

PROMISES AND CONSENT

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Promises create a duty to act as promised in the future. Equally, morally valid consent to some acts, such as sex, requires that one consent when the act occurs. A promise to perform an act that requires contemporaneous consent—for example, a sexual promise—intuitively seems morally problematic. Hallie Liberto argues that promisees have a moral duty to reject sexual promises. I argue, however, that it is morally permissible to accept a promise from another to perform an act that requires contemporaneous consent because the promise is conditional on consent. Accordingly, a sexual promise, for example, does not authorize nonconsensual sex. Furthermore, the promissory duty created by such promises is not rendered meaningless by its being conditional on consent.

Key words: Promises, consent, sex

Promises are forward-looking; they create a duty to act as promised in the future that the promisor cannot readily revoke. In contrast, although one may arguably consent in advance to some acts (Buller 2015), morally valid consent to other acts, such as sex, requires that one consent to the act when it occurs (Dougherty 2013; Dougherty 2018). If consent is prospectively granted to these types of acts, the consenting party has the right to revoke consent at any time and the other party ought to confirm that the prior consent still stands before proceeding.

A promise to perform an act that requires consent in the moment, therefore, seems morally problematic. Under prevailing theories of promising,¹ promises

1. Three accounts of promising have predominated: normative power accounts (Raz 1997; Shiffrin 2008; Owens 2012), expectation accounts (Scanlon 1998; Anscombe 1981), and conventionalist accounts (Rawls 1999: 303–8; Hume 2006: 110–23). For purposes of this paper, the theory to which one subscribes is immaterial.

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may contain inappropriate content that cause them to be morally invalid² or, alternatively, trigger a duty on the part of the promisee to reject the promise. For Hallie Liberto, promises to perform acts that require contemporaneous consent fall within this category.³ However, I will argue that it is morally permissible to accept a promise from another to perform an act that requires contemporaneous consent because the promise is conditional on consent. Furthermore, the promissory duty created by such promises is not rendered meaningless by its being conditional.⁴

The Problem with Promises to Perform Acts that Require Contemporaneous Consent

In this section, I describe Liberto's justification for the intuition that it is morally impermissible to hold another to a promise to perform an act that requires contemporaneous consent. Consider the following hypothetical:

Football Game: Sam promises Joe that she will have sex with him if Joe's team wins the game.⁵

A sexual promise is a paradigmatic example of a promise that seems intuitively morally problematic because it involves an act that requires contemporaneous consent. Like Liberto, I will focus on sexual promises because the cost associated with nonconsensual sex is high, the cost associated with nonperformance (i.e., frustration of a partner's sexual desire) is low, and there is no independent moral right to sex with a particular person (Srinivasan 2021). These factors result in a particularly strong intuitive reaction that such promises are morally problematic. That said, the logic of the argument applies to promises involving other acts that require contemporaneous consent, such as a promise to donate an organ.⁶

2. By morally invalid, I mean that the promise does not successfully create a promissory duty, or to put it differently, the promise 'misfire[s]' (Liberto 2017: 387). In contrast, morally valid promises create promissory duties (i.e., a moral obligation to fulfil the promise).

3. Liberto focuses on sexual promises, but her argument can apply to other acts requiring contemporaneous consent.

4. A promissory duty is a moral duty to perform the promised act. Note, however, that a promissory duty does not necessarily mean that the promisor ought to perform the promised act all-things-considered. It is possible that competing moral duties may defeat a promissory duty such that the promisor is not morally obligated all-things-considered to perform the promised act.

5. Adapted from Liberto.

6. The intuitive reaction against the moral permissibility of promises to donate organs may not be as strong as the intuitive reaction against sexual promises. One might contend that it is permissible to accept an organ donation promise, given there are pro tanto moral reasons to donate

As a preliminary matter, one might think that sexual promises are morally invalid. Some philosophers argue that a promise is morally invalid if it contains immoral content. For Shiffrin (2011), it is beyond a promisor's power to create a moral duty in herself to perform an immoral act merely by promising to do so. Yet, unlike, for example, a promise to kill another, it is usually not immoral to perform a sexual act. Thus, even if one believes that promises to perform immoral acts are morally invalid, sexual promises are not necessarily invalid promises because performing a sexual act is not typically immoral. Others, such as Owens (2016), argue that promises are valid regardless of whether their content is moral or immoral. Again, it would follow that promises like Football Game are morally valid.

Given that a promisor can successfully make binding promises with sexual content, the intuitive reaction is that the promisee has a moral obligation to release the promisor from her promissory duty.⁷ That is, in Football Game, Joe should not hold Sam to her sexual promise should the antecedent condition obtain (i.e., Joe's team wins the game).

In *The Problem with Sexual Promises*, Liberto offers an explanation for this intuition. A promise confers the promisee with power over the promisor. By making the promise, the promisor alters 'the moral landscape of permissions and obligations' (Shiffrin 2008: 500–1). Importantly, the promise constricts the range of morally permissible options that the promisor has available to her. By the same token, the promisee gains the power to hold the promisor to her promise—thereby limiting her decisional freedom—or release the promisor from her promise—expanding her range of morally permissible options. Indeed, the point of a promise is to give the promisee a claim against the promisor that she would not otherwise have. At least at the time of performance, a promise 'involves substituting another person's discretion for one's own' (Liberto 2017: 395). Since the promisee decides whether or not to release the promisor from her promise, the promisee exercises some discretionary control over whether the promisor ought to perform the promised act. As Owens (2006: 51) puts it, the promisee has an 'authority interest' over the promisor's decision. Promise-breaking is wrong, according to Owens, because the promisor does not respect the promisee's moral authority over her conduct.

Liberto contends there are some domains in which it is morally impermissible to exercise control over another's conduct. She terms promises that confer decisional power to another in inappropriate domains 'overextensive promises'

an organ independent of a promise. (A pro tanto reason is one that tells in favor of an action but is not dispositive in and of itself.) Regardless, if the argument in favor of sexual promises succeeds—where the intuitive reaction against permissibility is strongest—then the argument succeeds with respect to similar promises, including organ donation.

7. I set aside the question of whether the promisor acts immorally by making sexual promises.

(2017: 386). Liberto argues that the recipient of an “overextensive” promise is morally obliged to reject the promise. That is, it is morally impermissible to be ‘the decider’ of certain important choices in others’ lives (396). For example, suppose that a friend voluntarily promises you that she will have a child. Assuming your friend is cognitively capable, she ought to make the decision about whether to have children herself. You may offer advice to help her reach a decision, but you should not unduly sway her decision-making by holding her to the promise. If your friend decides that she does not want children, that option should be entirely available to her. Moreover, in Liberto’s view, the option to not have a child should not be incumbered by the specter of breaking a promise. By accepting your friend’s promise and holding her to it, you retain normative authority over a decision that you ought to not control.

Likewise, it is inappropriate to accept decision-making power over others’ sexual choices. For Liberto, one’s decision-making freedom should not be hampered by promissory duties in situations like Football Game. In other words, sexual promises are overextensive. The promisee decides which options are available to the promisor—namely, whether the promisor may refuse to perform and also not wrong the promisee. By failing to reject an overextensive promise, the promisee impermissibly leaves the promisor with two options: (1) perform even if she would not otherwise in order to keep her promise, or (2) refuse to perform at the cost of breaking a promise and wronging the promisee.

A Response to Liberto

Liberto contends that it is morally impermissible to hold another to a promise that involves contemporaneous consent, such as a sexual promise. I argue that Liberto’s claim is wrong. That is, a promisee may hold the promisor to a sexual promise. Put differently, a promisee is not morally obligated to reject a sexual promise.

Promises are communicative acts and, consequently, require interpretation. I will consider two plausible, but mutually exclusive, interpretations of the speech act ‘I promise to have sex’:⁸

1. I promise to have sex no matter what, even if I do not consent.
2. I promise to have sex, only if it would be consensual.

8. There are conceivably additional, more complex constructions of the promise. I aim to take two plausible interpretations and show that they can be cashed out in a morally permissible manner.

As to construction 1, I will argue that the promise creates a promissory duty that is defeated by competing moral considerations—namely, the right to bodily integrity. Thus, the promisor never incurs an all-things-considered moral obligation to perform the promised sexual act against her will. Although the promisor is not obligated to perform, her promise is not meaningless. Her promissory duty can give rise to second-order obligations and alters the moral landscape by attaching a moral cost to nonperformance. Put differently, the promissory duty may mean that the promisor is obligated to perform second-best acts and/or accept that she has wronged the promisee. Even though a promisee may permissibly accept promises in the form of construction 1, I will argue that construction 1 is not an accurate interpretation of sexual promises because promises are inherently conditional and we do not (and should not) consider the promisor to have any residual moral obligations to the promisee if she justifiably withholds consent. Rather, construction 2 is the accurate interpretation of sexual promises. Under construction 2, the promisor makes a conditional promise to have sex, and the antecedent condition is that sex would be consensual at the time of performance.

i. Construction 1: I promise to have sex no matter what, even if I do not consent.

Construction 1 is intuitively troubling because, at first blush, it appears to authorize nonconsensual sex. However, it is important to note that a sexual promise does not confer to the promisee the right to compel the promisor's performance. Crucially, a promise does *not* confer consent. When one makes a sexual promise, she places herself under a promissory duty, but that does not mean that she consents to sex. Morally valid consent has an important temporal element. It must be 'temporally immediate' (i.e., conferred or confirmed just prior to the act) and ongoing (Liberto 2022). Only consent, not a promise, confers morally valid permission to act upon another. Consider, for example, a friend's promise to stay for dinner until 10 p.m. If she attempts to leave at 9 p.m., she is breaking a promissory duty, but you are clearly not entitled to compel her performance by locking her inside your home until 10 p.m. Nor could you claim that she consented to your locking her inside by virtue of the promise. Although you are morally entitled to her performance of the promise, you are not morally entitled to compel her performance. Indeed, this distinction is recognized in the legal sphere, where courts rarely award specific performance for breach of contract (Scott and Kraus 2023). The law compels breachers to pay, not perform the contracted-for act. Consent and promissory duties are independent; one can consent absent a promissory duty and, equally, one can refuse consent despite owing a promissory duty. The

intuitive discomfort with sexual promises is that they seem to confer consent to a future sexual act. However, a sexual promise does not constitute future consent and, thus, the intuitive discomfort is misguided.

Like all promissory duties, the duties created by sexual promises are defeasible (Scanlon 1998). According to Raz (1999), a promise creates a *pro tanto* reason to undertake the promised act, but it does not necessarily follow that the promisor ought to undertake the act. Other considerations, such as the right to bodily integrity, can outweigh a promissory duty (Passi 2023). It is crucial to distinguish between a promissory duty, which is a defeasible *pro tanto* reason to act, and an all-things-considered moral obligation. One may have incurred a promissory duty to have sex, but in light of competing moral considerations, one may not have an all-things-considered obligation to have sex. In fact, one may have an all-things-considered obligation to *not* have sex, despite the promissory duty. Thus, one who makes an unconditional sexual promise may nevertheless not be morally obliged to perform, particularly when the promisor does not consent to sex at the time of performance and having sex would compromise the right to bodily integrity.

Construction 1 is not rendered meaningless even though the promisor is not morally obliged, all-things-considered, to perform. Riedener and Schwind (2022: 2) underscore that all valid promises have a ‘point’. The point of the promise can anchor secondary obligations that may be triggered if the promisor fails to perform the promised act. Specifically, a promisor who fails to perform may incur an obligation to ‘do something else which the point determinately favors at least as much’ (7). In other words, when a promisor does not perform the promised act, she may still be obligated to perform second-best acts. For example, imagine that Ryan promises Emily that he will donate his kidney to her no matter what. If Ryan later changes his mind, he arguably does not have an all-things-considered obligation to undergo the operation. Nevertheless, Ryan’s promissory duty may ground second-best obligations. Let us assume that that the ‘point’ of Ryan’s promise is to promote Emily’s health. Ryan’s promise may, therefore, oblige him to perform an alternative act (that does not compromise his bodily integrity), such as providing care for Emily after her transplant surgery.⁹ The same holds for sexual promises. If a promisor does not perform the promised sexual act, she may incur a duty to perform a second-best act that favors the point of her sexual promise.¹⁰ Thus, a promisee may permissibly accept a

9. The degree to which the substitute act must be similar to the promised act in order to discharge the promissory duty is debatable. Some argue that it is difficult to fulfil a promissory duty by performing a substitute act because different activities tend to be incommensurable (Raz 1986; Riedener and Schwind 2022).

10. An alternative, but similar, interpretation of a sexual promise could take a disjunctive form. That is, the promise could take the form: ‘I promise to have sex or perform a second-best act’.

sexual promise that takes the form of construction 1 because it does not require nonconsensual sex. Instead, it requires substitute performance if the promisor does not consent.

However, the fact that a promisee may accept such promises does not mean that construction 1 is an accurate interpretation of sexual promises. In fact, in my view, construction 1 is *not* an accurate interpretation of sexual promises. First, as explained below, even purportedly unqualified promises are conditional (Ross 1939). That is, virtually all promises contain built-in conditions, even if they appear unconditional at first blush. The inherently conditional nature of promises renders construction 1 an inappropriate interpretation. Sexual promises are not distinctive because they are unconditional, as construction 1 suggests. Rather, sexual promises are distinctive from other promises because the condition that excuses nonperformance is unusual: unlike other promises, the promisor is excused from fulfilling a sexual promise if sex would be nonconsensual.

Moreover, construction 1 is descriptively inaccurate. Adopting a subjective account of promising (Fried 1981),¹¹ it is unlikely that the promisor intends to give herself an unconditional duty to have sex, even if that duty is defeasible. Likewise, adopting an objective account (Kraus 2009),¹² it is unlikely that a reasonable promisee would believe that the promise imposed such an onerous duty on the promisor. These intuitions are confirmed by the fact that we do not consider sexual promises to have a residual—even a minor residual, such as an obligation to apologize—if the promisor does not consent. In fact, if Sam did apologize, the acceptable response from Joe would be along the lines of ‘Don’t be silly. Of course, you don’t have to have sex with me if you don’t consent’, not ‘I accept your apology for wronging me’. If the parties do not believe that the promissory duty holds absent consent, then construction 1 does not accurately capture the meaning of a sexual promise under subjective or objective theories of promising, which locate the meaning of a promise in the understanding of one or more of the parties.

Finally, to the extent that one believes that the conditions, if any, attached to sexual promises are ambiguous, one ought to disfavor construction 1 as a normative matter. Under the legal canon of constitutional avoidance, courts favor interpretations of ambiguous statutes that avoid raising constitutional concerns (*NFIB v. Sebelius*). Similarly, if a promise is ambiguous, one ought to adopt the interpretation that is less normatively troubling. Construction 1, although

11. Under a subjective account of promising, the state of mind of the promisor determines the content of the promise. That is, to determine the scope of the promissory duty, one looks to what the promisor understood herself to be agreeing to do.

12. Under an objective account of promising, one determines the content of a promise by reference to what a reasonable third party would believe based on the promisor’s conduct. As such, the content of the promissory duty may diverge from what the promisor intended.

permissible, gives short shrift to the attitudes, desires, and consent of the promisor. In this regard, construction 2 is normatively preferable insofar as it takes more seriously the promisor's consent.

ii. Construction 2: I promise to have sex, only if it would be consensual.

Few promises are absolute. Although promises are often made without qualification, conditions are almost always implied. W. D. Ross (1939: 98) highlights that everyday promises cannot be interpreted literally and, instead, are subject to 'implied conditions and qualifications'. Put differently, 'Promises generally don't result in a blank cheque of the promisee to your doing as promised, but seem importantly conditional' (Riedener and Schwind 2022: 2). To illustrate, consider a promise to mow another's lawn. Although the promise appears unconditional on its face, the promisor's duty to mow the lawn would be dissolved if her child were hospitalized when she was supposed to be mowing the lawn. This is because the promise was implicitly conditional—namely, on the promisor not having a powerful countervailing reason to not mow the lawn. Virtually all promises have implicit built-in conditions (Hart 1961: 136); sexual promises are no exception. A sexual promise—without further elaboration—should not be interpreted as a promise to have sex under any circumstances. It seems psychologically unrealistic that one would voluntarily incur an obligation to have non-consensual sex. Instead, it is more probable that a sexual promise is narrower than it appears at first blush. In my view, when one says, 'I promise to have sex', her promise may be more accurately interpreted as 'I promise to have sex *provided that it would be consensual, even if there are other attractive activities available to me*'.¹³

A sexual promise is, therefore, a conditional promise and 'if the antecedent condition is unfulfilled . . . it is just as if no [promise] had been made' (Dummett 1959: 150). The promisor has no promissory duty to have sex (or do anything else) if she does not consent. This point—that the promisor has *no* moral obligations to the promisee if she does not consent—explains, in part, why construction 2 is a more accurate interpretation of sexual promises than construction 1. As discussed, we typically do not consider the promisor to have any residual obligations to the promisee if she withholds consent, and that is indeed the state of affairs under construction 2 but not construction 1.

13. I take the position that parties may permissibly (and often do) have sex when there are more pleasurable alternatives available (Kukla 2021).

One may object that a sexual promise conditional on consent is no promise at all. Liberto advances this argument:

However, it is probably not the case that [the parties] hold a mutual understanding that her promise does not hold in the event that she changes her mind and does not want to have sex. Otherwise, there would be no point to having made the promise in the first place—nor could it have truly counted as a promise (2017: 392).

However, implicit conditions that exempt performance do not strip promises of their normative force (Holton 2010). For Raz (1999), a promise functions to prevent the promisor from acting on certain first-order reasons to act that would otherwise be available. In other words, the promisor surrenders some reasons that she could ordinarily use to justify her choice of action (Shiffrin 2008; Molina 2019). Returning to the lawn-mowing hypothetical, a person is usually entitled to decline to mow another's lawn if she would prefer to read a book. Yet, if she promises to mow the lawn, she is no longer morally entitled to refuse to do so merely because she would prefer to read a book. Morally speaking, that reason is no longer available to her to justify the decision to not mow. Similarly, in the context of sexual promises, simply preferring another activity over consensual sex does not dissolve the promissory duty. In this connection, consider another variation of the Football Game hypothetical in which Joe's team wins and Sam is enthusiastic about the prospect of performing her sexual promise. However, Sam is equally enticed by the prospect of spending the evening at a gathering with her friends to celebrate the team's win. Here, Sam's promise may prevent her from using her desire to attend the gathering to justify not performing the promise to Joe. Thus, a sexual promise is not meaningless even if the promissory duty is contingent on the promisor's consenting to sex at the time of performance.

Moreover, one may object that if the promisor prefers another activity, then she necessarily does not consent to sex. If that is true, then the antecedent condition would seem to fail whenever the promisor preferred an alternate activity and the promisor would not be subject to the promissory duty. In my view, this objection conflates the distinction between (1) the promisor withholding consent as a matter of fact and (2) whether the promisor is morally entitled to withhold consent. Under construction 2, the promissory duty is not conditional on the promisor saying, 'I consent' (or otherwise signaling her consent). Rather, the promissory duty is conditional on the promisor not *impermissibly* withholding consent. As discussed, a sexual promise cuts off, normatively speaking, certain reasons for withholding consent—namely, by merely desiring another activity more. Thus, a promisor may withhold consent as a matter of fact if she prefers

another activity, but it does not follow that she has withheld consent on a permissible ground.

At first blush, it is counterintuitive to think that there are morally impermissible reasons to withhold consent. Indeed, ordinarily one is morally entitled to refuse to have sex for any reason or no reason at all. Yet, in other domains, it seems clear that it may be morally impermissible to withhold consent. For example, one may not consent to donating his blood, but we may very well think that he ought to consent given the minimal cost to himself and the dire need of the recipient. In making a sexual promise, the promisor deprives herself of a reason (i.e., preferring another activity) that would otherwise be entirely sufficient to justify her decision to not consent. There are of course alternative grounds to permissibly refuse to consent, including if sex would compromise bodily integrity or another fundamental right. Thus, the relevant question for purposes of determining whether the antecedent condition is fulfilled is: Would the promisor consent but for her consideration of a normatively inaccessible reason (e.g., preferring another activity)? If so, the promissory duty stands even if the promisor does not provide actual consent.¹⁴

In addition, one may object that a sexual promise in the form of construction 2 is not a genuine promise for two distinct but interrelated reasons. First, desire typically plays a central role in one's decision regarding whether to consent to sex. If a person consents to sex only if she desires sex,¹⁵ and her desires are not under voluntary control, then one might conclude that she cannot promise to have sex because she cannot promise to desire sex. However, it is necessary to note that a sexual promise is not a promise to desire sex. At most, if desire is a necessary element of consent, then a promissory duty that is contingent on consent is, by extension, contingent on desire. It is coherent to make a promise contingent on something that is beyond one's control, such as desire. For example, I might promise you that I will buy lunch tomorrow if our mutual friend is in a good mood. Let's stipulate that her mood is beyond her voluntary control. Of course, I cannot promise you that she will be in a good mood because that is beyond her conscious control, but I can make a genuine promise that is contingent on an event (or state of mind) that is beyond any agent's voluntary control.

14. Of course, actual consent is required for the promisee to permissibly act.

15. This premise is disputable. Feminist scholars, most notably Catharine MacKinnon (2017), contend that much consensual sex is not desired by women. While MacKinnon argues that undesired but consensual sex is morally problematic, she notes that others (and most legal systems) view consensual sex as permissible regardless of whether it is desired. So, some might respond to the concerns above by arguing that desire and consent can be entirely separated. If desire and consent are independent, then a promissory duty that is contingent on consent is not necessarily contingent on desire. However, I am sympathetic to the claim that desire plays a role in consent. That is, I am doubtful that one can provide morally valid consent to sex without having *any* desire to have sex.

Second, one might worry that there is a high probability that the promisor will not desire (and therefore will not consent to) sex at the time of performance. And if one makes a promise with antecedent conditions that are very unlikely to be satisfied, then the purported promise is not a genuine promise. As a first line of response, one may dispute the claim that there is a high likelihood that the promisor will not desire sex at the relevant time. I will set this empirical dispute aside and concede that in many cases that promisor will have no desire to have sex. Does that mean that the promise is not genuine? I do not believe so. In my view, the fact that a promise is contingent on an unlikely event does not mean that it fails to count as a genuine promise. To be sure, the promise may be less useful or interesting to the promisee because she does not expect it to be performed, but it seems to count as a sincere and genuine promise nonetheless. Consider an analogy. I make you a promise that is contingent on a rare celestial event occurring tomorrow evening. Although my promise is not a joke, we both know that it is highly unlikely that the celestial event will take place tomorrow, and so we both believe that I will likely not be obligated to perform the promised act. If to our surprise the celestial event occurs, I could not justifiably refuse to fulfil the promise on the ground that my promise was not genuine. That is because a promise that is contingent on an unlikely but possible occurrence is a genuine promise.

Conclusion

In summary, using the paradigmatic example of sexual promises, I have argued, contrary to Liberto, that promisees may permissibly accept promises involving acts that require contemporaneous consent. Put another way, I reject Liberto's claim that one cannot hold another to such promises and one is therefore morally obligated to reject the promise. First, I considered sexual promises that are unconditional: the promissory duty stands no matter what. I argued that these promises do not generate a moral obligation to engage in nonconsensual sex. Rather, they give rise to an obligation to undertake a second-best act that favors the point of the promise. However, I concluded that this first construction was inaccurate because, *inter alia*, promises are inherently conditional and we do not consider a sexual promise to give rise to a residual if sex would be nonconsensual.¹⁶ Instead, I argued that sexual promises are conditional on the act being consensual at the time of performance. Under this second construction, if the

16. To be clear, it is possible that one may such a promise but, I have argued, highly unlikely given the nature of promises and human psychology. As such, the first construction is inaccurate in most, if not all, circumstances.

promisor permissibly withholds consent, then an antecedent condition of the promise is failed and the promisor has no promissory duty to perform whatsoever. If the antecedent condition is satisfied, then the promisor is indeed subject to a promissory duty to perform and the promisee does not have a moral obligation to release the promisor from the promise.

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