

The Embedding Social Context of Promtracts

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Abstract. This chapter discusses the social context of promises and contracts; *promtracts*, for short. To say that the social context of promtracts is G (affectionate, managerial, adversary) is to say that, in their central case, promtracts are embedded in some G social context or interpersonal relation complex, that promtracts that are embedded in some non-G context are somewhat deficient as promtracts. This chapter illustrates such views by examining four views: that promises/contracts are relational/transactional in context. The chapter rejects these views in favor of the pluralistic view that core promises and contacts are embedded in relational, transactional, and mixed social contexts. The case for the notion that that promtracts have a non-trivial social context is yet to be made.

ROADMAP

To make sense of competing claims about the social context of promtracts, the chapter uses the central case method. The conclusion is broadly pluralistic. To make sense of competing claims about the social context of promtracts, **section 1** introduces the central case method in philosophy. **Section 2** frames the issue in terms of the conveniently familiar and fluid distinction between relational and transactional contexts. **Sections 3** and **4** present and illustrate the competing views that promises are in their central case relational (promise relationalism) and transactional (promise transactionalism). These views are rejected in **section 5** in favor of pluralism about the context of promises. **Sections 6** and **7** present and illustrate the competing views that contracts are in their core relational (contract relationalism) and transactional (contract transactionalism). **Section 8** rejects these views in favor of pluralism about the context of

contract. **Section 9** brings together the pluralistic conclusions of its predecessors.

Speech acts are socially embedded--they cannot fail to occur in some social context or another--but thinkers can disagree about their primary embedding context. Imagine for instance two thinkers who agree that promises and contracts differ in their primary social context but hold reverse views of that difference: one holds that promises are in their central cases embedded in interpersonal relations that are hot, the embedding interpersonal relations of contracts are in the central case cold; the other holds that it is the other way around. This is just a caricature of a disagreement over the social context of promtracts. But recent work on these institutions can be understood to revolve around the same question. This chapter is an attempt to make sense of the problem of the primary social context of promtracts.

I believe that the building blocks of everything social are relations among individuals and so I think about a social context as an interpersonal relation complex. So I interpret the claim that some promtract is embedded in some context as the claim that one interpersonal relation--the promtract itself--is embedded in another. Now I take it as axiomatic that relations are self-embedding. Trivially, each promtractual (promissory/contractual) relation embeds itself. The interesting question concerns the *non*-promtractual relation of promtracts. The embedding relation need not be particularly robust, to be sure; it might not predate or outlast the promissory/contractual relation itself. Indeed every promtract can be said to presuppose those social relations that make its creation and performance possible, its minimal embedding context.

What is the claim that the social context of promtracts is G (or that G is the social context of promtracts)? Here is one possibility: Necessarily, successful promtracting occurs in some G social context or relation complex. But is hard to think of any nontrivial social environment that enjoys such exclusivity. On the face of it, we successfully promise and contract in most every social environment or relation complex. I will try to make sense of the social context question by taking it to concern the central case of promtracting. The claim that G is the social context of promtracts is the claim that, in their central case, promtracts are embedded in some G social context or interpersonal relation complex.

1. THE CENTRAL CASE METHOD

The idea behind the central case method is that philosophical explanation goes beyond the necessary and sufficient conditions or philosophical analysis of the target phenomenon. I start with a general illustration: Aristotle's discussion of friendship (1999: bk. 8 ch. 4).² Cf. Cooper (1999: ch. 14). Aristotle observes that some friends value each other intrinsically and others only instrumentally. On the face of it, Aristotle thought that they both partake in genuine forms of friendship; as a present-day Aristotelian might put it, both types of relationship meet the necessary and sufficient conditions on friendship. But Aristotle took pain to say that intrinsic friendship is superior to instrumental, and not just superior but superior as friendship; he called it 'complete friendship,' 'friendship without qualification,' or 'friendship most of all.' Similarly, he thought that instrumental friendship is inferior to intrinsic, and not just inferior, but inferior as friendship; he called it 'coincidental friendship,' 'friendship by similarity,' or 'friendship to a lesser extent.' Aristotle would not necessarily object if we took him to hold that, in friendship's central case, the friends value each other intrinsically, and that a purely instrumental friendship is a genuine non-central instance of friendship.

You might think that I am saddling Aristotle with a category mistake. Treating instrumental friendship as friendship implies that it is not a marginal case, something that is neither friendship nor non-friendship. But my Aristotle treats instrumental friendship as a non-central case. Isn't a non-central case a marginal one? If so, my Aristotle holds that instrumental friendship is a marginal and non-marginal case of friendship. Not so. The central case method focuses exclusively on non-marginal cases, cases that fall squarely within the relevant concept rather than on its margin or border. Indeed the point of the method is precisely that not all cases that fall squarely within the extension of a concept are equally central to it. That something is determinately F does not make it a central case of F. How is this possible?

Sincere and Insincere Promtracts

J. L. Austin famously distinguished different kinds of infelicities in speech acts. Sometimes you try to promise but fail, completely, as when I form an intention to promise but find myself unable to speak. My linguistic act does not 'come off' or is not 'achieved.' This is a case of 'misfire.'

Or suppose we orally agree on the sale of my house to you but never put the agreements in writing. Since the law requires contracts of this sort to be in writing, we fail to execute a valid contract. We started but failed to complete the contracting process. The contract is aborted or stillborn. In such cases, a necessary condition goes unmet. Austin's more interesting observation concerns less serious infelicities, cases in which the act is successful but interestingly deficient. These are cases of 'abuse.' Suppose I promise to meet you at Starbucks, intending not to do so. Then I successfully promise to meet you, but 'abuse the procedure' (1962: 16).

Austin can be plausibly taken to be using the central case method and making the two-fold claim that lying promises are (i) promises (they satisfy the necessary and sufficient conditions on promising) but are also (ii) deficient as promises. Let me try to motivate this line of thinking by using a familiar analogy. Think about the making of a promise as a move in the linguistic game of promising. Cf. e.g. Rawls (1954) and Hare (1964). Then think about the making of a lying promise as an illegitimate move in the promising game. When you 'promise' to meet me at Starbucks intending to meet someone else elsewhere, you really do promise to meet me; it's just that you do so against the rules. The rules of promising require you to intend to do what you promise, to promise only what you intend to do. In promising without the requisite intention, you intentionally break the rules or cheat. Now the rules in question are not just any old rules; they are essential to promising in the sense that you cannot promise without being subject to them. Indeed it is exceedingly hard to see how you could possibly promise while disavowing such *constitutive* rules ('I promise to meet you at Starbucks but have no intention to do so.') That is why you take pains to misrepresent yourself to me as intending to meet me at Starbucks (as respecting the constitutive rules of promising). However, in so doing you truly represent yourself to me as promising and as doing so correctly (by the constitutive rules).

Treating a lying promise as a move in a game helps motivate both parts of my Austinian view of it. On the one hand, the lying promise is a genuine (successful, complete, non-marginal) promise. After all, to play a game against its own rules you must play it first. If it is not the case that you play the promising game, it is not the case that you play it incorrectly. Yet knowingly playing the promising game in correctly or cheating is precisely what the lying promisor does. On the other hand, the lying promise is deficient as a promise. After all, playing a game against

its own constitutive rules (those one cannot avoid as long as one plays) is doing something that is deficient as a move in the game.

The primacy of sincere over insincere promises is born out by a broadly Kantian story. Cf. Kant (1998 [1785]: 15). Intuitively, lying and other insincere promises presuppose, or are parasitic upon, sincere ones. On the face of it, you can have sincere promises without lying promises at all, but not the other way around. And even if you can have lying promises with no sincere promises at all, these promises would still all represent themselves as sincere. If this intuition is basically right, sincere promises enjoy explanatory priority.

Kept and Broken Promises

Finally, I believe that promises are, in their central case, kept rather than broken. If to my request you sincerely promise to pick me up, then you make me a genuine, successful, complete promise, even if you later fail to deliver. However, I also believe that your promise falls short of the promissory ideal. Surely the constitutive rules of promising require you to keep your promises no less than they forbid you to promise insincerely. By breaking a promise, you make it the case that the promise you have made was deficient as a promise.

Hypothesis

Since the considerations underlying the last two examples are equally applicable to contracts, they can be taken to support the claim that, in their central (exemplary, paradigmatic, perfect) case, promtracts are sincere and kept; insincere or broken promtracts are promtract all right but are deficient as promtracts.³ Now these particular illustrations of the central case of promtracts tell us nothing about their embedding social context. Perfect or paradigmatic promtracts are sincere and kept regardless of the interpersonal relation complex in which they are embedded. But these are just illustrations of plausible claims about the central case of promtracts. Indeed I hypothesize that competing views about the embedding context of promtracts are claims about their central case. Someone who claims that the embedding social context of promtracts is hot should not be saddled with the patently false claim that I cannot promtract outside some hot social context. He should probably be taken to claim that promtracts are in their central case embedded in some hot context, that such promtracts enjoy explanatory priority over those that are

embedded in some cold social complex, that promtracts that are embedded in some cold interpersonal relation complex are deficient or imperfect as promtracts. Unlike the first, unqualified interpretation, the second, central case interpretation has a shot at truth.

2. RELATIONAL AND TRANSACTIONAL PROMTRACTS

I want to organize the discussion around Macneil's well-known distinction between relational and transactional contracts (1974, 1980, 2000), or rather between the more basic distinction between relational and transactional embedding social contexts or interpersonal relation complexes. There are several ways of drawing the distinction, but this is not a problem, as long as we avoid trivializing interpretations. In a trivial sense, every promtract is relational (it is a relation) *and* transactional (it is a transaction). This makes nonsense of the distinction. To take the distinction seriously, we must understand it to represent contrasting contexts. To reuse an earlier example, we can say that a social context is relational/transactional to the extent that it is hot/cold. We then get a spectrum of social contexts stretching between the hot and cold extremes.

Embedding social contexts are more interestingly defined in terms of multiple criteria, for example a two-fold definition according to which a social context is relational (transactional) to the extent that it is personal and moral (impersonal and non-moral). We then get a spectrum with four kinds of social context:

Fully Relational	Relational-Transactional	Fully Transactional
Personal Moral	Personal Non-moral	Impersonal Non-moral
	Impersonal Moral	

Diagram 1: Relational vs. Transactional (Twofold Definition)

There is of course nothing canonical about this way of drawing the distinction. For the most part, I will use a tripartite definition according to which a social context or interpersonal relation complex is relational (transactional) to the extent that it is close, personal, and ongoing (distant, impersonal, and discrete). Examples of relational social contexts include affectionate relationships among family members, lovers, or friends. Examples of transactional social contexts include a chance interaction between strangers, a sale of stocks, and a one-off business deal (the sale of the Empire State Building, for instance). We then get a spectrum with eight kinds of social contexts:

Fully Relational	Mostly Relational	Mostly Transactional	Fully Transactional
Close Personal Ongoing	Close Personal Discrete	Distant Impersonal Ongoing	Distant Impersonal Discrete
	Distant Personal Ongoing	Close Impersonal Discrete	
	Close Impersonal Ongoing	Distant Personal Discrete	

Diagram 2: Relational vs. Transactional (Threefold Definition)

The table illustrates the platitude that we can promtract in very different social contexts, namely those that fall in the leftmost, rightmost, and intermediate columns. More important, it illustrates the possibility of interesting positions in this area. Proponents of these views grant that we can promtract in all these contexts but insist that promtracting in some of them is privileged. Perhaps only promtracts that are embedded in a fully relational context (leftmost column) fall within the

central case of promtracts, for example. This is consistent with the said platitude.

The following sections (3-8) elaborate on such relational and transactional views of promises and contracts. Competing as they are, these views share the premise that promises or contracts belong by nature to some social sphere. Again, this is not the dubious claim that successful promising or contracting cannot occur outside its privileged sphere, but the potentially plausible claim that promising or contracting made outside its privileged sphere are deficient as promising or contracting or otherwise fall short of the promissory or contractual ideal.

3. PROMISE RELATIONALISM

Consider

***Promise relationalism.* Perfect or paradigmatic promises are relational or nontransactional in context. In their central case, promises are embedded in some relational social context. Promising in transactional contexts is nonparadigmatic or imperfect as promising; it presupposes promising in relational contexts.⁴**

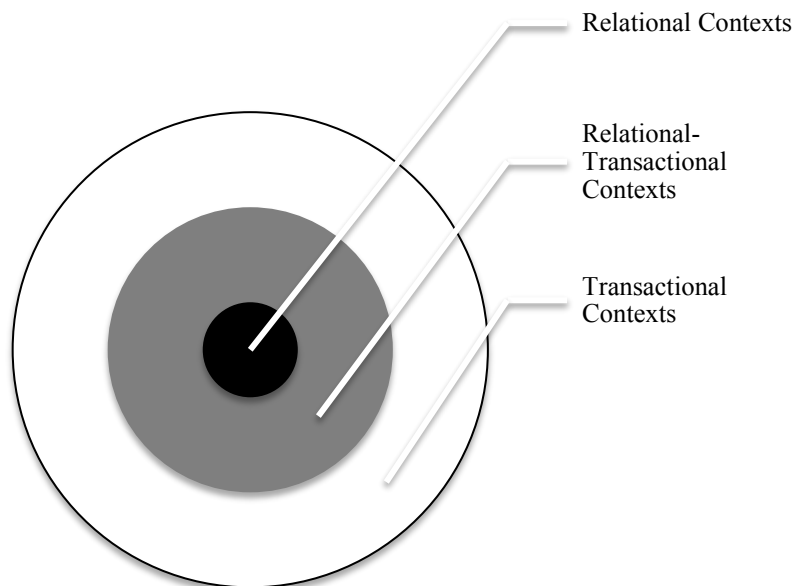


Diagram 3: Promise Relationalism

Inner doughnut hole represents the zone of promissory perfection.
Inner doughnut represents the zone of partial promissory perfection.
Outer doughnut represents the zone of promissory imperfection.

Let me mention three partially overlapping examples of this view.

Trust relationalism. Philosophers generally agree that promises invite trust, but there is little agreement about the kind of trust invited. According to Dori Kimel, the trust at play in promising is not simply a disposition to believe that the promisor will keep the promise but a disposition to believe that she will do so for the right sort of reasons. Reasons of the right sort have to do with the promisor's moral character. Promises are normally embedded in a context of personal and moral trust, whose 'expressions are intended as weighty, sweeping statements about

a person's character or moral worth' (2003: 59–60). While not a necessary condition of promising, such 'profound' trust is a 'normal condition' of promising. Thus promises between strangers, who do not already trust each other profoundly are somewhat abnormal.⁵ They derive their practical force 'from the normal operation of the practice in the framework of on-going relationships, under the conditions of preexisting trust.'⁶ Again, 'promises *between strangers* can be seen, not only statistically, but also logically speaking as the exception to a rule.'⁷

Daniel Friedrich and Nicholas Southwood (2011) provide another example of promise relationalism. According to their trust view, the promisor invites the promisee to trust her to perform the promised action. When the promisee accepts the invitation, the promisor incurs a moral obligation not to betray the promisee's trust. The trust operative in promising is said to be distinctly personal: 'For someone to trust one to do something she must have a certain *faith* or *optimism* in one's character insofar as one's doing it is concerned' (278). For example, to trust her husband to be faithful, the wife 'must regard him in a certain light, namely, as someone disposed to be moved by certain kinds of reasons: a recognition of the value of their marriage, a concern for her happiness, a respect for her as his wife, and so on' (278). The operative trust is also said to be a moral attitude: the promisor displays her willingness (conditional upon the promisee's acceptance) 'to be party to a certain kind of relationship with the promisee, namely one in which the promisee has a certain faith or optimism in the promiser's character that the promiser will perform some action that is of importance to the promisee. In so doing, and having the overture accepted (or not rejected), the promiser incurs an obligation to the promisee not to betray the trust she has invited. The distinctive wrong involved in breaking a promise is precisely a matter of violating this obligation' (280).

Notice that the trust of promising is less personal or robust in Friedrich and Southwood than in Kimel's. According to Kimel, only those who are already quite close can trust and be trusted in the relevant sense. Friedrich and Southwood on the other hand see no problem with trusting and being trusted by someone you have never met. That is why they think that farmers who are otherwise strangers can exchange perfectly good promises (2011: 290–1 n. 6).

Strawsonian relationalism. Stephen Darwall provides another example of promissory relationalism when he claims that '[p]romises have an essentially second-personal character'

(2011: 268). Darwall shares the now-common view that promising exercises normative power or authority to create a bundle of rights the promisee would not otherwise have, including the right to have the promise kept, demand its performance, waive these rights, criticize non-performance, and receive an apology.⁸ He also shares the common view that A promises B to do X when A undertakes an obligation to B to do X. Following a view he finds in Mill and Strawson, Darwall claims that A's directed obligation to B to do X consists of the fact that A's failure to do X warrants negative reactive attitude on the part of the participants and others, such as guilt, resentment, and indignation on the part of the promisor A, the promisee B, and some bystander C. Cf. Strawson (2008 [1962]: ch. 1). Darwall's 'second-personal' attitudes are all moralized, involving the evaluative judgment that A is morally blameworthy for his wrongful conduct.⁹

How personal are second-personal attitudes? Well, they all involve one person implicitly addressing another, making 'a claim on that person's will and conduct.' Thus all second-personal attitudes are personal. The opposition here is Strawson's *objective attitude*. When I take the objective attitude toward you, I treat you as an object of social policy, something to be managed, handled, or indeed protected, perhaps with a view to regulating behavior in socially desirable ways. Strawson (2008: 9, 22, 24). But there is also a sense in which only some second-personal attitudes are personal. Imagine that the promisor's action expresses ill will toward the promisee, and that they take things personally and react with moralized guilt and resentment. These attitudes are strongly personal in that you must be personally involved in the interaction to experience them, and experiencing them betrays emotional vulnerability to the other party.¹⁰ Not all second-personal attitudes are personal in that strong sense; others are available to the bystander. Indignation and moral blame are like that. These attitudes are somewhat detached; they are experienced vicariously, on behalf of the participants. For my purposes we can focus exclusively on the participants and take Strawsonian relationalism to be claim that promisors and promisees respond to promise-breaking with involved reactive attitudes such as guilt and resentment.

The second-personal version of this view can be taken to concern the central case of promises: In the central or paradigm case, the attitudes that the parties to a promise take to one another are highly personalized and moralized; they cannot help reacting to promise-breaking

with moralized guilt and resentment, and are in that way vulnerable to one another. There is no suggestion that parties cannot promise while taking less personalized attitudes such as detached indignation or the objective attitude. As Strawson noted, responsible adults occasionally take the objective attitude toward one another as a refuge ‘from the strains of involvement’ (2008: 10, 13). The suggestion is rather that such depersonalized promises fall outside the central case.

Both Strawsonian and trust relationalism say that, in the central case, the relations that embed promises are animated by distinctly moral and personal attitudes, but while trust relationalists emphasize the positive attitude of trust, Strawsonian relationalists emphasize the negative attitudes of guilt, resentment, and blame. These views can be bridged by adding trust to the list of second-personal attitudes (noting that breach of trust expresses ill will that triggers negative second-personal attitudes).¹¹

4. PROMISE TRANSACTIONALISM

Contrast promise relationalism with

Promise transactionalism. Perfect or paradigmatic promises are transactional or nonrelational in context. In their central case, promises are embedded in some transactional social context. Promising in relational contexts is nonparadigmatic or imperfect as promising; it presupposes promising in transactional contexts.¹²

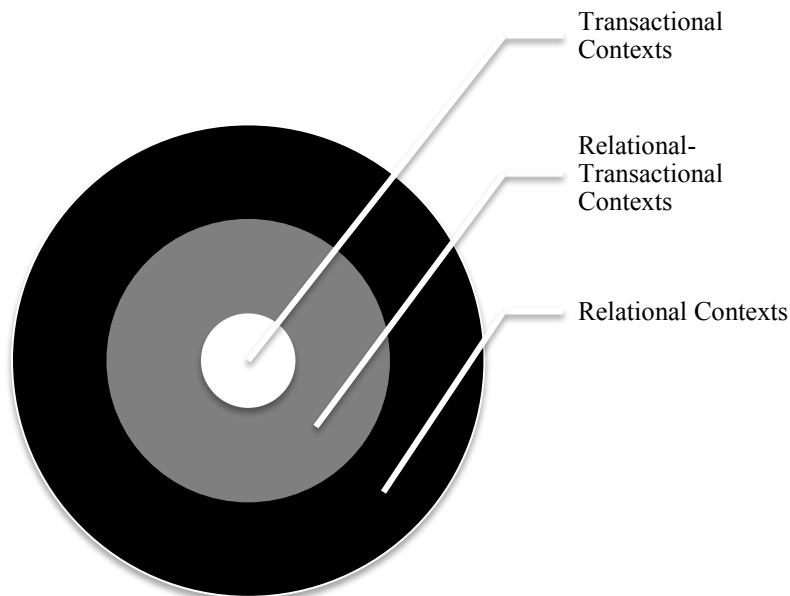


Diagram 4: Promise Transactionalism

Inner doughnut hole represents the zone of promissory perfection.
Inner doughnut represents the zone of partial promissory perfection.
Outer doughnut represents the zone of promissory imperfection.

Let me briefly present two versions of this view.

Humean transactionalism. Hume said that there are ‘two different sorts of commerce, the interested and the disinterested,’ and promises are ‘invented for the former,’ namely the ‘self-interested commerce of men.’ His discussion emphasizes promising made in the context of market exchange, where the parties are assumed not to be close or caring. Hume’s classic

example of promising involves farmers who exchange promises to exchange produce. Each of Hume's farmers are rational maximizers of their own interests. Each takes this attitude: 'I have no kindness for you, and know you have as little for me.' This commercial environment contrasts with 'the more generous and noble intercourse of friendship and good offices' (2006: 114 [*Treatise*, bk. 2, pt. 2, sec. 5]).

Annette Baier endorses this view of promises: 'strangers will be the ones Humeans reserve their promises for.' Promises generate trust by subjecting the promisor to the practice-dependent threat of 'victim-initiated general withdrawal of trust.' Indeed, trust between self-interested strangers requires precisely such a threat (1985: 188–91). By contrast, trust between intimates (family, friends, or neighbors) depends on no such threat. 'Those who take advantage of this sophisticated social device will be, mainly, adults who are not intimate with one another' (1994: 112).¹³

This picture of the embedding social context of promises contrasts with the one presented in the previous section. There is nothing especially personal or moral about the attitudes animating market exchange. For all we know, the farmers in Hume's example had no previous interaction. Their mutual trust cannot reflect their views of each other's character. Their mutual promises are primarily animated by self-interested considerations. Each keeps his promise to the other 'without bearing him any real kindness' because it is good for his business. Promise-breaking is costly, subjecting the promisor to the built-in penalty of losing the trust, and therefore cooperation, of the promisee and others. This is what Hume means when he writes that a promise 'is the sanction of the interested commerce of mankind (2006: 114–16).

Kantian transactionalism. While Humeans characterize the transactional context in terms of largely prudential attitudes, Kantians do so in terms of distinctly moral attitudes, albeit avowedly *impersonal* ones. Daniel Markovits for example writes that promises are 'arm's length relations' that contrast with intimate or love relationships: 'promises characteristically arise among strangers and . . . the immanent structure of the promise relation is in itself distancing, which is to say *opposed to intimacy*' (2011: 295). Intimate recognition involves seeing the other as *the* person she is, in all her particularities; promising on the other hand requires another kind of recognition: seeing the other as *a* person, abstracting from her particularities:

the promise in itself is not a case of seeing the promisee . . . with the vividness that love requires. Once true love has been achieved, promises between lovers wither away; and making new promises introduces a distance, a form of alienation even, into the love relation. Indeed, the genetic structure of promissory recognition is impersonal and in this sense *opposed* to intimacy. Promises prototypically do not promote intimacy, but rather an arm's length relation (303).

Markovits concludes that 'promise's highest form will be achieved not in personal promises—which are embedded in intimate relations whose own immanent structure . . . competes with promissory appreciation—but in promises among strangers, that is, among parties whose engagement arises entirely at arm's length' (313–14).

For all their differences, Kantian and Humean transactionalists both characterize the central case of promising in terms of distinctly impersonal attitudes.

5. THE PLURAL SOCIAL CONTEXT OF PROMISES

Promise relationalism and transactionalism share the premise that promises belong to some non-trivially characterizable social context; promises par excellence are either all relational or all transactional in context. This premise underestimates the social adaptability of promises. I will try to show that perfect promises (i.e. those falling within the central case of promises) are variously embedded, and play a paradigmatic role, in relational and transactional social contexts. The truth in promise relationalism (transactionalism) is the falsity of promise transactionalism (relationalism).

Against Promise Transactionalism

Promise transactionalism mischaracterizes promising in the context of close, personal, and ongoing relationships as less than perfectly paradigmatic. Recall Markovits's Kantian transactionalist claim that 'the immanent structure of the promise relation is in itself distancing, which is to say *opposed to intimacy*.' I cannot believe this claim. Parties to a loving relationship, however intimate, need to coordinate over time, and what better way to achieve this than by making promises? Promises characteristically promote love by coordinating between lovers. Where is the opposition?

Anticipating the problem, Markovits acknowledges that 'promises and love are not

strictly incompatible,' since lovers can make 'trivial promises' and promises that 'are not trivial at all.' He responds that

these possibilities concern the consequential or extrinsic interactions between promise and love. And even if the two relations can make room for each other or indeed support each other causally, they remain intrinsically—which is to say, in their immanent structure—opposed. Where love involves an emotional opening up or intimacy or vulnerability, promising closes off vulnerability. Promise is in its immanent structure opposed to intimacy; and promises characteristically arise at arm's length (309-10).

The passage relies on an intuitive distinction between intrinsic or essential opposition and extrinsic or contingent one. Presumably, to say that promises are extrinsically opposed to intimate relations is to make the empirical generalization that promises typically have some detrimental effect on such relations. To say that the opposition is intrinsic or essential is to say that promises are *in themselves* distancing and detrimental to intimate relations. Yet the passage provides support for neither claim. It does little to vindicate the extrinsic opposition in the face of the platitude that promises are typically conducive to intimate personal relations simply by promoting interpersonal cooperation over time. More to the point, the passage provides no reason to think about any opposition between promises and intimate relations as intrinsic or essential rather than merely extrinsic or contingent. It is admittedly easy to imagine cases in which a promise spoils intimacy or damage relations. Think about the effect of promising one's unsuspecting spouse that one will remain faithful tonight. Friedrich and Southwood (2011: 289). The possibility of such abuse is not special to promises; it extends to assertion as to every other linguistic act. The lesson is not that promises are opposed to intimacy, intrinsically or extrinsically, but rather that one ought to do the right thing at the right time.

Consider next another contrast between promises and close personal relations, the one posited by Humean transactionalists. The general idea is that, while promising is self-interested in motivation ('the sanction of the interested commerce of mankind'), close personal relations are benevolent ('the more generous and noble intercourse of friendship and good offices'). Let us grant for argument's sake that promising involves at least some self-interested motivation and friendship involves at least some benevolent motivation. This assumption entails no motivational

contrast. The contrast further assumes that self-interested and benevolent motives exclude each other. If there is no problem with mixing self-interested and benevolent motives, there is also no problem with mixing promises and friendship; friends can happily exchange promises and keep them for self-interested and benevolent reasons.

I doubt the exclusiveness assumption. Joseph Butler (1983 [1726]) has persuasively argued that, while genuinely distinct, self-interest and benevolence are psychologically and morally compatible.¹⁴ On the face of it, what motivates our interaction with our loved ones is a mixture of considerations, including self- and other-regarding ones. 'So for whose sake did you make/keep your promise to your son, his or yours?' To this question, my most credible answer would typically be: 'For the sake of us both.' Nor can I find any fault in such motivation. But then I see no reason to treat highly relational promises as less than perfectly paradigmatic.

I conclude that the case for promise transactionalism—the notion that promises between friends, intimates, or lovers are imperfect as promises—is yet to be made out. We can formulate the rejection of this view in *functional* terms. Promises are all-purpose cooperation devices; they serve to promote various forms of interpersonal cooperation over time. The need for such cooperation is as acute in the most relational of contexts as in the most transactional. Therefore, relational promises can promote a paradigmatic function of promises. There is no reason to treat such promises as imperfect or less than perfectly paradigmatic.

Against Promise Relationalism

The problems with promise transactionalism naturally suggest relational accounts. I will now claim that relational accounts mischaracterize promising in the context of distant, impersonal, or discrete relations as less than perfectly paradigmatic.

The problem is particularly clear in the case of Kimel's trust relationalism. Recall his claim that the normal function of promises is to promote close, personal, and ongoing relations by expressing 'robust' trust and respect. By this standard, the promises Hume's farmers exchange seem deficient. The farmers have no special knowledge of each other's character; they interact primarily for self-interested reasons. Since their promises cannot be said to promote close, personal, and ongoing relations or express personal-moral trust, they cannot be said to fulfill the normal function of promising. But this almost strikes me as a *reductio* of Kimel's trust

relationalism. For the promises exchanged by Hume's farmer do seem to fulfill at least one normal function of promising: interpersonal cooperation over time. If so, promoting robust personal relations by expressing robust trust and respect cannot be the (sole) normal function of promising.

Kimel can reply that interpersonal cooperation over time is an instrumental function of promises, which does not affect their intrinsic moral function (2003: 27–9, 57–64). But I see no obvious reason for treating the expression of personal trust or respect as intrinsic and the promotion of interpersonal cooperation as merely instrumental. How is interpersonal cooperation less intrinsic to promises than the expression of such pro attitudes? Nor do I see any obvious reason treat instrumental and intrinsic functions are mutually exclusive. Arguably, I can value our interpersonal cooperation instrumentally for its contribution to our independently valuable relation, and intrinsically for its own sake. Cf. Kagan (1998) and Frankfurt (1999: ch. 7).

Promise relationalists need not insist that promises are paradigmatically animated by the kind of robust personal attitudes characteristic of close personal relations, however. For arguably, even perfect strangers such as Hume's farmers can make and accept invitations to trust (as per Friedrich and Southwood) or appropriately resent me for breaking my promise (as per Darwall). But if Kimel's trust relationalism overpersonalizes promises, Friedrich and Southwood's trust relationalism and Darwall's Strawsonian relationalism overmoralize them. Cf. McNeilly (1972). They view promises that do not render it appropriate to respond to promise-breaking with moralized guilt, resentment, or indignation as substandard.¹⁵

Immoral promise. Start with the stock problem of the promise it is wrong to make or keep, for example Tony Soprano's promise to kill someone. Now it is easy to maintain that even such promises create at least some sort of overridable obligation (perhaps a linguistic one). It is harder to maintain that such promises create genuine *moral* obligations the violation of which legitimizes moralized blame.¹⁶ It is hard to believe that Tony's failure to kill makes him morally blameworthy in the slightest. While not obviously right, has been endorsed by some Strawsonian relationalists. Gary Watson (2009) for example has recently argued that the normative power or authority to create obligations or practical reasons by promising is constrained. Immoral promises exceed that authority and can create no moral obligation and warrant no moralized

blame. If this plausible view is right, Darwall's characterization of paradigmatic promises fails in such cases. Tony lacks the second-personal authority to obligate by promising. Since he is acting *ultra vires*, his promise creates no relational moral obligation or right and authorizes no person to react with the second-personal attitudes.

But if this is right, then I think Strawsonian relationalism à la Darwall is committed to the view that Tony's promise is substandard, not just morally speaking—as is trivially true—but also *as a promise*. That does not seem right. Tony's immoral promise functions in much the same way moral promises do, allowing the parties to achieve what they plan to achieve. Nor does Tony's promise seem bereft of normative implications. Promises are by nature to be kept rather than broken. If Tony fails to kill, he fails to comply with a constitutive requirement of promising. By breaking the rules of the system he chooses to invoke, he opens himself up to criticism. But he does not open himself up to moral criticism. The constitutive norms of promising are not particularly moral (or second-personal in Darwall's sense); you can violate them with moral impunity.¹⁷

Objective attitude. Difficulties with Strawsonian relationalism extend to perfectly moral promises. Suppose that Hume's farmers exchange and keep their promises for mixed self- and other-interested reasons. Suppose that if one farmer broke his promise, the other, though disappointed, would respond with no moralized resentment. He would handle the problem in a variety of other ways, such as giving the other new reasons to cooperate, finding the best available replacement deal, and spending more time in church. Or take the more personal case in which friends exchange and keep promises to meet partly out of sympathetic concern for each other. Suppose that if one friend broke her promise, the other would be disappointed but experience no moralized resentment. She would reschedule the meeting, cut her losses, and exercise. Such cases sound familiar and the conduct they involve seems appropriate. We often have better ways to respond to the violation of interpersonal norms than moralized blame. This seems as true in our personal lives as in our commercial ones.

A Strawsonian relationalist can deny that these considerations support the view that the promises in my last two examples are perfectly paradigmatic. He could argue, in a Strawsonian vein, that while we can temporarily suspend the moralized personal reactive attitudes on some

particular occasion, doing so wholesale is neither psychologically possible nor desirable. (1) Given human nature, regarding people exclusively with the objective eye is ‘practically impossible’ (2008: 12). (2) Doing so would lead to impoverished human relations. Cf. e.g. Wolf (1982).¹⁸ The Strawsonian relationalist might take this to show that (3) perfectly paradigmatic promises are given in the context of the moralized reactive attitudes.

My main difficulty with this response concerns the inference to the conclusion (3), but first let me register some doubts about the premises (1) and (2).

The premises. Neither premise is obviously right. Sommers (2007). The impoverishment claim (2) is particularly suspect. Those who think that moral responsibility presupposes susceptibility to moralized reactive attitudes might wonder whether a world in which we systematically suspend these attitudes is one without moral responsibility. Even so, there is no obvious reason to doubt our capacity to love, befriend, and sympathize with one another. Nor is there an obvious reason to doubt our capacity for virtue; arguably, we could still love the good and hate the bad.¹⁹ Finally, what reason do we have for thinking that the shallowing effect of going objective outweighs the notoriously painful effects of moralized guilt and resentment?

The psychological impossibility claim (1) is harder to deny. We clearly are in some way committed to seeing ourselves and others as proper objects of personal reactive attitudes. But this claim is open to different understandings. Strawson thought that our commitment to the reactive attitudes is as unavoidable as our commitment to inductive reasoning, that it is ‘in no way something we choose or could give up’ (2008: 28). But others have suggested that our commitment to the reactive attitudes is closer in nature to our commitment to religious belief. Perhaps it is something we could give up, at least partially and incrementally. Sommers (2007: 336–40).

The inference. Suppose however that the Strawsonian relationalist is right that adopting an exclusively objective view of people is psychologically inconceivable and impoverishing. It still does not follow that promises the parties to which take an objective view of one another are deficient as promises. No one seems to deny that it is often appropriate to interact with others without moralized blame. How are appropriately non-moralized promises deficient as promises?

Promise relationalism overpersonalizes promises, overmoralize them, or both. There is

no compelling reason to accept it.

Promise Pluralism

Beginning to emerge is the following view:

***Promise pluralism.* Perfect or paradigmatic promises are relational or transactional in contexts. In their central case, promises are embedded in some relational, transactional, or relational-transactional context.**

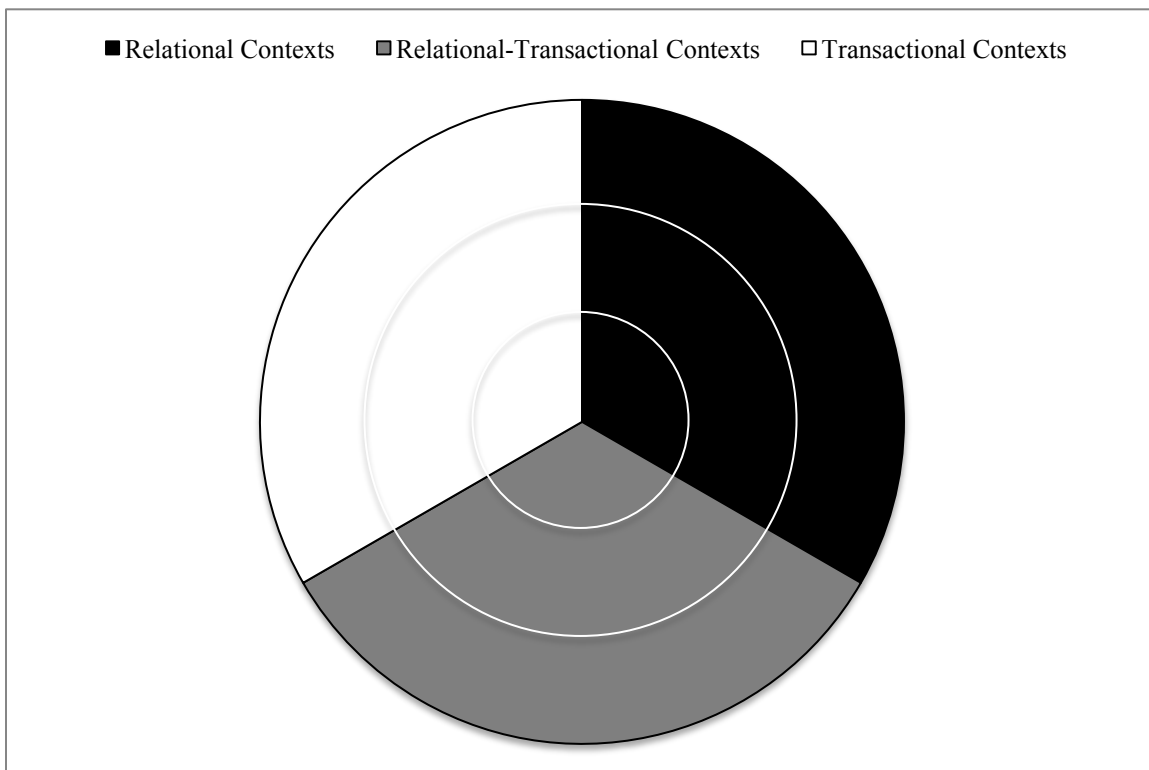


Diagram 5: Promise Pluralism

Inner doughnut hole represents the zone of promissory perfection.
Inner doughnut represents the zone of partial promissory perfection.
Outer doughnut represents the zone of promissory imperfection.

Notice that promise pluralism is not the rather pedestrian observation that promises are in fact made in all these contexts; it is the stronger claim that promises are made in all these context paradigmatically, that, contra promise relationalism, promises are not primarily relational and secondarily transactional in context, and, contra promise transactionalism, promises are not

primarily transactional and secondarily relational in context. There is no interesting priority between these contexts of promises, one way or the other. When it comes to embedding social context, the core (inner doughnut hole) of promises is split.

Just how pluralistic promise pluralism is depends on our working conception of the relational–transactional distinction. I cannot exclude the possibility that promise pluralism comes out false under some interesting interpretation of that distinction; all I can say is that it seems to hold under a wide range of plausible interpretations of that distinction, including, as we saw in previous sections, some that can be found in the literature. That being said, it is hard to see think of a non-trivializing interpretation of the relational–transactional distinction that would falsify promise pluralism.

Of course, most social contexts are mixed, but mixed cases require no special consideration. It stands to reason that, if perfect promising can occur in the context of maximally relational and transactional relations, they can occur in any mixed, relational-transactional ones. Our interpersonal relations with our business partners, employers, and nannies have personal and impersonal aspects. It is hard to find fault with the promises we make in the course of these relations, so long as they are sincere, voluntary, and kept.

A complete argument for promise pluralism requires a positive account of promises, which I have not offered. I do, however, believe that the discussion so far is sufficient to shift the burden of proof onto the other side. The starting point is the simple observation that promises are embedded, and seem to function quite well, in various relational and transactional environments. Thus the suggestion that transactionality or relationality marks a promissory imperfection requires explanation. Such an explanation is yet to be offered.

Extension. I now want to extend the discussion to contracts, which I take to be legally binding agreements. It is clear that promises and contracts are closely related. Fried (1981, 2007). Arguably, a contract consists of exchanged legal promises, legally binding promises that interdepend in such a way that warrants describing them as a joint promise. As in the case of promises, there is an outstanding debate over the social context of contracts. The debate presupposes that contracts have their own privileged embedding social context, some non-trivially describable interpersonal relation complex to which perfect contracts are confined. As

before, these views can be illustrated in terms of the fluid relational-transactional distinction.

6. CONTRACT RELATIONALISM

Consider

***Contract relationalism.* Perfect or paradigmatic contracts are relational or nontransactional in context. In their central case, contracts are embedded in some relational social context. Contracting in transactional contexts is nonparadigmatic or imperfect as contracting; it presupposes contracting in relational contexts.²⁰**

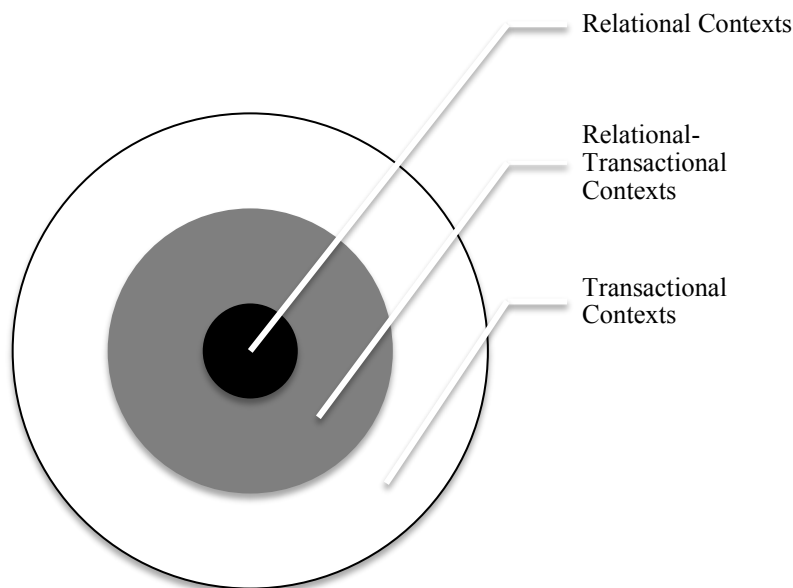


Diagram 6: Contract Relationalism

Inner doughnut hole represents the zone of contractual perfection.

Inner doughnut represents the zone of partial contractual perfection.

Outer doughnut represents the zone of contractual imperfection.

It was in the course of offering a relational account of contracts that Ian Macneil introduced the relational–transactional distinction (1974). Friends of relational contract theory stress the social embeddedness of contracts, the fact that all contracts are embedded in some complex of legal and non-legal relations, institutions, and norms. That is obviously so. First, there is no such thing as

a legally unregulated contract. Contracts are creatures of the law. By recognizing an agreement as a valid contract, the law already regulates it (by endowing it with legal significance). And all contracts are subject to further legal regulation of their formation, content, and enforcement. Second, even the simplest of contracts presupposes such non-legal institutions as language, culture, and morals as well as such semi-legal institutions as property, economy, and government. Since the idea of the unembedded contract is a chimera, the embeddedness of contracts cannot be all that relational contract theorists want to claim. Their most basic insight is the potentially controversial claim that the social context in which typical, representative, or paradigmatic contracts are embedded is particularly thick or robust ('relational,' 'intertwined'). Different relationalists take different views of the exact sense in which paradigmatic contracts are robust. The general thought is that paradigmatic contracts are embedded in complex, long-term, high-stakes cooperative relations governed by non-legal social norms such as internal rules of firms, trade customs, and etiquette.²¹ Macneil and others insist that the norms governing these relational contracts impose a collectivist ethic of solidarity (reflected in legal duties of fairness, good faith, or sharing), as opposed to an individualistic ethic of profit-maximization. Cf. Barnett (1992).

An example of a highly relational contract is a supply agreement between a smelting plant and a coalmine. See Campbell (2001: 16–18). The parties to such an agreement have had at least some interaction before and in any event expect to establish a fairly long, stable, and amicable economic relation. The relation is expected to have multiple dimensions and require constant adjustments to the changing circumstances and needs of the parties. As the relationship evolves, the expectations will be adjusted by mutual consent. Since the overarching goal is continued cooperation, the parties will accommodate each other without resort to the law. At the limit, the contract will amount to little more than an insurance policy for the end-game contingency (the end of cooperation). Bernstein (1996).

So contract relationalists envisage a spectrum of embedding social contexts stretching from the maximally transactional pole to the maximally relational, and make the potentially controversial claim that representative, paradigmatic, or important contracts fall closer to the former. There is no denial that highly transactional or discrete contracts exist, a stock example

being the spot gasoline purchase on the road. The claim is rather that such contracts are the exception rather than the norm. Contracts falling closer to the thick relational pole of the embedding context spectrum enjoy some sort of explanatory priority over those falling closer to its thin transactional pole. And the law should take account of this fact.^[22]

7. CONTRACT TRANSACTIONALISM

Those who reject contract relationalism might wish to go all the way in the other direction to espouse:

Contract transactionalism. Perfect or paradigmatic contracts are transactional or nonrelational in context. In their central case, contracts are embedded in some transactional social context. Contracting in relational contexts is nonparadigmatic or imperfect as contracting; it presupposes contracting in transactional contexts.²³

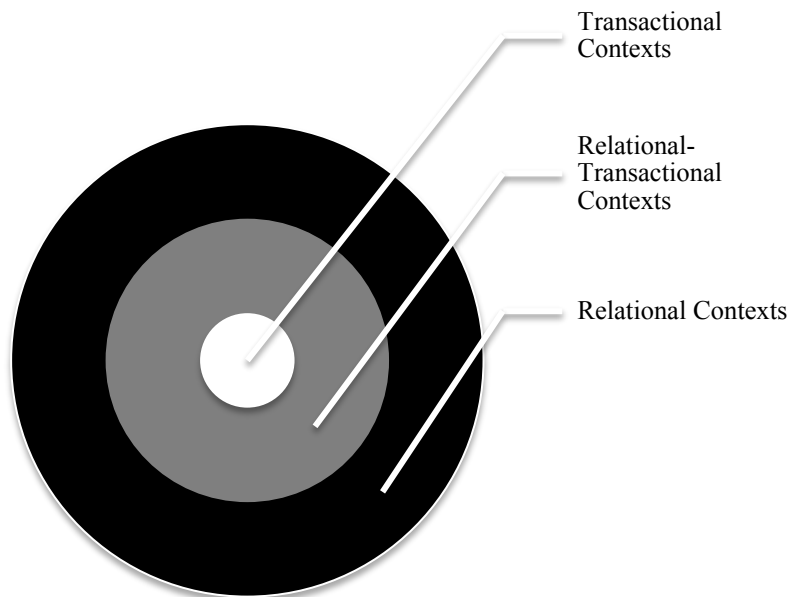


Diagram 7: Contract Transactionalism

Inner doughnut hole represents the zone of contractual perfection.
Inner doughnut represents the zone of partial contractual perfection.
Outer doughnut represents the zone of contractual imperfection.

Let me mention two similar examples of this view.

Contract as detachment. I noted Kimel's promise relationalism (section 3); I now note his contract transactionalism. He sees 'contract essentially as a tool for dealing at arm's length;' 'the main role of contract law is that of facilitating arm's length transactions,' and 'the institution's main preoccupation is with facilitating and regulating transactions outside of the framework of already-existing relationships characterized by trust, interdependence and earnest cooperation' (2007: 242–3).²⁴

In Kimel's discussion, 'contract emerges not as *promise*, but as a *substitute* for promise' (2003: 79). Kimel does not deny that contracts consist of exchanged promises; what he does seem to deny is that contractual promises are very good or 'normal' promises. Contracts and promises, he maintains, have 'diametrically opposed' intrinsic functions. The intrinsic normal function of promises is the promotion of personal relations through the expression of robust, personal-moral trust and respect. The intrinsic normal function of contracts on the other hand is the facilitation of personal detachment (65–90). To say that personal detachment and personal relations are 'diametrically opposed' (78–80), I take it, is to say that promoting one of them between two persons does not promote the other. As Kimel claims: Promises and contracts are practices that are capable of promoting only one of [personal relations and personal detachment]—and not the same one (79). Call this view of contracts the *detachment thesis*.

Kimel's argument for this thesis plausibly assumes that what makes contractual promises contractual is their legal enforceability. While typically reparative rather than punitive, remedies for breach of contract also deter. By making contracts sanction-enforceable, the legal system makes the consequences of their breach significantly costly. Kimel assumes that the legal threat of sanction is effective: the threat is public, clear, and credible; breach of contract is highly likely to result in sanction. He further assumes that this credible threat is normally sufficient to deter breach *by itself* (37, 54–8, 75–6).

Kimel's first argument for the detachment thesis is that the sanction-enforceability of contracts provides even perfect strangers with whatever assurance they need to co-operate successfully, and can therefore allow parties—give them the option—to co-operate and pursue valuable goals in transactional ('discrete') contexts, outside the context of meaningful personal

relationships and their attendant attitudes of profound trust and respect (54–64, 81–2). The second argument for the detachment thesis lies implicit in Kimel’s discussion. Parties to meaningful personal relations, with their robust trust and respect, have no need for contracts, because they have no need for sanction-enforceability. The constitutive attitudes of these relations provide the parties with all the assurance they need to cooperate successfully.

Kimel’s main argument for his detachment thesis is negative, seeking to establish that contracts are ‘singularly inadequate’ for promoting personal relations by expressing personal-moral trust (a task for which promises are ‘uniquely suited’). Contracts in the context of a meaningful personal relationship ‘positively damage, rather than reinforce, the relationship’ (2003: 76–7, 56, 29). Here is how. The sanction-enforceability (credible threat of sanction for breach) of contracts creates reasons that are sufficient to motivate performance (because they outweigh the reasons to breach). But then (so goes the argument), neither contractor can know that the other has performed the contract for reasons that are right in the context of meaningful personal relations (i.e. profound personal-moral trust or respect); neither can exclude the possibility that the other has performed for fear of sanction. Sanction-enforceability ‘casts a thick and all-encompassing veil over the motives and the attitudes toward each other attributable to parties to contracts.’ Performance under such veil cannot express robust trust or respect.

This *argument from motivational opacity* can be summarized as follows: (1) Robust personal relations require motivational transparency, the ability reasonably to ascribe motives to one another, and specifically the ability to tell that the other has acted from robust trust or respect. (2) Sanction-enforceability generates motivational opacity; for all that one party knows, the other party’s performance has been motivated by fear of sanction.²⁵ (3) Therefore, contracts are inadequate for robust personal relations.

Contract as Arm’s-Length. I noted Markovits’s transactionalist view of promises (section 4). I now note his transactionalist view of contracts. Like Kimel, Markovits characterizes the embedding social context of contracts as a transaction arising at ‘arm’s length,’ outside the context of intimate personal relations. Markovits characterizes arm’s length relations in Kantian terms, specifically in terms of a distinctly impersonal moral attitude: recognition of authority or respect for personhood. Unlike Kimel, Markovits thinks that contracts exhibit this impersonal

moral attitude not in spite but precisely because of their promissory nature. In fact he makes the stronger claim that contracts involve this attitude to the highest degree; contractual promises are a better example of arm's-length relations than noncontractual promises: the practice of contract 'represents promise's highest and most complete expression' (2011: 296).

Markovits's reasons for thinking that contracts are paradigmatically arm's-length are somewhat different from Kimel's. He claims that contracts are particularly suited for impersonal recognition in three ways. First, contractual motivation is *self*-interested. It generates impersonal respect for personhood by excluding distinctly personal attitudes, such as sympathetic concern and paternalism (315-16). Second, contracts are *reciprocal*. Contracts are agreements or exchanged promises, where each party authorizes the other because the other authorizes it. This 'formal equality' makes for a particularly complete case of the impersonal recognition or respect Markovits associates with promises: each party recognizes not only the authority of the other but also her own authority. Finally, contracts are creatures of *positive law*, and are enforceable in the law courts. This makes the abstract public reasons generated by contractual promises concrete (318). In all three respects, 'contract perfects the recognition associated with promise.'

Kimel and Markovits differ less on contracts than on their relation to promises. For Markovits, the three ways in which contracts are particularly transactional or arm's length are also those in which contracts are 'promise's the highest and most complete.' This view depends on his *promise transactionalism* (questioned in section 5). Kimel on the other hand rejects promise transactionalism, and therefore the view that contracts are normal promises. For all that, Kimel and Markovits share the contract transactionalist belief that perfect contracts arise at arm's length.

Crossing contract transactionalism with promise relationalism yields:

Contract as imperfect promise. Contractual promises are imperfect promises.²⁶

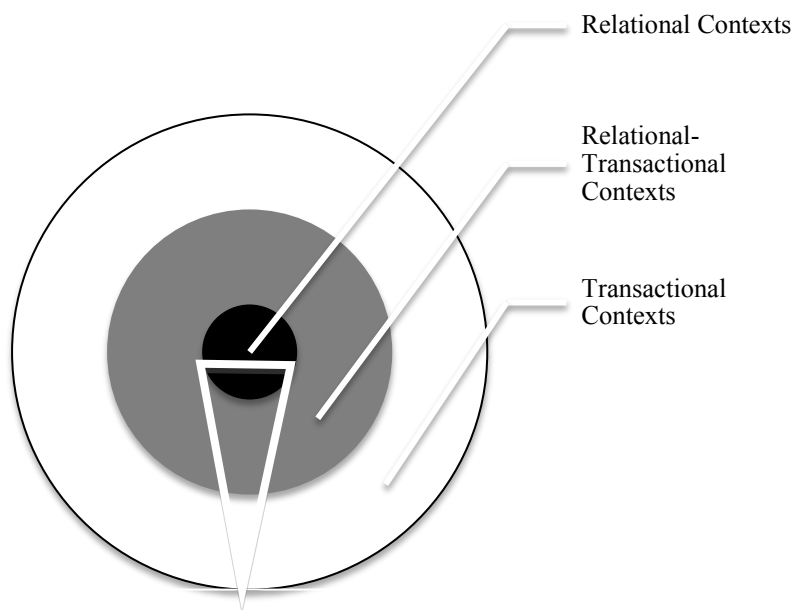


Diagram 8: Contract as Imperfect Promise

Inner doughnut hole represents the zone of contractual perfection.
 Inner doughnut represents the zone of partial contractual perfection.
 Outer doughnut represents the zone of contractual imperfection.

Narrowest triangle segment represents the zone of contractual perfection.
 Middle triangle segment represents the zone of partial contractual perfection.
 Widest triangle segment represents the zone of contractual imperfection.

Now we have already seen one way to question contract as imperfect promise, namely by questioning promise relationalism.²⁷ The next section presents another way of questioning that view, namely by questioning contract transactionalism.

8. THE PLURAL SOCIAL CONTEXT OF CONTRACTS

I question both contract relationalism and contract transactionalism.

Against Contract Relationalism

We can be brief here, for the considerations adduced against promise relationalism in section 5 apply with greater force to contract relationalism. The problem is not simply that many contracts are embedded in relatively distant, impersonal, and discrete relations, but that contracts that fall

much closer to the transactional or discrete pole of the spectrum seem perfectly desirable, appropriate, and functional. On the face of it, promoting all-purpose interpersonal cooperation over time is a proper paradigmatic function of contracts. Transactional contracts fulfill this function no less than relational contracts.

Take a spot contract governing sale of gas, candy or stock, where the parties have had no interaction before and anticipate no meaningful relation after the transaction. As contracts go, these are quite transactional. Now to echo a comment made in section 2, there can be no denial that such contracts are legally regulated and socially embedded. The contractual relation is itself an interpersonal relation complex with significant legal and moral implications. The contract is designed to survive its own breach. As soon as the parties violate their primary contractual obligations, they get secondary ones. But none of this makes the contract relational other than trivially. What makes the spot contracts I have in mind relatively transactional is the fact that they presuppose no further independently significant relation between the parties. In the cases I have in mind, all interaction between the parties will come to an end as soon as they successfully discharge their contractual obligations. And yet these transactional contracts operate exactly as they should, allowing their sides to exchange goods on the market without as much as knowing each other or forging larger personal or economic relations of significant duration.

A contractual relationalist can protest that such spot transactions involve no genuine contract. A contract is a bridge between the present and the future, requiring at least some time-gap between entrance and performance. The transactions in my examples on the other hand are instantaneous exchanges of goods. One response is that even spot transactions involve a time-gap between entrance and performance, albeit a short one. Arguably, by pointing to a candy in your store, I accept your offer to sell it. We now have a contract but neither one of us has discharged his obligation. Delivery and payment take time, if only seconds.

Another response is that my worry about contract relationalism is not confined to spot contracts. Presumably, a sale that is expected to take a few weeks to complete can still fall closer to the transactional end of the spectrum. Take a contract for the sale of house. Like all contracts, it is regulated, embedded, and requires the parties to cooperate with respect to the transaction for the duration of its successful completion. But the contract does not require or anticipate any

further, minimally robust personal or economic relations. In a typical case, the buyer and seller of a house are strangers who share an interest in cooperating for the purpose of the particular land transaction and returning to strangerhood. The interpersonal relation complex in which their contract is embedded can hardly be described as robust, multidimensional, and long-term. Yet these contracts operate exactly as they should, allowing strangers to cooperate on mutually beneficial terms without forging close, personal, or multidimensional relations.

Contract transactionalists are right to explain why contracts are routinely embedded and function well in transactional environments by reference to their sheer legality, the fact that they impose legally binding and enforceable obligations. However, an adequate explanation does not require transactionalism. The law provides public rules for the regulation of contracts, remedies for breach, and courts in which they can be enforced. The law provides the parties with reasons to make, rely upon, and keep contracts, reasons they would not have apart from the law. At least one good reason to keep a contract emanates from its sanction-enforceability, the threat of being found in breach and ordered to compensate. Reasons of enforceability are relatively insensitive to the embedding social context of contracts; they exist quite regardless of the exact nature of the relations the contractors have or anticipate, require no significant close personal relation, and apply to strangers and spot transactions. This begins to explain how contracts (or contract law) are suited to promote interpersonal cooperation even in transactional social settings. Yet there is nothing in this line of thought to suggest that contracts (or contract law) are *unsuited* to promote interpersonal cooperation in relational social settings.

Notice that in addition to giving actual contractors reasons to keep their contracts, the law gives potential contractors reasons to enter contractual relations. The law does so by providing potential parties the option to subscribe to a framework of rules as to the formation, content, interpretation, performance, and enforcement of contracts. Subscription to the framework can streamline interpersonal cooperation by saving recourses and adding a measure of stability and predictability to their cooperative efforts. Parties can have such reasons to contract without having or anticipating robust long-term cooperative relationship. This continues to explain how contract (or contract law) are suited to promote interpersonal cooperation in transactional settings, without denying their suitability to do the same in relational ones.

Against Contract Transactionalism

So contract transactionalists are right that many contracts are embedded in some relatively transactional (non-relational) social context, an interpersonal relation complex animated by relatively detached or impersonal attitudes. They are also right that contracting in transactional contexts (at arm's length) is often perfectly appropriate; lack of attachment or intimacy does not render contractual cooperation on mutually beneficial terms inappropriate; some perfect contracts are transactional. Yet this falls short of contract transactionalism; it is consistent with the claim that some perfect contracts are relational. I now argue that this claim is true.

Marriage contract. Islamic law (sharia) provides one potential counterexample to contract transactionalism.²⁸ Under Islamic law, marriage (nikah) is not a sacrament but a private contract. While Islamic law determines some of the terms of the contract, it allows the parties to modify some and add others. The marriage contract typically establishes a long-term intimate personal relationship and regulates some of its central terms, including country of residence, education, career, and visitation with in-laws. It also 'obligates each spouse to treat the other well.' Kecia (2008). The marriage is expected to be 'permanent' unless the contract explicitly stipulates a fixed duration. The marriage contract is bound to be among the one or two most important contracts the parties enter in their entire lives, one approximating a precondition on having sexual or spousal relations in traditional Muslim society. To my mind, such contracts merit two claims. First, they are fairly relational, embedded as they are in a fairly intimate, robust, and long-term marriage relation complex and Islamic law. Second, they are paradigmatic, appropriate, and functional contracts. Therefore, Islamic marriage contracts counterexample contract transactionalism.

A contract transactionalist might object that marriage contracts under Islamic law are not genuine contracts because Islamic law is not genuine law. Echoing H. L. A. Hart's comments about 'primitive communities' (1992: 91–2), one might argue that Islamic law has first-order rules of conduct but lacks second-order rules for recognizing, changing, or adjudicating them, which are necessary to turn them into a legal system. Now it is fair to wonder why we should take this argument to support its conclusion rather than to undermine its premises, but the objection fails for the simpler reason that the nikah is a valid contract under some contemporary

legal systems that have incorporated Islamic law. Saudi law, for example. Wynn (2008).

The objector might concede that Islamic (or Saudi) marriage contracts are genuine contracts and restrict the scope of contract transactionalism to liberal legal systems. The claim now is that liberal legal systems are (appropriately) reluctant to enforce spousal contracts for the reason that such enforcement would compromise the personal autonomy of the partners. But this claim is not generally true. The attitude the liberal state takes (or should take) to spousal contracts is complicated; its readiness to enforce them varies (as it should) with the kind of contract at issue. For example, liberal jurisdictions are typically reluctant to enforce prenuptial contracts regulating how the spouses are to lead their everyday lives (sex lives, for instance), but are often happy to enforce prenuptial or postnuptial contracts regulating the division of property upon divorce or separation. Lifshitz (2012). (Contracts regulating the end of marriage are mixed in context. On the one hand, these contracts begin and often end their lives embedded in a close, stable, and personal relationship. On the other hand, they are designed to kick in precisely when the relation begins to grow distant, unstable, and impersonal).

Sales contracts. Turning to a mundane example, I previously cited the transactional nature of some typical sale contracts as a point against contract relationalism. It is time to add that such contracts are not invariably transactional; the relation complex in which sales contracts can be embedded can be as robustly relational as possible. Jo might have a close and involved relationship with her father, but her only way of buying his father's house is by executing a written contract. The contract in this case would be embedded in a close, personal, and long-term parent-child relationship. Yet I am not tempted to say that the relational environment makes the agreement deficient as a contract.

More examples. Next consider the kind of contract relationalists highlight, for instance employment, franchise, and supply contracts. The relationships such contracts anticipate are not particularly personal (they are mainly economic), but they are surely complex, long-term, cooperative, and tend to take on significant personal significance as they evolve. Since they seem to be perfectly paradigmatic contracts, they seem to counterexample contract transactionalism.

In reply, a contractual transactionalist can claim that employment, franchise, and supply contracts, and spousal, fiduciary, and insurance contracts, cannot count as exemplary contracts

for the simple reason that they are heavily regulated. But this threatens to confuse the contract with its embedding social context or relation complex. It may well be correct to say that employment relations become less contractual as employment contracts become more heavily regulated (that is to say as the law determines more aspects of the relation between parties to an employment relation regardless of their contract). It is however incorrect to say that employment contracts become less contractual as they become more regulated. Again, if employment contracts are more heavily regulated than entertainment contracts, then it may or may not be correct to say that employment is less contractual than entertainment, but it may not be correct to say that employment contracts are less contractual (or fall shorter of contractual perfection) than entertainment contracts. Presumably, if employment contracts are more heavily regulated than entertainment contracts, the conditions of forming them are more demanding. Yet by hypothesis, they meet these demanding conditions. The fact that a contract meets more demanding conditions on contracting hardly makes it less contractual or less good of a contract. Nor does it make its enforcement any less desirable. By heavily regulating contracts of type X, the law expresses no reluctance to enforce type X contracts; it only expresses reluctance to enforce type X contracts that fail to comply with its regulations.

In conclusion and as contract relationalists have long argued, perfectly good contracts are often embedded in robust, long-term, personal or economic relations and social norms. I now respond to the positive arguments for contract transactionalism mentioned in section (7).

Detachment. Recall Kimel's first argument for his detachment thesis: sanction-enforceability of contracts enables contractors appropriately to co-operate for valuable purposes in highly transactional contexts. This is exactly right, but it provides no support for the detachment thesis, the view that personal detachment is the main, intrinsic, or normal goal of contracts or contract law. It is compatible with the view that some perfectly good contracts are highly relational in context.²⁹ Consider next Kimel's second (implicit) argument for the detachment thesis: parties to significant personal relations have no need for enforceable contracts to cooperate; their robust mutual trust and respect provides them with all the assurance they need. This empirical assumption is too broad to be true. Sanction-enforceability is sometimes quite necessary to secure cooperation in highly relational contexts. For one thing, the parties might

want to insure against the breakdown of their relationship. For another, they might reasonably believe that their robust mutual trust and respect cannot be relied to secure cooperation, unless supplemented by sanction-enforceability. Finally (now granting the said empirical assumption), the parties might need to enter a contract regardless of its sanction-enforceability (if only because they get the terms for free).

The cogency of the detachment thesis then turns entirely on Kimel's argument from motivational opacity: (1) Robust personal relations require motivational transparency, the ability reasonably to ascribe motives to one another, and specifically the ability to tell that the other has acted from robust trust or respect. (2) Sanction-enforceability generates motivational opacity; for all that one party knows, the other party's performance has been motivated by fear of sanction. (3) Therefore, contracts are inadequate for robust personal relations.

I grant premise (1) and focus on the largely empirical premise (2). I see at least two problems with this premise. First, to deliver the conclusion (3), the premise must be read to imply that, if you cannot reasonably tell that I have kept my contract *other than from* fear of sanction, you also cannot reasonably tell that I have done so *from* robust respect for you. Otherwise, you could reasonably ascribe me the right sort of motive (robust respect), after all.³⁰ Second, the argument for this premise relies on the assumption that a contract's sanction-enforceability generates a sufficient reason to keep it. Let me take these points in order.

I see no reason to accept the assumption that your inability to tell that my contract-keeping was not motivated by fear of sanction renders you unable to tell that it was motivated by robust trust and respect for you. This assumption clearly implies that if I have kept my contract in order to avoid sanction, I have not also done so out of robust respect. This is reminiscent of the view rejected in section 5, namely that one cannot perform an action from both self-interested and benevolent reasons. Arguably, I could keep my contract both in order to avoid sanction and out of robust respect for you. If that is basically right, then you can arguably know for a fact that I have kept my contract to avoid sanction and still reasonably believe that I have also done so out of robust respect for you. In any event, it is hard to see how your inability to tell whether I have acted to avoid sanction prevents you from being able to tell that I have acted out of respect.

Kimel claims that sanction-enforceability generates motivational opacity by providing

each party with a sufficient reason to keep their contract, a reason strong enough to move each party to keep its contractual obligation even in the absence of other reasons to do so, and in particular even in the absence of robust respect for the other party. But at least in Anglo-American legal systems, remedies for breach are often insufficient to deter breach apart from other reasons to perform, such as dependence on the other party's continued cooperation. Nor can we salvage this assumption by interpreting it as a conceptual claim about ideal contract systems. There is no special reason to want remedies for breach of contract to motivate performance by themselves rather than in conjunction with other factors. And arguably, ideal contract remedies are not designed to motivate performance, only desirable performance.

Arm's length. Recall the three features Markovits think turns contracts into 'the highest and most complete expression' of an intrinsically distancing arm's length relation: self-interest, reciprocity, and positive law. I want to grant that contractual relations exhibit these features (to at least some extent) and deny that they render contracts in themselves distancing or detrimental to intimate or otherwise significant close personal relations. My basic complaint against the intrinsic opposition of self-interest and intimacy should already be clear from the discussion of promise transactionalism in section 5 (and the detachment thesis in the previous paragraphs): one can properly perform the same action for self-interested and other-regarding reasons, including in the context of intimate and otherwise close, significant, and long-term personal relations. What is crucial for such a relation is not that the parties not be stably disposed to interact for self-interested reasons (for their own sake) but rather than they be stably disposed to interact for other-regarding reasons (for the sake of the other or their relation). Indeed the prospect of an intimate relation animated by exclusively other-regarding motives strikes me as pathologically romantic. I should think that the capacity to interact from mixed, self- and other-regarding motives is a mark of healthy intimate relations. If this is basically right, the presumed fact that contractual relations are animated by at least some self-interested considerations grounds no case against mixing contractual and intimate relations.

Something similar can be said about reciprocity. Contracts are reciprocal in the sense that each party commits because the other does. But contracts are for that reason alone intrinsically distancing or inimical to personal relation, all agreements are, for all agreements are reciprocal in

this rather thin sense. And I see no more reason to think that agreements are in themselves inimical to intimacy than to think that promises are. I have argued that there is nothing less than paradigmatic about promises made in robustly relational social contexts (section 5). Similarly, there is nothing less than perfectly paradigmatic about agreements struck in such contexts. Nor is my reason for so thinking is any different. Parties to the most intimate of personal relationships must cooperate and agreements are excellent cooperation devices. Indeed there is something counterintuitive about the thought that unilateral (*nonreciprocal*) promises are *more* suitable for intimate relations than reciprocal promises.

Finally, I cannot share the belief that the legality of contracts--their being creatures of positive law--makes them intrinsically distancing or intimacy-resistant. The example of enforceable spousal contracts (in Islam and state jurisdictions) suggests that the relation between positive law and intimacy is merely contingent. The legality of contracts can be highly relevant to whether parties should enter into a particular contract as well as to whether the law should contractualize (make enforceable) particular types of contract. I take it that many states have no reasons for and some reasons against contractualizing agreements that regulate spousal sexual lives in detail. This does not make the legality of contracts inherently distancing.

Contract Pluralism

Beginning to emerge is

***Contract pluralism.* Perfect or paradigmatic contracts are relational or transactional in context. In their central case, contracts are embedded in some relational, transactional, or mixed relational-transactional context.**

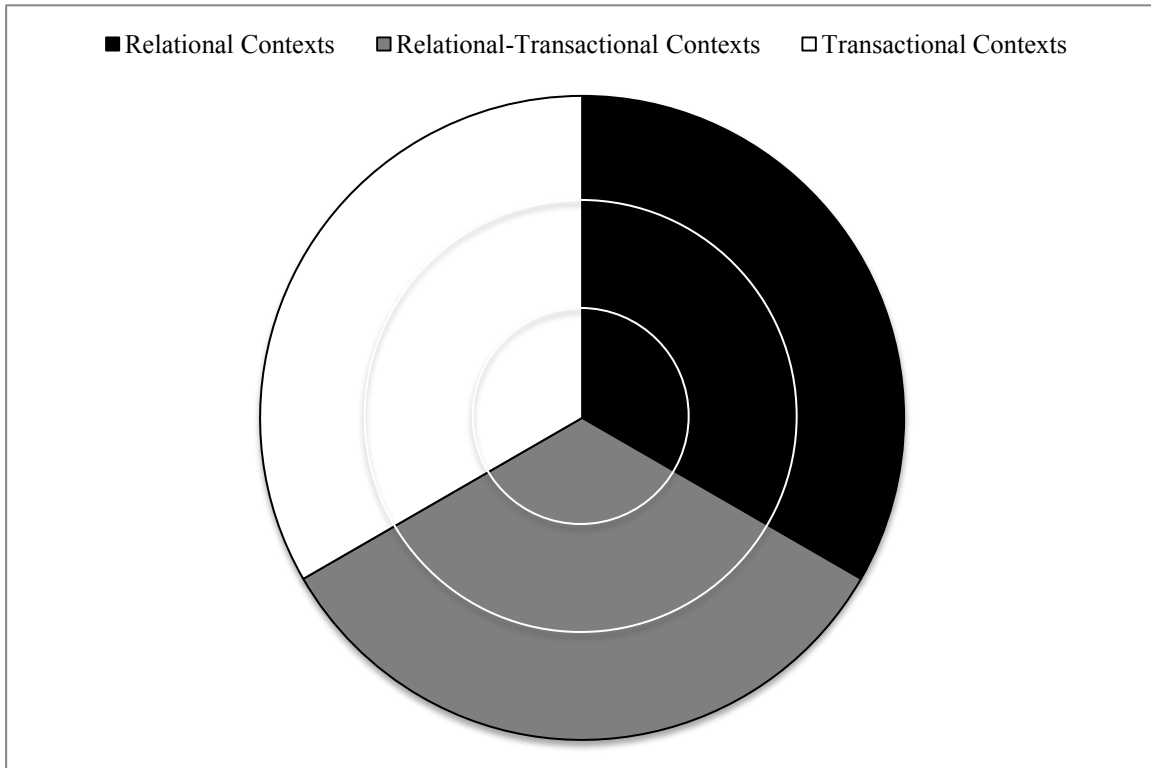


Diagram 9: Contract Pluralism

Inner doughnut hole represents the zone of contractual perfection.
 Inner doughnut represents the zone of partial contractual perfection.
 Outer doughnut represents the zone of contractual imperfection.

This view goes beyond the observation that contracts can be made in both relational and transactional social contexts. It makes the stronger claim that such contracts may be exemplary, perfectly good, paradigmatic contracts. Pace some potentially interesting theses about their embedding social context, contracts are neither primarily relational and secondarily transactional nor primarily transactional and secondarily relational. When it comes to embedding social context, the core (inner doughnut hole) of contracts is split.

Now just how pluralistic contract pluralism is depends on our working conception of the relational–transactional distinction. I cannot exclude the possibility that contract pluralism comes out false under some plausible interpretation of that distinction. All I can say is that it clearly seems to come out true under a wide range of plausible interpretations, including some currently on offer in the literature.

9. CONCLUSION

I close by bringing promise and contract pluralism into contact. After all, I have assumed that contracts are agreements or joint promises. Emerging is a picture in which the pluralism of contractual promises reflects that of agreement promises, which in turn reflects the pluralism of promises. Consider

Wide Promise Pluralism

(1) Promises are relational or transactional in context. In the central case, promises are embedded in some relational, transactional, or mixed relational-transactional context.

(2) Agreement promises are relational or transactional in context. In their central case, agreement promises are embedded in some relational, transactional, or mixed relational-transactional context.

(3) Contractual promises are relational or transactional in context. In their central case, contractual promises are embedded in some relational, transactional, or mixed relational-transactional context.

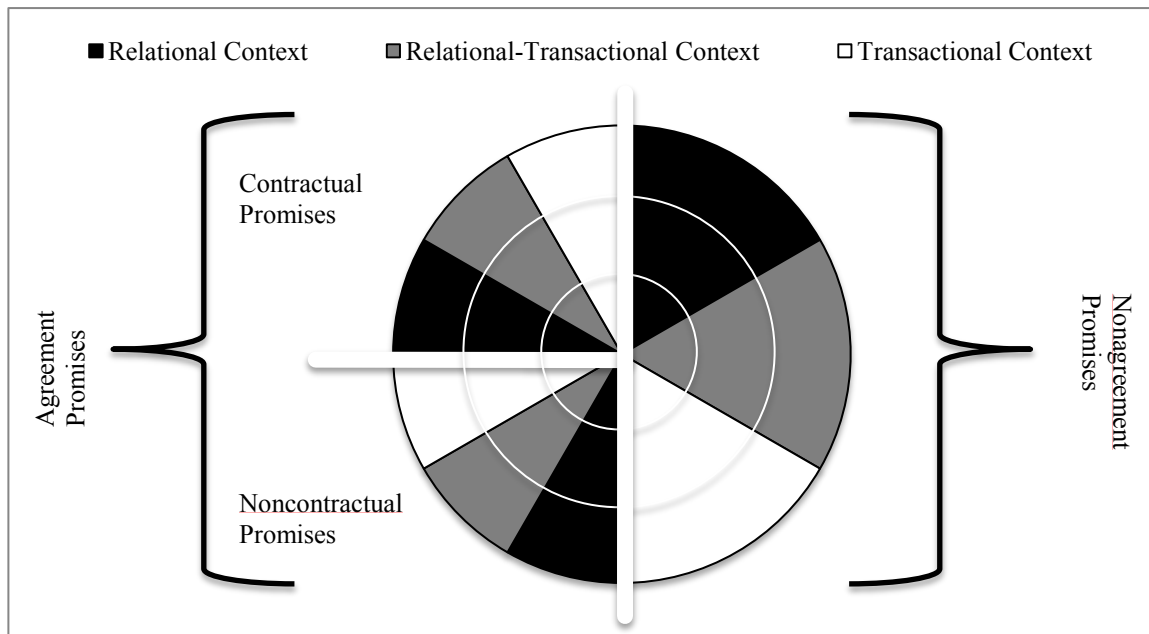


Diagram 10: The Social Diversity of Promises, Agreement Promises, and Contractual Promises

Inner doughnut hole represents the zone of promissory perfection.
Inner doughnut represents the zone of partial promissory perfection.
Outer doughnut represents the zone of promissory imperfection.

Promises, understood broadly to include agreement and contractual promises, emerge from the discussion as a highly adaptable social animal, one that can function perfectly well in radically different social environments. On this picture, we make promises in pretty much every nontrivially describable type of social context or interpersonal relation complex, be it relational, transactional, or mixed. Different promises are made under different promising practices, animated by different attitudes, and governed by different social norms. Promises can play a proper role in all these settings, if only by promoting all-purpose interpersonal cooperation over time.

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ENDNOTES

¹ I would like to thank the participants in the contract and promise workshop at Georgetown Law for their many useful comments. For valuable comments, many thanks to David Enoch, Ruth Halperin-Keddari, Alon Harel, Les Green, Dori Kimel, Greg Klass, Shahar Lifshitz, Eyal Zamir and an anonymous referee for OSLP.

² Thanks to Martin Stone for the example.

³ There are other examples. Darwall (2011: 269) regards coerced and coercive promises as genuine promises that are deficient as promises: 'Promises under such conditions may not completely 'misfire,' as Austin put it, but they nonetheless constitute an 'abuse' in his terms. They violate 'felicity conditions' that are part of our very idea of the speech act.'

⁴ Cf. Kimel (2003, 2007), Shiffrin (2008), Raz (1982), and Darwall (2011).

⁵ The 'normal' circumstances for promising contrast with those that are 'marginal, esoteric, atypical' or 'epitomize the margins of the practice, but not its core.' Kimel (2003: 7, 20).

⁶ 2003: 20–31.

⁷ 2007: 251. But cf. Kimel (2007: 257), where he seems to *reject* 'relational theory of promise' for the reason that it confuses promises with the background relations in which they are embedded. This is hard to square with his claim that promises outside the relational context are exceptional 'logically speaking' (251), and especially with the account in Kimel (2003), where the normal intrinsic function of promises is said to facilitate relations through the expression of personal and moral trust and respect. In any event, Kimel's 2003 account is clearly relational.

⁸ The bundle-of-rights view of promises originates with Hart (1955).

⁹ Darwall says that the second-personal character of the reactive attitudes involve 'an implicit address of a putatively legitimate claim' (2011: 263). Incidentally, Darwall seems to deviate from Strawson in two ways. First, Strawson did not seem to think that reactive attitudes are all moralized. He did not think of resentment as a moralized or blameworthiness-implying attitude, for example (see 2008: 5). Second, Strawson did not seem to think that the reactive

attitudes admit of external justification (see 2008: 25). See also, Deigh (2012).

¹⁰ On the essentially personal nature of the personal reactive attitudes of the participants, see Strawson (2008: 5, 10–12).

¹¹ Note one respect in which Darwall's Strawsonian relationalism is like Friedrich and Southwood's but unlike Kimel's trust relationalism: the reactive attitudes animating promising extend to strangers. Strawson (2008: 6–7) thought that the personal reactive attitudes extend to 'chance parties to an enormous range of transactions and encounters . . . raging from the most intimate to the most casual.'

¹² Cf. Hume (2006 [*Treatise*, Bk. III, Pt. II, Sec. V]), Baier (1985: ch. 10 and 1994: 110–20), Macneil (1974 and 1980), and Markovits (2011).

¹³ Hume thought that paradigmatic promising is self-interested, and that parties to close personal relations often act 'without any prospect of advantage.'

¹⁴ Butler makes at least three claims about the relation between self-love and benevolence (or love of one's neighbor). First, while distinct, these motives are compatible (not 'opposed'). Second, interested action is not all bad/wrong and disinterested action is not all right/good. Finally, these motives are mutually reinforcing ('coinciding').

¹⁵ Darwall's overmoralization extends to all 'second-personal' interactions by virtue of which one person incurs an obligation to another, including agreement, invitation, and request (2011: 268–70).

¹⁶ Darwall acknowledges the distinction between moral and other (e.g. etiquette) obligations (2006: 98–9).

¹⁷ Consider an analogy. Suppose the constitutive norm of assertion is truth: Assert the truth only. That does not imply that your false assertion opens you up to moralized criticism. Arguably, no moralized blame is proper when you lie to save your parents. But then the constitutive norm of assertion is not particularly moral. For a non-moral view of the norms of assertion, cf. Williamson (2000: ch. 11).

¹⁸ Or 'a tragic world of human isolation' (400); 'the words "friendship" and "love" would take on a hollow ring under the objective attitudes' (391).

¹⁹ Sommers (2007: 326-27) offers this antidote to the impoverishment claim:

When you take the objective attitude toward other human beings, you do nothing more than see them as natural things. But a human being is still a human being—the most exciting, infuriating, unpredictable, lovable, loathsome natural thing in the world. . . . Nothing in the objective attitude prevents us from recognizing, appreciating, *cherishing* the rich and wonderful qualities of another person. . . . The better the objective attitude is understood, I believe, the less ‘gruesome’ it will appear.

²⁰ Cf. Macneil (1974, 1980, 2000), Macaulay (1963, 2003), Campbell (1996, 2001), and Leib (2009).

²¹ Macaulay (1963) has famously found that non-legal norms seem to provide the parties with at least as much guidance as the does the contract (in conjunction with the law). Contractual parties often avoid invoking the contract (or remedies for its breach) in the course of their relationship.

²² Proponents and critics of relational contract theory sometimes associate it with such claims as: ‘every transaction is embedded in complex relations’ (Macneil, 2000: 881), ‘exchange of any importance is impossible outside a society. Even the purest ‘discrete’ exchange postulates a social matrix’ (Macneil, 2000: 884), ‘there are no truly discrete contracts’ (Campbell, 2001: 45), ‘all contracts are relational’ (Scott, 2000: 852), ‘we are all relationalists now’ (Scott, 2000: 852), ‘discrete contracts—contracts that are *not* relational—are almost as imaginary as unicorns’ (Eisenberg, 2000: 816). But these claims simply insist on the social embeddedness of contracts—a truism. To avoid trivialization of relational contract theory, we must take seriously the relational–transactional distinction and possibility of genuinely transactional contracts. Here is a more sympathetic interpretation:

It is Macneil’s major achievement to have shown that open minded analysis of contracting reveals a class of relational contracts in which action predominantly is so oriented in the minds of the parties towards conscious co-operation that a contract of this class ‘no longer stands alone as in the discrete transaction, but is part of the relational web’. All the negotiating tactics adopted by the parties, concerning formulation, performance, variation, termination and application of

remedies, can be explained only as being informed by this co-operative attitude. Campbell (2001: 18; references omitted).

²³ Cf. Kimel (2003, 2007), Baier (1985: 110–20), Bagchi (2009), and Markovits (2011).

²⁴ Kimel (2007) stops short of asserting that contracts are paradigmatically transactional, to leave open the possibility that contracts have no single paradigmatic context. But he seems to close that possibility by insisting that the transactional model (contract law's main role is to facilitate arm's length transactions outside the relational context) is 'more illuminating' than the relational one (235). In any event, I focus on Kimel (2003), which clearly treats relational contracts as less than normal and somewhat 'marginal, esoteric, atypical' (7, 20).

²⁵ This echoes Meir Dan-Cohen more general point that when sanctions are clearly announced, 'compliance can no longer carry the significance it otherwise would have had as an expression of respect. For all we know . . . compliance was motivated by fear of sanction, and is therefore devoid of expressive content' (2002: ch. 3).

²⁶ Cf. Kimel (2003) and Raz (1982: 928-31).

²⁷ Markovitz (2011) provides an example of someone who rejects contract as imperfect promise because he rejects promise relationalism.

²⁸ I thank Ruth Halperin-Keddari for the example.

²⁹ It is not clear that Kimel still holds that personal detachment is the intrinsic normal function of contracts. Since offering this view in his (2003), he has re-described personal detachment merely as 'one of the most important functions of contract law' (2007: 247). This amendment all but repudiates the detachment thesis, with its diametric opposition between the intrinsic normal functions of promises (relation) and contracts (detachment). It is compatible with the claim that personal relation too is among contract law's most important functions.

³⁰ Premise (2) also depends on the following assumption, which I want to grant for argument's sake: If you know that our contract's sanction-enforceability generated a sufficient reason for me to keep it, you cannot reasonably tell that I have kept it other than from fear of sanction (and so that I have done so exclusively for some other reason).