same domain. With respect to the latter divide, the law of contract and property would arguably fall on opposite sides: for the law of contract piggybacks on (and presupposes) the nonlegal practice of making promises and entering into agreements, whereas property law does not generally piggyback in the same way on ownership rights that are conferred by customary property regimes.

perhaps a purer case of a community of merchants engaged in business as usual among themselves. (We may think of merchants of long ago—in Venice, Amsterdam, or Bruges—and their homegrown mercantile practices, not yet recognized by the legal system of any state, allowing for the routine transfer of debts.[36]) We may suppose that all the merchants know about the transferability of (certain) claim-rights in advance of conferring them. In such circumstances, a promisor who fails to satisfy the transferee's claim without justification would wrong the transferee no less than he would have wronged the seller (promisee) if there had been no transfer and the promisor had withheld payment.[37] Put differently, if a merchant ~~who~~, in the course of doing business, voluntarily confers a transferable claim-right—more exactly, a claim-right deemed by the community of merchants to be transferable—it would be obtuse to hold that whether the holder of the claim has been morally wronged by the promisor's subsequent breach turns solely on whether the holder was the first to hold the claim or the third.[38] In particular, the obligation owed to the transferee in these circumstances bears all the signs of "directedness" even though the promisor has never looked the transferee in the eyes or addressed

36. "It is significant that the first free transferability, that of bills of exchange, developed among merchants *apart from law proper*" (Llewellyn, "What Price Contract?," 721; emphasis in the original). For an authoritative (and fascinating) historical treatment that emphasizes the role of extralegal commercial practices, see Rogers, *Early History of the Law of Bills and Notes*.

37. Two remarks: First, it is worth noting that (as I shall explain below, in the context of "general offers") the relationship between promisor and promisee may be radically impersonal. Second, the above formulation allows me to sidestep questions concerning the general conditions of a morally binding promising practice. If there are conditions that are not met (e.g., concerning distributive justice), then the promise will be (morally) void ab initio. The formulation also allows me to avoid taking a position on whether the right of a "good faith transferee" can ever be stronger than that of the promisee, as when a seller of goods extracts a promise (to pay the purchase price) from a buyer through a fraudulent misrepresentation of the quality of the merchandise. In this connection, it should be noted that US law grants favorable treatment to the good faith holder of a "negotiable instrument," a notable creature of transfer that deserves mention on the ground that it allows contractual rights to more perfectly perform the function of money. When somebody issues a negotiable instrument in the course of some transaction—for example, when somebody pays for merchandise by delivering a "pay to bearer" note that satisfies a number of legal formalities—they incur an obligation that is in some sense grounded in the transferable document itself. For a fascinating recounting (and critique) of the modern developments in this area, see Grant Gilmore, "The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman," *Georgia Law Review* 15 (1980–81): 605; see also Grant Gilmore, "Formalism and the Law of Negotiable Instruments," *Creighton Law Review* 13 (1979–80): 441–62; and James Stevens Rogers, *The End of Negotiable Instruments* (Oxford: Oxford University Press, 2011).

38. Of course, I do not mean to suggest that there are no differences between the first holder and the subsequent ones. For example, in the typical case, the promisor received something in exchange from the first holder (e.g., the seller of merchandise) but not from the third.

him by name—that is, the transferee to whom performance is owed may waive the promisor's obligation in advance of the scheduled performance or forgive the promisor's breach after the fact, may aptly resent a shirking promisor, and may be owed compensation or an apology from the promisor in the event of breach.[39] To be clear, my claim is not that merchants should adopt a norm allowing for transfer; rather, the claim is that once they have done so, it may be morally transformative in the manner I have described.[40]

Finally, let us distinguish between three types of transfer practices, two involving default rules and the third a mandatory rule. Under one default rule (*default assignable*), a promisor who confers a promissory right also thereby confers the power to transfer that right unless, at the time of the promise, the promisor fulfills special conditions sufficient for withholding the power to assign. Under a reversed default rule (*default non-assignable*), a promisor does not confer a power to assign unless they "opt in" by satisfying special conditions for conferring such a power. By opting in, the promisor gives the promisee the power to transfer the right to a third party without the promisor's (subsequent) consent. Finally, under a *mandatory* transfer regime, any promisor who confers a right also confers the power to assign it, and the promisor has no ability to avoid

39. In enumerating some of the hallmarks of directed obligation, I do not purport to offer an analysis. For a very insightful recent treatment, see Julian Jonker, "Directed Duties and Moral Repair," *Philosophers' Imprint* 20 (2020): 1–32; for a classic discussion, see Michael Thompson, "What Is It to Wrong Someone? A Puzzle about Justice," in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, ed. R. Jay Wallace et al. (Oxford: Clarendon, 2004), 333–84. Additionally, it is important to differentiate the above intuition from the distinct claim that the promisor has all-things-considered reason to satisfy the (conventional) claim of a transferee. In the absence of directed obligation, whether a promisor has all-things-considered reason to satisfy the (conventional) claims of a transferee arguably depends on considerations such as whether others would detect and imitate the promisor's breach (thereby potentially weakening a valuable practice) or whether the transferee is a "profligate debauchee" who "would receive harm [rather] than benefit from [payment]" (Hume, *Treatise of Human Nature*, 310). By contrast, the judgment that the transferee would be wronged does not generally depend on such considerations.

40. We may assume that the merchants did not, in general, make higher-order promises to honor the claims of transferees in all subsequent transactions. More generally, I assume that the attitudes and behavior in virtue of which social norms exist do not involve or entail promises to adhere to the norms. Although this assumption is standard, it has in effect been challenged by Margaret Gilbert, who has offered an account both of social norms and of promising in terms of joint commitment. See, generally, Margaret Gilbert, "Three Dogmas about Promising," in *Promises and Agreements*, ed. Hanoch Sheinman (Oxford: Oxford University Press, 2011), 80–108; Margaret Gilbert, "Obligation and Joint Commitment," *Utilitas* 11 (1999): 143–63; Margaret Gilbert, "Social Convention Revisited," *Topoi* 27 (2008): 5–16. For insightful discussion of Gilbert's views, see Jeffrey S. Helmreich, "The Bounds of Morality: Gilbert on Promissory Obligation," *ProtoSociology* 35 (2018): 217–34.

conferring such a power short of refraining from making the promise. The judgment registered regarding the possibility of incurring obligations to transferees is, I take it, insensitive to the distinction between these types of transfer practices. While the default assignable and mandatory regimes may lead to concerns about whether a given promisor knowingly or voluntarily conferred the power to assign, these concerns may be overcome in particular transactional contexts.[41]

A. Accommodationist Strategies

Strategy 1: Promissory incorporation.—One anticonventionalist strategy for accommodating the moral judgments is to simply deny that the cases of assignment and bankruptcy differ at a fundamental level from the earlier examples involving the carpool from the music recital or the exchange of glances between intimates. In societies with bankruptcy regimes and transfer practices, it belongs to the mutual understanding of parties to commercial agreements that the rights and obligations that emerge from those agreements are assignable and dischargeable in bankruptcy. Due to this understanding, both features are incorporated into the content of the promise and belong to the characterization of the promised performance. Properly understood, the promise is to pay you, or a transferee, X dollars, subject to modification by a bankruptcy court.[42]

Starting with bankruptcy, we may begin evaluating this strategy by observing a close connection between a promise to Φ and the expression of an intention to Φ. While it is generally agreed that the expression of intention does not entail the corresponding promise, it is widely held that the promise entails the (sincere or insincere) expression of the corresponding intention. With most action theorists who have considered

41. In the case of the mandatory regime, it certainly does not follow from the fact that a promisor lacked the option to confer the claim-right without also conferring the assignment power that the promisor's conferral of the assignment power was involuntary.

42. Scanlon allows for "the possibility" that "the expression 'I promise' . . . conveys specific terms and conditions, which do not derive from general moral principles of the kind I have been discussing but are part of our particular social practice of promising." T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 309. In the contract literature, Richard Craswell has advanced the thesis that the rules of a practice are incorporated into the content of the promissor's commitment: "In a nutshell, the fidelity principle is consistent with any set of background rules because those rules merely fill out the details of what it is a person has to remain faithful to, or what a person's prior commitment is deemed to be. Thus, while fidelity may dictate that a promisor must live up to the obligations described by any set of background rules the law has adopted, it cannot guide the legal system in deciding which background rules to adopt in the first place." Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising," *Michigan Law Review* 88 (1989): 489–529, 490. For the fidelity principle as ground of contractual obligation, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1982).

the question, I shall assume that "there is in general a difference between intending X on the assumption that p, and conditionally intending X if p."[43] In the former case, where the intention is unconditional but formed on the basis of an assumption, a failure of the assumption may well lead the agent to change plans. For example, Abe, keen to acquire a better understanding of the concept of "negative capability," forms an intention to attend a Keats reading group the following day; having formed the intention on the assumption that no close relative would unexpectedly perish in the meantime, he withdraws it after receiving some unexpected bad news. By contrast, in the presence of grave illness, Abe's plans may have been conditional all along: Abe intends to join in the reading group unless mother takes a turn for the worse, say. If the worst occurs, Abe's failure to join in the group involves neither a change in plans nor the withdrawal of an intention that was conditional from the start. To be sure, there is a sense in which it is true in both cases that Abe (as well as his audience, if Abe expressed his intention) understood from the start both that he would not join in the reading group in the event of a death in the family and that he would be justified in his failure to show. However, we cannot infer from such "an understanding" that the relevant condition is internal to the intention in the manner of a condition.

This distinction between assumptions and conditions applies as much to promises as it does to intentions. This follows from the widely held view concerning the relation between promises and expressions of intention, but also from more straightforwardly normative considerations. Indeed, there is a normatively significant distinction between breach and nonbreach that tracks the distinction between assumptions and conditions. If Abe made a promise corresponding to the unconditional intention (i.e., he promised to attend the next session of the Keats group), the failure of the assumption (that there would not be a sudden death in the family) might justify or excuse breach but does not constitute fulfillment of the promise.[44] Indeed, with an eye toward such cases, philosophers frequently posit a "residue" of secondary duties that are said to arise in connection with even justified breaches—for example, duties to compensate the promisee after the fact, or at least to apologize.[45] By

43. Michael Bratman, "I Intend That We J," in *Faces of Intention* (Cambridge: Cambridge University Press, 1999), 142–62, 158.

44. Even here, what justifies the breach is presumably the tragedy itself (and its effects), and not the failure of an assumption that the tragedy would not occur. There is a further question of whether the morality of promising includes something akin to the legal doctrine of force majeure—an unforeseen and dramatic change in circumstances not due to actions by the parties that frees parties from liability. However, it bears noting that (as a matter of law, at least) the change must be more dramatic than merely suffering an unexpected financial downturn.

45. See, e.g., Thomson, *Realm of Rights*, 85–103; Bernard Williams, "Ethical Consistency," in *Problems of the Self* (Cambridge: Cambridge University Press, 1973), 172–77.

contrast, there is no breach (and therefore no secondary duties triggered by breach) when the agreement made allowance for the contingency in the form of a condition.

The intuition that requires explanation is that a discharge in bankruptcy absolves the honest debtor of further responsibility with respect to their discharged commercial debts (again, subject to provisos to be discussed below). There is no breach, as well as no secondary duties, when such a debtor fails to pay the unpaid balance. The incorporation strategy could explain this when (and only when) the relevant contingency takes the form of a condition rather than an assumption. It is in part an empirical question how many commercial agreements should be construed in one way rather than the other. Just as many people assume that tragedy will not strike when they go about planning their day, even when they know that they would change their plans if it does, so too (one suspects) many parties to agreements assume that they will be able to fulfill their commitments, even when they know that they would have recourse to bankruptcy in the event of an unexpected downturn. But this is just an empirical hunch, and one that I need not rely on.[46] Regardless of how many actual agreements fall into either category, what is crucial is that the intuition in question is not sensitive to the distinction between assumptions and conditions. That is, it makes no difference, with respect to the moral impact of bankruptcy, whether the contingency at issue ("unless bankruptcy intervenes") was understood in the manner of an assumption or in the manner of a condition. In either case, if the transaction was commercial and the practice provided for bankruptcy, then the debtor is off the hook with respect to the discharged obligations.

In the case of assignment, there is further reason to doubt that the normative effects of transfer can be accounted for by suitably enriching the content of the promise. To be sure, the terms of an agreement can be designed to mirror assignment as far as the required performance is concerned. Suppose I promised Smith to pay her a certain sum; after a transfer, I am under an obligation to make the same payment to Jones, the transferee. Let us suppose, further, that the transfer was achieved by the satisfaction of certain conditions, be it the transfer of a written instrument or a communicative act. In the absence of distinctive norms allowing for transfer, there is nothing preventing me from promising Smith that I

46. The empirical conjecture is weaker than, but in the same spirit as, the claim of Chief Justice John Marshall in his sole dissenting opinion (joined by Justice Story): "It is not, we think, true that contracts are entered into in contemplation of the insolvency of the [promisor]. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if ever suspected, provision is made for it, by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract." Ogden v. Saunders, 25 U.S. 213 (1827).

will pay the sum to whoever satisfies the relevant conditions. But this gambit, which succeeds in ensuring that the transfer leaves unchanged the content of the promissory obligation, does not account for the full panoply of assignment's effects. For, as noted, the transfer of rights can affect not only the performance that is owed but also the identity of the rightholder; that is, the transfer alters the identity of the party that would be wronged if performance were withheld. And no mere manipulation of the terms of the agreement can explain how, after the transfer, I owe it to Jones, and not to Smith, that I fulfill those terms.

I have so far assumed that we cannot say of each successive transferee that they are a recipient of the promisor's promise. In distinguishing between the promisee and the transferee, I follow the law's own characterization, as well as the ordinary language of commerce. Nevertheless, the relevant question is not whether it would strain ordinary language to say that the promisor made a promise to each successive transferee, but whether the conditions sufficient for incurring a directed obligation, by the lights of some (putative) nonconventional moral principle—promissory or otherwise—would be satisfied by the relation between promisor and transferee.

In considering this question, I am assuming that the nonconventionalist cannot appeal to a moral principle that directly provides for the transferability of promissory rights in commercial contexts. The reason I assume that there is no such transfer provision in (putative) nonconventional promising principles is that positing such a provision would be highly counterintuitive. As I have already observed, in the noncommercial realm the notion of assigning promissory rights is currently unheard of. Whether or not there are reasons to change our practices, nobody thinks that promisees enjoy a power to transfer in the absence of a transfer practice. And this is true, I contend, not only in personal contexts but in commercial ones as well. Indeed, we may observe that the same is true of bankruptcy. Even in the commercial realm, in the absence of a bankruptcy practice, mere insolvency, together with the liquidation of assets, would not extinguish the remaining balance of a debt. Accordingly, even if nonconventional principles could somehow pick out the commercial domain, the transferability of promissory rights, as well as their susceptibility to discharge, would still be dependent on the existence of the practices of assignment and bankruptcy.[47]

47. It was for this reason that I said, in n. 3, that nothing turns on the issue of whether a natural morality has the resources to demarcate the commercial domain. Additionally, it should be noted that the accommodation strategy considered and rejected in this paragraph (call it "nonconventional fragmentation") constitutes an accommodation strategy distinct from the other strategies considered in this section. (Perhaps I am mistaken, but I do not consider it a serious enough contender to warrant extended discussion.)

Let us return, then, to the question of whether, against the background of a transfer practice, nonconventional moral principles may explain a moral obligation owed to a transferee. If a promisor, invoking the rules of a prevailing practice, invests the promisee with an assignment power, then an informed promisor knows that there may be some third party who may come to rely on the promisor's performance (e.g., by giving up something of value to acquire the right). But such knowledge is hardly unique to transfer and does not in general suffice to create a relation of directed obligation. As I will show, if such knowledge were sufficient to obligate the promisor to the transferee, this not only would entail that promisors owe directed obligations to "intended third-party beneficiaries" but also, more problematically, would extend to the much wider class of cases where it is merely foreseeable that someone might come to rely on the promisor's performance.[48] If I am hired by Jones to babysit his children on a given evening, it might well be foreseeable, or even known in advance, that Jones will proceed to make plans with others, plans that may well depend for their fruition on my reporting for duty. Yet, despite such foreknowledge, my promissory obligation is owed to Jones, and not to any of Jones's companions who rely on me at their peril.[49]

To be sure, we must not overstate the degree of acquaintance—social or cognitive—that is required to incur a promissory obligation to someone. By means of "general offers"—conditional promises extended to members of the public at large—I may succeed in binding myself to someone by publishing an ad in a newspaper or by shouting from a rooftop. To the extent that a promisor must be able to entertain thoughts about a promisee as a condition of promising, such a condition may be met by descriptions as thin as "whoever may be listening." Since a practice that recognizes transfer will also recognize conditions for (effective) transfer, these conditions can in turn serve as the basis on which the promisor may latch onto a transferee in thought or in talk. While this is a rather slender basis for binding oneself to another, it is no more slender

48. The third-party beneficiary cases are problems if one assumes the traditional view, according to which a promisor owes a (moral) obligation to the promisee, but not to an intended third-party beneficiary. H. L. A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955): 175–91, 180. While Nico Cornell has recently challenged the traditional view by holding that the intended third-party beneficiary is wronged upon breach, even he concedes that the promisor is not under an obligation owed to the third party. Nico Cornell, "Wrongs, Rights, and Third Parties," *Philosophy and Public Affairs* 43 (2015): 75–173, 117.

49. Even if the babysitter does not stand in a relation of promissory obligation to Jones's companions, it is possible that he still owes them something in virtue of foreseeably arousing their expectations in circumstances where they may rely. My argument depends only on the uncontroversial view that if the babysitter owes anything to such third parties, the obligation has a different deontic profile—that is, a difference in content or strength—than the obligation owed to the hiring party.

than whatever designators allow a stranded seafarer to bind herself to someone on shore by tossing a message in a bottle onto the open seas. Nevertheless, even if a more robust acquaintance with the promisee is no prerequisite to directed obligation, the fact remains that more is needed to create a relation of directed obligation than mere foreknowledge that someone (under whatever description) may come to make plans that depend on the promisor's performance.

Let us turn, then, to a leading nonconventional theory of promising—T. M. Scanlon's assurance theory—to see how it manages to restrict the scope of obligation, thereby excluding cases like the babysitter example. I choose this influential theory simply because, due to the relative weakness of its conditions, it has the best chance of establishing a relation of obligation between promisor and transferee.[50] According to Scanlon's "Principle F," if A intentionally provides B with wanted assurance that A will X (unless B consents to A's not X-ing), and B is successfully assured, then—absent B's consent or special justification, and provided that certain mutual knowledge conditions are met—A owes it to B to X.[51] Rather than evaluate this principle, I merely wish to highlight how it manages to confine the assurer's obligations. In order to trigger Scanlon's

50. In particular, the conditions of Scanlon's assurance theory are weaker than the most plausible reliance theory, which holds that one incurs an obligation when one gives somebody wanted assurance not merely that one will perform some act but that they may safely rely on one's performance. For relevant discussion (building on MacCormick's account), see Stephen R. Perry, "Protected Interests and Undertakings in the Law of Economic Negligence," *University of Toronto Law Journal* 42 (1992): 247, 281; Mark P. Gergen, "Negligent Misrepresentation as Contract," *California Law Review* 101 (2013): 953–1011, 953. Similarly, nonconventionalist normative power theories (most famously, Joseph Raz's theory) fail to establish a relation of obligation between promisor and transferee in a wider range of cases than the assurance theory. For such theories typically require successful communication of the undertaking, which is usually more difficult to establish than the corresponding assurance relation. (For different ways of characterizing the communicative act, see Lewinsohn, "'Natural Unintelligibility' of Normative Powers.") Likewise, Shiffrin's own nonconventionalist "rights-transfer" theory (to be distinguished from Benson's juridical conception) relies on a communicative act, which puts it in the same position (with respect to the problem at hand) as the normative power theory.

51. Scanlon, *What We Owe*, 304. Note that one may deny that this principle is the ground of promissory obligation, while still accepting that it is a valid moral principle. See, e.g., Michael Bratman, *Shared Agency* (Oxford: Oxford University Press, 2014), 110–11. I argue against the validity of the principle elsewhere. See Jed Lewinsohn, "Limited Assurance," *Philosophy and Public Affairs* 49 (2021): 275–89. I will take this opportunity to supplement the earlier article in one respect. While I claimed there that the distinguished line of expectation theories to which Scanlon's assurance theory belongs can be traced at least as far back as Bentham, I have since discovered that an expectation theory can arguably be attributed to Adam Smith ("That obligation to performance which arises from contract is founded on the reasonable expectation produced by a promise"; Adam Smith, *Lectures on Jurisprudence*, pt. 1, div. 3, sec. 9).

principle, it is not enough that A knowingly leads B to expect his performance; additionally, A must "act with the aim of providing this assurance" to B, and this must be mutually known by both parties. This aim requirement allows Scanlon to reach the right results in the cases considered earlier. It blocks an obligation owed to a third-party beneficiary, at least in cases in which it cannot be inferred by the third party that the agent acted with the aim of assuring her, and, more importantly, it explains why the babysitter stands in a different relation to the employer than to whoever else may have formed plans that depend on the babysitter's performance.[52]

The question, accordingly, is whether a generic transferee is in a position to infer that the promisor has acted with the aims required by the theory. Even without a transfer practice, a seller who would not accept payment in the form of untransferable credit might willingly part with her goods if a buyer were to make a general offer (in the newspaper, say) to give something of value to whoever possesses, at some future date, a certain transferable object (e.g., a certain handkerchief) currently in the possession of the seller. The suggestion, accordingly, is that the transactional background produced by a transfer practice can produce the same normative results as such a general offer, and it can do so by triggering the very same conditions of the same principle.[53]

The problem with this strategy is that the intuition regarding obligations owed to transferees is not sensitive to the distinction between the transfer practices considered earlier. And yet, as we will see, the strategy under consideration is effective only with respect to one transfer regime (at most). Let us start with the most favorable practice, default nonassignable, which requires that the promisor take certain steps, beyond those that confer the underlying claim-right, in order to confer the power to transfer. We may suppose that promisors have reason to satisfy such transfer conditions only if they are aiming to confer the power to transfer and that they will do so only if aiming to give the promisee the means of assuring third parties that the promisor will satisfy a transferee's claim. Given these (generous) assumptions, it can be inferred that the promisor

52. It is irrelevant for a Principle F analysis whether the babysitter can identify the particular third parties who may come to rely. On pain of implausibly excluding so-called general offers, Scanlon must hold that the assured party can be singled out by thin description (e.g., "whoever is listening") and also that the assurer can trigger Principle F even if she is initially uncertain whether she has successfully assured anyone of anything.

53. A similar strategy has been pursued to establish a relation of obligation between the originator of a "letter of credit" and third parties. Even when formally addressed only to the letter's recipient, Williston treats such letters as "a general offer addressed to anyone who will advance money upon the faith of it." See Samuel Williston, *The Law of Contracts*, 1st ed. (New York: Baker, Voorhis, 1920), sec. 32. Although I have not seen this strategy employed in the context of contractual assignment, it was first suggested to me by T. M. Scanlon in prepared remarks on an early draft of this article at Harvard Law School in 2015.

who conferred the transfer power aimed to give the promisee the means of assuring third parties that the promisor would satisfy the claim of a transferee.

Although it is tempting to conclude that this is enough to satisfy the conditions of Principle F, there is an obstacle that threatens this inference. To establish that the promisor aimed to give the promisee the means of assuring third parties that she (the promisor) would satisfy the claims of a transferee is not yet to establish that the promisor aimed to assure any third party of anything. A seller of lethal weapons may intend to give a purchaser the means of inflicting lethal harm without intending that the customer use the product to harm anything. Whether or not such a seller is culpable, we cannot infer, even if the weapons are good for one thing only, that the seller had the aim of hastening anyone's demise. The seller may have had the sole aim of receiving the purchase price and may even have harbored the hope that the buyer's criminal intention would somehow be frustrated. Similarly, a promisor may charge a fee for conferring the transfer power and may prefer that the conferred power remain unexercised. Still, when such a promisor does not honor the claim of a transferee, surely they have at least violated the spirit of Principle F. And since it would not be difficult to extend the principle to cover the case, we may grant that the assurance theory can account for an obligation owed to the transferee in a default nonassignable regime.[54]

The prospects for the incorporation strategy worsen considerably when we turn to the default assignable regime, where the very course of conduct that confers the right on the promisee also confers the power to transfer, unless the promisor takes certain (further) steps for withholding the power. If A intentionally provides B with a tool that is widely known to be good for one thing only—opening cans, say—then it can usually be inferred that A intentionally provided B with the means to open cans. While it still would not follow that A has acted with the aim of getting B to implement the tool, the claim that A intentionally provided B with the means to open cans is arguably still stronger than the claim that A knowingly did the same. However, if A intentionally provides B with a tool that is widely known to be good for two functions, then, absent further information about the transaction, it can at most be inferred, with respect to either function, that A knowingly provided B with the means of performing it; in particular, it cannot be inferred that A aimed to do so.

Where default assignable is the prevailing rule, the act of making a promise does two things that might each be of value to a promisee: the

54. This assumes that a contractualist analysis in terms of the relevant interests (the assurance interest, on the one side, and the interest in retaining the liberty to change one's mind, on the other) would license the extension. If this assumption fails, so much the worse for my (contractualist) opponent.

promisor confers a claim-right and also confers the power to transfer that right. Even if the value of the power can be reduced to the value of being able to assure third parties that the promisor will act in a certain way, the value of the claim-right obviously cannot. And, often enough, the right is what is wanted by a promisee, irrespective of the transfer power that may be conferred along the way. Since it does not follow from the promisor's failure to withhold the transfer power that the promisor aimed to confer the power—for the parties may simply not have cared enough to go through the steps of withholding the power—the most that can be inferred by a generic transferee is that the promisor knew that she was furnishing the promisee with the means of providing assurance to third parties regarding the promisor's conduct. Yet this falls short not only of the letter of Principle F but also of any assurance principle strong enough to rule out the cases that need to be excluded: not merely cases involving an intended beneficiary but all cases involving a foreseeable third party, under any description, who forms a plan that depends on the promisor's performance. Given the prevalence of interlocking webs of plans, it is only slight exaggeration to say that, in the default assignable regime (and, a fortiori, the mandatory regime), any assurance principle weak enough to let in a generic transferee would also grant entry to everyone in the village.

Strategy 2: Promissory denial.—Another accommodationist strategy is to deny that the rights at issue—that is, morally binding rights that are successfully extinguished by bankruptcy's discharge or bestowed upon a transferee—are the products of genuine promises. While such rights are the creatures of contract, they are not the products of genuine interpersonal commitments (promises), and where there was no promise to begin with, there is no impairment of an ensuing promissory obligation that needs to be explained.

In evaluating this strategy, everything turns on the word "contract." In 1931, Karl Llewellyn helpfully canvassed four definitions of the term that have (then and now) currency in ordinary life: "'Contract' itself is an ambiguous concept, ambiguous particularly when more is concerned than unmixed legal doctrine. (1) The word is used especially to indicate business agreements-in-fact, as such, irrespective of their legal consequences—irrespective indeed of whether they have legal consequences. . . . (2) Or the word is used to indicate agreements-in-fact with legal consequences . . . [e.g.,] barter and outright conveyance. (3) Again, the word indicates the legal effects . . . of promises . . . (4) [or] the writing embodying an agreement."[55] Llewellyn maintains that the third definition "has demonstrated to be singularly useful for the law," and many authorities deviate only slightly from this usage, reserving the term "contract" for promises

55. Llewellyn, "What Price Contract?," 707–8.

that are legally enforceable.[56] Thus, the highly influential *Restatement (Second) of Contracts* defines "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," and defines "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[57]

Llewellyn's third definition rules out by definitional fiat the possibility of contracts without promises. However, Llewellyn's second definition refers to a class of agreements-in-fact that are agreements to thereby modify the parties' legal rights and duties in various respects. While Llewellyn only considers under this heading agreements to thereby modify the parties' property rights (barter, conveyance, gift), one may wonder whether that class of agreements might be expanded to include agreements that confer on either party legal rights that are good not against the world (in the manner of property rights) but only against the counterparty in the transaction. We may introduce the term "contracts without commitment" to refer to such transactions that have the following feature: the parties incur legal obligations by satisfying conditions sufficient for the exercise of a legal power (whatever they may be) without satisfying the conditions sufficient for promising (whatever they may be). Accordingly, we may reformulate the promissory denial strategy as the position that holds that the relevant class of cases all involve contracts without commitments.

The first thing to note is that it is open to any given legal system to rule out the class of contract without commitment by fiat—that is, by requiring a promise as a condition of incurring contractual obligations (along the lines of the *Restatement (Second)*). Second, even if legal sources do not rule out the possibility, one's moral principles may substantially diminish, to the point of eliminating, the set of agreements that fall into this category. In particular, if one incurs a legal obligation to X as a way of assuring someone that one will X, then (provided that the counterparty is assured and the other conditions of Principle F are satisfied) one will have successfully generated an obligation by the lights of Scanlon's assurance theory. Since this would appear to include the greater number of broadly commercial agreements, the strategy of promissory denial is not viable for proponents of the assurance theory.

Third, even if the possibility of contracts without commitments is left open both by the legal authorities and by one's theory of promissory obligation, it is a deep, albeit contingent, fact that parties (in all contexts,

56. Ibid.

57. *Restatement (Second) of Contracts*, sec. 1, 2 (1981).

including commercial) often have reason to want more by way of assurance than mere legal obligation. This is due in large part to the various costs associated with legal enforcement; however, even if one's counterparty is known to be intrinsically motivated to obey the law, one still often has reason to want more than a legal obligation. For there is often a "difference in content between the running, flexible [extralegal] obligation understood in fact by the parties and the rigid, stereotyped obligation which is all the law will recognize."[58] If Llewellyn is correct that commercial actors often have reasons to want assurances that are resistant to a legal rendering, then it is no surprise that commercial agreements routinely involve genuine commitments.

Finally, promissory denial is vulnerable to straightforward counterexample. Few would question that in hiring an independent accountant or attorney to help prepare one's taxes, say, one ordinarily commits to paying the agreed-upon fee for the service. And yet if the client's insolvency and bankruptcy were to intervene before payment is made, few would recognize a persisting moral obligation to pay the tax advisor the unpaid balance of the discharged debt, at least when the following conditions obtained at the time of agreement: the advisor had (or should have had) general knowledge of the rules of bankruptcy and the risks of insolvency, the client had no knowledge of her impending insolvency, and the dealings between the parties occurred at arm's length.[59] Given these assumptions, if the client does not satisfy the discharged debt once her financial situation improves, she cannot be accused of thereby violating the advisor's rights, legal or otherwise.[60]

58. Llewellyn, "What Price Contract?," 712–13. An economic literature investigates the conditions under which rational parties would favor informal enforcement mechanisms. See, e.g., Ronald J. Gilson, Charles F. Sabel, and Robert E. Scott, "Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine," *Columbia Law Review* 110 (2010): 1377–1447.

59. Note that the fulfillment of these conditions does not entail that the risk of bankruptcy was priced into the terms of the contract. More importantly, even if the risk is priced in, it doesn't follow from this fact alone that the moral obligation is extinguished if the risk materializes. After all, where collection costs are high or monitoring difficult, the risk that a solvent promisor may fail to perform may also be priced in.

60. Four clarifications about this case: (1) I use the example of a tax advisor only because the "general knowledge" condition is so obviously satisfied. (2) It is, to reiterate, a contingent matter whether the (extralegal) commercial norms of a given transactional context recognize bankruptcy's discharge. See n. 33. (3) I do not deny that it might be within the realm of "normal" for the client to apologize for his failure to pay the discharged debt. However, an apology would be no less easy to imagine when a promisor expressly conditioned performance on the nonoccurrence of an unlikely event that in fact occurs ("I'm really sorry, I know you had been looking forward to the concert and had planned around it, but Jones somehow came up with the money, and as I told you . . ."). In particular, borrowing Helmreich's remarks concerning a different case, the client "need not act on or express the idea—essential to genuine apologies, for example, or pleas for forgiveness—that

The grain of truth in promissory denial is that commercial commitments do have a different character (and feel) than commitments in other domains. However, it hardly follows from this that commercial agreements do not qualify as bona fide commitments. As I have emphasized throughout, such context-sensitivity is to be expected if promissory norms are creatures of convention.

Strategy 3: Conventional grafting.—The final strategy to be considered is a hybrid view that recognizes a nonconventional basis for the obligation owed to the promisee and a conventional basis for the obligation owed to the transferee. According to this view, when a promisee transfers a claim-right, she at once waives her nonconventional right to performance while also conferring on the transferee a corresponding conventional claim against the promisor. Underlying this account is the plausible idea that although a conventional scheme cannot take away from our nonconventional duties by fiat alone, it may succeed in (morally) obligating us in cases where we were previously under no such obligation.

The first thing to say is that if this strategy of conventional grafting has any force at all, it is only with respect to assignment; to the extent that bankruptcy's discharge subtracts from our obligations, this cannot be explained by grafting, on the basic assumption that legal authorities cannot extinguish a nonconventional obligation by fiat alone. The second shortcoming of this strategy is that it is incompatible with the central premise of the argument that, more than any other, is responsible for the resurgence of nonconventionalism about promising in recent decades. The argument in question was most influentially formulated by Scanlon and has subsequently been embraced by many prominent philosophers.[61] Scanlon claimed that a conventionalist theory cannot adequately capture the sense in which the obligations that are owed in virtue of promises are owed to the promisee in particular. However, as noted, when transfer is morally transformative, the obligation owed to the transferee has all the hallmark features of directedness. Accordingly, such an obligation can be

what he did was not acceptable, something he does not consider himself free to do." Helmreich, "Bounds of Morality," 222; see also Jeffrey S. Helmreich, "The Apologetic Stance," *Philosophy and Public Affairs* 43 (2015): 75–108, 93–96. (4) Finally, as with assignment (see n. 39), the judgment that the promisor does not owe the promisee the discharged balance of the obligation should (and can) be distinguished from the claim that the promisor does not have all-things-considered reason to satisfy the balance.

61. Scanlon, *What We Owe*, 316. Many others have endorsed Scanlon's claim that conventions cannot deliver directionality. See., e.g., Stephen Darwall, "Demystifying Promises," in *Promises and Agreements*, ed. Hanoch Sheinman (Oxford: Oxford University Press, 2011), 255–76; G. A. Cohen, *Lectures on the History of Moral and Political Philosophy* (Princeton, NJ: Princeton University Press, 2014), 134; Niko Kolodny and R. Jay Wallace, "Promises and Practices Revisited," *Philosophy and Public Affairs* 31 (2003): 119–54; Bernard Williams, *Truth and Truthfulness* (Princeton, NJ: Princeton University Press, 2002), 294.

the product of convention only if a conventional scheme can be a source of duties owed to particular individuals.[62]

IV. THE COMMODIFICATION OF RIGHTS AND THE VALUE OF FRIENDSHIP

While I have focused on the possibility of a morally transformative transfer practice, I now wish to consider the outer bounds of such a practice, where even a reversed default rule (*default nonassignable*) would make many of us recoil. As I have observed, the informality of a promising practice is no bar to assignment; as a matter of historical fact, assignment has its origins outside of the law. And yet there is a wholesome impulse to cringe when asked to contemplate even an informal transfer practice that would extend to promises made in the context of friendship or valuable personal relationships. The question I would like to consider is whether this resistance is supported by reasons.

One might decline the invitation to consider transfer in friendship by questioning the significance of promising for friendship. Since friendship is partly constituted by heightened care and concern and marked by beneficent dispositions, it is tempting to think that the need to extract promises from a friend (as a way of getting them to lend a helping hand, say) is an indication that the affection that fuels a friendship is in short supply. Indeed, one may go further and follow Hume in distinguishing "those two different sorts of" ways of providing goods and services, "the interested and the disinterested," and relegate promising to one side of this divide.[63] When one serves a friend, one does so out of care and concern; by contrast, when one serves someone beyond one's "narrow circle," someone in whom one takes no special interest, one does so as a

62. There is independent reason to reject Scanlon's argument about conventional norms and directed duties. Indeed, it is somewhat remarkable, given their other commitments, that nobody who has endorsed Scanlon's argument (Scanlon included) appears to have noticed that the argument straightforwardly generalizes to the case of (transferable) property rights. For when somebody enters your house, or even your yacht, without your permission (and without justification), then by ordinary lights they have wronged you in particular. Of course, such intuitions do not constitute an explanation of how conventions succeed in generating (directed) duties, and the same goes for the intuition concerning the claims of transferees against promisors considered above. While I take moral intuitions to constitute defeasible evidence for moral conclusions, they are of course no substitute for a general theory, which I shall provide in future work. (In the meantime, I refer the interested reader to the later essays of David Gauthier; see esp. David Gauthier, "Assure and Threaten," *Ethics* 104 [1994]: 690–721; and David Gauthier, "Friends, Reasons, and Morals," in *Rational Deliberation*, ed. Susan Dimock, Claire Finkelstein, and Christopher W. Morris [Oxford: Oxford University Press, 2022]. Although work remains to be done, nobody in recent times has come closer than Gauthier in making the case for the bindingness of practices and social rules.)

63. Hume, *Treatise of Human Nature*, 335.

means to procuring some "prospect of advantage." A promise, on this view, is the "form of words invented for . . . interested commerce . . . by which we bind ourselves to the performance of any action"—invented, in other words, as a means of facilitating mutually beneficial exchanges that might otherwise be thwarted owing to the absence of alternative bases for reliance.[64] In short, one might conclude from this that promises are for strangers who lack the care and concern that might supply a motive to serve, whereas friends have recourse to the "generous and noble" motives of love, reciprocity, and gratitude.

This view of the matter should be resisted. While there is indeed an important contrast to be drawn between "interested" and "disinterested" motives for service, this distinction applies as much to the different motives for committing to serve as it does to the service itself. While holding oneself out to another as a friend engenders expectations of a readiness to help in time of need and an interest in spending time together, these are general dispositions, and there is a question regarding the nature of the path connecting these dispositions with particular acts of friendship. Notwithstanding the philosopher's fantasy, it is most rare to find our friends drowning at sea, and our partiality in action is more typically manifested in the content of our plans regarding the future—our plans to help or spend time with our friends—than in the choices we make when we find ourselves in unanticipated situations. Our friendly dispositions and willingness to help are generally activated not by performing on a moment's notice but rather by making offers to interact in the future, or by answering requests to help or collaborate with commitments to do so.

Still, one may wonder, even if friendship routinely requires the formation of shared plans (to interact, collaborate, and so on), is it really essential to friendship that the parties not merely make such plans but also incur obligations to stick to them? Insofar as some shared plans leave each party with the prerogative to renege should they come to change their mind, could friends not manifest the dispositions characteristic of friendship by making plans such as these?[65] While such "plans without commitment" should be carefully distinguished from Llewellyn's "running and flexible" obligations, I need not insist that the former have no place in a friendship, as they would not undermine the importance of promising for friendship. We wish to help and spend time with our friends, and, given the need to plan ahead, this often requires making commitments in advance. For one thing, plans that do not bind are prime candidates for reconsideration in light of competing claims. Even if everybody

64. Ibid.

65. There has been controversy about whether there can be such plans without commitment. See, e.g., Margaret Gilbert, "What Is It for Us to Intend?," in *Sociality and Responsibility* (Lanham, MD: Rowman & Littlefield, 2000), 19–22; Bratman, *Shared Agency*, 107–20.

were to subordinate their own interests to those of each of their friends, ~~as,~~ friendship is neither exclusive nor transitive, and so, absent an obligation, one could expect a conscientious friend to cancel plans if given the opportunity to provide greater help or bring greater joy to their other friends. Additionally, given the possibility of disagreement concerning what would promote an individual's interests, even one who valued a certain friend above all else might well back out of a plan to interact with her in a certain way in the absence of an obligation to follow through.[66]

66. Shiffrin ("Promising, Intimate Relationships, and Conventionalism") has argued that promising is indispensable to valuable friendships on the grounds that it provides the means to overcome power imbalances. While everything I say is compatible with this claim, I, unlike Shiffrin, do not think that it lends any support at all to the view that promissory norms are nonconventional. Even if promising is essential for healthy friendships, the value of friendship no more establishes the nonconventionality of promising than does the value of literature establish the nonconventionality of language.

Moreover, Shiffrin substantially misrepresents Hume's conventionalist position when she writes that "on this theory, promises are inventions that we could have failed to invent and still gotten by morally, although perhaps less well and less efficiently" (Shiffrin, "Promising, Intimate Relationships, and Conventionalism," 498). For one cannot "get by morally" if one cannot "get by." And while Hume held that one cannot so much as make a promise in the absence of a promising convention, he could not have been clearer that such a convention is essential for society, which is in turn essential for human life and all valuable forms of it (calling it, along with a property convention, "inseparable from the species"; Hume, *Treatise of Human Nature*, 3.2.1, 311). Recognizing the general difficulty for her characterization of his position, Shiffrin attempts to downplay Hume's remarks about the necessity of promising for society by claiming that "what he seems to have in mind . . . is what is necessary [merely] for civil society . . . ; he is not advancing claims about what is necessary for morally decent interpersonal relationships" (Shiffrin, "Promising, Intimate Relationships, and Conventionalism," 499 n. 34). However, this interpretation is difficult to square with two notable contrasts drawn by Hume in the same part of the *Treatise*. First, he contrasts property and promising, on the one hand, with government, on the other: "But tho' it be possible for men to maintain a small uncultivated society without government, 'tis impossible they shou'd maintain a society *of any kind* without . . . the observance of those . . . fundamental laws concerning [property] *and the performance of promises*" (Hume, *Treatise of Human Nature*, 346–47; emphasis added). Indeed, given his view that society is necessary for human life ("'tis utterly impossible for men to remain any considerable time in that savage condition, which precedes society"), it follows that individual humans cannot expect to subsist in the absence of a promising convention (ibid., 316). And Hume makes this conclusion explicit when he draws the second of the aforementioned contrasts. Here, Hume compares the practice of promising with that of international agreements and offers the following explanation for why "a prince" who "violates any treaty" is less culpable, morally speaking, than a "private gentleman who breaks his word": "tho the intercourse of different states [facilitated by the practice of treaty-making] be advantageous, and even sometimes necessary, yet it is not so necessary nor advantageous as that among individuals [facilitated by the practice of promising], without which 'tis utterly impossible for human nature ever to subsist" (ibid., 363). Although I have myself criticized Hume for misconceiving the significance of promising for friendship (or, at least, for inviting such a misconception), this shortcoming should not lead us to distort his position. While Hume thought that the primary function of the

Moreover, even if we could give our friends some basis for relying on us without undertaking a promissory obligation, it is itself a mark of friendship to want to give them more—indeed, we often want to give our friends the kind of assurance that a promisor characteristically gives a promisee: even if our circumstances and attitudes should change (at least within wide limits, including fluctuations in one's patterns of affection), we can still be counted on to show up. For all of these reasons, commitments made to friends are, one might say, important and routine stations on the road from the friendly will to the friendly deed.[67]

A second way of shrugging off the invitation to consider a transfer practice that extends to promises issued between friends grants that promising is significant for friendship but denies that there are any reasons to institute a transfer practice in such contexts. The advantages of transferability in general stem largely (if not exclusively) from its capacity to supplement the money supply in an economy, and the transferability of the kind of commitments we make in the context of valuable personal relations would not (the argument goes) serve such ends. Even if this argument were correct, it would not answer the question raised by the possibility of extending our transfer practices into social and domestic spaces. It is one thing for a practice to be unsupported by reasons. It is

institution of promising is the facilitation of mutually advantageous transactions between nonintimates, he also thought that there could be no human life—and hence no morally decent intimate relationships—in the absence of an institution serving this function.

67. There is a second way of denying the significance of promising for friendship that should be mentioned: Montaigne held that obligation (including promissory obligation) has no place in a "perfect friendship"; however, this view fell out of a more general conception of such a relationship as a complete union of wills that precludes the application of any essentially interpersonal concepts (such as, in his view, the concept of obligation). "As I do not find myself obliged to myself for any service I do myself: so the union of such friends, being truly perfect, deprives them of all idea of such duties . . . [as well as] words of division and distinction, benefits, obligation, acknowledgment, entreaty, thanks, and the like. All things, wills, thoughts, opinions, goods, wives, children, honours, and lives, being in effect common betwixt them . . . they can neither lend nor give anything to one another." Montaigne, "Of Friendship," in *The Complete Essays of Montaigne*, trans. Donald M. Frame (Stanford, CA: Stanford University Press, 1958), 135–44. I doubt that this conception of even the closest of friendships carries great appeal, and even Montaigne thought that such perfect friendships are exclusive ("each one gives himself so entirely to his friend, that he has nothing left to distribute to others") and rare ("'tis much, if fortune bring it but once to pass in three ages"), contrasting them with those "ordinary and customary friendships," and urging the reader not to "confound the rules of the one and the other." The question of transfer under discussion concerns the "rules" of ordinary, noninstrumentally valuable friendship. (Incidentally, Montaigne's claim that obligation is an essentially interpersonal concept, i.e., that one cannot owe oneself anything, is defended by Seneca in an unjustly neglected discussion; Seneca, *On Benefits* [Chicago: University of Chicago Press, 2011], 118–23. For a rich recent discussion of related matters, see Richard Moran, *Exchange of Words* [Oxford: Oxford University Press, 2018], chap. 7.)

another thing for a practice to make us cringe. The task at hand is to explain the cringe.

And the argument is surely not correct. Allowing transfer in friendship would serve some of the same ends as commercial transfer practices, as well as some additional ones. Nobody can seriously maintain that the private sphere is devoid of commitments to performances that would be in high demand by third parties (who might therefore be willing to give something of value in exchange for the right to the performance). And unlike the commercial realm, where a promisor generally confers a power to transfer only if the promisee insists on it or because no one bothers to insert a nonassignment clause, the "friendly promisor" has an additional reason to consent to assignment, insofar as conferring such a power to their friend (i.e., the promisee) would redound to the latter's benefit. The very dispositions that lead friends to make promises to one another should counsel in favor of free transfer, at least where such transfer would make performance no more burdensome.

To be sure, even limited by a material burden condition, the promisee's power to assign would make a promisor more vulnerable to the promisee, who would be able to bind the promisor to a third party without the promisor's consent. However, vulnerability is a well-known feature of friendship, and it is not obvious why this instance would be beyond the pale. More importantly, we should reject any suggestion that the problem with transfer in friendship relates to the effects of transfer on the required performance. For a friendly promisor may unproblematically grant their friend the very same power over the required performance—for example, by promising to perform some service for whomever their friend designates. The promisee's exercise of such a "power to designate" affects the required performance in the same manner as would a transfer. And yet many would balk if asked to contemplate an informal practice that would empower a promisee to go further, by transferring the entitlement itself.

Finally, if the resistance to transfer in friendship stems from the risk that the promisee might transfer her right to a less accommodating third party, or to someone with whom the promisor would prefer not to interact, then either default regime would defuse the problem by enabling the promisor to take care of herself—that is, by giving her the means to avoid conferring the power when she was not willing to run this risk. And yet, notwithstanding these considerations, many of us would resist even those practices that merely enable promisors to empower their friends to assign promissory rights conferred out of friendship. If such resistance is warranted, it must be due to the transfer's effect on the relations of obligation.

By all accounts, the general dispositions characteristic of a valuable friendship—that is, the attraction, or desire to associate, that goes by the name of "liking" the other, as well as the care and concern that involve a desire to help—are among the features that both make a relationship a

friendship and make a friendship something worth having. In other words, such dispositions are constitutive elements of a friendship and do not merely inherit their value from the value of the activities they characteristically produce. If such dispositions of friendships (herein, "friendly motives" or "friendly dispositions") are noninstrumentally valuable, then it is but a short step to the conclusion that so are their manifestations in deed.[68] Whether this is due to general considerations about the transmission of value from dispositions to their manifestations or to considerations specific to friendship, it is undeniable that we value acts of friendship in part because they arise from friendly dispositions. This transmission of value would extend not only to the ultimate acts of friendship—to the acts of lending a hand, spending time together, and so on—but also to the commitments that, I have claimed, so often stand between the general dispositions and the ultimate acts. (Indeed, one might argue that they apply chiefly to those commitments; after all, when a friend shows up after committing to do so, they do not do so freely, but rather in fulfilment of an obligation that requires them to show up. By contrast, if they fulfill any obligation by making the commitment to show up, it is usually an imperfect one that did not require a commitment on that particular occasion.) Although such commitments constrain us, and thereby prevent us from pursuing other desirable courses of action, they themselves are valuable manifestations of the dispositions of friendship. What I propose is that it is this inherited value that justifies the resistance to the extension of a transfer practice to the domain of friendship.

Of course, not every promissory obligation owed to a friend is the result of friendly motives. When I make a purchase on an online platform that facilitates anonymous transactions and a friend happens to be the anonymous vender, the payment obligation does not issue from the dispositions of friendship. The impulse to recoil at a transfer practice in the sphere of friendship does not extend to transfers such as these, even if the identities of the parties are revealed after the sale. This is, I take it, some corroboration of the view that it is the fact that rights were conferred out of friendly motives that is the source of the resistance to transfer among friends. This view would also explain why it would not eliminate the problem to restrict the class of eligible transferees to the promisor's set of friends. For if someone incurs a promissory obligation out of friendly motives for the promisee, and the promisee proceeds to

68. While the step is short, it is not without complications. The difficulty concerns commitments to help or spend time with friends that should not have been made. Even if some such commitments are not valuable, it may nonetheless be appropriate for a practice to be guided by a presumption that commitments between friends were not made in error. In other cases, when the commitment is to perform an inherently heinous act, the practice should not recognize the force of the commitment in the first place; accordingly, such cases do not pose a special problem for the question of whether to allow transfer.

transfer her right, then even if the promisor and the transferee are friends, the ensuing relation of obligation owed to the transferee would not have issued from the dispositions constitutive of their friendship and so would not inherit their distinctive value.

More generally, while we often speak of a transferred promissory right as if it were an object that survives the transfer, such language masks the fact that a particular promissory right is one pole of a particular relation of obligation (i.e., a token state of affairs consisting of the instantiation of a relation type), which, like any other instantiation of a relation type, cannot survive a substitution of relata.[69] Properly conceived, the entitlements we confer on our friends, out of friendly motives, are not discrete modules that can be removed from one relationship and reinserted onto another without losing their distinctive value; rather, a transfer of a friendly entitlement involves the destruction of the original, noninstrumentally valuable relation of obligation, as well as its replacement by a relation that is devoid of such value.

Of course, it does not follow from the fact that there would be a loss of such value that we should not accept the loss when enough is at stake. How-ever, just as someone who properly values a valuable friendship would generally resist sacrificing the relationship in order to promote some other end (including another friendship), so too, perhaps, someone who prop-erly values a friendship would resist sacrificing the noninstrumentally val-uable components of the relationship as a way of getting something in ex-change or even of helping some other friend. Better still, just as material gifts offered in friendship are often taken to acquire a kind of value that routinely leads people to avoid selling them off at the marketplace, or even "regifting" them to other friends, so too —for precisely the same reasons—proper appreciation for the value of commitments made out of friendly motives gives people reason to recoil at the prospect of transferring the re-sulting entitlements to others. Indeed, I shall weaken my claim and merely affirm the conditional: if there is reason to avoid discarding a gift simply because it was given out of motives of friendship, then there is equally rea-son to avoid transferring an entitlement that resulted from a commitment made out of friendship.[70] In fact, there is some reason to think that trans-ferring the promissory right would be worse than transferring (as opposed to destroying) the gift, given that, as I have already noted, the relation of obligation, unlike a gold watch, would not survive the transfer. Of course, even when some uneasiness is felt, the unwillingness to discard the gifts of afriend, or even the friendship itself, is not absolute, and

69. Consider: if Ann marries Charles in the immediate aftermath of divorcing Bob, this is not enough to save her (first) marriage. And this is not just true of marriage.

70. Of course, if a gift consists in cash, then nobody thinks that the recipient improperly values the gift by exchanging it. In general, where it is commonly known that a recipient has reason to value a gift only as a medium of exchange, one can hardly object to its transfer (though in certain contexts some might object to the choice of gift!).

difficult choices may have to be made when circumstances are sufficiently dire. But to the extent that we can arrange our affairs in a way that allows us to avoid such choices, so much the better. Just as a market devoted to the sale of objects of sentimental value would be for many a site of sorrow, so too a market in rights conferred out of motives of friendship.[71]

I have suggested that the resistance to transfer in friendship is an intelligible response to the values at stake in the context of friendship. The conventionalist framework invites a socially sensitive inquiry, one that considers the bearing of conventional norms on the social contexts to which they apply. For the conventionalist maintains that the moral obligation to keep our promises is, at bottom, an obligation to conform to conventional promissory norms when those norms meet certain conditions or realize certain values. Since conventional norms can capture features of the social context rather finely and are not limited to the more abstract, general categories of nonconventional morality, such a framework allows for a degree of nuance and context-sensitivity in moral evaluation unavailable to nonconventional approaches.

71. Of course, even where people ought not discard such material gifts, they often (quite appropriately) retain the legal power to do so. This is a reflection of the stranglehold the law enjoys over our property practices, combined with the reasons for not qualifying an owner's legal power to alienate in the case of gifted property.