Duress, Deception and the Validity of a Promise

David Owens

An invalid promise is one whose breach does not wrong the promisee. I describe two different accounts of why duress and deception invalidate promises. According to the fault account duress and deception invalidate a promise just when it was wrong for the promisee to induce the promisor to promise in that way. According to the injury account, duress and deception invalidate a promise just when by inducing the promise in that way the promisee wrongs the promisor. I demonstrate that the injury account is superior. I then argue that in this respect promising is like any exercise of a normative power. I conclude by distinguishing two theories of promissory obligation, a widely held view which I call the information interest theory and an alternative which I call the authority interest theory. I argue that the points established earlier support the authority interest theory over its rival.

A highwayman, finding an inadequate amount of money on his victim, forces them to promise to provide more once they are released. Here the victim does make a promise, that is they express an intention to undertake an obligation to furnish the highwayman with more money. Nevertheless, the law and common opinion would agree that the victim is not bound by their promise. Nor would he be bound if he promised to buy a second hand car from a dealer and subsequently discovered that the dealer had tampered with the mileage clock. In these cases duress and deception invalidate the promise.

Promissory obligation has long been a central topic in moral and political philosophy and thus the topic of promissory invalidation has also attracted philosophical attention. But many have wondered whether there is anything of philosophical interest to be said about how and why duress and deception invalidate. Hume for one alleged that when thinking about such matters we draw distinctions which reflection cannot justify and he uses this as evidence of the conventional nature of promissory obligation (Hume 1740, Bk. 3, Pt. 2, Sect. 5). Other writers from

---

1 Legal theorists have written extensively on the topic of contractual validity and though I have found these writings extremely helpful and shall refer to several of them, I shall not discuss them directly. This is because legal theorists are concerned with contracts - reciprocal agreements where both parties expect to get something out of the deal - and treat unilateral or gratuitous promises as at best peripheral cases. Their main interest is in the remedies for breach of contract, in how costs should be allocated once a contract has been breached. I focus on the question ‘when does the breach of a promise wrong the promisee?’ and I shall discuss the remedies for breach of promise only in passing.
Grotius through Sidgwick down to the present day have found only confusion in this area, inviting us to infer that one can settle when promise is void for duress or misrepresentation only in the context of a particular legal system.\textsuperscript{2} It would be indeed foolish to suppose that the details of what constitutes, say, a valid marriage contract can be worked out \textit{a priori}. But moral reasoning might still provide some insight into promissory validity and, in particular, into why duress and deception tend to invalidate promises. And this might cast some light on the nature of promissory obligation as such. At least that is my hope.

I shall proceed as follows. In the first section, I focus on a specific notion of invalidation according to which an invalid promise is one breach of which does not wrong the promisee. In the second section, I introduce two accounts of how force and fraud invalidate promises: the fault account and the injury account. Both share the idea that force and fraud invalidate because they are wrongs but they interpret this idea in quite different ways. I argue that the injury account is superior and in the third section, I apply this account to the exercise of other normative powers like giving and consenting. In the final section, I distinguish two different theories of promissory obligation - the familiar information interest theory and the less familiar authority interest theory - and suggest that the truth of the injury account supports the latter.

1. What is invalidation?

What is it for a promise to be invalid? My answer is simple: a promise is invalid when the promisor would not wrong the promisee just by breaking their promise. To explain that simple answer, I must separate wronging someone or injuring them on the one hand from doing something wrong or being at fault on the other. For an invalid promise needs to be distinguished from a promise that the promisor is justified in breaking. Wronging someone by breaking a valid promise can be the right thing to do.

\textsuperscript{2} After considering exactly when promises are invalidated by ‘force or fraud’, Sidgwick concludes that ‘on all these points Common Sense seems doubtful’ (Sidgwick 1874, p. 306). Sidgwick’s scepticism is endorsed by (Atiyah 1981, p. 25). Grotius notes ‘a great variety of opinions’ on these points (Grotius 1625, Bk 2, Ch. 11, Sect, 7).
Several writers have maintained that whether an action wrongs someone and whether that action is justified are two quite different questions. One might say this because one thought that we are sometimes justified in doing things for which there is no moral justification. But I am envisioning the rather different possibility that the right thing to do even from the moral point of view is to wrong someone, to injure them, perhaps by violating some right of theirs. For example, we are sometimes entitled to damage the property or harm the persons of others and in so doing we normally wrong them.

What is the precise significance of this wronging? If the injury here were a legal wrong, the legal consequence would be compensation of some sort. But it is less clear what reaction fits a moral injury, especially where the injury’s infliction is justified. Compensation is often out of place and even where compensation suits, it is as an expression of other more basic reactions.

I am inclined to think that, in at least some cases, guilt, remorse, apology, requests for forgiveness are appropriate responses on the part of the perpetrator even though what they have done was justified (Marcus 1996, pp. 31-3). Conversely, blame and resentment, as well as forgiveness and offers of reconciliation on the victim’s part are frequently not out of place. I shall support these claims by describing situations (of justified breach of promise) in which such responses are quite common, a fact which places the burden of proof on anyone who thinks them irrational or at least inappropriate. But these scenarios are not meant to settle the matter. What I need both to elucidate the notion of promissory invalidation and to formulate my own theory of it is the idea that whether one wrongs someone by breaking a promise and whether the breach is justified are two different things. Others can make this distinction in their own way without rejecting the rest of what I say.

3 (Gardner 2005, pp. 54-7) argues that the law of both tort and contract require the idea of a wrong that is nevertheless justified. See also (Thomson 1990, pp. 100-3).

4 For example, offering compensation for breach of promise would often be rather odd. How do you compensate someone for failing to turn up to their wedding? If you do send them a gift in an effort to make it up to them, the gesture will be well received only in so far as the gift is taken to be an expression of some feeling (not just the discharge of a debt.) (Williams 1982, pp. 27-30). There are also cases in which the promisee very much wants the promise to be kept but actually benefits from its breach. This hardly invalidates the promise but it does make compensation inappropriate.

5 Philosophers who try to make this distinction without supposing that justifiable wronging is blameworthy include Raz (2004, pp. 189-93 and 1986, pp. 359-66) and Thomson (1990, Ch. 3). In my view, both Raz and Thomson make too much of compensation. If you fail to turn up to someone’s wedding, attention will focus on whether the happy couple are entitled to resent your absence and not on, for example, whether you should pay them for the wasted place at the wedding breakfast.
One is often justified in breaking a promise, for example when some more weighty duty (e.g. a more important promise) turns out to conflict with it in a way which could not have been anticipated when the promise was made. But the fact that one is justified in breaking the promise is perfectly consistent with the fact that one is wronging the promisee, that one is failing to discharge an obligation to them. We often feel guilty about such a breach of promise, apologise for the breach and seek to make it up to the promisee, even while continuing to believe that breaching this promise was, in the circumstances, the right thing to do. And the guilt the wronger feels here is something more than the regret a decent person feels whenever they must cause harm, or allow someone to be harmed: there is an injury, not just a harm.

Suppose I have a limited supply of a life-saving drug and must decide who is to live and who is to die. I feel bad about leaving the unfortunate to die but I do not owe them the drug and I am not wronging them by giving it to someone else. Things would be different had I promised them the drug and then found myself unable to supply. To break a valid promise is to wrong the promisee and they are entitled to complain of the wrong done to them even where that breach is justified (Williams 1982, pp. 59-61). Third parties may judge that it would be inappropriate for them to blame the wronger but the view from the sidelines does not bear directly on how those involved in the wrong should feel. If the promisee rises above complaint or resentment (i.e. forgives the promisor) they might well be admired but that is precisely because they are entitled to these reactions.

None of this applies when the promise broken is simply invalid. Here the promisee is not wronged by the breach. For example, our highwayman is not wronged when his victim fails to fulfil their promise. We might conclude from this that a decent person would not hesitate to break such a promise. But perhaps this would be a bit too quick. What, after all, is the point of extracting the promise? Might it not make sense for the highwayman to hope that his victim’s good character will ensure that

---

6 I do not think that guilt feelings are always appropriate whenever one breaches a valid promise. I would argue that each promise excludes from the promisor’s deliberations a certain range of reasons for not performing the promised act. If the promisor breaches their promise for a reason that is not excluded, and this reason justifies the breach, their breach does not wrong the promisee and so guilt would be out of place. But if the promisor breaches for a reason that is excluded, the breach wrongs the promisee even if the excluded reason is sufficient to justify the breach. For the sake of simplicity, I shall ignore this complication.
they keep it? Must the highwayman be banking on their irrationality, or at least on their ignorance of the fact that duress invalidates a promise?

Adam Smith considers this very example (Smith 1759, pp. 330-3). He affirms that such a promise is invalid ‘as a matter of jurisprudence’ and that ‘no injury is done to the robber’ by its breach. But he also says that ‘whenever such promises are violated, though for the most necessary reasons, it is always with some degree of dishonour for the person who made them’. Not everyone will agree. Among those who do, some might think that this is so because the promisor would be besmirching their honour by giving in to the threat, others because of the insincerity involved in making the promise. But whatever truth there is in these ideas, all should endorse Smith’s conclusion that the highwayman’s victim cannot be wronging the highwayman by breaching a valid promise. If what they do is wrong, it is wrong in some other way.

At the outset, I noted that many of those who write about promises doubt whether philosophical reflection alone can tell us anything much about their validity conditions. I suspect at least some of these sceptics have not separated the issue of whether someone is wrong to break a promise (i.e. whether they are justified in so doing) from the issue of whether the promise is valid (i.e. whether the promisor would be wrongdoing the promisee by breaking it). Endless considerations may bear on whether the right thing for me to do is to breach my promise and perhaps there is nothing general or systematic to be said about when such a breach of promise is justified. Nevertheless we may be able to draw some fairly definite conclusions about when duress or misrepresentation invalidate a promise, conclusions with significant theoretical implications.

2. Invalidation and wrongdoing

An account of invalidation has two components. First, it presents us with a list of potential invalidators, together with some explanation of why those sorts of things invalidate. Second, it tells us how these invalidating conditions must be connected to the promise in order to invalidate that promise. Here I shall say little about the second issue. An invalidating condition must at least induce the promise. If the highwayman’s threat had nothing to do with the traveller's promise, it could hardly
invalidate that promise. It might also be that the threat must either excuse or justify the making of the promise but I shall not pursue that question here.7

As to the first question, I shall focus on invalidation by duress and misrepresentation. Several writers have argued that duress and misrepresentation invalidate a promise where it is wrong to get someone to promise in that way. Since using force or fraud to get someone to do something is at least a prima facie wrong whatever that something is, we can use this fact to explain why a promise induced by force or fraud may be invalid without obvious circularity.8 Unfortunately these writers do not clearly distinguish actions which are wrong in that they are unjustified from actions which are justified (and therefore right) but which nevertheless wrong (i.e. injure) someone.9 Once this distinction is made, we have two rather different proposals to consider. The first goes as follows:

*The Fault Account:* Promises induced by duress or misrepresentation are invalid where it is wrong to get someone to promise in that way.

Here ‘wrong’ means unjustified, where an unjustified action is one the agent is at fault in performing.

On the face of it, this proposal has at least one important virtue: it deftly handles cases in which one might think oneself justified in extracting a promise by force. Consider the parental warnings that make children promise to behave or the threats of punishment with which judges persuade malefactors to promise to reform. Though such promises are clearly extracted under duress, the point of extracting them is still to put those who give them under an additional (promissory) obligation to do what they ought to do anyway. And to serve that purpose, the promises induced must

---

7 For example (Raz 1986, p. 149) argues that one is coerced into ø-ing when one is induced to ø by a threat which is a prima facie wrong and which justifies or excuses ones ø-ing. Raz does not consider whether this concept of coercion should be used to elucidate invalidation.

8 The fact that force or fraud is being used to induce a promise with a given content might be crucial in determining whether the victim has responded in a reasonable or else in an excusable way and so, perhaps, in determining whether his promise is valid.

9 Fried argues that duress invalidates a contract where it 'proposes a wrong' to the promisor (Fried 1981, pp. 97-9). See also (Altham 1985, pp. 11-2) and (Smith 2004, pp. 316-23, 376-8). Unlike these authors, Thomson does distinguish doing something wrong or morally impermissible from doing something which wrongs someone (Thomson 1990, Ch. 3). She also maintains that duress and misrepresentation invalidate a promise specifically where they wrong the promisor (pp. 310-3). But she believes that wrongdoing someone entails doing something wrong (p. 122) and that wrongs like coercion and misrepresentation invalidate promises because their perpetrators are ‘at fault’ (pp. 312-3).
be valid. The fault account can explain the validity of these promises by supposing that parents and judges are justified in using threats to obtain them.\footnote{Perhaps the same should be said of a promise of surrender extracted by force or fraud in the course of a just war. For discussion of surrender promises, see (Deigh 2002, pp. 489-90), (Altham 1985, p. 10) and (Scanlon 1998, pp. 325-6).}

However, there is an alternative explanation of what is going on here. Perhaps the promise obtained is valid only because the threats used to extract it do not wrong the promisor \emph{at all}, justifiably or otherwise.\footnote{‘Force and fraud are in war the two cardinal virtues’ (Hobbes 1651, Pt. 1, Ch. 13, Sect. 13). Consequently Hobbes thinks that promises made under duress in war are binding (Hobbes 1651, Pt. 1, Ch. 14, Sect. 27). Should we expect a decent soldier to feel that they are wronging the enemy by coercing or deceiving them in the course of a just war?} It does seem a little odd to expect the judge to feel guilty about threatening a criminal with jail or the parent to feel remorse at warning their child that it will be confined to the house. Judges and parents are authorised to do these things. This line of thought suggests an alternative account of invalidation, namely

\textit{The Injury Account:} Promises induced by duress or misrepresentation are invalid where by getting someone to promise in that way you wrong them.

On this view, a promise is a much more fragile thing: duress or misrepresentation invalidate a promise whenever they wrong the promisor, even where the promisee is justified in using them to extract the promise.

I shall test the injury account against its rival by example. We are sometimes entitled to use duress and deception in order to persuade a fellow adult to do something that needs to be done and which they would not otherwise do. Still to behave thus most often \emph{is} to wrong the person coerced or misled. Now are we equally entitled to induce action by using the same forms of duress or misrepresentation to extract a valid promise? There is nothing in the fault account to explain why such a promise should be invalid when the duress or misrepresentation used to obtain it is justified. And yet invalid it often is.

Take misrepresentation first. Suppose I am trying to establish an exercise routine and a friend persuades me to accompany them to the gym this evening. Both my friend and I know that I will be much better off, physically and psychologically, once this routine is established. But my friend is concealing something from me: this
very evening a bar crawl is planned which would prevent me from accompanying them to the gym. My friend knows perfectly well that this is a temptation which I would not resist and so, out of concern for me, they conceal the crawl and do everything they can to ensure that nobody else mentions it to me. When rumours of it reach my ears, my friend reluctantly denies that there is any such crawl and gets me to promise that I will accompany them. Despite my friend's best efforts I later discover the truth and, filled with self-loathing, abandon my trip to the gym.

Clearly my friend has deceived me. Their reluctance to deceive me indicates that they think such deception wrongs me. Yet if my health is in question unless I exercise, they might well feel justified in misleading me about the crawl in order to get me into the gym. But when I do not show up, I doubt they will think that I have wronged them in breaching my promise. I may be a fool, I may be ungrateful but I am not obliged to go to the gym simply in order to keep the promise I made them, for I made this promise only because they deceived me. They wronged me in misleading me on a material point and that wrong invalidates my promise.

In considering duress, it helps to raise the stakes a bit. Suppose I have some extremely embarrassing disease which a course of injections is needed to treat. Without these injections, my health will be seriously damaged but I keep putting them off out of fear of the needle. I confide all this to you and as time goes on you become more and more concerned about the danger to my health. Reluctantly, you threaten to break your vow of secrecy and tell people of my embarrassing disease unless I begin the course of injections at once. Many of us would think ourselves justified in making this threat but would also feel guilty because we are wronging our friend by threatening to breach a confidence. Now suppose that you have to go away suddenly and so will not be around to check whether I have actually begun the course of injections. You instead blackmail me into promising to have the injections. Here again you may be entitled to do so in the hope that I will feel obliged to keep the

12 Does such non-disclosure of material information by the promisee invalidate a promise? This is a fraught issue both within and outside the law. It is to avoid this question that I turn the gym example into one involving outright deception. I would trace our uncertainty about when non-disclosure invalidates to our uncertainty about whether the promisee’s non-disclosure wrongs the promisor. The common law imposes duties of disclosure only in rather special circumstances and so tends to uphold the validity of contracts, even where one party has kept crucial facts to himself. Civil law imposes more extensive duties of disclosure (as it does positive duties of aid) and so tends to void contracts where it was obvious to one party that the other was operating on a false assumption. Both attitudes can be accommodated within the framework I am suggesting.
promise but I doubt that I would be wronging you simply by breaching it. I might be wronging you in other ways but one thing you could not complain of is breach of a promise obtained by such threats.

I conclude that the fault account cannot explain cases in which one is entitled to use duress and deception in order to get someone to do something but where a promise extracted by these means would be invalid. By contrast, the injury account is untroubled by these examples. Still the injury account might be thought to have troubles of its own.

To see why, note that I am using ‘duress’ and ‘misrepresentation’ to cover a wide range of phenomena. Deliberate coercion or deception intended to induce the promise come immediately to mind. But these terms also cover cases of negligent coercion or misstatement where the promisee did not know that they were pressurising or misleading the promisor but ought to have known this. Furthermore, I mean to include what is often called ‘innocent misrepresentation’ and what might be called ‘innocent duress’, that is cases where the promisee had no way of knowing that they were either misleading or pressurising the promisor. The apparent problem for the injury account is that such duress and misrepresentation, though innocent, still puts the validity of the promise in doubt.13

We can illustrate the point with regards to misrepresentation by modifying the example of the would-be gym buddy. Everything is as it was except that my friend knows nothing of the bar crawl and rightly regards such a thing as extremely unlikely, so when they assure me that the rumours are groundless they are being both sincere and reasonable. Yet once it transpires that the rumours are correct, the fact that they misled me might well make me wonder whether I am still obliged to accompany them to the gym (or at least about whether I am so obliged simply because I promised). Here the fact that I was misled by the promisee and that their false assurance got me to promise is crucial. Had I refused to credit the rumours because I myself thought such a thing unlikely, the discovery that the rumours were correct and that I had based my promise on a false assumption would not release me from it. An unanticipated temptation does not invalidate a promise.

13 For example, (Smith 2004, pp. 367-8) is puzzled by the fact that innocent misrepresentation invalidates a contract in law. ‘The relevant mistake is not typically serious enough, qua mistake, to justify setting aside the contract for this reason’ and so ‘absent wrongdoing’ on the promisee's part it is not clear to Smith why the promisor should be allowed to breach.
The injury theorist has a choice here. He could simply deny that my promise is invalid. Or else he could maintain that it is invalid because, in being misled by the promisee, I have been wronged by him, even though the promisee is not at fault. It might seem strange to speak of a wrong in cases of ‘innocent’ misrepresentation. Even those prepared to accept the idea of a justified wrong might baulk at accusing the promisee of wronging me when he could not have known that he was wronging me. But the grounds for this reluctance are not evident. It would certainly make sense for my friend to feel bad about misinforming me on a point which clearly mattered to both of us even where his mistake was a perfectly reasonable one. The question is whether this ‘feeling bad’ registers a wrong done to me.\(^\text{14}\) Perhaps my friend has wronged me simply by misleading me, though his behaviour is either justified or excused by the reasonable but false belief which motivated it.\(^\text{15}\) If so, the injury theorist will maintain that my promise is invalid because I was wronged when misled on a material point.\(^\text{16}\)

This line of thought raises difficult issues which need not be resolved here for, as already noted, the injury theorist may instead deny that my promise is invalidated by innocent misrepresentation. Perhaps promises based on false information innocently furnished by the promisee are thereby invalidated only where the mistake involved would have invalidated the promise anyway, whether or not it was induced by the promisee. The injury account implies only that the validity of the promise depends on whether the misrepresentation which induced it wrongs the promisor. We can attribute any uncertainty about the validity of my promise here to a corresponding uncertainty as to whether I have been wronged by the promisee.

\(^{14}\) Similar issues are raised by Williams's example of the driver who kills the child that runs in front of their truck (Williams 1982, pp. 27-30). Whether or not they regard themselves as negligent, a decent person will be tormented by the thought that they killed a child, may appeal for forgiveness from the child's relatives etc.

\(^{15}\) Some argue that actions based on reasonable mistakes are justified by those mistaken beliefs (Baron 2005), others that these mistakes merely excuse those actions (Gardner 2005, pp. 63-5).

\(^{16}\) Elsewhere (Owens 2006, p. 57) I argue that whilst a promisor has a specific duty to fulfil his promise, someone who makes a prediction about his own behaviour need have no duty to ensure that his prediction turns out to be true. But if he wrongs his audience by misleading them (however innocently) does he not have a duty to put things right in so far as he can? And is that not a duty to make his prediction true (in so far as he can) whenever it threatens to be falsified? I doubt it. Where there is no harm involved, merely informing your audience of your (reasonable) mistake may suffice. If you misled them in a way which was harmful you may have to ameliorate the damage or somehow compensate them for it. Occasionally it might be that the only way you can do so is to make your prediction true after all. But there is no general duty to ensure that what you say turns out to be true.
In cases of ‘innocent duress’ the promisee is in no position to know that they are putting the promisor under illicit pressure. For example, they might reasonably but mistakenly think that the gun they are waving in the promisor’s face for theatrical effect is an obvious replica, a thought reinforced by the promisor’s efforts to appear nonchalant. But when they discover that (as the promisor knew all along) the gun is both real and loaded, similar issues arise. The promisee might think that in terrifying the promisor they wronged them and that this wrong invalidates the promise, even though their behaviour is either justified or excused by their reasonable belief. On the other hand, the promisee might deny there is any wrong here and so insist that the promisor’s terror invalidates their promise only if it is terror of a sort that would have invalidated their promise anyway, whether or not they, the promisee, had induced it. Again, I leave this matter open.

3. Invalidation and normative powers

Promisors exercise a form of normative power, they change the normative situation simply by communicating the intention so to do. Promising is not unique in this. The same is true when you give someone a gift or grant them your consent. In both cases the recipient acquires an ability to do things which they previously could not do without wronging you (e.g. to make use of your car). And they do so simply because you communicate the intention to make them a gift of your car or to consent to their using it. Gifts and consents are also like promises in that they can be invalidated by duress and misrepresentation. Thus, our conclusion that the injury account rather than the fault account gives the best treatment of promissory invalidation may be tested by asking whether the same applies to other exercises of normative power.

One who exercises a normative power intends to change the normative situation by communicating precisely this intention. Promises, gifts and consents all

---

17 Here I am concerned with acts of consent. (Raz 1986, pp. 83-4) points out that someone may consent to obey the rules of a golf club simply by walking into the club, provided they do so in the knowledge that this will subject them to the rules of the club. They do not need to walk in with the intention of subjecting themselves to its rules. Here their consent is not mediated by an act of consent.

18 The natural lawyers drew an analogy between the validity conditions of property transfers and those of promises, for example (Grotius 1625, Bk. II, Ch. XI, Sect. 1) and (Locke 1690, Bk. 2, Ch. 16, Sect. 186). (Thomson 1990, pp. 348-52) compares promises with consents.

19 The notion of a normative power I am employing here is a rather narrow one. A normative power is not just any power to affect the rights or obligations of other people, it is a power to do this specifically
involve an exercise of normative power but there are important differences among them. Giving your child permission to use your car tomorrow makes it the case that they would not wrong you by driving your car tomorrow. But this consent does not give your child the right to require you to give them the use of the car tomorrow; in consent you exercise a normative power, you do not transfer it. If you meanwhile give the car to someone else, you have not wronged your child simply because they can no longer take advantage of the consent you offered them. By contrast promising them the car gives them the right to require you to provide them with a working car (*a fortiori* when you made them a gift of the car). By giving or by promising the car, you grant your child a normative power which you previously had yourself, namely the power to decide who can drive this car tomorrow.

There is a further way in which we exercise normative power, namely by issuing commands or orders. Like consents, orders do not involve granting anyone a normative power (delegating power is a different matter). But unlike consents, the effect of a valid order is to *impose* your authority on someone else rather than to waive it. As we shall see, this difference matters for the understanding of invalidation. Nevertheless all exercises of normative power, orders included, have this in common: an exercise of normative power cannot be efficacious if it is induced by wronging those who exercise it. The injury account rather than the fault account is the correct theory of invalidation, not only for promises but for consents, gifts and commands also.

Take consenting or giving. Some extremities justify one’s seizing someone else’s property or making use of it without their consent and among them are situations in which one is entitled to use either force or fraud against the owner in order to gain control of their property. Still in these cases one usually wrongs the owner: a decent person will feel bad about having to behave in this way and their victim may reasonably resent it. Now one might instead use force or fraud to extract the owner’s consent to one’s use of their property or to persuade them to hand it over. But whatever good this indirection does, it does not remove the element of wronging. Even where one is justified in using certain forms of duress or misrepresentation to take control of someone’s property, one cannot avoid wronging them altogether by

by communicating the intention so to do. Raz’s notion of a normative power is close to but not identical with my own (Raz 1999, pp. 98-104).
first using these very means to persuade them to agree, for the consent or gift thus obtained is probably invalid. Promises, gifts and consents are invalidated by force and fraud even where the perpetrator would be justified in behaving like that in order to secure the thing promised, given or permitted.

The same is true of commands. If a legitimate authority issues an order because of threats or misrepresentation, those subject to their authority do them no wrong by disregarding it. Again, the author of the threats or the misrepresentation may be entitled to use those means in order to extract the order in the hope that it will be obeyed but that fact does not make the order valid. To be valid, an exercise of a normative power must not be induced by wronging those who exercise the power. In particular, consents, orders etc. induced by coercion or deception will be valid only in those peculiar circumstances (war, legitimate punishment etc.) where such behaviour is not a wrong. The validity of the exercise of a normative power depends on whether the actions which induced it wronged its possessor rather than on whether those actions were wrong (i.e. unjustified).

As well as this similarity, there is an important difference between orders on the one hand and promises, consents and gifts on the other. Orders are, like promises etc., directed at particular people. But an order is unlike a promise etc. in that the prior conduct of the recipient of the order has no special significance in determining whether the order is valid or not. It does not generally matter to the validity of the order exactly who extracts it from the authority by wronging them. By contrast (as I have been assuming) the promisee must be involved in the duress or the misrepresentation if it is to invalidate the promise and the same is true of gifts and consents.

In my explicit statement of the injury account I left it open whether duress or misrepresentation by a third party might invalidate a promise. I shall now argue that where an act invalidates the promise which it induces because it wrongs the promisor, that act must involve the promisee. I leave the notion of ‘involvement’ here intentionally vague. The promisee is certainly involved if they coerce or mislead the promisor into promising but they might also be involved in some cases where a third party set out to extract this promise by duress or misrepresentation. The crucial point is that the promisee is definitely not involved unless they are the author of the
duress/misrepresentation, or had prior knowledge of it. 20 And where they are not involved, the wrong of coercion or misrepresentation cannot invalidate a promise made to them (Pufendorf 1673, Bk. 1, Ch. 9, Sect. 15-6), (Thomson 1990, pp. 312-3).

True, the knowledge that Jack promised to marry Jane only because of the lies or the threats of Jane’s father will surely influence our attitude to Jack if Jack goes on to break his promise. For example, Jack’s breach of promise may be justified by the injury he has suffered at the hands of Jane’s father but I doubt that the behaviour of Jane’s father invalidates Jack’s promise. Jane had no knowledge of her father’s lies or threats and took Jack’s promise at face value. Given this, Jack will feel bad because he is wronging Jane, however justifiably, in failing to marry her. And I take it that what is true of promises is equally true of gifts and consents. If someone forced you to hand over a gift to a third party, a gift which they accept in good faith, you might be justified it taking it back from them when the opportunity arose but you could not do so without wronging them. A decent person will not repossess such a gift without a qualm.

So why then is the validity of an order indifferent to the identity of the coercer or the deceiver but not the validity of a promise? Promises, gifts and consents all differ from orders in that they must be accepted by the person to whom they are directed, otherwise the normative situation has not changed in the way the promisor, giver etc. intended. Take promises first. 21 It is often said that valid contracts involve a meeting of minds between the two parties. This is equally true of unilateral promises. We cannot make an animal a valid promise because there is no mind to meet, or none that grasps what a promise is. A promise made to a person that is tacitly rejected or explicitly spurned is not binding on the promisor.

In promising, the activity of the promisee in accepting the promise is as crucial to its validity as the activity of the promisor in offering it. Promising is a mechanism whereby the promisee takes possession of a normative power from the

---

20 Hume imagines a surgeon who asks a patient for a promise of payment before they will operate to save the patient’s life (Hume 1740, Bk. 3, Pt. 2, Sect. 5). The surgeon may have no prior obligation to operate (perhaps because they would run a serious risk of infection) and do not wrong the patient in demanding payment, even if the patient has been wrongfully injured by a third party. Once the price is agreed (and provided it is not outrageous!) both parties are committed. If the surgeon were involved in injuring the patient, the situation would be quite different.

21 The view that promises must be accepted is widely shared, for example (Hobbes 1651, Pt. 1, Ch. 14, sect. 22), (Kant 1797, Pt. 1, Ch. 2, Sect. 2), (Fried 1981, pp. 41-3).
promisor. Given this, it makes sense that the behaviour of the promisee should be of special significance in determining whether the promise is valid or not. Where the misrepresentation or the duress came from a third party it may be unfair, all things considered, to expect the promisor to perform. But the intrinsic character of the interaction between the promisor and the promisee that established the promissory bond remains unaffected: the promisor offered and the promisee accepted the right to require the promisor to perform. Hence the promise is not invalidated. By contrast, that bond is thoroughly compromised if the promisee has themselves extracted the promise by going against the very value which, as I shall argue in the next section, the whole procedure is supposed to serve.

Gifts too involve a grant of normative power (and not just of physical control) to a willing recipient, while consenting transforms one’s relations with another person in their favour. One who refuses a gift or declines your offer to allow them to stroke your knee acquires no right to possess or do these things. An order, by contrast, is an exercise of a normative power which involves the will of nobody other than the power’s possessor. We do not have to mention the attitude of the order’s recipient in order to explain its moral significance. Hence, if the commander’s will is suborned and his order thereby invalidated, that need not depend on whether the order’s recipient is involved.

In this section, I have argued that the injury account rather than the fault account explains not only the validity of a promise but that of any exercise of a normative power. So what is it that promising has in common with these other phenomena which makes the injury account true of them all? Why should the fact that the promisee has wronged the promisor by using force or fraud invalidate the promise they extract even when their extracting the promise in that way was justified? To answer that question, let us first ask what the function of a promise is, what human interest promising is here to serve.

4. The function of a promise

22 ‘In order that a promise may transfer a right, the acceptance of it is no less necessary than when a transfer of ownership is made’ (Grotius 1625, Bk.2, Ch. 11, Sect. 14). See also (Pufendorf 1673, Bk. 1, Ch. 9, Sect. 16).
According to many writers, we make promises and take them seriously because promising serves what I call an information interest. People want information about how other people are going to behave both for practical reasons – to help plan their own behaviour and co-ordinate with others – and simply for the sake of knowing what will happen. On this view, the basic function of a promise is to provide the promisee with information about how the promisor is going to behave. That is why promises exist and are taken seriously. A promise does this by giving the promisee a form of control over what the promisor does: the promisor must perform unless the promisee releases them.

It is undeniable that promisees often have an interest in knowing how promisors will behave. It is equally undeniable that promises often serve this information interest and are offered and accepted precisely for that reason. But these facts do not establish that promises are here to serve our information interest. A promise is a distinctive social tool with various features differentiating it from other speech acts (predictions and expressions of intention) that give us information about how speakers are going to behave. A theory of promising must explain why we have a tool with these distinctive features (Owens 2006: 74-6). Here I shall concentrate on the information interest theory’s account of one such feature, the validity conditions of a promise.

If the information interest theory is correct, it is clear in outline how we are to go about deciding when a promise is valid. First, the promisee has an interest in not having their expectations disappointed. Second, the promisor has an interest in not being bound to performance just because of the statements they previously (and perhaps sincerely) made. Thirdly, all of us have an interest in facilitating the provision of accurate information about how others are going to act, an interest which is served by encouraging speakers to be accurate without deterring them from speaking at all. The principles governing the validity of a promise are the result of striking a fair balance between these competing interests (Scanlon 1998, pp. 302-5 and Scanlon 2003, pp. 244-5). In particular, we determine when duress and misrepresentation invalidate a promise by asking whether the promisor had a fair

---

23 This assumption is shared by both ‘expectation theorists’ like (Scanlon 1998, Ch. 7) and (Thomson 1990, Ch. 12) and by ‘practice theorists’ like (Hume 1740, Bk. 3, Pt. 2, Sect. 5), (Fried 1980, pp. 13-4) and (Foot 2001, pp. 45-51). I discuss their views critically in (Owens 2006). (Sidgwick 1874, pp. 442-
opportunity to avoid taking on the burden of performance given the way they were misled or the pressure they were put under when they made the promise (Scanlon 2003, pp. 254-5, 262-8).

At this point, it might help to take up a suggestion made by one well-known advocate of the information interest theory, Philippa Foot. She remarks that the role played by promises could be filled by a will-binding drug which bound one who took it to future performance (Foot 2001, p. 45). Suppose a drug has been invented which is God’s gift to those who wish to give up smoking. Resolve ensures that you both decide to give up smoking and carry out this decision. Note that Resolve works independently of the agent's practical judgement in that Resolve ensures that the agent will both make and carry out the decision to give up smoking regardless of what they judge best. We have all made decisions which we think we ought not to have made and stuck with decisions despite realising that they ought to be abandoned. For example, one may have decided to take a certain trip regardless of the cost and then come to think better of it but the prospect is so pleasing that one akratically sticks with the initial plan. What Resolve does is to ensure that you give up smoking regardless of what you think about whether you ought to.

For Foot, making a promise to give up smoking is functionally equivalent to taking Resolve. Resolve is just a chemical replica of the bond created by a promise and it serves our interests in much the same way. If so, the principles governing the validity of a promise should be much the same as those governing when it is acceptable to get someone to take Resolve. At first sight, the comparison seems apt. Someone who took Resolve only because they were falsely told that smoking had been made illegal or because they were threatened with compulsory aversion therapy has not had a fair opportunity to avoid taking on the burden of performance. And so they should not be bound in that way.

Unfortunately the parallel is undermined by the very examples which caused trouble for the fault account. If Resolve were available to us, it would sometimes be right to use force or fraud to get someone to take it. This behaviour would wrong them no doubt but the wrong might well be justified. Yet a promise extracted in such a way and in similar circumstances would not bind to performance and this fact must

---

4) claims that the difficulties common sense encounters when delineating the validity conditions of a promise can be overcome by asking how promises can best serve our information interests.
be a puzzle for anyone who thinks that promises matter because they assure us of the promisor’s future performance. If the information interest theory is correct, why should it make any difference whether the duress or misrepresentation secures this assurance directly by inducing immediate action (whether this action be immediate performance or the taking of a performance compelling drug) or indirectly by inducing a promise to perform? If you are entitled to secure performance or deferred performance by these means, why are you not able to secure a valid promise of performance by these means also? Why are you not permitted to use promises secured by duress or misrepresentation for that purpose if promissory obligation exists just so that promisees can control the future actions of promisors? To answer these questions we need an alternative view of why human beings take promises seriously, of the human interest that promising serves.

A valid promise gives the promisee the right to require performance from the promisor. So much is obvious. On the information interest theory, the promisee values this right because it puts the promisor under his control. I shall argue that the promisee may value this right for its own sake and not just because it renders the promisor’s behaviour more predictable to him. I shall start by describing our interest in having the right to govern our own lives and then explain why we might want similar rights over the lives of others.

Each of us has an interest in being in authority over the conduct of our own lives. To be in authority over the conduct of your own life is to have the right to decide how you will act. To have the right to decide how you will act involves two things. First, it involves being able to act in various ways without wronging anyone else; you are subject to someone else’s authority when they can require you to act in certain ways. Second, it involves being able to require other people not to interfere. You do not have the right to sit down if someone else can prevent you from sitting down (say by holding you up) without wronging you.

Sometimes it is right for you to act in a certain way without your having the right to act in that way. Suppose you are justified in sitting down despite the fact that by acting in that way you are wronging someone who has the authority to order you to remain standing. The fact that you are justified in sitting down means you can rightly sit but this does not satisfy your interest in being in authority over that aspect of your
life. Only a right to act in that way would do that. My hypothesis is that promising exists to serve this *authority interest*.

This authority interest must be distinguished from an interest in physical control. Our smoker might well have an interest in not being prevented from giving up smoking if they so decide. This is an interest in having physical control over that aspect of their life. In general, we have an interest in controlling those aspects of our lives that matter to us. But now suppose that our smoker is very weak willed and knows it. They have physical control over their smoking but, at least in a world without *Resolve*, this control is of very little use to them since they know they are unlikely to exercise it in a sensible way. Such physical control is much less important to them than it would be to someone who could employ it well.24

Nevertheless, our akratic smoker still has an interest in having the right to determine whether or not he will smoke. That is the smoker has an interest (a) in its not being the case that they wrong someone else by either smoking or not smoking and (b) in its being the case that others cannot decide the matter for them without thereby wronging them. Our akratic smoker’s interest in having this authority may be just as strong as that of a resolute smoker. The fact that you are weak willed does not make you any more indifferent to whether other people have the right to tell you what to do or to force you to do it. A smoker’s authority interest in the matter of whether they smoke is clearly distinct from their control interest.

How does this interest in authority over oneself extend to other things and other people? There is little I can do without the world’s co-operation. Returning to control for a moment, if I have an interest in controlling whether or not I smoke, I must also have an interest in controlling the availability of both cigarettes and nicotine pills: one does not really control what ends one sets oneself unless one also controls the means one must use to pursue them. And this is equally true where the means involve the actions of others. If the availability of cigarettes or pills depends on what other people do, someone with an interest in controlling whether they smoke or not will have an interest in controlling whether others make cigarettes or pills.

24 Might our akratic smoker have a further interest in not being *forced* not to smoke? I doubt any significant interest of his would be violated if some force of nature prevented him making a choice he knows he would not have made anyway thanks to his own weakness. True, he does have an interest in not being *coerced* into smoking that is in not being wronged or injured in this way. But that interest presupposes a prior interest in having the right not to smoke.
available to them. Our control interests extend well beyond our bodies and the same is true of our authority interests.

To have an interest in having the right to decide whether or not you smoke is also to have an interest in having the right to decide whether or not other people make cigarettes or nicotine pills available to you. The right to decide whether you should smoke is of no value to someone who has no right to decide whether cigarettes or pills are made available to them. The right to attain the end is worth something only to someone who has the right to obtain the means necessary to attain that end. So someone with an interest in having the right to smoke or not has an interest (a) in its being the case that they can obtain either cigarettes or nicotine pills without thereby wronging anyone else and (b) in its being the case that other people cannot prevent them from doing this without thereby wronging them. And where other people have the right to decide where the cigarettes or the nicotine pills go, the obvious way to secure this result is to get them to hand over this right. Once this is done, it is they who would be wronging you if they failed to provide either cigarettes or pills when you asked for them.

Our authority interest over other things and people is not satisfied by our both having and being justified in exercising control over other people. We also have an interest in being able to exercise this control without wronging them. Our smoker would much prefer to be in a situation where he owns or has been promised some nicotine pills than in a situation in which he must steal them, however justifiably. Conversely, we have an interest in possessing the right to control something whether or not we can exercise effective control over it. Suppose by far the best way for our smoker to give up is to take nicotine pills regularly. Yet they know perfectly well that they cannot bring themselves to do so because the pills taste foul. Nevertheless, they have an interest in its being the case that they would not wrong anyone by taking the pills and that others would wrong them by stopping them, an interest which is as strong as their interest in having the right to give up smoking. If the sale of nicotine pills were banned, they might sensibly resent this and feel wronged in much the same way as a regular user even though they lack effective control over whether they use the pills.

Clearly our authority interests extend well into the world around us. My hypothesis is that the function of consents, promises and gifts is to serve these
authority interests. We are all concerned with who has physical control over what. I reckon people have an interest not just in whether something happens (and thus in being able to determine whether it happens) but also in who would be wronging whom if it happened (and thus in being able to determine who would be wronging whom if it happened). A consent serves its recipient’s authority interest by allowing them to do certain things without wronging the consentor. Both promises and gifts serve their recipient’s authority interest by giving them the power to determine whether others wrong them if these others do, or fail to do, certain things.

With the authority interest theory before us, we can now ask whether it can succeed where the information interest theory failed: does it explain why a promise is invalidated by force or fraud, even where the promisee is entitled to use those means to extract the promise? To put the question another way, is it really the case that a promise obtained by force or fraud cannot serve anyone’s authority interests, including those of the promisee? The answer may seem doubtful: surely a promise obtained in this way might have that sort of value, at least to the promisee? I think not. Let us consider consent first and then promise.

Return to the smoker who was entitled to steal some nicotine pills but preferred to have the owner’s consent to his taking them. Presumably there is something he values in having the owner’s consent which is absent when he must wrong the owner of the pills, however justifiably, in order to get them. Could the smoker really obtain a consent with that sort of value by wronging the person from whom he got it? Surely, if the smoker could obtain his consent only in that way, he would lack such a reason to prefer having the owner’s consent to being justified in stealing the pills.

What this suggests is that there is something special about the authority interest. Most human interests can be served by doing things which wrong people. For example I can serve my own information interest in knowing that someone will not smoke by forcing them to take Resolve. The authority interest is not like that; one cannot further one’s own authority interest in regard to another person by doing something which wrongs them, so any attempt to change what I have a right to do to them by wronging them will be self-undermining.
Given this, it is no surprise that wrongs like coercion and misrepresentation invalidate promises. A valid promise changes the normative situation by giving the promisee the right to require performance from the promisor. That too is a change meant to serve the promisee’s authority interest. So if the promisee cannot serve his own authority interest in regard to the promisor by wronging the promisor then the distinctive value of such a promise to the promisee must be lost wherever the promise is induced by wronging the promisor. A promisee cannot obtain a genuine right to performance by wronging the promisor. And that is just to say that a promise obtained in this way must be invalid.

Is the account of invalidation just offered circular? I have explained why a coerced promise is invalid by suggesting that such a promise cannot serve the promisee’s authority interests. Yet the authority interest here is just an interest in having a certain right. Isn’t saying that a coerced promise cannot serve this interest just another way of saying that it cannot give the promisee a right to performance i.e. that the promise is invalid? The information interest theory is immune to such circularity worries, for our interest in certain kinds of information is not (as such) an interest in having any right and can therefore be used to explain why we have certain rights, including the rights conferred by promises.

The worry is misconceived. As Raz remarks ‘no vicious circularity is involved in the claim that X has a certain right because it is in his interest to have it. It is no more circular than the claim that Jack loves Jill because she needs his love’ (Raz 1986, p. 191). Similarly no vicious circularity is involved in the claim that a certain transaction does not give Jack a right because it does not serve his interest in having that right. True, the information interest theorist is more ambitious. He tries to explain the validity conditions of a promise without making any use of notions like ‘right’, obligation’, ‘authority’ etc. And he might make the further claim that one’s interest in having any right is always based on some further interest which having that right serves, an interest in something other than a right. But, as we have seen, the validity

25 Is he seeking to avoid being the object of resentment? Our smoker has an interest in obtaining consent even when the cigarette owner would otherwise remain unaware of the theft. And where the owner is aware of it, there is something especially bad about being the object of justified resentment. 26 Someone might agree that the authority interest is fundamental (i.e. not derivative) whilst also maintaining that it is not a particularly weighty interest. On this view, though the authority interest is needed to explain when a promise is valid or invalid, a binding promise should be taken really seriously only when some other interest (e.g. an information interest) is at stake. I believe the authority interest is often weighty. Though many will not agree, such disagreement about the importance of
conditions of a promise cannot be explained by the information interest theory. Our interest in authority may indeed be a fundamental human interest.27

Department of Philosophy
University of Sheffield
Sheffield S10 2TN, United Kingdom.
d.owens@sheffield.ac.uk

References


purely promissory obligation can exist against a background of agreement about the basis of promissory obligation.

27 Many thanks to Michael Pratt, Joseph Raz, Seana Shiffrin, Jonathan Smith, to audiences at UCLA, UC Riverside, the University of London and to several anonymous *Mind* referees for helpful


...comments on an earlier draft. My work on this paper was supported by the Arts and Humanities Research Council and by the School of Advanced Study at the University of London.


